



***ABA Commission on Effective Criminal Sanctions***  
**Roundtable on “Second Look” Sentencing Reforms**

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## **Introduction and Overview** **By Margaret Colgate Love\***

The laws and regulations that have governed federal sentencing for more than twenty years were the product of a reform movement that was grounded in a rejection of “rampant, irrational variation in judicial sentencing and parole practices, in federal as well as state courts.”<sup>1</sup> Judge Marvin Frankel, one of the most influential reformers of his day, spoke out against the “arbitrary cruelties perpetrated daily” by judges exercising unbridled discretion.<sup>2</sup> Back end release decisions by the paroling authority were considered equally arbitrary, and in addition undercut the public’s right to be truthfully informed about a particular offender’s quantum of punishment at the time of its imposition in open court. Coincidentally, social scientists were arguing that “nothing works” to rehabilitate criminals, challenging the theoretical underpinning of indeterminate sentencing. The reformers found this a convenient scientific justification for replacing the old sentencing system with one that would produce certainty and clarity, as well as uniformity. The sentencing decisions of individual judges would henceforth be strictly regulated by guidelines produced by a central authority with administrative expertise.

Discretion would also be eliminated at the back end: “Equality of treatment replaced rehabilitation as the overriding determinant of release decisions.”<sup>3</sup> Notwithstanding a last ditch effort in the late 1970s to save the federal parole system by codifying a detailed Guideline Table aimed at eliminating disparity in parole decisions, the 1984 Sentencing Reform Act instead eliminated parole itself. The whole idea of back-end administrative adjustments to sentences was deemed inconsistent with the new paradigm of “truth in sentencing.” Prison officials too found their discretion to adjust sentences through the award of good time severely limited to 15% of the sentence imposed.

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<sup>1</sup> Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 31 (1998).

<sup>2</sup> Marvin Frankel, *Criminal Sentences: Law Without Order* 103 (1973).

<sup>3</sup> Stith & Cabranes, *supra* note 1, at 37.

Twenty years of experience under the federal sentencing guidelines has taught us the importance of retaining some degree of judicial discretion in imposing sentences, for institutional reasons as well as considerations of fairness. Happily, the Supreme Court has opened up the possibility of a system in which judges are guided but not controlled by administrative rules. Returning more discretionary authority to the sentencing judge provides a necessary counterbalance to the discretionary authority of prosecutors. Mandatory minimums now stand as the chief obstacle to achieving a fair balance of rule and discretion in imposing sentences.

Having made some progress in restoring balance to the front end of federal sentencing, it seems appropriate to turn our attention to the back end. If a routinely available parole mechanism has no place in a determinate system, is there a room for some more limited opportunity to revisit a sentencing decision, particularly one that involves decades in prison? The legitimacy of truth in sentencing comes into question if a punishment that appeared just and fair at the time of its imposition appears unjust and inappropriate when circumstances change. The possibility occurs that truth in sentencing is not a static concept, but one that evolves over time. Yet the federal sentencing system seems ideally constructed to keep sentenced prisoners out of sight and mind once their final appeals have concluded. I imagine it was this circumstance that led Justice Kennedy, in his iconic speech to the ABA Annual Meeting in 2003, to urge courts and lawyers to take responsibility for “what happens after the prisoner is taken away.”

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.

I began to appreciate the devilish efficiency of the federal sentencing system’s construction when I was Pardon Attorney in the 1990s. That was about the time that petitions from prisoners sentenced under the 1984 Act, and the 1986 no-parole drug sentences, began to flood the clemency system. From this vantage point I was able to see how the sentencing system was operating in districts across the country, and could see

some of its shortcomings. Far from eliminating discretion at the front end of sentencing, it had driven it underground, into the prosecutor's office. Particularly in drug cases, it appeared that small fish who had nothing to trade for their freedom, or who were simply too scared to cooperate, received much longer sentences than the main perpetrators. Sentencing entrapment cases made me cringe.<sup>4</sup> Also disturbing was how severely people were punished for exercising their right to a jury trial. I came to appreciate how important clemency was to a legal system that made no provision for mid-course corrections, even where a particular prisoner's circumstances had radically changed since sentencing. But prosecutors rarely supported clemency, and the Bureau of Prisons adopted a new policy of making no recommendation in any clemency case in which its views were sought. Nor was BOP willing to explore the one possible avenue of relief under its control, the sentence reduction authority in 18 U.S.C. § 3582(c)(1)(A)(i).

In the past two decades, federal sentencing system has reverted to its 19<sup>th</sup> century roots, when executive clemency was the sole avenue for early release, with one important caveat. Then, presidential sentence commutations were issued regularly and generously to federal prisoners whose imprisonment no longer seemed just or efficient.<sup>5</sup> Nowadays, sentences are rarely commuted, and the system for administering the pardon power resembles a lottery. Worse yet, the clemency process may not be fairly accessible to ordinary people: At the beginning of the Clinton Administration, I was directed to deny all commutation petitions except those in which a Member of Congress or the White House had expressed an interest. While this directive was later retracted, its spirit has informed the exercise of the pardon power ever since. In his two terms in office,

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<sup>4</sup> Sentencing entrapment occurs when a person predisposed to engage in one sort of criminal activity is persuaded by government agents to engage in conduct exposing him to harsher punishment. See Application Note 15 to USSG § 2D1.1; *United States v. Searcy*, 233 F.3d 1096 (8th Cir. 2000). One fairly common scenario in commutation petitions filed in the mid-1990s involved defendants who had been persuaded to cook powder cocaine into crack, thereby triggering the much higher penalties applicable to that form of the drug.

<sup>5</sup> In his classic 1941 study of federal pardoning practices, W.H. Humbert reported that between 1860 and 1900, 49 percent of all applications for presidential pardon were granted. In 1896 there averaged 64 acts of pardon for every 100 prisoners, and in the next five years the ratio between acts of clemency and the federal prison population was, on average, 43 percent. W.H. Humbert, *The Pardoning Power of the President*, American Council on Public Affairs 111 (1941). Data from the Office of the Pardon Attorney reveal that the Justice Department relied on the pardon power as an early release mechanism long after the enactment of parole and probation statutes. See Margaret Colgate Love, *Reinventing the President's Pardon Power*, 20 Fed. Sent. Rptr 5, 7, n. 15 (2007).

President Bush has granted only eight sentence commutations, while denying more than six thousand applications.<sup>6</sup> By way of contrast, in the decade prior to enactment of the Parole Reorganization Act, Presidents Harding and Coolidge between them granted 2024 commutations, at a time when the federal prison population was one tenth the size it is today. Presidential pardoning is not what it used to be.

If “Fear of Judging” drove front end sentencing reforms, as Professor Stith and Judge Cabranes so memorably put it, “Fear of Forgiving” seems to have what closed off any realistic possibility of back end relief.

Here are some of the questions we will be asking in this day’s conference. In a determinate sentencing system, are there circumstances in which a prison sentence that has otherwise become final should be reconsidered and reduced? Who should make the decision, and what should the criteria be? If reform is needed, should we move toward a regularized “second look” authority resembling parole, as is suggested in the current draft of the revised Model Penal Code Sentencing Articles, or should we instead reserve early release for the extraordinary and compelling case that would traditionally be suitable for clemency? If the former, how would such an authority be justified in a “truth in sentencing” paradigm? If the latter, how should such a system be structured and administered to ensure consistency and accountability? What role should prison authorities play in determining the term of incarceration? Should prisoners have increased opportunities to earn good time credit? Can sentence reduction ever be justified by budget imperatives or prison overcrowding? Should we seek to repatriate non-citizen prisoners prior to the expiration of their terms?

The day will be divided into four sessions, organized around the papers that have been prepared by our presenters. In the first session, we will focus on what has been called the patriarch of release mechanism, executive clemency. Justice Kennedy challenged us to “reinvigorate the pardon process . . . [that] of late, seems to have been

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<sup>6</sup> All but one of President Bush’s eight commutation grants reduced lengthy mandatory drug sentences. The eighth commutation, probably more accurately styled a remission, obviated Scooter Libby’s prison term entirely.

drained of its moral force.” Noting that “pardons have become infrequent,” he observed that “a people confident in its laws and institutions should not be ashamed of mercy.” How realistic was his challenge in a sentencing system dominated by administrative law concepts, and in the current political climate?

The second session will be devoted to statutory “second look” mechanisms in a determinate sentencing framework. We will discuss the revised Model Penal Code/Sentencing draft, and other proposals to engraft more regularly available early release functions onto a determinate sentencing system. We will also discuss the authority in existing law by which federal prison authorities may ask the sentencing court to reduce a term of imprisonment for “extraordinary and compelling reasons.”

The third session will discuss the usefulness of special sentence reduction mechanisms to achieve appropriate back-end relief. These include the Sentencing Commission’s authority to make guidelines changes retroactive; opportunities available to prisoners to reduce their sentence through program participation; and special early release opportunities for non-citizens.

In the final session we will take stock of what we have learned, and consider where to go from here.

## **The Politics of Forgiveness: Reconceptualizing Clemency**

**Rachel E. Barkow\***

Executive clemency is no longer a robust feature of American government. In recent decades, only a small handful of state governors have exercised their clemency power with any kind of regularity. Most governors, like recent Presidents, have rarely used their power to commute sentences and have issued pardons sporadically and erratically.

In an era with more than seven million people either serving time in prison or under some form of supervised release,<sup>7</sup> the question of how to reinvigorate clemency has become an urgent one. Commutation through executive clemency is often the only hope for correcting a sentence after it has been imposed by a judge because parole has been abolished or dramatically curtailed in many jurisdictions, and judicial sentencing reduction power after a sentence has been handed down is weak or nonexistent in most places.<sup>8</sup> Even after an offender has served his or her sentence in full, clemency is important because the collateral consequences of conviction do not end with release from prison. The executive's power to pardon is often the only means by which offenders can remove or limit legal restrictions to enable them to reenter and reintegrate into society.<sup>9</sup>

The dilemma is that the pressing need for robust clemency is equaled by the difficulty of achieving it. Politicians remain afraid of soft-on-crime accusations or facing

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<sup>7</sup> Bureau of Justice Statistics, U.S. Dep't of Justice, Prison Statistics (Dec. 16, 2007), <http://www.ojp.usdoj.gov/bjs/prisons.htm> (at year-end 2006, there were 2,258,983 prisoners in the U.S.); Bureau of Justice Statistics, U.S. Dep't of Justice, Probation and Parole Statistics (Dec. 5, 2007), <http://www.ojp.usdoj.gov/bjs/pandp.htm> (at year-end 2006, 4,237,000 people were on probation and 798,200 were on parole).

<sup>8</sup> Where back-end sentencing reform is available through these other means, clemency may be less important. For example, Connecticut governors rarely grant commutations, but the courts have authority to modify sentences without input from either the governor or the state board of pardons. C.G.S.A. 53a-39. Illinois, in contrast, has non-parole-eligible determinate sentencing, making clemency the only option for early release for many of its inmates.

<sup>9</sup> Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction 7 (July 2005) (“[I]n 42 states, and for federal offenders, pardon provides the only system-wide relief from collateral sanctions and disqualifications based on conviction.”).

a Willie Horton-style advertisement<sup>10</sup> should an individual on the receiving end of a pardon or commutation go on to commit another crime. And in a legal era that calls for transparency and regularity of process, an unfettered and undisclosed clemency power has been under attack by legal reformers and scholars.<sup>11</sup>

This essay considers possible approaches for reenergizing clemency in this hostile political and jurisprudential climate. It draws inspiration from two main sources. Part One begins by analyzing more closely clemency practice in recent years, with a specific focus on those relatively few governors in recent times who have made or proposed greater use of their clemency power. Part Two broadens the inquiry by looking to sentencing reform in general. Because the decision to grant clemency shares many traits in common with judicial sentencing discretion, it is valuable to look to changes in sentencing law and policy to identify how successful reform efforts have taken hold in that context and how the lessons of sentencing reform could be applied to clemency reform.

No magical formula will rejuvenate clemency. But the experience in some states with particular governors and the sentencing reform movement generally hold promise for structural changes and framing techniques to produce modest increases in clemency grants. And if clemency rates increase without a political backlash, that experience might pave the way for more dramatic improvements.

## **I. The Practice of Clemency Today**

Recent decades have seen a precipitous drop in the number of clemency requests being granted by state executives and the President.<sup>12</sup> The number of pardons has decreased, and commutations are particularly rare, with the President and the vast

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<sup>10</sup> See, e.g., *A 30-Second Ad on Crime*, N.Y. TIMES, Nov. 3, 1988, at B20; <http://www.youtube.com/watch?v=EC9j6Wfdq3o&feature=related>

<sup>11</sup> See Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 Harv. L. Rev. 1332 (2008).

<sup>12</sup> Barkow, *supra* note 5, at 1349 n.78 (describing decline in federal clemency grants since the 1970s); Daniel T. Kobil, *Should Mercy Have a Place in Clemency Decisions?* in *Forgiveness, Mercy, and Clemency* (Austin Sarat & Nasser Hussain eds., 2007) at 36, 37 (citing a survey of commutations from 1995 to 2003 showing a decline at the state level).



majority of states governors granting only a handful of commutations in the past decade – all while the number of people being sentenced escalates at a rapid rate.<sup>13</sup>

But the general pattern masks some notable exceptions. First, individual governors have bucked this trend, granting a high number of clemency requests in a variety of cases even when facing reelection or with the goal of seeking a higher office. Former Arkansas Governor Mike Huckabee, for example, stands out for having granted clemency (pardons and commutations) to more than 1,000 individuals in his time as governor, many of which occurred in his first term in office.<sup>14</sup> Former Maryland Governor Robert Ehrlich similarly granted a high number of pardons and commutations.<sup>15</sup> Virginia Governor Timothy Kaine is also granting clemency requests at a rapid clip. In only his first 14 months in office, he granted nine commutations and restored the rights of 768 individuals.<sup>16</sup> Huckabee and Kaine’s approach to clemency seems to have been driven in part by their religious faith and moral convictions.<sup>17</sup> Ehrlich’s view was that he

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<sup>13</sup> Kobil, *supra* note 5, at 36, 37 (noting that 34 states granted 20 or fewer commutations from 1995 to 2003); Barkow, *supra* note 5, at 1349 n. 78 (noting that as of 2007, President George W. Bush had granted only 5 commutations).

<sup>14</sup> Adam Nossiter and David Barstow, *Charming and Aloof, Huckabee Changed State*, NY TIMES, Dec 22, 2007, at A1. Huckabee’s successor, Mark Beebe, has also granted clemency applications at a relatively high rate, though most of his grants have been pardons for individuals who have already completed the terms of their sentences instead of commutations. For a catalog of Beebe’s grants, see <http://pardonpower.com/labels/Arkansas.html>.

<sup>15</sup> Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction*, Maryland (noting that between August 2003 and March 2006, Ehrlich granted 150 pardons and 15 commutations). See also *Ehrlich Grants Clemency to 18; 249 Commutations and Pardons Issued During 4-Year Term*, BALTIMORE SUN, Jan. 13, 2007, at 5B; *Mr. Ehrlich and Clemency*, Washington Post Editorial, Page B06, 8/27/06; Matthew Mosk, *Ehrlich Prolific in Granting Clemency*, Washington Post, Page A1, 8/25/06.

<sup>16</sup> Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction*, 2008 available at <http://www.sentencingproject.org/tmp/File/Virginia08.pdf>. Although Kaine is barred by Virginia law from seeking reelection, he has been mentioned as a candidate for other offices, including the vice presidency. Kate Zernike, “Charismatic Governor Rises to the Short- List” 8.13.08, New York Times, <http://www.nytimes.com/2008/08/14/us/politics/14kaine.html?ref=politics>

<sup>17</sup> Adam Nossiter and David Barstow, *Charming and Aloof, Huckabee Changed State*, NYT 12/22/07, (“By every account, Mr. Huckabee’s approach to clemency was heavily influenced by his religious beliefs.”); Caryle Murphy, *Catholicism, Politics a Careful Mix for Kaine*, 10/31/05, Washington Post (describing the influence of religion on Kaine’s politics).

had a constitutional duty to take pardon seriously.<sup>18</sup> Notably, none of them have appeared to have suffered politically for their clemency decisions.<sup>19</sup>

Second, in nine states pardons have been regularly available to ordinary citizens to restore their rights.<sup>20</sup> Of these states, four vest the pardon power in an independent board,<sup>21</sup> four require the governor and a pardon board to agree on pardon decisions,<sup>22</sup> and one vests the pardon decision in a board of high officials that includes the governor.<sup>23</sup> Thus, in each of these states, an agency possesses significant, if not exclusive, power to make the pardoning decision, thereby taking some or all of the political heat off the governor.<sup>24</sup>

There is a third category of clemency grants that merits attention, namely those involving governors targeting specific populations for relief or granting only a narrow form of relief. In Colorado, Governor Bill Ritter established a new board to review clemency applications of juveniles who were tried as adults and imprisoned in adult facilities.<sup>25</sup> This may or may not signal a greater willingness to grant clemency, but it does show the governor's interest in giving these cases greater scrutiny. Other governors have also been willing to give relief on a more targeted basis. In particular, some governors have focused on restoring voting rights for offenders who have served their sentences. In Florida, for example, Governor Charlie Crist urged the state's parole commission to reinstate the voting rights of 600,000 offenders who had completed their

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<sup>18</sup> Mosk, *supra* note 9 (quoting Ehrlich as stating that his law school training and his marriage to a public defender instilled in him a sense of duty).

<sup>19</sup> While Ehrlich was a one-term governor who failed to win reelection, there is little evidence that his record on clemency played a major role in his defeat. Matthew Mosk, *Ehrlich Prolific in Granting Clemency*, Wash. Post, Aug. 25, 2006, at A1.

<sup>20</sup> Love, *supra* note \_\_, at 8 (listing Alabama, Arkansas, Connecticut, Delaware, Georgia, Nebraska, Oklahoma, Pennsylvania, and South Carolina).

<sup>21</sup> *Id.* at App. A tbl 1 (Alabama, Connecticut, Georgia, and South Carolina).

<sup>22</sup> *Id.* (Arkansas, Delaware, Oklahoma, and Pennsylvania).

<sup>23</sup> *Id.* (Nebraska).

<sup>24</sup> Scholars such as Michael Heise have found that clemency in capital cases is also more likely with a board. Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 Va. L. Rev. 239, 297-302 (2003).

<sup>25</sup> Governor's Press Release: <https://www.advancecolorado.com/governor/press/august07/juvenile-clemency-board.html>

sentences.<sup>26</sup> Governor Tom Vilsack of Iowa, before leaving office, issued an executive order reinstating rights to those felons who had completed their sentences.<sup>27</sup> Governor Beshear of Kentucky has pushed for legislation to restore rights to felons.<sup>28</sup>

Although none of these categories represents a seismic shift in clemency practice, each provides a window to how clemency grants could be increased even in a political climate that is otherwise hostile to their issuance.

The experience of Governors Huckabee, Ehrlich, and Kaine shows two things. First, it demonstrates that some executives have an incentive to pardon, either out of a sense of faith or duty. Second, using the themes of redemption and forgiveness as tenets of religious faith or constitutional duty can, in turn, offer a competing political narrative that may shield governors who exercise their pardon power from attack. Governors Huckabee and Kaine were explicit in the role that religion played in their executive decisions, and their decisions to forgive offenders and give them a second chance fit well within a faith-based narrative. For his part, Ehrlich relied on his constitutional duty to ensure that errors were corrected in criminal cases and that just sentences were meted out.

Of course these approaches are not going to translate to all governors or all voters. Some executives will not be comfortable employing a rationale based in religion because they do not believe it, either because it is not the message of their religion or because religion does not play a role in their approach to governance. And although there is an

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<sup>26</sup> <http://www.fairvote.org/?page=165&articlemode=showspecific&showarticle=2590> Crist excepted murderers, violent sex offenders, and certain career criminals. Abby Goodnough, "In a Break from the Past, Florida Will Felons Vote," New York Times, 4/6/07 <http://www.nytimes.com/2007/04/06/us/06florida.html>.

<sup>27</sup> Todd Dorman, *Former Governor Criticizes Vilsack's Voting Rights for Felons Decision*, Quad-City Times, 6.21.05, available at <http://www.qctimes.com/articles/2005/06/21/news/state/doc42b79d842d833543812069.txt>; Kate Zernicke, *Iowa Governor Will Give Felons the Right to Vote*, NY Times, June 18, 2005.

<sup>28</sup> Beshear removed obstacles to restoration, Beshear simplifies process to restore voting rights for felons, Herald-Dispatch, March 4, 2008, available at <http://www.herald-dispatch.com/homepage/x1657944652>, and he praised legislation aimed at automatic restoration, *Beshear to help more felons vote*, March 4, 2008, available at [http://polwatchers.typepad.com/pol\\_watchers/2008/03/beshear-to-help.html](http://polwatchers.typepad.com/pol_watchers/2008/03/beshear-to-help.html).

argument to be made that executives have a duty to pardon,<sup>29</sup> as Ehrlich emphasized, some executives may disagree, particularly if they are concerned that a duty-based explanation will seem too abstract and legalistic to appeal to voters. But while the value of giving a second chance may not work for all executives or for all populations, it should appeal to some. And the faith-based approach in particular is likely to resonate with many voters. Religion is a key force in politics, and it has emerged as an important driver of criminal justice reforms in recent years. Faith-based interests have been one of the leading forces driving the reentry movement and legislation like the Second Chance Act.<sup>30</sup> The experience of these governors shows that these same political forces could be marshaled to support a more generous clemency approach as well.

Another lesson from the above mentioned examples is that governors could increase clemency grants without less political risk if they were to approach clemency in a more surgical fashion, focusing on forms of relief that are not as vulnerable to political attack. Pardons issued after an offender has served a sentence in full and has lived in society for some number of years without reoffending are certainly less risky than commutations that set someone free before the end of the judicially-imposed sentence.<sup>31</sup> To take the sliding scale concept further, it is also less risky to grant a former felon only a modest form of relief by reinstating his or her right to vote but granting no other relief. Most states already grant offenders the right to vote once a sentence has been served in full.<sup>32</sup> This fact shows that voters, in the main, are comfortable with giving offenders who have served their time the right to participate in elections. A governor like Charlie Crist who wishes to grant this right as a matter of the clemency power is therefore not going against a strong political current in opposition to these rights.<sup>33</sup> And it hard to imagine a successful attack ad along the lines of the Willie Horton technique that

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<sup>29</sup> See Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to be Merciful*, 27 Fordham Urb. L.J. 1483, 1506-1509 (2000).

<sup>30</sup> See *The Right Has a Jailhouse Conversion*, NY Times Magazine, Dec. 24, 2006.

<sup>31</sup> Thus, in the nine states with a robust pardon practice, commutations are far less frequent. See also President William J. Clinton, Remarks at the ceremony appointing Roger Gregory to an interim seat on the Fourth Circuit Court of Appeals (Dec. 27, 2000), reprinted in 13 Fed. Sent. Rep. 228 (“Presidents and governors should be quite conservative on commutations . . . but more broad-minded about pardons.”)

<sup>32</sup> Love, *supra* note \_\_, at 11.

<sup>33</sup> Only Florida, Kentucky, and Virginia disenfranchise all felony offenders for life until they receive a pardon or judicial restoration of rights. Love, *supra* note \_\_, at 12.

highlighted a link between giving an offender the right to vote and the commission of another crime.

Taking this lesson a bit further, governors can narrow not simply the forms of relief they make available, but the types of offenders whom they deem eligible. It is less politically risky to show mercy on first-time offenders and/or those who have committed non-violent offenses. In this regard, drug cases may be particularly good candidates for more clemency grants because narcotics laws frequently impose mandatory sentences that are harsher than the specific facts of a case warrant. A more generous approach to clemency for those who were very young when they committed their offense might also be feasible, as Governor Ritter's efforts seem to indicate, because these offenders can be very sympathetic figures whose claims of rehabilitation may be seen as more believable than most because of the maturation that comes with getting older.<sup>34</sup> At the opposite end of the spectrum, clemency for elderly inmates is viable for similar reasons. These offenders can plausibly argue that age has given them the wisdom to see how wrong their crimes were. Moreover, these claims can be bolstered by data; ex-convicts over the age of 55 have a much lower recidivism rate than 18 to 49 year-olds.<sup>35</sup>

Of course, the narrower the approach, the less valuable clemency is at checking legislative and prosecutorial overreaching and ensuring individualized justice. Moreover, most of the narrower approaches to clemency still come with risks. It takes just one offender who benefited from a pardon or commutation to reoffend to call into question an executive's judgment. Nonviolent or elderly offenders may be less likely to commit additional crimes, but some of them undoubtedly will. And while voters might

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<sup>34</sup> See, e.g., Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. TIMES, Oct. 2, 2005, at A1 (describing convincing claims of rehabilitation made by a Pennsylvania man convicted of a murder committed when he was 15); Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-Year-Old Children To Die in Prison*, available at <http://eji.org/eji/> (cataloging cases of 13 and 14-year-olds serving life sentences).

<sup>35</sup> Mark Martin, *Governor to Consider Early Inmate Release; Giving Nonviolent Convicts a Break Could Ease Crowding, Stave off Judges*, S.F. CHRONICLE, Feb. 23, 2007, at A1 (citing a federal study finding a 3% recidivism rate among ex-convicts over 55 compared to a 45% recidivism rate among 18-49 year-old ex convicts).

respect governors who pardon as part of their religious faith, that may not be a sufficient defense if someone pardoned goes on to commit a particularly heinous crime.

It is this risk of the one bad apple that serves as the greatest deterrent for an executive deciding whether to use his pardon or commutation powers. While some governors will take the risk because their faith or a sense of duty is sufficiently strong; but others – from the empirical evidence, most – will resist. For these governors, the risk either needs to approach zero or be eliminated, or it needs to be seen as worth taking because of the benefit it brings.

The use of independent commissions is a possible strategy for helping to eliminate the risk. In the nine states with a more robust clemency practice, the governor can shift the blame to the clemency board if someone pardoned reoffends. The problem with the independent agency model as a cure-all is that not every state with a pardon board as part of the process has seen an increase in clemency grants. Indeed, many of the states with low grants of clemency have such a board.<sup>36</sup> These boards might be necessary for increased clemency power, but they are not sufficient. And getting these boards formed in the first instance in states that do not have them requires political will.

Thus, to make clemency a more robust practice in more than a handful of jurisdictions requires looking beyond the practice of clemency itself.

## **II. Clemency as Sentencing Reform**

If one must look elsewhere for clues on how clemency can be reinvigorated, the most logical place to look is to sentencing reform more generally. A decision to grant clemency is, after all, a sentencing determination, albeit one made at the back-end of the process, after a judge or jury has already set a punishment. Commutations are decisions to reduce or modify a judicial sentence. Pardons also alter a sentence, either by erasing one or more of a defendant's convictions and thereby reducing a sentence as a result, or

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<sup>36</sup> In states like Illinois, Kansas, Missouri, New Hampshire, and Ohio to name just a few examples, there are boards that have to be consulted, but low clemency rates. See Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction*, *supra* note \_\_. Former California Governor Gray Davis, for example, vetoed parole for 278 of the 284 convicted murderers for whom the state parole board recommended release. Editorial, *Models for Mr. Bush*, WASH. POST, Dec. 28, 2004, at A18.

by negating what would otherwise be the consequences of a criminal conviction, such as voter ineligibility or disqualification for government benefits.

Like other sentencing determinations, clemency decisions must negotiate the modern politics of crime in order to be exercised with any frequency. While that political landscape presents formidable obstacles for those seeking to reform sentencing in any matter that benefits criminal defendants, the politics of sentencing in recent years reveals that modest improvements in that direction are possible, and the lessons translate well to clemency. Part A begins by discusses the sentencing commission movement and the lessons it offers for using an agency model in clemency. Part B turns to the many sentencing reforms in various states that have been driven by fiscal conservatism and highlights how the push for those reforms could be channeled into clemency determinations.

#### **A. The Agency Model**

Grants of clemency, as already noted, have been more frequent in those states that use independent pardon boards. But it is not enough simply to call for all jurisdictions to use these boards. There are political hurdles to establishing them in the first instance, and even when they do exist, they are not always effective in influencing gubernatorial decisions. Only a portion of the states with these boards have seen appreciable grants of clemency applications.

Here the sentencing reform movement may offer valuable lessons on how to maximize the effectiveness of such a board and, in turn, how to get jurisdictions that do not already have one interested in establishing one in the first place. The use of an expert agency to help set sentencing policy has been the defining feature of sentencing reform in the last three decades. Reformers looked to an agency model to help insulate sentencing decisions from the immediate pressures of the political process and achieve greater uniformity in sentencing.<sup>37</sup> Roughly one-third of the states and the federal government

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<sup>37</sup> Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715 (2005).

now use an agency to help set sentencing policy within their respective jurisdiction.<sup>38</sup> These agencies vary in their powers and structure, but they all possess some influence in establishing a jurisdiction's sentencing laws, and many of these commissions have been quite successful.<sup>39</sup>

What does the sentencing experience teach us about how these clemency boards can be made most effective in our political climate? The first lesson is that the composition of these boards has been critically important to their success. The most influential state sentencing commissions include representatives from all the interest groups. They include representatives from the defense bar as well as prosecutors, judges, members of the community, and often legislators themselves.<sup>40</sup> Thus, the successful commissions include not only those groups that typically get muted in the legislative process, such as defense interests, but also those powerful groups who are readily heard. Both groups are important so that all points of view are aired and so that the final proposal of the commission is more likely to have political influence.

In the context of clemency boards, it is likewise important to have a diverse membership and to include groups most likely to oppose such grants to become part of the process. Thus, pardon boards should not only include experts who can evaluate future risks of offending, but prosecutors and representatives of victims' rights groups. Having these individuals on board with the executive's decision is a critical means of muting any subsequent criticism that the governor's deference to the board or decision to grant clemency was ill-placed. Consider in this regard Governor Ehrlich's active pardon practice. One of his strategies was to seek input from victims before granting a clemency application.<sup>41</sup> This tactic probably helped to neutralize political opposition and may

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<sup>38</sup> Rachel E. Barkow and Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 Tex. L. Rev. 1973, 1974 and tbl. 1 (2006).

<sup>39</sup> Barkow, *supra* note \_\_\_, at \_\_\_.

<sup>40</sup> In the case of sentencing commissions, either having legislators on the commission or otherwise in a close relationship with the commission is critical because of the role that legislators can play in overruling the commission. Barkow, *supra* note 30, at 800-804. Legislators should not serve on clemency boards because of separation of powers concerns, so in the context of clemency, the key is to get the political interests who would oppose clemency grants (namely prosecutors and victims groups) to participate.

<sup>41</sup> Mosk, *supra* note \_\_\_.



partially explain why Ehrlich's clemency record did not figure heavily when he stood for reelection. A more recent example comes from Nevada, where the placement of the Attorney General on the state's pardon board could provide cover for the governor if he wishes to adopt to the board's recent proposal for early release of nonviolent offenders. Having a prosecutor provide a stamp of approval for such a proposal provides a strong defense against any criticism that the decision was made without a concern for law enforcement.

Ensuring that potential opponents are part of the process is arguably even more important in clemency than in other sentencing decisions because of the point at which a clemency decision is made. Sentencing commissions set policies in the abstract, without an eye toward how a particular, identifiable offender should be treated. Clemency, in contrast, is a decision about a particular person, and it takes place after some other actor has determined how that individual should be sentenced. Thus, the decision to relieve that person from his or her sentence is not merely an abstract policy judgment or an act of mercy. Unless the grant is based on an unforeseen change of circumstance, the decision to grant clemency is implicitly a judgment that some other actor in the system – the judge, the jury, the prosecutor or the legislator – made a mistake. The people who are having their decision second-guessed therefore stand as a potential voice in opposition to the grant – unless they have been made part of the decisionmaking process. That does not mean that the same prosecutor who brought the case must agree to a clemency decision, though it is probably valuable to get that person's input. Nor does it mean that the judge who issued a sentence must agree, though here, too, his or her perspective is valuable. What it does mean is that the interests of these groups – prosecutors and judicial actors – should get an airing in the board's process so that the ultimate decision can be seen as sensitive to law enforcement concerns and respectful of the sentencing process.<sup>42</sup>

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<sup>42</sup> Here it is noteworthy that in the early days of the republic, the prosecutor or the sentencing judge often recommended an executive pardon or commutation. Margaret Colgate Love, *Reinventing the President's Pardon Power* 4 (Oct. 2007).

This need for diversity means that clemency boards should not be mere arms of law enforcement interests, for that could skew them too far in the opposite direction, against issuing any grants at all.<sup>43</sup> The pardon process at the Department of Justice, for instance, has become dominated by prosecutors, which helps explain the anemic role pardons plays at the federal level. Instead, clemency boards should mimic the most successful state sentencing commissions, which are careful to mix law enforcement interests with those of defense lawyers and former offenders so that each side can learn from each other and increase the likelihood that sound conclusions will be reached and less subject to political attack later.

## **B. Data- and Cost-Driven Decisionmaking**

The most successful sentencing commissions share in common not only a diverse membership, but also a focus on reducing the costs of incarceration. In particular, those commissions that produce prison capacity impact statements – statements that show what a proposed sentencing increase will cost the state – have been the most successful at pushing back tough-on-crime posturing.<sup>44</sup> When confronted with the real dollar costs of a sentence increase, politicians take a closer look at whether the proposed increase actually makes sense. It is therefore not surprising that states with prison capacity impact requirements have experienced slower prison growth than states without such requirements<sup>45</sup> and that a concern with lowering incarceration costs is a key predictor of whether a jurisdiction establishes a commission in the first place.<sup>46</sup>

While commissions are well placed to reduce costs because of the systematic data analysis they can perform, jurisdictions have adopted other sentencing reforms to save money even without the help of a commission. In the beginning of the 21<sup>st</sup> century, many states have repealed mandatory minimum sentencing laws, reduced sentence lengths for

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<sup>43</sup> See Barkow, *supra* note \_\_, at 803 (cautioning against imbalance on sentencing commissions).

<sup>44</sup> Barkow, *supra* note \_\_, at 804-805.

<sup>45</sup> Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. Crim. L. & Criminology 696, 703-704 (1995); Kevin R. Reitz, *The Status of Sentencing Guideline Reforms in the U.S., in* Penal Reform in Overcrowded Times 31 (Michael Tonry ed., 2001).

<sup>46</sup> Barkow & O’Neill, *supra* note \_\_, at 1976 (finding among other things that “corrections as a large percentage of state expenditures and a high incarceration rate are positively correlated with the presence of sentencing commissions”).

some offenses, or provided opportunities for alternatives to incarceration.<sup>47</sup> And almost all of these efforts have focused on the need to stop the burgeoning costs of incarceration.<sup>48</sup>

This same focus on cost savings could be used in clemency decisions. Indeed, there is emerging evidence that governors are starting to look at the cost-savings rationale for clemency. Take, for example, some recent proposals from California and Nevada, states which face extreme prison overcrowding. Governor Schwarzenegger recently proposed granting early release to approximately 22,000 inmates to address the crisis in prison overcrowding in California.<sup>49</sup> In Nevada, the Pardon Board recently proposed releasing those inmates who are first-time offenders with no history of violence who are within two years of finishing their sentence.<sup>50</sup>

Pardon boards can not only highlight the cost savings with more robust clemency, but they can serve as repositories of data on what benefits clemency decisions actually bring. These boards can maintain a record of who has received a pardon or commutation and what they have done since that time. They can keep track of the good things people do after receiving a second chance – the jobs they take, the families they support, the communities they serve. This information can tap into a politics of redemption and hope to counteract the usual politics of fear. Narratives are powerful in criminal law and a governor facing an attack based on a grant of clemency-gone-wrong can employ examples of clemency decisions that have yielded positive results as a counterattack. More systematically, these boards should be able to quantify the fiscal benefits of clemency decisions, including the savings in incarcerations costs (including medical costs for elderly inmates who have been released), the economic benefits of getting former offenders reemployed, and the crime reduction that may result from successfully reintegrating offenders into a community.

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<sup>47</sup> See generally Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 *Colum. L. Rev.* 1276, 1285-1290 (2005) (describing state sentencing reforms based in cost concerns).

<sup>48</sup> *Id.*

<sup>49</sup> Keith B. Richburg & Ashley Surdin, *Fiscal Pressures Lead Some States to Free Inmates Early*, *WASH. POST.*, May 5, 2008, at A1.

<sup>50</sup> Geoff Dornan, *Pardons board to look at reducing prison overcrowding*, available at <http://www.nevadaappeal.com/article/20081030/NEWS/810299954/1070&ParentProfile=1058&title=Pardons%20board%20to%20look%20at%20reducing%20prison%20overcrowding>.

There are, of course, fundamental differences between using cost savings as a justification for sentencing reforms and for clemency determinations. Clemency has traditionally been seen as an act of individualized mercy, not as a means of cost-cutting or an economic stimulus. Cost considerations have not typically been part of the pardoning or commutation process, and certainly other mechanisms – like front-end sentencing reform or even parole on the back-end – offer more systematic and rational means of confronting the ballooning costs of rising incarceration rates.

But considering fiscal concerns as part of a clemency decision would not necessarily conflict with the vision of clemency as the power to dispense mercy. In an era of widespread cost-benefit analysis throughout the executive branch, it is far from irrational to put clemency determinations within the same general framework. If an elderly prisoner is unlikely to commit more crimes because of his or her advanced age and the cost of keeping him or her in prison is expensive, particularly in light of large medical costs, it is reasonable for an executive to take that into account as part of the determination of whether that prisoner should have a sentence commuted. Similarly, if particular restrictions on ex-offenders, such as the loss of license eligibility or the right to vote, are causing harm not just to the ex-offender but to society generally because those restrictions prevent offenders from reentering society as productive members of the economy, that should factor into a pardon determination. These factors need not replace traditional inquiries made at the pardon stage. Rather, they can serve as supplemental data points that can highlight for governors and the voting public that the risk associated with a commutation or pardon is worth taking because of the benefits it can bring.

The broader point is that cost-benefit analysis as a mechanism for decisionmaking can improve all kinds of decisions, including clemency. A governor or President who seeks to make rational decisions about the dispensation of government benefits and the trimming of government costs should embrace this means of analysis. If clemency is a sentencing decision, it should be as reasonable as any other.

That does not mean that mercy has no place in the equation. Forgiveness, rehabilitation, and reformation can and should be considered. But in the current political climate, considering *only* those factors has meant that individuals rarely, if ever, get relief. The reason is that executives are weighing the benefits of forgiveness against the obvious costs of pardons. Indeed, it is hard to explain their rapid decline on any basis other than executives' preoccupation with the risk of having a pardoned offender commit another crime and being blamed for it because the pardon or commutation diminished deterrence or let a previously incapacitated offender go free. Executives are well aware of the costs of commuting a sentence or granting a pardon. So, encouraging executives to do a cost-benefit analysis as part of the clemency determination would not change how executives are already analyzing the cost side of the equation.

Instead, focusing on the costs and benefits of a grant of clemency would highlight that clemency brings societal benefits, and not simply benefits to the individual. Clemency can correct a sentence that has proven itself to be too long – either by a comparison to other cases, a closer look at the facts of an individual case that might have been ignored because of a mandatory sentencing law, or because circumstances have changed. Correcting an excessive sentence can save the state money, free up a prison bed, and give the individual serving the sentence the opportunity to reenter society earlier and become a productive member. And to the extent boards can help achieve these cost-savings benefits, that is an argument for forming them in the first place. Indeed, it is the cost-savings potential of a sentencing commission that has led so many states in recent years to turn to an agency model, and that same concern might push toward an independent agency model for clemency as well.

To be sure, even this expanded notion of the benefits of clemency might not be enough to outweigh the main cost, which is the increased risk of an additional crime by the individual who receives the pardon or commutation. But putting these benefits at the fore helps to improve the decisionmaking process and makes it more likely that the public and the executives they elect will see that clemency is a risk worth taking.

### III. Conclusion

Reinvigorating clemency is no easy task. The costs of getting a clemency decision wrong – resulting in an individual whose application for clemency was granted then going on to commit another crime, particularly a violent one – are high in this political climate of 30-second ads and soundbites. Executives will run that risk only if there are corresponding benefits that are greater.

Looking to the actual practice of clemency today as well as sentencing reform more generally, this Essay suggested a two-prong strategy for strengthening clemency in a tough-on-crime environment. The first part of the strategy aims to reduce the risk associated with clemency. This means creating boards that can take the heat for decisions that turn out badly. It may also mean focusing on specific categories of offenders and forms of relief that pose less risk for clemency.

The second part of the strategy involves highlighting the benefits of clemency beyond individual justice. Of course individual justice remains central to clemency determinations, but a more robust clemency scheme in today's political landscape will require a broader vision of what second chances mean to society. Commutations are about cost savings as well as individual justice. Pardons are not just about second chances for the individual but about making offenders productive members of communities and lowering the risk that they will reoffend.

While these changes may yield only modest improvements initially, each successful clemency grant makes the case for additional grants. That is, as the practice of clemency once again becomes a regular one, bearing societal benefits, the risk of any one decision going wrong is not as great.<sup>51</sup> The result should be, over time, a return to an era which clemency is a key part of a functioning system of justice. For it is as true today as it was at the Framing that “the criminal code of every country partakes so much of necessary severity that, without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”<sup>52</sup>

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<sup>51</sup> Margaret Colgate Love, *Reinventing the President's Pardon Power* 14 (Oct. 2007).

<sup>52</sup> *The Federalist* No. 74, at 422 (Alexander Hamilton) (Penguin Books ed. 1987).

***Resuscitating the Clemency Authority to Achieve Federal Sentencing Reform***  
**(DRAFT)**

by

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In the film, *Monty Python and the Holy Grail*, King Arthur and his intrepid band of English knights seek the Holy Grail from a castle full of extremely uncooperative Frenchmen. Arthur's quite reasonable request to see the holy relic prompts the castle's guards to pepper the crusaders with a confusing stream of Gallic invective, causing a befuddled Arthur to ask with great earnestness, "Is there someone else up there we could talk to?"

Proponents of meaningful federal sentencing reform, at least insofar as they have sought an end to overly harsh sentencing measures, have met with similarly dismissive (albeit more polite) responses from Congress. There long has been little interest on the part of legislators in doing away with "truth in sentencing" and reinstating a federal system of parole, or even in abandoning oppressive mandatory minimum sentences.<sup>1</sup> However, unlike King Arthur, there *is* someone else to whom reformers can talk: the President, whose plenary power to pardon and commute represents the historic mechanism for correcting draconian sentencing practices.

The problem with asking the President to use pardons and commutations to repair flaws in the federal sentencing system is that, although we live in an era of greatly expanded executive power, the clemency authority has fallen into desuetude. The post-Watergate era has been marked by a steady decline in presidential acts of clemency, culminating in the current administration of George W. Bush who has trivialized the clemency power into virtual oblivion. This is especially true with regard to commutations, the form of clemency most suited to remedying sentencing problems.

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<sup>1</sup> Cite to FedCure Efforts; HB 3072(2005)(to reintroduce parole); See also <http://fedcure.blogspot.com/2007/08/fedcure-news-and-legislative-updates.html>

Although it was once not uncommon for presidents to commute more than 100 sentences during a term in office, of late commutations have been virtually nonexistent.

The purpose of this essay is to explore whether the clemency power can be revived and utilized by the President to alleviate some of the most punitive manifestations of our current approaches to sentencing. I first will consider how a convincing case might be made to an incoming administration about the need to use the clemency power more aggressively to eliminate overly harsh sentences. I then propose that the President remove the advisory aspect of the clemency power from the hands of the Justice Department, and instead establish a body of experts from diverse disciplines whose charge would be making clemency recommendations in specific categories of cases. Finally, I suggest that in commuting sentences, the President utilize his ability recognized in *Schick v. Reed* to commute sentences, specifically by requiring a period of supervised release and other conditions intended to reduce the risk of recidivism.

***1. Making a case for increased use of the clemency power***

Presidents rarely commute sentences anymore, but this has not always been the case. John F. Kennedy granted over 100 commutations in less than three years in office, while President Lyndon Johnson commuted 226 sentences, a number which represented nearly 25% of his total grants of clemency.<sup>2</sup> Yet over the past two decades, Presidents Bush, Clinton, and Bush combined to grant a miniscule 72 commutations—fewer than .5% of the total commutation applications they received. If President Obama is to be persuaded to revive the clemency power and commute sentences again, a case will have to be made as to why he should deviate from the practices of his immediate predecessors.

At the outset, reform advocates must carefully define what they are asking the president to do: clemency should not--and probably cannot--effect sweeping changes in sentencing policy. Although the clemency power affords the president an important check on the Congress and the judiciary, it is not a mechanism intended to displace the lawmaking function. Surely a president who sought to reinstate parole by aggressively

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<sup>2</sup> USDOJ Website of the Pardon Attorney.



commuting federal sentences across the board would be rightly accused of overreaching, and his actions might be challenged on separation of powers grounds.<sup>3</sup> Moreover, individualized review of 200,000 federal sentences would be an overwhelming task that any president would be reluctant to undertake.

However, it would be a proper use of Article II authority for a president to use clemency systematically to address a discrete class of cases where the sentencing mechanism seems to be malfunctioning. There have been numerous instances in the past of such targeted review of a group of troubling cases by executives. Governors have used the clemency power to review the sentences of abused women offenders who were not allowed by the legislature to raise the defense of battered women syndrome.<sup>4</sup> The Georgia Board of Pardons and Parole reviewed the cases of resident aliens who had become subject to deportation because of changes in the immigration laws and granted 138 pardons.<sup>5</sup> Presidents Ford and Carter used the clemency power to mitigate the sentences of those who had violated the Selective Service laws during the Vietnam War. Thomas Jefferson employed the pardon power to eliminate the sentences of those convicted under the Alien and Sedition Act.<sup>6</sup>

Thus, federal sentencing reformers should identify groups of cases that exemplify the most unfair aspects of our current system. Professors Shanor and Miller have persuasively argued that systematic grants of clemency should be used to remedy the vast sentencing disparities that exist between those convicted of possessing crack and those possessing powder cocaine.<sup>7</sup> Another category that might be appropriate for systematic

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<sup>3</sup> See *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>4</sup> For example, Ohio governor Richard Celeste commuted the sentences of 25 female prisoners who had been convicted of assaulting or killing their husbands or companions at trials in which they had been unable to offer evidence of battered-woman syndrome. 25 Women Granted State's Clemency, Columbus Dispatch, Dec. 22, 1990, at 1A, col. 1.

<sup>5</sup> Elizabeth Rapaport, *The Georgia Immigration Pardons: A Case Study in Mass Clemency*, 13 FSR 184 (2001).

<sup>6</sup> 11 THE WRITINGS OF THOMAS JEFFERSON 43-44 (A. Bergh ed. 1907) (1853) (letter to Mrs. John Adams, July 22, 1804) (“I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.”)

<sup>7</sup> Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons* 13 Fed. Sent. Repr. 139 (2001).

clemency review is the group of mandatory minimums sentences. Although numerous commentators including the members of the Kennedy Commission<sup>8</sup> have recommended repealing mandatory minimum sentencing laws, this does not appear to be imminent. Yet the mandatory minimum sentencing rules continue to create profound dilemmas for federal courts, as U.S. District Judge Joan Gottschall recently noted in *U.S. v. Roberson*.<sup>9</sup> The court sought in *Roberson* to achieve a proper sentence in a case where “Congress had in fact legislated two distinct ways of charging bank robbery in which a firearm was brandished, only one of which bore a mandatory minimum.” In such cases, federal judges across the country are struggling with whether to impose a reasonable guidelines sentence and then “tack on” the mandatory minimum, resulting in an especially harsh overall sentence; or instead to add the mandatory minimums on to an unusually lenient sentence under the guidelines, thereby achieving an overall sentence that they consider to be fair given the real offense.<sup>10</sup>

What *Roberson* and cases like it make clear is that as a result of the mandatory minimums, judges are regularly imposing sentences that they do not believe fit the crime or the circumstances of the particular defendant. Surely, systematic review by the President of the excesses attributable to mandatory minimum sentencing would be an appropriate use of the clemency power—to remedy what Alexander Hamilton long ago referred to as “cases of unfortunate guilt, [so that justice does not] wear a countenance too sanguinary and cruel.”<sup>11</sup>

Once a specific class of cases is identified where sentencing rules are malfunctioning, persuasive arguments must be mustered for why the Obama administration should deviate from the “safe” course of inaction that has been followed by Presidents in recent years. As Professor Barkow’s article makes clear, there are strong institutional and political reasons why the president (and those who advise him) may

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<sup>8</sup> Cite to Kennedy Commission Report

<sup>9</sup> 573 F.Supp.2d 1040, 1046-48 (N.D. Ill. 2008).

<sup>10</sup> *Id.* at 1046-48 (describing, *inter alia*, a court that added a one-day sentence for three drug counts--the Guidelines range for which was 78-97 months--onto a 55-year sentence mandated by the statute governing brandishing a firearm during a crime of violence).

<sup>11</sup> *Federalist* 74

have no interest in commuting sentences: there are significant possible downsides to commuting sentences (appearing soft on crime; fear of future misbehavior by recipients of clemency), and few potential rewards. Perhaps the only president who has won praise for generous use of the clemency power is President Lincoln, and that came mostly in retrospect.<sup>12</sup> President Ford's pardon of Richard Nixon eventually has come to be recognized as a courageous act that helped the country unite after Watergate, but the antipathy the pardon initially stirred probably cost him the 1976 election.

Moreover, incoming administrations recognize that there are a finite number of issues that they can address during their time in office. This is sometimes referred to as the problem of "limited political bandwidth," and freeing convicted criminals from prison has the potential to occupy a great deal of that bandwidth. New administrations inevitably must prioritize the problems that they wish to grapple with. First level issues must be addressed immediately by the administration. For President Obama, solving the economic crisis and conducting two wars would be obvious first level issues requiring immediate attention. Level two issues eventually must be addressed, but are not absolutely crucial—health care reform might qualify as an example of a level two issue for the new administration. Finally, level three issues may be tackled if time and resources allow. I have been told by those with experience in this process of establishing executive priorities that remedying sentencing disparities through clemency would likely be classified as a level three issue, which may account for why governors and presidents often do not get to clemency until the end of their term in office.<sup>13</sup>

Thus, if a president is to be persuaded to revive the power to commute sentences, it must be conceived of as a higher priority. First, the president and his staff must be convinced that there is a pressing need to commute a significant number of prison terms in order to ensure fairness in sentencing. This might be done by dramatically raising awareness of and concern about sentencing inequities, as Families Against Mandatory

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<sup>12</sup> Carl Sandburg's biography of Lincoln, Chapter 51 "The Pardoner;" Inside Lincoln's Clemency Decision Making, P. S. Jr. Ruckman & David Kincaid, *Presidential Studies Quarterly*, Vol. 29, 1999.

<sup>13</sup> See Clinton, circa 2000; Celeste circa 1991; but see Margy's Wash Post op ed re: the late pardon as a recent phenomenon.

Minimums has long sought to do.<sup>14</sup> The differences between Presidents Obama and Bush on matters of law enforcement suggest that there would be a greater receptivity to the importance of using clemency to achieve sentencing reform by the new administration. Although Obama has not spoke directly about clemency, the website outlining his executive agenda states that “the disparity between sentencing crack and powder-based cocaine is wrong and should be completely eliminated.”<sup>15</sup> As an Illinois state senator, Obama was well aware of the dangers of erroneous convictions and successfully led efforts to require all interrogations in capital cases to be videotaped, and to allow first time offenders to receive relief from civil disabilities.<sup>16</sup> Vice President Biden likewise is sufficiently concerned with inequities in federal sentencing laws to have sponsored the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007 that would have eliminated the five-year mandatory minimum for simple possession of crack cocaine.<sup>17</sup>

In addition to highlighting the urgency of acting to redress unfair sentences, it would also be desirable to increase the potential political payoff to the president for using the clemency power. Broadening the constituencies urging the president act would help to accomplish this. If the only people interested in reviving the use of clemency are sentencing reform advocates, members of the ABA, and the families of federal prisoners, it is less likely that this will provide sufficient incentive for the Obama administration to deviate from the “safe” course of inaction followed by recent presidents.

A strong, diverse coalition that favors utilizing commutations would certainly include proponents of racial equality in sentencing, since the crack cocaine sentencing scheme affects minorities disproportionately. In this era of shrinking federal funds, a pro-clemency constituency should also derive support from fiscal conservatives looking for ways to reduce federal spending—it is much less costly to release offenders with outside supervision than to incarcerate them for long periods of time. Various governors

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<sup>14</sup> For example, FAMM has sought to publicize the stories of individuals whose lives have been blighted by punitive federal sentencing rules. *See* <http://www.famm.org/ExploreSentencing/FederalSentencing.aspx>

<sup>15</sup> Cite

<sup>16</sup> Cite; Chicago Defender (6/12/03).

<sup>17</sup> S. 1711.

have issued commutations in response to budget crises similar to that now facing the federal government.<sup>18</sup> Another group whose support could prove crucial is religious leaders who advocate clemency in furtherance of the values of fairness and equality in sentencing. At the end of President Clinton's term in office, a coalition of 52 religious leaders called on the president to release federal low-level, nonviolent drug prisoners who had served at least five years of a lengthy sentence; this advocacy may well have played a role in President Clinton granting 20 such commutations.<sup>19</sup>

Law enforcement voices would also be an essential part of the chorus for clemency. Federal judges and former prosecutors who are willing to speak out against the rigidity of the sentences that are meted out under our current system would offer the president a great deal of political "cover" for using the clemency power. Given the hostility frequently evinced by judges toward mandatory minimums, it should not be difficult to marshal comments like these of Judge Weinstein:

Extensive use of mandatory minimums has created grave problems in criminal justice system administration. Under these statutes, a defendant convicted of a particular crime faces what is sometimes an unnecessarily harsh sentence which the judge is powerless to adjust. These minimums are sometimes out of proportion to penalties set by otherwise controlling guidelines. In practice, the bounded discretion of judges is replaced with the unbounded discretion of the prosecutor to choose whether to charge a crime subject to a mandatory minimum or waive the minimum.<sup>20</sup>

Prosecutors, whose handiwork would be most directly undone by presidential commutations, are likely to be a more difficult but not impossible constituency to persuade to support increased use of the clemency power.<sup>21</sup>

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<sup>18</sup> See Governor Patton [of Kentucky] orders the early release of non-violent offenders to offset budget shortfalls for the Department of Corrections (Dec. 16, 2002); OK Governor Keating. Order; see also Geoff Dornan, Pardons board to look at reducing prison overcrowding, *Nevada Appeal* (Oct. 30, 2008).

<sup>19</sup> 8 Virginia Clergy Join Call for Clinton to Release Nonviolent Drug Offenders, *Norfolk Virginian-Pilot*. Nov. 19, 2000; see also Chad Thevenot, Coalition for Jubilee Clemency Year 2000 Letter to President Clinton Campaign Final Report and Recommendations for Action, reproduced at <http://www.cjpf.org/clemency/report2000.html>

<sup>20</sup> U.S. v. Polizzi, 549 F.Supp.2d 308 (E.D.N.Y., 2008).

<sup>21</sup> See Terrie Morgan-Besecker *Preate files suit for those serving life sentences* *The Times Leader*, Wilkes-Barre, Pa. (Aug. 12, 2008)(reporting that the former Pennsylvania Attorney General had filed suit in federal court against the state Board of Pardons alleging the board is violating the law by refusing to grant clemency hearings to inmates serving life sentences).

2. *Placing the advisory function for clemency in the hands of an independent body of experts instead of the Justice Department.*

Assuming that the president can be persuaded that clemency is necessary, commutations will only issue if there is a functioning process that provides the president with the information and sound advice that he requires to exercise his constitutional authority. Unfortunately, there is wide agreement that the federal clemency process is broken. It has been marred by the removal of the former U.S. Pardon Attorney in disgrace, by the buildup of a huge backlog of clemency requests, and by the slowing of clemency grants to the barest of trickles.<sup>22</sup> If the clemency power is to be revived, the current system of processing clemency applications by a handful of attorneys in the Justice Department will have to be overhauled.

One approach that might be used is to retain the current process, but seek to improve it incrementally. This could be done by maintaining the Justice Department's role in investigating and advising the president as to clemency, but increasing the number of attorneys processing clemency requests, or allowing the Pardon Attorney to report directly to the Attorney General rather than to the Deputy Attorney General.<sup>23</sup> Either of these suggestions would improve the clemency process at the margins: a larger staff would mean that more clemency requests could be processed, while a more direct reporting chain could raise the Pardon Attorney's profile and influence within the Justice Department. However, I believe that more sweeping changes are needed if clemency is to function as more than an afterthought in our system of justice.

There is an inherent conflict of interest present when the Justice Department acts as the primary gatekeeper for clemency, given that its primary role is to prosecute cases and enforce the law. As Evan Shultz has argued persuasively, "the pardon process seems to have been captured by the very prosecutors who run our inevitably flawed criminal justice system."<sup>24</sup> This tension is particularly pronounced when it comes to

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<sup>22</sup> Cite Margy; Washington Post; articles about Roger Adams

<sup>23</sup> See Hoffstadt, 13 FSR 180; Love Congressional testimony.

<sup>24</sup> Evan P. Shultz, *Does the Fox Control Pardons in the Henhouse?* 13 FSR 177.

commutations, a form of clemency by means of which the president shortens or eliminates the very sentences that federal prosecutors have worked hard to impose. Although many states are also struggling with how to exercise the clemency power in a meaningful fashion, no state gives the primary authority for processing clemency requests to the office of the Attorney General or to another body charged with principally with prosecutorial duties.<sup>25</sup>

Rather, the President should look for advice to either a body of professionals charged with the sole task of reviewing clemency requests, or to a group of volunteers appointed because of their expertise in the many areas relevant to making commutation decisions. Former Ohio Governor Mike DiSalle envisioned such a board as follows:

“I would like to give the [clemency] commission complete independence from political considerations by making appointments for life or good behavior, like the justices of the Supreme Court. I should also like to see the membership composed entirely of professional men--a psychiatrist, a jurist, a physician, a sociologist, an educator, perhaps a barrister, and a criminologist. Such a body, thus assured of independence and expertise, could be entrusted with . . . lesser matters of clemency and commutation with more freedom from extraneous pressures than an elected governor has.”<sup>26</sup>

Despite the archaic, sexist phraseology, DiSalle was on to something, as certain states are discovering. The states that are most effective in terms of exercising the clemency power tend to be those which entrust a professional board with the power to grant clemency or to make a binding recommendation to the governor.<sup>27</sup> Other states such as Colorado and Michigan are experimenting with clemency boards comprised of expert citizen volunteers charged with the task of advising the governor on exercising the power. Though it is too soon to tell, they offer some promise of reviving the clemency power in their respective jurisdictions.

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<sup>25</sup> *C.f.*, Nebraska, where AG is part of the body that decides whether clemency should be granted. Cite to Margy’s book.

<sup>26</sup> Michael DiSalle, *The Power of Life or Death*

<sup>27</sup> Love at p. 21 (Out of the 13 states which issue more than a token number of pardons, all but one entrusts a professional board with granting or making

Such Boards offer several advantages. First, they would allow the president to draw on not just the legal acumen that Justice Department attorneys would possess, but the interdisciplinary expertise of people from across the country. For example, President Obama could appoint to a federal clemency advisory board some of the most respected sentencing experts, criminal psychologists, prosecutors, defense attorneys, scholars, and jurists—persons with great and varied expertise in evaluating the excessiveness of sentences, in reviewing complex legal arguments, and in predicting recidivism. President Ford appointed just such a board of citizen experts to review and make clemency recommendations in cases involving persons convicted during the Vietnam War under the Military Selective Service Act or discharged pursuant to the Uniform Code of Military Justice.<sup>28</sup>

Relying on the advice of such a board would also to some extent insulate the President from charges that he is soft on crime or opening the prison gates arbitrarily, allowing him to counter critics by pointing out that he acted on the advice of a board of experts with respect to each grant of clemency. Although responsibility ultimately rests with the president, as many governors have found when making controversial clemency decisions, a favorable recommendation from an advisory board can deflect, or at least diffuse some of the criticism that often attend such grants.<sup>29</sup>

**3: *The President should grant conditional commutations that require completion of an appropriate period of supervised release and compliance with other appropriate conditions.***

Executives are often reluctant to grant clemency because of the potential for embarrassment or even tragedy if a clemency recipient re-offends. Undoubtedly, when it comes to clemency, every governor's or president's nightmare is Willy Horton—the Massachusetts inmate who received a furlough during the administration of Governor

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<sup>28</sup> Executive Order 11803, "Establishing a Presidential Clemency Board," (September 16, 1974). President Ford appointed a board that consisted of nine men and women with diverse backgrounds including several educators, a former U.S. Senator, the executive director of a paralyzed veterans organization, several attorneys, and a retired Marine Corps general. *See* <http://www.presidency.ucsb.edu/ws/index.php?pid=23895>

<sup>29</sup> *See* Clinton; Celeste who were widely criticized for failing to obtain input from advisory bodies.



Michael Dukakis and used his freedom to kidnap and rape again. If the President is to resume granting commutations, he should put in place a mechanism to help ensure that those whose imprisonment is commuted are monitored to reduce the risk of recidivism. Happily, Congress has provided for supervised release for most offenders who are discharged from federal prison. For example, under 18 U.S.C. § 3583(a), a sentencing court may, and often must, require that “the defendant be placed on a term of supervised release after imprisonment.” In any case in which supervised release was included as part of a sentence (and this would certainly be the case for most drug or firearms sentences), the President should commute only the sentence of imprisonment and leave the court’s supervised release requirement intact.

A more difficult case is arguably presented if the President chooses to commute a sentence of imprisonment in which supervised release was not originally contemplated. Under such circumstances, if the President were to impose a condition of supervised release, this might give rise to a challenge by the clemency recipient (once he is out and wants to be free of supervised release) that the President exceeded his power to pardon under Article II by imposing a sentence that was not contemplated by the judge, thereby usurping judicial power. However, the Supreme Court held in *Schick v. Reed*, 419 U.S.256 (1974), that the President can commute a sentence under virtually any terms that do not otherwise offend the Constitution.<sup>30</sup>

The plenary language of *Schick* has been followed by the lower courts. In *United States v. Libby*,<sup>31</sup> the district court upheld President Bush’s imposition of a condition of supervised release on Scooter Libby even though he had not served any time in prison, despite the fact that federal law authorizes supervised release only after a period of incarceration. Although Judge Walton was troubled by the fact that President Bush had “effectively rewritten the statutory scheme on an *ad hoc* basis” by creating a sentence that did not exist under federal law, he acknowledged the breadth of *Schick*’s holding and noted that commutation decisions are rarely the province of the courts. By similar logic,

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<sup>30</sup> The *Schick* Court held that the pardoning power’s limitations “if any, must be found in the Constitution itself.” 419 U.S. at 267.

<sup>31</sup> 495 F. Supp. 2d 49 (D. D.C. 2007).

it would not offend the Constitution for the President to impose a period of supervised release after imprisonment even in cases where the sentencing judge had not required a period of supervised release.

Using the conditional release mechanism, the President might also predicate the inmate's continued release on the successful completion of a drug rehabilitation regimen or on continued participation in a "Twelve Step" program. Federal "drug courts" are currently experimenting with such mechanisms and are enjoying some success.<sup>32</sup> The President could likewise impose other conditions that would enhance the prospects of success by the inmate such as educational or vocational training. In other cases, the President might condition release upon the inmate making restitution to those his crimes injured within a specified period. However, by retaining some supervisory control over the commuted inmate, the President would have greater assurance that those he releases into society will not reoffend.

#### ***4. Conclusion:***

Clemency is a mechanism that is specifically designed to allow a "second look" at sentences that are overly harsh, especially where changed circumstances render the imposition of a sentence unjust. The problem is that for the past 30 years, no president has been "looking" in a serious way at federal sentences beyond using clemency to review a handful of the most innocuous cases. But it is shortsighted to ignore a power that the framers deemed important enough to designate as one of the few responsibilities expressly given to the president in Article II of the U.S. Constitution. This is especially true today when we face a justice system that is often marred by instances of inflexible, overly punitive sentencing. This article offers a possible roadmap by means of which we might return to meaningful use of the clemency power. It will not be easy to revive its use by the president, but given the important role that clemency has long played--and can still play--in our constitutional system, it is a task that is worth the candle.

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<sup>32</sup> Article by Magistrate Terence P. Kemp; additional cites describing federal drug courts

**SECOND LOOK RESENTENCING UNDER 18 U.S.C. § 3582(c)  
AS AN EXAMPLE OF BUREAU OF PRISONS' POLICIES THAT RESULT IN  
OVER-INCARCERATION**

By  
Stephen R. Sady\*  
Lynn Deffebach\*\*

Over-incarceration of federal prisoners takes a huge societal toll: the hundreds of millions of taxpayer dollars wasted; the human costs of individual freedom lost and families broken; and the redefinition of our society as one willing to incarcerate more than is necessary to accomplish legitimate goals of sentencing. Without any reduction in the Guidelines or creation of new programs, the Bureau of Prisons (BOP) can eliminate thousands of years of unnecessary incarceration through full implementation of existing ameliorative statutes. One of the most glaring examples is the BOP's failure to provide the mechanism for implementing the Sentencing Commission's Guideline on sentence reductions for "extraordinary and compelling circumstances," leaving thousands of the most deserving prisoners – including the most ill and infirm – in prison instead of the community.

The first section provides a detailed look at the effective repeal by BOP administrative action of second look resentencing for prisoners whose "extraordinary and compelling circumstances" warrant the sentencing judge's reassessment of sentencing factors under 18 U.S.C. § 3582(c). The second section describes the legislative history of § 3582(c) that envisions judicial review of compelling and extraordinary circumstances that are not limited to terminal illness. The final section summarizes other BOP policies that fail to provide the range of amelioration contemplated by federal sentencing statutes.<sup>1</sup>

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<sup>1</sup> For an expanded discussion of the BOP policies that result in longer over-incarceration, see Stephen R. Sady & Lynn Deffebach, *The Sentencing Commission, The Bureau Of Prisons, And The Need For Full Implementation Of Existing Ameliorative Statutes To Address Unwarranted And Unauthorized Over-Incarceration*, United States Sentencing Commission Symposium On Alternatives To Incarceration (July 2008), available at [http://www.rashkind.com/alternatives/dir\\_04/Sady\\_Over-Incarceration.pdf](http://www.rashkind.com/alternatives/dir_04/Sady_Over-Incarceration.pdf) (hereinafter Symposium Paper).

**A. Based On The Sentencing Commission’s Standard For “Extraordinary And Compelling Circumstances” In U.S.S.G. § 1B1.13, The BOP Implements A Process That Obstructs The Sentencing Courts’ Exercise Of Discretion To Reduce Sentences.**

In 18 U.S.C. § 3582(c), Congress provided for second look resentencing by giving discretion to the sentencing judge to reduce a sentence if the court finds that “extraordinary and compelling reasons warrant such a reduction.”<sup>2</sup> Congress realized that a wide variety of circumstances could fit into the description of “extraordinary and compelling” circumstances in 18 U.S.C. § 3582(c)(1)(A)(i), and delegated to the Sentencing Commission the task of setting criteria and providing examples:

The Commission, in promulgating general policy statements regarding the sentencing modification provisions in § 3582(c)(1)(A) of Title 18, shall describe what should be considered extraordinary and compelling circumstances for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.<sup>3</sup>

The statute contemplates that the BOP would perform a gatekeeper function: sentencing discretion is to be exercised by the sentencing judge, but the sentencing judge does not receive notice of the case until the BOP files a motion. This is where practice has broken down.

Despite the explicit direction to the Sentencing Commission, this delegation resulted in no action for the first 20 years of the Guidelines. In this power vacuum, the BOP adopted a rule that, despite the absence of a statutory basis for such a restriction, only permits the filing of a motion based on imminent proximity to death. The result of the policy is brutal: with almost 200,000 federal prisoners, the BOP approved an average of only 21.3 motions each year between 2000 and 2008 and, in about 24% of the motions that were approved by the BOP, the prisoner died before the motion was ruled on, so a federal judge never had the opportunity to even make a decision.<sup>4</sup>

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<sup>2</sup> 18 U.S.C. § 3582(c)(1)(A)(i) (2000).

<sup>3</sup> 28 U.S.C. § 994(t) (2000).

<sup>4</sup> Judi Garret, Dep’ty. Dir., Office of Information, Policy, & Public Affairs, Federal Bureau of Prisons (May 2008), <http://or.fd.org/ReferenceFiles/3582cStats.pdf>.

Last year, the Sentencing Commission adopted a rule that, consistent with the statutory language, contains no limit on what can constitute “extraordinary and compelling” circumstances, and sets out examples beyond imminent death. The newly promulgated Guideline lists other examples of circumstances that can meet the statutory standard:

- a permanent physical or medical condition that substantially diminishes the ability of the prisoner to provide selfcare within a prison environment;
- the death or incapacitation of the prisoner’s only family member capable of caring for the prisoner’s minor child or children.
- other factors that, alone or in combination, constitute extraordinary and compelling circumstances, with rehabilitation a factor that can only be considered in combination with others.<sup>5</sup>

Although this Guideline became effective on November 1, 2007, not a single motion has been filed pursuant to the new U.S.S.G. § 1B1.13. The old BOP rule remains on the books, and the BOP, in an interim rule, has not changed a syllable of the basic standard.<sup>6</sup> The BOP to this day is instructing Wardens by rule to deprive sentencing judges of the opportunity to exercise their discretion and is, in effect, assuring that the range of discretion contemplated by the statute and the Sentencing Commission is never exercised.

The BOP has effectively repealed the congressional delegation to the Sentencing Commission to describe the scope of § 3582(c) relief. Unless the BOP administers the statute in a fair and reasonable manner, the new Guideline is a dead letter. The Sentencing Commission, having made such a clear statement contemplating vigorous use of the statute, has taken no action to assure that the tasks delegated to the Commission are realized in the real world by the agency whose ministerial function is simply not being carried out.

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<sup>5</sup> U.S.S.G. § 1B1.13, comment. (n.1).

<sup>6</sup> The BOP explicitly stated in the interim rule that the Commission’s proposed factors, which had been circulated since May 2006, would not be considered: “It is important to note we do not intend this regulation to change the number of . . . cases recommended by the Bureau to sentencing courts. It is merely a clarification that we will only consider inmates with extraordinary and compelling medical conditions for [reduction in sentence], and not inmates in other, non-medical situations which may be characterized as “hardships,” such as a family member’s medical problems, economic difficulties, or the inmate’s claim of an unjust sentence.” *Reduction in Sentence for Medical Reasons*, 71 Fed. Reg. 76619-01 (Dec. 21, 2006).

In contrast to the BOP's interim rule, neither the statute nor the Guideline provides for the BOP to make a recommendation to the sentencing judge. The statute simply directs the BOP to file a motion to notify the sentencing judge of the need to decide whether "extraordinary and compelling circumstances" warrant a sentence reduction. Under basic separation of powers principles, the BOP should be operating as no more than the conduit for potential claims to come before the sentencing judge. Otherwise, the Executive Branch effectively becomes the sole adjudicator of second looks – a function already provided to the Executive Branch in the powers of pardon and commutation.

The result of the BOP's obstruction of § 3582(c)'s full implementation is expensive. The deserving prisoners described by the Commission in U.S.S.G. § 1B1.13 are real and numerous. Many of the potential beneficiaries are medically needy and, therefore, expensive to house. Given the number of federal districts, even one motion a year per district would double the number of § 3582(c)(1)(A)(i) motions filed per year, greatly reducing unnecessary prison expenditures. Most importantly, judges, defense counsel, and even prosecutors would have a mechanism available to deal with the "extraordinary and compelling" prison tragedies that need judges to do justice.

**B. The Legislative History Supports The Sentencing Commission's Standards For Relief Under §3582(c) Based On Broad Judicial Discretion.**

For many years, the sentencing judge had virtually unlimited discretion under Rule 35(b) to reduce a sentence within 120 days of the sentence becoming final.<sup>7</sup> The Sentencing Reform Act of 1984 repealed Rule 35(b), but maintained a second look mechanism that removed the time limit but constrained the circumstances for granting relief in § 3582(c).

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<sup>7</sup> Fed. R. Crim. P. 35(b) (1984) (repealed):

A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

The legislative history explicitly links the repeal of Rule 35(b) with the new § 3582(c). Noting that Rule 35(b)'s demise "leaves a substantial void in the sentencing system," Congress sought to provide limits on the formerly unrestricted discretion and a narrow definition of changed circumstances warranting court action.<sup>8</sup> The subcommittee report mentioned as changed circumstances after sentence "cases in which the defendant's family may have suffered a catastrophe" and significant service to law enforcement, then stated: "Whatever their format, adequate post-sentencing procedures should be maintained to give relief in those and similar situations."<sup>9</sup>

Congress intended the judicial sentence reduction authority in § 3582(c) to be an extension of the then-existing authority that would allow a sentencing judge to address "the unusual case in which the defendant's circumstances are so changed . . . that it would be inequitable to continue . . . confinement."<sup>10</sup> Although severe illness was considered a changed circumstance warranting a sentence reduction, it was not the only circumstance:

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, or other cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence . . .<sup>11</sup>

The only limitation on the court's authority to act is that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason" and that the court shall consider the § 3553(a) factors in exercising discretion.<sup>12</sup> Thus, the legislative history of the second look provision contemplates that the BOP should only exercise a gate-keeping ministerial role. The BOP is failing in this function by only notifying the court in the case of terminal illness with death imminent, not the broad range of possible "extraordinary and compelling" reasons.

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<sup>8</sup> *Comprehensive Crime Control Act of 1983, Hearing on S. 829 Before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary*, 98th Cong. at 491 (1983).

<sup>9</sup> *Id.* The subcommittee also referred to a "demonstrable change in attitude," which was retained in the statute as a factor only to be considered in combination with other factors in the last sentence of 28 U.S.C. § 994(t).

<sup>10</sup> S.Rep. No. 225, 98th Cong., 1st Sess. 37-150 at 5.

<sup>11</sup> *Id.* at 55.

<sup>12</sup> 28 U.S.C. § 994(t).

**C. The BOP's Restrictions And Obstruction Of The Second Look Statute and Guideline Is Symptomatic Of Other BOP Policies That, Contrary To Separation Of Powers Doctrine, Impede The implementation Of Ameliorative Statutes.**

Unfortunately, § 3582(c) is not the only example of the BOP's failure to implement fully the available ameliorative statutes. The policies of institutionalized over-incarceration are consistent, inhumane, and expensive:

- The BOP applies the federal statute on good time credits at the rate of 12.8% of the sentence imposed, although Congress intended to award good time reductions at 15% of the sentence imposed, and the Sentencing Commission calibrated the Sentencing Table at the congressionally mandated 15%, resulting in over 36,000 years of over-incarceration;<sup>13</sup>
- The BOP fails to provide the sentence reduction incentive for thousands of addicted non-violent offenders by implementing rules that disqualify statutorily eligible prisoners who successfully complete in-prison substance abuse treatment;<sup>14</sup>
- The BOP unilaterally discontinued the boot camp program that the Sentencing Commission recognized as a sentencing option that provided for both a sentence reduction and extended community corrections for non-violent offenders with limited prior records;<sup>15</sup>
- The BOP's rules on sentence computation create *de facto* consecutive sentences despite state judgments providing that the time should run concurrently, fail to provide good time against the concurrent part of sentences where the time was served before the imposition of sentence, and institute dead time by refusing to credit time in administrative detention in immigration cases;<sup>16</sup> and
- The BOP consistently underutilizes community corrections, even after the Second Chance Act extended to one year the guarantee of consideration for pre-release community corrections placements to provide greater transition programming.<sup>17</sup>

Basic separation of powers doctrine limits the appropriate role of the Executive Branch in determining the actual length of custody. Where Congress provides

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<sup>13</sup> Symposium Paper at 2-9.

<sup>14</sup> Symposium Paper at 9-17.

<sup>15</sup> Symposium Paper at 21-23.

<sup>16</sup> Symposium Paper at 23-27.

<sup>17</sup> Symposium Paper at 27-29.



ameliorative measures that lessen the period of custody, such programs should be executed in a manner that assures that terms of imprisonment are subject to the full lenity authorized by Congress. By misreading or grudgingly implementing ameliorative statutes, the Executive Branch can seriously exacerbate actual time served. This Executive practice, because it is not connected to the Sentencing Reform Act's purposes of sentencing, has become the engine for massive, unnecessary over-incarceration. The Executive Branch, by failing to fully execute ameliorative laws, unilaterally and unfairly lengthens prisoners' sentences.

### **Conclusion**

At the outset of the Guidelines era, the Supreme Court in *Mistretta v. United States* held that the Guideline's system had sufficient judicial participation and congressional oversight to survive a separation of powers challenge.<sup>18</sup> The Executive Branch's chronic failure to fully implement Congress's ameliorative measures challenges that assumption. By increasing actual time in custody through executive fiat, the BOP added to the soaring incarceration numbers and expense of unnecessarily inflated prison populations. As Justice Kennedy pointed out: "Our resources are misspent, our punishments too severe, our sentences too long."<sup>19</sup> Redirection of the BOP's policy towards full implementation of ameliorative statutes – especially the second look statute – would bring both justice and rationality to a system that incarcerates for longer than necessary to accomplish the purposes of sentencing.

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<sup>18</sup> 488 U.S. 361, 374 (1989).

<sup>19</sup> Justice Anthony M. Kennedy, Address at the American Bar Association Annual Meeting (August 9, 2003).

## **A Case for Compassion** **By Mary Price\***

Michael Mahoney died alone in a federal prison hospital on July 30, 2004. Despite appeals from family members, FAMM, and even the judge who had sentenced him to fifteen years in prison, prison officials refused to release him to die with his family. The story of Michael's conviction, imprisonment, and final illness and death is an indictment of the criminal justice system. It is especially an indictment of the federal Bureau of Prisons, which we believe routinely fails in its responsibility under law to consider and recommend to the courts those prisoners whose cases present "extraordinary and compelling reasons" for early release.

Michael pled guilty in 1994 to federal armed career criminal charges, and received the mandatory 15-year prison term dictated by 18 U.S.C. § 924(e). The seriousness of the charges and harshness of his sentence are belied by the actual circumstances of his case. Michael's "career" in crime consisted in its entirety of three personal use amount drug sales to the same undercover informant within a thirty-day period some fourteen years before, which the State of Texas had charged as three separate felonies. Following a brief period of incarceration in Texas, Michael returned to his home state of Tennessee and opened a small business, a pool hall. He employed people, paid taxes, and went about his life quietly. Concerned for his safety at closing, he decided to purchase a gun to protect himself while making night deposits of the business's cash receipts. Michael later told the sentencing judge that he had been assured by the pawnshop owner, who was also an attorney, that his prior felonies need

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\* Mary Price is Vice President and General Counsel of Families Against Mandatory Minimums. In that capacity, she advocated for Michael Mahoney in connection with his petition for executive clemency, and in connection with his later request to the Bureau of Prisons for compassionate release.

not be disclosed because they were more than ten years old. This seemed reasonable to him because he had been allowed to obtain a state liquor license after a ten-year waiting period.

Sometime later, Michael's gun was stolen. Concerned that it might be used to commit a crime, he reported the theft to authorities. He was arrested when he arranged to purchase a gun to replace the one stolen.

The decision by federal prosecutors to count the three 1980 drug sales as separate convictions would make a profound difference in Michael's sentence in 1994. It meant the difference between a five-year and a 15-year mandatory minimum. The fact that the mandatory minimum tied the judge's hands also had a huge impact. Had Michael been sentenced under the federal Sentencing Guidelines as a simple felon in possession of a firearm, a federal offense, his guideline range would have been 27-33 months. Instead, he received a sentence intended for hardened career criminals – recidivists whose repeated use of firearms may warrant a stiffer sentence. Michael was no career criminal. He made one mistake in 1984.

Judge James D. Todd struggled with the fifteen-year sentence the law required. He continued the sentencing hearing to research the issue on his own, saying:

I am not going to impose such a sentence without giving myself an opportunity to look at it some more and try to find a way around it. Because it seems to me this sentence is just completely out of proportion to the defendant's conduct in this case. Now I understand the statute was intended to stop people who have had previous drug convictions from possessing a firearm. I think that's a worthwhile purpose, and I send criminals away regularly for violating that, and I have no hesitation in doing that . . . . I'm not going to impose a sentence of fifteen years without having an opportunity to see if there's some way around it because it just seems to me this is not what Congress had in mind.

In the end though, Judge Todd concluded that he had no choice but to sentence Michael to the mandatory minimum term, but not without expressing his feelings about this outcome:

I don't think that this is the kind of case that Congress had in mind, where the prior convictions were some fifteen years ago and you've had a relatively clean record since that time. . . . [That said] the court has no authority to depart downward . . . . So it doesn't matter how compelling your circumstances may be, it doesn't matter how long ago those convictions were, and it doesn't matter how good your record has been since those prior convictions. 18 U.S.C. 924(e) requires in your case that you receive a sentence of fifteen years. So the court has no alternative but to impose that sentence.

FAMM profiled Michael's case in its newsletter, and national media, including *Rolling Stone Magazine* and the *Wall Street Journal*, also wrote about it. After six years in prison, Michael's health began to deteriorate due to liver disease. Michael was one of 18 non-violent federal prisoners serving excessive sentences for whom FAMM advocated clemency at the end of President Bill Clinton's term. The outgoing President granted all of the requests submitted by FAMM except Michael's.

In early 2003, Michael began complaining to BOP doctors about painful swollen glands. Despite his history of health problems, months passed, during which time family repeatedly pleaded with authorities to assess his condition. When he was finally taken to the University of Kentucky Medical Center, he was diagnosed with Non-Hodgkins Lymphoma. Michael was hospitalized almost immediately and placed on a very intensive regimen of radiation and, when the radiation failed to control the spread of the disease, chemotherapy. These efforts were to no avail. He developed a particularly aggressive form of cancer, which his doctors considered incurable. He became bedridden and began to suffer great pain.

When his case was determined to be hopeless, he was returned to the prison hospital. At the prison hospital, despite the fact that he was dying, his family, who lived at great distance, was denied access to him for more than one hour a day. On one occasion, his elderly father, who had traveled for hours to the prison by car, was turned away one day and forced to return the next. When staff tried to turn him away again, he had to plead before they would relent and allow him an hour with his dying son. Michael's mother contacted the facility over and over again because of Michael's reports that the medical staff was unresponsive to his requests for additional pain medication.

When it was obvious that he was dying, Michael made a request to prison authorities that he be permitted to return home, where his family was willing and able to care for him in the final weeks of his life. The law governing release in such circumstances, 18 U.S.C. § 3582 (c)(1)(A), places in BOP's hands the task of bringing a motion to the sentencing judge for sentence reduction. Imminent death has always been considered the quintessential "extraordinary and compelling reason" contemplated by the statute. In the spring of 2004, the warden at the Lexington Federal Medical Center sponsored just such a request in Michael's case. The prison social work staff put together a petition, gathered medical evidence, ensured that insurance and a care plan were in place for Michael, and prepared his family to bring him home. We learned from BOP personnel that many who knew Michael at Lexington cared for him and believed it was time for him to go home.

We believed it as well. His further incarceration served no purpose, and under the circumstances it had become an additional form of punishment not contemplated by the court at sentencing. And he was well beyond the point that he was physically capable of

doing any harm, had he ever been capable or inclined. Whatever we as a people had hoped to achieve from imprisoning Michael for a crime he never intended to commit had been accomplished. Requiring him to die alone in prison caused him and everyone who loved him unnecessary pain.

In late July, the warden's request, which had been endorsed by the BOP's regional office, cleared by the BOP's legal office in Washington, and unopposed by the United States Attorney, had been denied by Harley Lappin, the director of the BOP. Mr. Lappin's decision not to ask the court to approve Michael's early release was apparently based on the nature and circumstances of Michael's 1994 conviction.

Judge Todd, who would have been the deciding judge had the BOP filed a motion seeking Michael's release, immediately wrote to Mr. Lappin, indicating his receptivity to such a motion. He stated that in 20 years in the bench he had never before written to a corrections official on behalf of an inmate he had sentenced. Describing the circumstances of Michael's conviction, he said that "Mr. Mahoney's case has troubled me since I sentenced him in 1994 . . . [as] one of those cases in which a well-intentioned and sound law resulted in an injustice." He said he was aware that Michael was bedridden, suffering great pain and considered near death. He suggested "that . . . a motion [for compassionate release] is the only way to mitigate in a very small way the harshness which 18 U.S.C. § 924 (c) has caused in this unusual and unfortunate case."

Mr. Lappin did not reply. Michael died a few days later.

The federal BOP brings very few petitions for compassionate release under § 3582(c)(1)(A)(ii) to the federal courts each year, generally no more than 20. The applicable standards are not clear, and the administrative process is difficult for inmates

to navigate, particularly if they are sick or disabled. We have been hearing for years from BOP officials that the governing policy guidelines are being revised, but year after year passes without change.

In May 2006, United States Sentencing Commission sent a proposed policy statement to Congress that would provide guidance for courts considering motions from the Bureau of Prisons for early release due to extraordinary and compelling circumstances. Advocates had long urged the Commission to draft a policy statement to help the courts address motions and to give life to Congressional intent that the early release mechanism be used for situations beyond terminal illness or debilitation mental or medical situations.<sup>1</sup> The draft policy statement provided several examples of grounds for early release motions including an affirmation of the core use of the power provided courts under 18 U.S.C. § 3582©(1)(A)(i) to consider, as an extraordinary and compelling circumstance, the fact that the defendant is “suffering from a terminal illness” and the defendant is “not a danger to the safety of any person or to the community, as provided in 18 U.S.C. §3142(g).”<sup>2</sup>

The Department of Justice, considering that proposed policy statement, opposed any expansion of the use of the early release mechanisms, enunciating what Oregon Deputy Federal Public Defender Steve Sady has coined the “death-rattle” criteria. DOJ advocated release only for:

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<sup>1</sup> See Mary Price, *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A)*, 13 Fed. Sent’g. Rep. 188 (2001) (discussing legislative history and arguments for expanding use of the power).

<sup>2</sup> U.S.S.G. §1B1.13 and application note 1(A)(i). The inquiry, under 18 U.S.C. § 3142(g) directs the court to take into account familiar factors such as nature and circumstances of the offense, whether the offense was violent, or involved controlled substances, firearms or explosives; the history and characteristics of the defendant, including substance abuse and criminal history. Michael Mahoney posed no danger to anyone at the time he was sentenced and was physically incapable of posing any danger to anyone, even were he inclined to, at the time of his death. He was, for all intents and purposes, incapacitated.

prisoners who are terminally ill and “with a prognosis (to a reasonable medical certainty) of death within a year,” or prisoners “suffering from a profoundly debilitating (physical or cognitive) medical condition that is irreversible and cannot be remedied through medication or other measures, and that has eliminated, or severely limited the inmate’s ability to attend to fundamental bodily functions and personal care needs without substantial assistance from others (including personal hygiene and toilet functions, basic nutrition, medical care, and physical safety.)”<sup>3</sup>

Despite DOJ’s opposition, Congress permitted the policy statement to be adopted.<sup>4</sup> It was hoped that the BOP would take such a policy statement as a signal to use its authority vigorously and as expansively as Congress intended.<sup>5</sup> It has not. Since the policy statement was adopted, the BOP has not brought any motions for early release for other than the terminally ill or incapacitated. And, as far as we know, it has not increased the number of motions for even those situations.

A policy statement guiding judicial discretion is meaningless if the courts are barred from exercising discretion by the Bureau of Prisons whose approach to the process is unchanged. There are neither penal nor societal reasons to continue to incarcerate a dying prisoner who is not now, if he ever was, a danger to the community.<sup>6</sup> The discussion of whether the Department of Justice has assumed too much in preventing worthy motions from reaching courts will have to wait a future paper, but certainly, in

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<sup>3</sup> Letter from Michael J. Elston to Hon. Ricardo H. Hinojosa, 2 (July 14, 2006).

<sup>4</sup> U.S.S.G. § 1B1.13.

<sup>5</sup> See, e.g., John Steer and Paula Biderman, *Impact of the Federal Guidelines on the Presidential Power to Commute Sentences*, 13 Fed. Sent’g. Rep. 155 (2001) ([w]ithout the benefit of any codified standards, the Bureau [of Prisons] as turnkey, has understandably chosen to file very few motions under this section.”).

<sup>6</sup> For a discussion of the various arguments in favor of compassionate release, see William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*. Maryland L. Rev. 2009 (forthcoming).



this case, no one can discern a sound reason in law, policy or common sense to justify forcing a Michael Mahoney to die the way he did.

Congress in the Sentencing Reform Act and the U.S. Sentencing Commission signaled clearly that the courts be afforded the discretion to make decisions about which motions for early release to grant. The BOP has not, however, acted to ensure that the courts are able to consider petitions for early release from prisoners whose conditions, medical, terminal or otherwise, might merit it. The new administration can change this culture. The Attorney General can signal his intention that the statute be used as intended by providing a guidance memo laying out his support for use of the power to reduce a sentence for extraordinary and compelling circumstances consistent with that intended by Congress in the Sentencing Reform Act and by the Commission in its recent guideline amendment. This memo should instruct that the BOP bring motions before the sentencing judge in all cases where the petitioner's circumstances meet the criteria laid out at U.S.S.G. § 1B1.13.

If the Bureau of Prisons is unwilling or unable to exercise this power as Congress intended it may be time for Congress to allow prisoners to petition the court directly, taking the Bureau of Prisons out of the business of controlling compassion. It is a business for which the BOP is ill suited, in light of its primary mission as custodian, and particularly in light of what has become in recent years a routine failure of compassion at the highest reaches of the Bureau. It is particularly inappropriate to have BOP basing its decision, as it did in Michael's case, on perceptions about the gravity of a prisoner's offense of conviction. If the original offense is relevant at all in circumstances like Michael's, it is for the court to judge and not the jailer.. The Bureau would still have an

important role, helping prepare release plans, helping courts assess suitability for release and ensuring an orderly transition in the event early release is granted. These are tasks the BOP takes on routinely when preparing a prisoner to reenter the community.

Moreover, permitting the courts to entertain motions from prisoners directly would not prevent the BOP from bringing motions for sentence reduction directly, or from making recommendations to the courts in cases brought directly by prisoners. But pleas like Michael's should not be prevented from reaching the ears of judges, whom Congress intended would make the ultimate decision about release in the sort of extraordinary and compelling circumstances that almost everyone agreed were present in Michael's case.

Michael's life and his lonely and pointless death should remain a reminder to those who work to change the way the government responds to prisoners who are terminally ill, or whose further incarceration is otherwise pointless, unnecessary and cruel.

# **Exploring the Theory, Policy and Practice of Fixing Broken Sentencing Guidelines**

by  
Professor Douglas A. Berman

**Early Rough Draft for  
ABA Roundtable on “Second Look” Sentencing Reforms**

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## **I. A Basic Theory of Broken Sentencing Guidelines**

Some sentencing guidelines are broken. To be more complete and to borrow liberally from the Bard, we might say that some guidelines are born broken, some guidelines achieve brokenness in application, and some guidelines have brokenness thrust upon them by the evolution of sentencing law and practice.

The notion that some sentencing guidelines are born or become broken should not surprise anyone involved in the development and operation of the federal sentencing guidelines. The first U.S. Sentencing Commission readily conceded that the original U.S. Sentencing Guidelines could not and would not be perfect. As one original Commissioner explained, the Commission recognized from the beginning that it would need to “continuously revise the Guidelines over the years” based on what was to be learned from “gather[ing] data from actual practice [and] analyz[ing] the data” to assess how a federal guideline sentencing system could and should be improved.<sup>1</sup> The reality of broken federal guidelines is confirmed by the fact that the U.S. Sentencing Commission has proposed and Congress has approved 725 amendments to the federal sentencing guidelines during their first two decades. Moreover, though it took a while to figure this out, the Supreme Court in

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<sup>1</sup>Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 7-8 (1988).

2005 ultimately determined in *United States v. Booker*,<sup>2</sup> that the procedures being used to apply the federal sentencing guidelines were constitutionally broken.

I cannot in this short draft develop a fully detailed theory of broken guidelines. But I can provide a brief overview of how guidelines can get to be broken, and can highlight particular provisions of the federal sentencing guidelines that have become broken in various ways. (The problem of broken guidelines is also present in state sentencing systems, of course, but this paper will give particular attention to federal sentencing dynamics.)

First, some guidelines are “born broken” because of an inherent design flaw in their creation. I view many of the quantity-driven guidelines in the federal sentencing system — those provisions in Chapter 2 of the U.S. Sentencing Guidelines Manual that require precise measures of economic loss or drug amounts to assess offense seriousness — as inherently flawed because the precise quantity of economic loss or drugs rarely provides an effective proxy for the true seriousness of an offense or for the true culpability of an offender.

Second, some guidelines “achieve brokenness in application” because of the difficulties courts face in operationalizing what may be generally sensible sentencing rules. I view many offender-oriented guidelines in the federal sentencing system — those provisions in Chapter 5 of the U.S. Sentencing Guidelines Manual that declare most personal characteristics “not ordinarily relevant” to whether a sentence should be outside the guidelines — as now broken because district and circuit courts have struggled greatly in trying to develop principles to guide when a defendant’s personal characteristics should or should not justify a non-guideline sentence.

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<sup>2</sup>543 U.S. 220 (2005)

Third, some guidelines “have brokenness thrust upon them” because over time the evolution of sentencing law and practice can reveal significant flaws in the application of sentencing rules that may have been initially sound. I view the criminal history guidelines in the federal sentencing system — those provisions in Chapter 4 of the U.S. Sentencing Guidelines Manual that provide an intricate set of rules for categorizing a defendant’s criminal past — as now broken because they have proven sometime ineffective at distinguishing among some defendants with very different risks of recidivism.

As suggested before, my goal here is not to provide a comprehensive theoretical taxonomy of broken guidelines or to detail all the provisions of the federal sentencing guidelines that I view as broken. But, as I proceed to outline a set of modern principles for fixing broken guidelines, it is useful to consider all the different ways guidelines can become broken and, in turn, to consider dynamically the types of corrective actions that might be justified.

## **II. A Modern Policy for Fixing Broken Harsh Sentencing Guidelines**

My initial assertion — “some sentencing guidelines are broken” — should not be considered at all controversial or really debatable. What likely is controversial and debatable is my vision of how modern sentencing systems should assess and respond to the unavoidable reality of broken guidelines. Specifically, I contend that the first and perhaps most essential modern priority for any sentencing commission should be to identify and seek an immediate and effective fix for those guidelines which are broken due to their unjust and/or ineffective harshness.

My policy proposal here is informed by fundamental concerns about the injustice and inefficiencies of modern mass incarceration in the United States. A recent report from the Vera Institute of Justice provides a basic accounting of America’s modern eagerness for locking up its populace:

Between 1970 and 2005, state and federal authorities increased prison populations by 628 percent. By 2005, more than 1.5 million persons were incarcerated in U.S. prisons on any given day, and an additional 750,000 were incarcerated in local jails. By the turn of the 21st century, more than 5.6 million living Americans had spent time in a state or federal prison — nearly 3 percent of the U.S. population.<sup>1</sup>

The overall population of incarcerated individuals nationwide hits record highs nearly every year, and sophisticated projections suggest that the extraordinary number of persons locked behind bars is likely to continue to increase in coming years.<sup>2</sup>

The unprecedented growth in U.S. imprisonment is especially stunning when placed in a global perspective. A far higher proportion of American adults is imprisoned than in any other country; our incarceration rate — which is nearly 750 individuals per 100,000 in the population — is now roughly 5 to 10 times the rate of most other Western industrialized nations:

The U.S. imprisons significantly more people than any other nation. China ranks second, imprisoning 1.5 million of its much larger citizen population. The U.S. also leads the world in incarceration rates, well above Russia and Cuba, which have the next highest rates of 607 and 487 per 100,000. Western European countries have incarceration rates that range from 78 to 145 per 100,000.<sup>3</sup>

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<sup>1</sup>Don Steman, *Vera Institute of Justice, Reconsidering Incarceration: New Directions for Reducing Crime* (2007); see also Pew Center on the States' Public Safety Performance Project, *One in 100: Behind Bars in America 2008* (2008).

<sup>2</sup>The Pew Charitable Trusts, *Public Safety, Public Spending: Forecasting America's Prison Population 2007-2011* (2007).

<sup>3</sup>*Id.* at 1.

The realities of modern mass incarceration — combined with my view that our nation’s historic commitment to protecting individual liberty and limiting government power should prompt extreme concerns about excessive terms of imprisonment — lead to the conclusions (1) that unduly harsh guidelines are the type of broken guidelines now most in need of fixing, and (2) that sentencing commissions now need to become persistently proactive in fixing broken harsh guidelines and in making sure fixed guidelines benefit as many individuals as possible. Let me here repeat a key point: my suggested modern policy for fixing broken guidelines is specifically and intentionally attendant to modern crime and punishment realities. If crime rates were generally on the rise and modern incarceration rates were historically low, a sensible priority for sentencing commissions might be to identify and seek to fix those guidelines that are broken due to their unjust and/or ineffective leniency. But a converse reality now defines modern crime and punishment: crime rates are generally on the decline and modern incarceration rates are historically high. Consequently fixing broken harsh guidelines should be a defining priority for modern sentencing commissions.

Turning specifically to the federal sentencing system, the U.S. Sentencing Commission has two decades of sentencing experiences and sophisticated research to help it identify which broken harsh guidelines should be fixed (and fixed with all deliberate speed). Though I cannot in this paper develop a fully detailed account of all the broken harsh federal sentencing guidelines that may merit fixing, I can provide a brief overview of how the Commission can and should develop a dynamic fix-it agenda in the wake of the 20 years of federal sentencing experiences.

First and foremost, pre-*Booker* downward departures patterns and post-*Booker* variance patterns provide a ready-made accounting of those guidelines that judges consider problematically harsh. Early proponents of guideline sentencing systems expected reasoned departures from suggested sentences to play a fundamental part in guideline revisions.<sup>1</sup> Disappointingly, the federal sentencing guidelines over the last two decades have rarely “codified” many of the judicially suggested reasons for reducing guideline sentences.

Second, the U.S. Sentencing Commission has commissioned a number of public and judicial surveys concerning sentencing views and attitudes; these studies provide an informative and astute assessment of which guidelines seem both to the public and to judges as unduly and unnecessarily harsh. Similarly, various public policy groups have issued reports and commissioned surveys that effectively document which guideline provisions have proven to be most broken due to their unjust and/or ineffective harshness.

Last but certainly not least, the U.S. Sentencing Commission’s staff has itself completed an impressive array of research reports and data analyses throughout the last two decades. These Commission research efforts effectively document the significant increase in the overall severity of federal sentences during the guidelines era. These research efforts also suggest a significant number of guidelines which, in operation, produce unexpectedly and undeservedly harsh sentences for many types of offenses and offenders.

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<sup>1</sup>See Leslie T. Wilkins et al., *Sentencing Guidelines: Structuring Judicial Discretion* xvii (1978) (discussing value of judicial departures from guidelines to provide “an informational feedback loop,” which should “inject a continuous element of self-improvement and regeneration into the guidelines”); see generally Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 77 *Notre Dame L. Rev.* 21 (2000).



There are, of course, various ways one might seek to identify broken guidelines in state and federal sentencing systems and various different modern policy approaches one might adopt for how best to fix broken guidelines. But, as explained above, the troublesome realities of modern mass inform my view that unduly harsh guidelines are the type of broken guidelines now most in need of fixing. And because of its national presence and prominence, I would urge the U.S. Sentencing Commission to lead the way with a proactive agenda focused on fixing broken harsh federal sentencing guidelines.

### **III. A Practice of Making Fixed Guidelines Apply Retroactively**

As briefly mentioned above, I contend not only that sentencing commissions now should be persistently proactive in fixing broken harsh guidelines, but also that commissions should seek to make sure fixed guidelines benefit as many individuals as possible. If and when a sentencing commission identifies and then fixes any guidelines deemed broken due to unjust and/or ineffective harshness, defendants previously sentenced under the broken guidelines should generally be able to receive the benefit of the fix. Principles of equal justice and sentencing parsimony both strongly suggest that, as a general rule, not only future defendants but also past defendants ought to get the benefit of any and all guideline fixes. In other words, all fixes to broken harsh guidelines that serve to reduce applicable sentences can and always should be presumptively and broadly retroactive absent compelling reasons for limiting who benefits from the fix.

Helpfully, recent experiences in the federal sentencing system with a major guideline revision highlights the ability for modern sentencing systems to effectively and efficiently implement retroactively a (long-needed) broken guideline fix. This fix involved, of course, the federal sentencing guidelines for crack and powder cocaine

offenses, an issue that has engendered controversy and criticisms for decades. Specifically, a dozen years after it started issuing detailed research reports documenting that the 100-to-1 crack/powder ratio was unjustified and unfair, the U.S. Sentencing Commission in 2007 was finally able to amend its guidelines to reduce applicable sentencing ranges for crack offenses. The Commission lowered the base offense level for all crack cocaine offenses by two levels, which served to reduce — but only partially and less than the Commission had previously urged — the disparity in drug crack/powder quantities triggering particular guideline sentencing ranges.

Notably, while few questioned or publicly resisted the Sentencing Commission's efforts to ensure federal crack sentences were somewhat more just in the future, significant controversy erupted over whether the fixed guidelines should be applied retroactively to benefit defendants who had previously been sentenced under the broken harsher crack guidelines. During public hearings, the Department of Justice argued aggressively that giving retroactive effect to the fixed guidelines could adversely impact public safety and would create many practical difficulties. In opposing retroactivity, the Justice Department made much of the fact that a very large number of incarcerated defendants might benefit from the new guidelines and a good number of prisoners previously sentenced for crack offenses under the broken guidelines might be eligible for immediate release. (According to the Commission's research, nearly 20,000 defendants might be eligible for reductions under its fixed guidelines and well over a thousand of these defendants might be eligible for release right away if the new guidelines were made immediately retroactive. ) The Justice Department apparently saw no problematic irony in arguing that it was now unwise and dangerous to give retroactive effect to fixed crack

sentencing provisions because the injustices wrought by the broken crack guidelines were still impacting so many still-imprisoned federal defendants. But many members of the judiciary and public policy groups expressed vocally and public support for retroactivity, arguing in various ways that principles of equal justice and sentencing parsimony justified allowing previously sentenced defendants to benefit from this guidelines fix.

In December 2007, the Sentencing Commission officially and unanimously voted to give retroactive effect to its amendment reducing penalties for crack cocaine offenses. As explained in a detailed policy statement issued with its decision, the Commission provided for retroactivity of the crack amendment to become effective four months later on March 3, 2008 in order to give courts and others impacted by this decision an extended period to prepare for the administrative issues implicated by the large number of incarcerated defendants who might be eligible for a sentence reduction under the fixed crack guidelines. In its policy statement, the Commission stressed that federal district judges were, after considering various factors, to make the ultimate determination of whether an incarcerated offender should receive a reduced sentence and how much his sentence should be lowered. The Sentencing Commission's nuanced and conscientious policy statements implementing its retroactivity decision appeared to address effectively the public safety and administrative concerns voiced by the Justice Department.

In the wake of the Sentencing Commission retroactivity decision, the Sentencing Commission and practitioners effectively focused upon the varied practical issues involved in implementing the new crack guidelines retroactivity. In early 2008, the Commission convened special meetings in some federal districts to foster and facilitate effective communication about crack retroactivity among all federal sentencing

participants; for these meetings, the federal defenders produced memoranda providing suggestions for how the fixed crack guidelines could and should be applied retroactively. And in February 2008, the federal Bureau of Prisons circulated a letter to all federal district judges that provided a prison administrator's perspective on how best to structure and make effective orders for reduced sentencing terms.

Due in part to all the effective preparations by the Sentencing Commission and practitioners, the federal criminal justice system appears to have handled smoothly and effectively the various administrative challenges posed by making retroactive a guideline fix that impacted nearly 10% of the entire federal prison population. Despite "sky-might-fall" concerns expressed by the Department of Justice, federal prosecutors in many districts have readily acknowledged how well the federal justice system has handled the process of retroactively fixing past broken sentences.

### **Conclusion**

Modern crime and punishment realities suggest how to react to the essential reality of broken sentencing guidelines: the central priority for modern sentencing commissions should be to identify and seek an immediate and effective fix for those guidelines which are broken due to their unjust and/or ineffective harshness.

## **International Prisoner Transfer**

by

Sylvia Royce

### **Introduction**

International prisoner transfer is a well-established mechanism for sending foreign nationals to their home countries to complete their U.S. imposed sentences. Transfer allows prisoners to serve their sentences in their home cultures (where language, food, and customs are more familiar) and closer to friends and family. It also assures that the home country, to which the prisoner will in almost every case be deported anyway if he completes his sentence in the U.S., will understand precisely what his offenses of conviction in the U.S. entailed, assuring that he will be monitored, supervised and receive needed treatment as he is released into that society. Perhaps most importantly for purposes of this discussion, it saves significant sums of money.

Why then is the program so poorly understood? Why are so few prisoners actually transferred? And what can be done to improve the situation? This paper attempts to answer those questions and to place international prisoner transfer on the menu of choices to the U.S. as it seeks to improve sentencing practices and save U.S. dollars.

### **History of International Prisoner Transfer**

The original international transfer treaties went into effect in the late 1970s when bilateral treaties were signed with Canada, Mexico, and a few other countries. Although there are still a number of bilateral treaties in existence, the overwhelming majority of treaty transfer relationships have been established through two multilateral treaties, the Council of Europe Convention on the Transfer of Sentenced Persons (the COE Convention), and the Inter-American Convention on Serving Criminal Sentences Abroad (the OAS Convention). The original intent of the treaties was not the transfer of foreign nationals out of the U.S. It was, rather, the retrieval of American citizens who were incarcerated abroad in countries such as Mexico, Turkey and Thailand, sometimes under extremely difficult conditions. As time has gone by, the numbers of Americans seeking to return to

the U.S., has remained constant or dwindled. The numbers of foreign nationals in U.S. prisons seeking transfers to their home countries, however, continues to increase almost every year. Obviously, the Sentencing Guidelines have played an important role in this increase, both because the numbers of convicted persons serving sentences of incarceration (as opposed to being placed on probation, for example) have grown, and because the length of these sentences has grown, giving inmates so much more incentive for transferring home.

### **How Our Treaty Partners View Their Transfer Relationships with the U.S.**

In general, our treaty partners are not happy with the way we administer our part of the transfer program. The high denial rate is frustrating to some of our strongest diplomatic allies because it requires their consular officials to minister to the needs of their nationals in our custody for years, because it causes families of foreign prisoners considerable expense as they come to the U.S. to visit their loved ones, and because, to their way of thinking, it is so nonsensical. All of their nationals are going to be deported home sooner or later anyway, they argue, and denial of transfer is a disservice to the home countries. Prisoners who receive treaty transfers return home with their convictions a matter of record in the home country, and the home country's correctional system can decide when they are ready to be paroled and set parole conditions to protect those societies. When inmates are simply deported home at the end of serving their U.S. sentences, the details of their convictions (and often even the fact of conviction itself) are not known to the home government, and even if known this information usually does not allow the home government to set conditions on the freedom of the former U.S. prisoners because they have already served their full sentences.

These are difficult arguments to refute, and they justify vigorous efforts to transfer as many inmates as possible to home countries that maintain a principled correctional system.

### **Disabilities Suffered by Foreign Nationals in Bureau of Prisons Custody**

Prisons tend to be built, not surprising, where land is cheap and population density is low.

In designating inmates, the official policy of the Bureau of Prisons is to attempt to locate American citizen inmates within 500 miles of their homes to facilitate family visits, but this policy is abandoned for foreign nationals. Little or no attempt is made to place foreign-born inmates close to their families or close to a port of entry for visitors from their home countries. Thus, there are Europeans and Canadians incarcerated in rural Texas, and Mexicans incarcerated along our northern border. Foreign nationals are used to fill in population gaps in remote institutions which are often contract facilities with poor programming.

Because of their immigration status,<sup>1</sup> foreign nationals are not eligible to participate in the residential drug program. Pursuant to 18 U.S.C. § 3621, successful completion of the residential drug program can reduce a sentence of incarceration by up to one year. Also because of their immigration status, foreign nationals are not eligible for minimum security institutions (the federal prison camps). Because the cost of incarceration in the federal system goes up as the security level goes up, this policy costs the taxpayers significant amounts of money, too.

Moreover, their time in American jails and prisons does not conclude on their release dates. Instead, they spend additional time in immigration (Department of Homeland Security) custody even after their full sentence has been served while awaiting out-processing and transportation to their home country. This adds weeks, and sometimes months, to their time in U.S. custody.

### **Numbers of Foreign Nationals in U.S. Custody**

Although it is surprisingly difficult to obtain precise figures, it is generally agreed that approximately 28% (roughly 56,000) of all Bureau of Prisons inmates are foreign-born, and for the most part they are still citizens of their home countries.<sup>2</sup> (Some, of course,

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<sup>1</sup> Stephen Sady discusses these issues in his article on reducing unauthorized over-incarceration.

<sup>2</sup> The Federal Bureau of Prisons keeps statistics only on the birthplace of inmates and assumes that everyone is a citizen of the country in which he was born. Although this approach produces a rough approximation of citizenship, it ignores the fact that every country sets its own standards for deciding who its citizens are, the fact that borders have changed in many areas, and the fact that some individuals are dual

are naturalized U.S. citizens, who will only be deported if they lied to enter the United States and the government succeeds in de-naturalizing them, but this situation is unusual.) Because of changes which entered immigration law through the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (“IIRAIRA”) and the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), almost everyone convicted of a federal felony today stands convicted of an “aggravated felony” and is therefore “removable” (the new term for deportable). This means that, with a few rare exceptions, these inmates will be deported at the end of their sentence from the U.S., never to return. It usually does not affect the outcome that some of these deportable aliens have very strong ties to the U.S. (e.g., all family members reside in the U.S.) and very weak ties to their country of citizenship (e.g., the deported persons do not speak the language of their country of citizenship). Most are going to their country of citizenship; it is just a question of when.

### **Why Do So Few Foreign Nationals in U.S. Custody Apply for Transfer?**

The Department of Justice receives only about 1500 requests for international transfer every year. Why so few?

Although we have treaty transfer relationships with more than 100 countries, we do not have treaties with a half dozen countries with significant numbers of foreign nationals incarcerated here: Colombia, Cuba, the Dominican Republic, Jamaica, El Salvador, and Haiti. There are also no treaty relationships with a number of countries that have only a few nationals apiece in U.S. prisons, i.e., many Asian, African and Mideast countries.<sup>3</sup>

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nationals. The fifty states all have their own ways of establishing or estimating citizenship of their inmates; in the absence of evidence to the contrary, this paper assumes that the citizenship statistics for state inmates, taken as a whole, are probably consistent with those of the federal system.

<sup>3</sup> The Department of State resists negotiating any new bilateral treaties, arguing that this process is labor-intensive and produces no benefits that are not realized by extending the multilateral Convention on the Transfer of Sentenced Persons to additional signatories. It is also clear that there are many efficiencies in having most or all treaty partners adhere to the same standards, definitions and procedures, and that this is much more likely to take place when all countries are bound by the same treaty. It appears, though, that at least a few countries are not even aware of the possibility of establishing a treaty relationship with the U.S. by signing the Council of Europe Convention when neither the U.S. nor the other country is a member of the Council of Europe. It might be helpful if the Department of State began a more aggressive education campaign in this regard – something it tends to undertake only when there is a U.S. citizen incarcerated in



The application process was designed to be simple for those who speak no English, and it places virtually the entire burden of assembling the set of official documents which constitute an official application on Bureau of Prisons case managers. The case managers are like government employees everywhere, running the full gamut from dedicated public servants to time-serving bureaucrats. Some inmates beg to transfer, only to be ignored by their case managers. There are a few institutions which are particularly bad in this respect, and everyone who works in the field has known about them for years, but neither case managers nor wardens are disciplined for failing to submit transfer applications in a timely fashion.

At least some inmates do not apply because they know that the denial rate is high and the program is anything but transparent. They assume that they will not be approved and do not see the point in trying.

Some do not apply because they do not understand that they will be deported anyway at the end of their sentences and, having lived in the U.S. for years, they hope to remain here with friends and family.

Some do not apply because case managers genuinely do not know that there is a treaty relationship with the home country or because they are confused about qualifications for transfer.<sup>4</sup>

As to state inmates – although every state can theoretically participate in the transfer program, only a few do so as a matter of policy. Those that do participate interpose many barriers to applying (e.g., requiring the inmate to have been through removal proceedings, and not providing any information on the program to inmates and correctional staff). The

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the foreign country.

<sup>4</sup> For example, the process for updating the Program Statement which tells case managers about the program is lengthy and cumbersome. The Bureau of Prisons does not simply go to the online version of the program statement and add a new country to the country list. In addition, case managers sometimes do not think a prisoner can apply for transfer if he still owes any portion of his fine or special assessment (he can), or if he has an appeal pending (although the treaties are clear that an inmate may not transfer with an appeal pending, he should be allowed to apply for transfer and if approved, withdraw his appeal.)

Department of Justice (which must also approve the state inmate for transfer and to which foreign governments appeal for help when the states do not cooperate) has mounted several outreach programs to the states to explain the benefits of transfer to them and to the U.S. as a whole, but these efforts have met with very limited success, and our federal system affords few tools to federal officials seeking to enforce treaty obligations, especially in the criminal justice area.<sup>5</sup> Perhaps this will change as states experience their own budget crises.

### **Special Problem Situations: Mexico, Colombia, Cuba and Canada**

A large proportion of foreign nationals in the federal prison system are from these four countries. We have no treaty relationships with Colombia and Cuba, and our implementing legislation (18 U.S.C. § 4100 et seq.) forbids transfer to countries except pursuant to treaty. Even if Colombia or Cuba signed the Council of Europe Convention, there would likely be a great reluctance to transfer prisoners to Colombia and Cuba because of the political differences and lack of confidence in the criminal justice systems of those countries.

The situation with Mexico is more complex. We have been transferring prisoners to and from Mexico since the late 1970s, and the Department of Justice has said that approximately 90% of the applications it receives are from Mexican nationals. In September 2008 the Bureau of Prisons published statistics showing that more than 17% of total inmate population was Mexican.<sup>6</sup> Yet last year we transferred fewer than 200 prisoners home to Mexico. Here are the reasons, in roughly the order of importance:

1. The Government of Mexico has sharply limited the numbers of citizens it is willing to take back.
2. Our bilateral treaty with Mexico does not permit the transfer of those who are

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<sup>5</sup> See *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

<sup>6</sup> According to the Bureau of Prisons "Quick Facts," the foreign population is divided as follows: 17.2% from Mexico, 1.5% from Colombia, 0.9% from Cuba, 1.4% from the Dominican Republic, and 5.5% whose citizenship is "other/unknown," which would include a significant number of inmates from Canada.

deemed to be domiciliaries<sup>7</sup> of the sentencing country.

3. Our bilateral treaty with Mexico does not permit the transfer of those whose offenses of conviction are immigration offenses.

Mexico has limited the numbers of citizens it is willing to take back for a host of reasons. Mexico's own prisons are already crowded. Feeding and housing more prisoners is not an attractive way to spend scarce government funds. Mexico has been pressured by the U.S. to reduce corruption in its prison system and to assure that transferred Mexicans serve their full U.S. sentences; Mexico has responded to this pressure by refusing to take back citizens who have more than two or three years left to serve, and by refusing to take back those who appear to have significant assets, which are viewed as a corrupting factor. As a result, the numbers of Mexicans transferred under the program have decreased even as the numbers incarcerated in the U.S. have doubled.<sup>8</sup>

Canada has long been a bright spot in the transfer program with the U.S., at least from an economic point of view. Sentencing disparities and stark differences in conditions of confinement have meant that almost no U.S. citizens seek to transfer home, while substantial numbers of Canadians seek transfer from the U.S. Since the Conservative Party's coalition government took office in Canada approximately four years ago, however, the Correctional Service of Canada has introduced many new criteria for transfer which have caused length delays in processing, and some Canadians who have managed to run the whole gauntlet in the U.S. to a Department of Justice approval have been denied the right to return to their home country. Canada's liberal tradition may reassert itself in time, or the legal challenges which are being mounted to the administration of the transfer program in Canada may cause the Conservative

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<sup>7</sup> Our treaty with Mexico requires "that the offender not be a domiciliary of the Transferring State." Article II (3). The term is not defined in the treaty. It has been widely interpreted to mean someone who has attained lawful permanent resident status in the U.S. *or* someone who has lived in the U.S. some significant period of time and whose closest relatives live in the U.S.

<sup>8</sup> In 2000 there were about 16,000 Mexican citizens in federal custody, and a mere 285 were repatriated. Disappointing as that number was, the situation deteriorated further: in 2004, only 101 were repatriated, in 2005, only 115, and in 2006, only 113. No statistics for 2007 are available.

government to rethink its views, but in the short term the U.S. has no recourse.

### **Congressional Mandates**

Congress has been expressing frustration with our international prisoner transfer program since at least 1995, and it seems likely that those seeking legislative amendments to increase the numbers of outgoing transfers would find a sympathetic ear on the Hill. Two sections of the IIRAIRA spoke directly to the issue. Section 331 of the IIRAIRA required a single report from the Secretary of State and the Attorney General on the use and effectiveness of the treaties with the three countries with the greatest numbers of nationals incarcerated in the U.S. That report focused on the transfer relationship with Mexico and -- because it made no sense to focus on nonexistent transfer relationships with countries with which we had no treaties -- on the transfer relationships with Canada and the United Kingdom. Section 330 of the IIRAIRA requires the Attorney General to file an annual report to Congress on international prisoner transfer “whether each prisoner transfer treaty to which the United States is a party has been effective in the preceding 12 months in bringing about the return of deportable incarcerated aliens to the country of which they are nationals and in ensuring that they serve the balance of their sentences.”<sup>9</sup> These reports are made available to the public only through the Freedom of Information Act, which means that dissemination and criticism of them have been sharply limited.

### **Countries to Which Transfer Should Almost Always Be Approved**

There is almost no justification for refusing transfers to Canada, Israel, or to any country in Western Europe. These countries have principled correctional systems, even if they do not conform in every respect with our views on the benefits of lengthy incarceration. These countries also have mutual legal assistance treaties with the U.S. so that the occasional inmate who is needed later as a witness can usually be brought back.<sup>10</sup>

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<sup>9</sup> The Section 331 Report and all of the Section 330 Reports have gone to the House and Senate Judiciary Committees and are required to state about the return of deportable incarcerated aliens to the country of which they are nationals and in ensuring that they serve the balance of their sentences.”

<sup>10</sup> Until recently, the Government of Canada said that it could not send Canadians back to the U.S. once they were in Canada without going through full-blown extradition proceedings. That appears to no longer be its position, or perhaps it has simply thought of more creative ways of coercing Canadians to

There are probably certain countries in Eastern Europe and South America that also belong in this category. We need to confer with the Department of State and consult the roster of countries with which we have mutual legal assistance treaties to identify them.

**How the Process Is Supposed to Work (and Where It Frequently Breaks Down)**

1. Pursuant to Bureau of Prison program statements, all foreign national inmates are supposed to receive what is called a “team meeting” as part of their orientation within four weeks of arriving at their designated institution. Foreign nationals are supposed to have the international prisoner transfer program explained to them and be given a chance to sign a Transfer Inquiry Form at the team meeting.

*The time between sentencing and arrival at a designated institution is dead time for purposes of international transfer, and it can take months for an inmate to arrive at his designated institution.*

2. After the Transfer Inquiry Form is signed, the prison has up to sixty days within which to forward a set of official documents to Bureau of Prisons headquarters in Washington. The set of official documents includes the transfer inquiry form, presentence report, judgment, fingerprints, photographs, and what is termed a “case summary.” The case form is a short-form presentence report which can be sent to the home country to give them the facts of the case and some information about the applicant. The case summary is the only original written document prepared in the prison.

*Depending on how comfortable the case manager is with writing, the case summary can be easy or difficult to prepare. It is not at all uncommon for the assembly of these documents to take more than 60 days. There is no disincentive for case managers and institutions to delay forwarding the official documents to Washington.*

3. The official documents are reviewed for completeness by Bureau of Prisons

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agree to return.

headquarters and delivered twice a week to the International Prisoner Transfer Unit, a part of the Office of Enforcement Operations in the Criminal Division of the Department of Justice. The applications then wait several days or more for assignment to one of the analysts in the Unit. The analysts, who can be lawyers, paralegals, or law students, begin the process by requesting the views of the prosecutor and principal law enforcement agency on the proposed transfer, and by asking the Department of Homeland Security for the immigration status of the applicant.<sup>11</sup> Depending upon the foreign government, the Department of Justice sometimes sends a set of documents to the other country so that the foreign government understands who is applying for transfer and can investigate and evaluate the situation itself.

*The internal processes of the some law enforcement agencies have so many layers of bureaucracy that it can take months for them to return the requests for views. Their lengthy processes do not seem to yield more accurate or insightful information. Although the Department of Justice's official position is that requests for views should be returned within ten days, the Department does not enforce this in any way.*

4. From this point forward, the process is mostly shrouded in mystery. The analysts consider the various views and write a kind of summary of the situation for the decision-maker which includes the analyst's own recommendation. It appears that a supervisor in the unit reviews the file and adds his or her own recommendation. The file is then delivered to one of the officials with signature authority, usually within the Office of Enforcement Operations but occasionally to a higher official, who almost invariably follows the recommendations of the staff.

A few analysts are remarkably quick to assemble the paperwork and make insightful recommendations to their superiors. *More typically there can be significant delay at this stage as analysts cope with heavy caseloads and other duties.*

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<sup>11</sup> Significantly, the views of the sentencing judge are never asked, and where they have been volunteered (as in a Judgment), they are of little influence. The Department of Justice believes that transfer is the responsibility of the Attorney General alone.

5. The inmate, the foreign government, and the Bureau of Prisons are notified of the decision on the application. In what is often a vain effort to avoid additional correspondence, the Department of Justice gives a reason or reasons for a decision to deny an application.

*The reasons for decision given in denial letters are not always enlightening, meaning that the inmate and the foreign government are left with very little idea of what went wrong.*

6. Where a decision has been made to approve the outgoing transfer, the foreign government is asked whether it will accept the prisoner and if so, how it will enforce the sentence. Will the prisoner be eligible for parole? Will the sentence be shortened?

*This can become a very time-consuming process as the foreign government struggles to answer these questions. Moreover, once the treaty relationship is well-established, the general outlines of the foreign government's method of enforcing sentences is already known to the Department of Justice. The treaties do not permit a receiving country to increase the sentence, and it is so rare for a country to have no parole or furlough system that it makes little sense to ask for the details.*

7. If the foreign government also approves the transfer, a consent verification hearing is scheduled and, after that the foreign government is asked to make arrangements to take custody of the prisoner. If the inmate is slated to go to Canada or Mexico, he joins one of four regularly-scheduled transfers from FCI Ray Brook in Upper New York State, or FCI LaTuna in Texas. If he is going anyplace else, his file enters the queue of situations requiring special consent verification hearings, which are required under 18 U.S.C. § 4107.

Special consent verification hearings require “writting” the prisoner to the nearest federal courthouse, arranging a hearing before a federal magistrate-judge at which the government is represented by an Assistant U.S. Attorney and the inmate is represented by

an Assistant Federal Defender. Sometimes an interpreter must also be brought to the courthouse.

*Arranging the consent verification hearing can be a time-consuming for Department of Justice staff and for any inmate not going to Canada or Mexico.*

8. After the documents confirming the result of the consent verification hearing are received in Washington, the foreign government is notified that it must make arrangements with the Bureau of Prisons to pick up the inmate, almost invariably from an international airport. Once the inmate is turned over to the foreign officials at the airport, they must leave the country with no stops within the U.S.

*Because the inmate is almost always returned to his regular place of incarceration rather than moved to a port city after a consent verification hearing, there is a delay of at least six weeks between the conclusion of all legal proceedings and the turning over of the prisoner to the foreign authorities.*

### **Why the Denial Rate Is So High**

As discussed above, only about 1500 applications for transfer are received in a year. Perhaps even more surprisingly, the denial rate for these applications is approximately 60%. How can that be?

The U.S. views international prisoner transfer as a discretionary process; i.e., the U.S. can deny a transfer for any reason or for no reason.<sup>12</sup> The treaties do not require the Department of Justice to give a reason when it denies a transfer, but the practice of giving

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<sup>12</sup> Federal courts refuse to review these decisions, saying that the Attorney General's discretion in determining the wisdom of approving an international transfer application is unfettered. See *Bagguley v. Bush*, 953 F.2d 660 (D.C. Cir. 1991), and *Scalise v. Thornburgh*, 891 F.2d 640 (7<sup>th</sup> Cir. 1989), *cert denied*, 494 U.S. 1083 (1990). In addition, the Anti-Terrorism and Effective Death Penalty Act of (AEDPA) introduced formidable requirements regarding the exhaustion of administrative remedies, meaning that inmates who seek to challenge the failure of Bureau of Prisons personnel to comply with the treaties and their own program statements must "grieve" the failure through multiple layers of the same prison bureaucracy, a formidable task for non-English speakers or for anyone who fears the power of the prison officials who have total power over their day-to-day lives.



reasons – either real or pretended – is well established. While there are at least ten reasons for denying a transfer, some are worth discussing here either because they occur so frequently or because they make no sense under current law.

Domiciliary status. This is usually interpreted to mean that the applicant has been residing in a country with a permanent intent to remain. Domiciliary status is conclusively presumed where the inmate has made the effort to obtain lawful permanent resident status in the U.S., but even illegal aliens are said to be domiciliaries of the U.S. if they have lived here for a “lengthy” period of time. Only the Mexican treaty actually forbids the transfer of domiciliaries, but the general rule against their transfer is applied by the U.S. against all nationalities as a matter of policy. Sometimes the reasons for denial refer to “domiciliary status,” while other times they refer to “ties to the United States.” Either way, the result is the same: if the applicant has lived in the U.S. a significant amount of time, he will not be transferred.

“The seriousness of the offense.” While there are undoubtedly a few offenses that are too serious to allow the foreign national inmate to leave the jurisdiction of the U.S., this reason for denial is given frequently and inconsistently. The transfer authorities don’t seem to recognize that virtually all applicants are serving felony sentences because there simply isn’t time to go through the whole process unless the inmate has several years to serve,<sup>13</sup> and that most federal felonies are “serious.” In view of the writer, the U.S. should not deny transfer because of the “seriousness of the offense” except in rare instances, but it has become code for “the prosecutor really doesn’t want this applicant to be approved for transfer because he doesn’t want him to receive a break,” or “this sentence seems awfully long; there is probably more to this case than appears in my file,” or simply, “I am not in the giving vein to-day.”<sup>14</sup> Oddly, denials which are justified on this basis often advise the inmate that he may reapply in two years, and recommend that

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<sup>13</sup> Occasionally, applicants decide not to transfer at the last minute because the process has taken so long that he has only a few months left to serve. Because a transferring prisoner “brings his conviction home” with him, producing a clear record in the home country, some applicants begin to see that perhaps finishing the sentence in the U.S. and then simply going home by way of deportation offers some advantages.

<sup>14</sup> Richard III, Act 4, Scene 2, by William Shakespeare.

he do everything in his power in the coming two years to “address the reasons for denial over which he has some control.” But where the “seriousness of the offense” is the only reason given for the denial, how can he do this?

The need for testimony. Inmates make plea agreements in which they commit to testifying against codefendants, and the U.S. must hold them to those agreements. The difficulty arises when the codefendant’s whereabouts are unknown, or where they are known to reside in countries with vigorous extradition proceedings; in these cases, it happens repeatedly that inmates serve their whole sentences here in the U.S. before the codefendants are extradited here.

Restitution. No prisoner is allowed to transfer from the U.S. with unpaid restitution. When the first treaties were negotiated in the late 1970s, the Departments of State and Justice sent witnesses to the Hill to urge their ratification and to testify about the need for implementing legislation. Congress inquired as to how restitution and fines would be handled. As to restitution, the Executive Branch guaranteed to Congress that no foreign nationals would be allowed to transfer who still owed restitution.

At that time, sentencing was still a largely discretionary judicial prerogative, and judges were permitted to consider a defendant’s ability to pay restitution in deciding whether to order it. Then came the Victim and Witness Protection Act of 1982, removing this discretion from sentencing judges. Now, restitution must be ordered for a large number of financial crimes, without regard to the defendant’s ability to pay. The result? Applications for transfer are denied, these prisoners serve every day of their sentence here in the U.S., and the victims still do not receive any restitution.

### **The Role of Human Nature in the Process**

*On the part of the transfer authorities:*

“When I decide who can transfer and who cannot, I am important.”

“I’d better not approve this transfer over the objection of the prosecutor because you never know when I might want a favor.”

“Bureau of Prisons staff are fellow law enforcement officers. They must be treated with the utmost deference, even where their actions violate our treaties, the rights of inmates, and their own program statements.”

“Saying no generates less work than saying yes. No is “no” for at least two years; yes generates work in setting up consent verification hearings and negotiating pick up of the prisoner by foreign correctional authorities.”

“What if this guy comes back to the U.S. and commits a serious offense? This will make me look so bad.”

*On the part of prosecutors:*

“I work long hours to convict these guys. They came here to do their crime; let them stay here to do their time.”

“Extraditing this guy to the U.S. was a long, expensive process for the U.S. Make him stay here to do his time.”

“He will do less time if he transfers to his home country than he will if he remains here, because [insert here the name of almost any country] still has the institution of parole.”

*On the part of prison officials:*

“If we have fewer prisoners in this contract facility, the BOP might not renew our contract.”

“This prisoner is a big pain. I’m not going to send his application forward (but I’ll tell him I did).”

### **Streamlining the Process – Reducing the Time Spent in U.S. custody**

The following changes would not require treaty renegotiation or amendment of U.S. law:

1. Immediate repatriation for certain nationals who have arrived in the U.S. pursuant to extradition. A few countries, notably Israel and the Netherlands, have either formal or informal agreements about transfer in their extradition treaties with the U.S. which require transfer. Where the result is a foregone conclusion, the long decisional process

seems particularly wasteful. In these cases, judicial removal orders and inmate consent to transfer should take place in the sentencing courtroom, and pick up of the prisoner by foreign correctional officers should take place immediately thereafter.

2. Consider all foreign nationals whose countries usually take their own citizens back for transfer, and offer it to those who have been approved by the U.S. For good or ill, federal prisoners have no right to be incarcerated in any particular place or region. Why limit transfer to those who have expressed an affirmative desire to go home, or delay consideration of those who will apply later? If federal prosecutors were directed to forward the presentence reports and judgments on these foreign nationals to Washington as part of closing a case, it would be fairly simple for the Department of Justice to make a preliminary determination of eligibility while the foreign government assembles its own file.

3. Interpret the statutory requirement for a consent verification hearing to allow videoconferencing. This would eliminate the necessity of bringing the inmate to a federal courthouse, a step that the Bureau of Prisons and U.S. Marshals insist cannot be accomplished reliably in less than 5½ weeks, even if the prison and courthouse are very near one another.

4. When a prisoner is approved for an outgoing transfer, the foreign government can merely be advised of that fact and asked when and where within the U.S. (New York, Los Angeles, or Miami) it would like to pick him up. As it is done now, the pick up is arranged only after the consent verification hearing has been completed, meaning that the inmate is returned to his designated institution until arrangements have been finalized, whereupon another six weeks are consumed by moving him to the pick up location.

5. Advise Congress formally that the Departments of State and Justice no longer consider it reasonable to deny transfer to inmates with court ordered restitution where the presentence report does not evidence ability to pay, and that this commitment will be abandoned if Congress does not renew its objection within some reasonable period of

time.

6. Relax the definition of domiciliary so that more people who want to transfer can obtain approval. The transfer of illegal aliens should not be defeated by a finding that they are domiciliaries or because of the strength of their ties here no matter how they have been in the U.S.

### **Additional Proposals for Reducing the Foreign National Prison Population<sup>15</sup>**

Widespread deportation of prisoners significantly in advance of their projected release dates is authorized by law,<sup>16</sup> but it has run into heavy opposition from prosecutors and no implementing regulations have ever been written. It is also not fair to American citizen codefendants who will not receive a reduction in sentence because the U.S. does not have parole. However, there are advantages which American citizens receive which foreign nationals do not – such as halfway house placement in advance of release, and service of sentence in a camp. It would be logical and principled to consider reductions in term for foreign nationals to compensate for the benefits which are denied to Americans. Perhaps an across-the-board percentage reduction in sentence could be applied to the sentences of foreign national. What we want to do, though, is avoid involving the immigration authorities in detention prior to deportation of such persons until the immigration system has undergone a massive improvement, or we will find that we are incarcerating these individuals in immigration prisons rather than in regular prisons. This has apparently happened in some locations. A federal law authorizes deportation in lieu of further incarceration, but the immigration authorities have never coordinated with the Federal Bureau of Prisons and Department of Justice to write regulations to implement the process. A few of the states have, however, with the result that the state correctional system saves money by transferring its foreign inmates to federal immigration custody.

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<sup>15</sup> The writer is indebted to Lisa A. Kahn, an attorney at the Department of Justice who authored a study on the feasibility of proposed improvements to the International Prisoner Transfer Program in June 1998.

<sup>16</sup> See the AEDPA at 8 U.S.C. § 1231(a)(4)(B), which authorizes deportation of an alien if he is confined for a nonviolent offense (other than alien smuggling), so long as the Attorney General finds such deportation “appropriate” and in the best interest of the United States.

Other possibilities:

Building U.S. prisons in Mexico. This possibility was explored in the early- and mid-1990s and abandoned because (1) there was scant indication that we would receive permission, let alone cooperation, from the Government of Mexico, and (2) there were formidable liability problems. Nevertheless, this proposal deserves another look given the numbers of Mexican nationals in U.S. prisons, the desperate desire on the part of many of them to serve their sentences closer to their families, and the cost savings that would result from incarcerating them in Mexico.

Alternatively, we could renounce the bilateral Mexican treaty and its domiciliary clause so that transfers would then proceed between the two countries pursuant to the COE or OAS conventions. Virtually every foreign national in BOP custody will be deported, even if he has spent his whole life in the U.S. and all of his family continues to reside here; let these people begin to make the adjustment to the other culture as soon as possible. No one benefits when they are retained here for their full sentence.

Renegotiating the treaties to avoid the necessity of prisoner consent to a transfer. This approach was recommended by Congress in 1996, and caused much unhappiness in the Department of State. There is also likely to be at least some resistance from our treaty partners. This is probably too complicated, but it should perhaps be reconsidered. It certainly justifies implementation of the simpler approaches to improve the process.

Amending 18 U.S.C. § 4100 to eliminate the need for a consent verification hearing. There is no reason to require a full-blown “consent verification hearing,” as a condition of every transfer. Why not handle this the way every other country does, on the papers?

Amending 18 U.S.C. § 4100 to eliminate the need for a treaty. A few countries would be willing to accept an occasional, *ad hoc* prisoner transfer, but signing a multilateral transfer treaty does not appeal to them; they fear that the situation will

somehow get out of hand. The U.S. does not enjoy any advantages by insisting that a treaty relationship must be the exclusive means for the transfer of prisoners.

### **Unintended but Foreseeable Consequences of Reducing the Prison Population**

No matter what the legal mechanism, there will be consequences if the inmate population of the Federal Bureau of Prisons is reduced. Caseloads will go down, meaning that the remaining U.S. citizen inmates could, at least theoretically, receive better educational programming and psychological counseling. Closing of facilities will throw some Bureau of Prisons employees out of work, and some of these employees are unionized, which makes the Bureau itself reluctant to tangle with them. Many facilities are placed in remote areas where land is cheaper and far from large urban areas where there are more employment opportunities. To the degree possible, the closure of facilities should probably be planned for regions where job growth is expected.

### **Conclusion**

Because such a large proportion of foreign inmates in Federal Bureau of Prisons custody are from Mexico, the transfer program alone could not greatly reduce the numbers of foreign inmates. The transfer program could, however, repatriate perhaps 4% to 7% of the inmate population if it were determined to do so. The bureaucracy to do this is in place and for the most part we would have the cooperation of our treaty partners.

## **Terms of Imprisonment: Treating the Non-Citizen Offender Equally**

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While much of the discussion about sentencing focuses on the front end, in light of our generally (overly) long prison sentences, back-end measures should be re-thought ever more carefully. These includes prison management tools which may assist in the rehabilitation, education, and training of inmates already during their imprisonment.

Good time has traditionally been grouped in three categories. It can be awarded for good conduct, for successful participation in prison programs, or for extraordinary achievements or service.<sup>i</sup> As the *Preliminary Draft to the Model Penal Code: Sentencing* indicates, all inmates should have access to good time, based on any of the three categories.<sup>ii</sup> Current reality in the federal system is different, however.

At present a substantial number of offenders in the federal criminal justice system are excluded from beneficial programming, which also deprives them of attendant sentence discounts. This is the case because of their non-citizen status. Many of these inmates are permanent resident aliens; others are undocumented, which means they do not have permission to stay or remain any longer in the United States. Much of the discussion surrounding non-citizen offenders has focused on deportation as the civil but most severe sanction ultimately following upon conviction. Non-citizen offenders, however, are subject to a whole host of additional sanctions which can be directly imposed through the judicial system or be inflicted administratively through the categorical or discretionary denial of potential benefits, such as prison programming. Many of these restrictions that occur throughout the criminal justice process hurt not only the non-citizen offender but also have a negative impact on our society.



Some courts have considered a defendant's status as a non-citizen in denying probation and instead imposing a prison sentence. Other courts have enhanced a sentence because they viewed the offense as more serious in light of the defendant's "guest" status. California's drug treatment provision which prohibits a jail sentence for those convicted of first-time simple drug possession automatically makes deportable those non-citizen offenders eligible for the program – surely an unintended consequence of a program designed to rehabilitate, rather than incarcerate, drug abusers.<sup>iii</sup> In addition, courts have interpreted the treatment program to exclude non-citizens because of the likelihood that the immigration service would remove them prior to the completion of the drug treatment program.<sup>iv</sup>

Confinement conditions for non-citizens that are harsher than merited by the offense committed are usually a function, not of the individual's status *per se*, but instead of the existence of a detainer. Detainers allow the continued detention of a non-citizen through the immigration service upon release from the criminal justice sanction until the non-citizen is deported. Because of the need to detain the individual until deportation and the impending deportation, the Bureau of Prisons (BOP) has restricted release and programming benefits an identically situated citizen inmate would otherwise obtain.

The BOP denies credit toward the total sentence even if an prisoner had previously been held in the administrative custody of the immigration authority.<sup>v</sup> Even though the immigration services detains many non-citizens who are being held for unauthorized entry, for example, the BOP "categorically denies credit for time spent in administrative custody of the BOP."<sup>vi</sup>

The BOP and state prison authorities do not permit non-citizens to enter educational programs since it assesses their need in learning English and obtaining a GED as low in light of the impending deportation which makes either credential less valuable in their opinion. In addition, this expense may appear unnecessary to the tax payer since the foreign country to which the defendant will be deported is the likely beneficiary of such educational gains.

The BOP also precludes non-citizens from participating in the Residential Drug Abuse Treatment Program (RDAP) which allows inmates to receive not only drug and alcohol treatment but potentially a sentence discount of up to one year.

Two factors make the BOP's restrictions on benefits granted to non-citizen detainees particularly salient: the large number of non-citizens in US prisons and the now large number of them with detainers and immediate deportation orders. This combination precludes a large number of inmates from program eligibility and earlier release for RDAP participation. This piece will focus on one program, the RDAP, explain how it functions, and then detail why it would be advantageous for the inmate and US society if the non-citizen were allowed to participate and benefit from the sentence discount.

### I. *What is RDAP?*

The BOP introduced its first residential drug and alcohol abuse treatment program, as a pilot, in 1989. The number of inmates who volunteered was small, in part because the rigorous program did not provide any incentives for participation. By late 1991, the BOP began to offer some rewards, in the form of goods and performance pay awards.<sup>vii</sup> Still in 1993 only slightly over 1,100 inmates participated.<sup>viii</sup>

The number of participants, however, increased dramatically after passage of the 1994 Violent Crime Control and Law Enforcement Act which provided up to one-year sentence reduction for non-violent inmates who successfully completed a residential drug abuse treatment program.<sup>ix</sup> Because of the large number of inmates who fulfill the program prerequisites, an ever higher number of inmates have been able to benefit from the program.<sup>x</sup> At any point in time, there are now about 6,000 inmates enrolled in the RDAP, with a waiting list that is yet longer.<sup>xi</sup>

About half of all BOP institutions offer RDAP, with inmates being housed in separate treatment units. The program itself requires intensive drug treatment, with about 500 hours of treatment usually spread out over nine months.<sup>xii</sup> The programs have a small staff-inmate ratio, and include a trained psychologist.<sup>xiii</sup>

The positive response to the program may not be surprising as the RDAP is the only program in the federal prison system that allows for earlier release based on program participation. During the 1980's the discretion of prison officials to award sentence reductions or move prisoners early into less restrictive confinement for program participation or work was dramatically curtailed. In the federal system, for example,

“good time,” awarded for good behavior, is limited to a maximum of 15 percent, and the same now holds true in many states.<sup>xiv</sup>

The RDAP is based on the assumption that drug and alcohol addiction are intimately connected to offending even if the precise correlation remains contested. In any event, it is generally accepted that “drug dependence can amplify the offending rates of people whose circumstances may already predispose them to crime.”<sup>xv</sup> Once the addiction has been broken, reform and rehabilitation of the offender will proceed more easily, which will decrease future offending and ultimately enhance public safety.<sup>xvi</sup> The goal is to turn the offender into a productive member of society.

Statutorily, all inmates convicted of violent crimes are ineligible for early release as a result of participation in the program. However, they remain eligible to participate. That does not hold true for INS detainees, pre-trial inmates, and contractual boarders, which includes prisoners housed by the BOP but sentenced under the authority of any state, the District of Columbia, or the U.S. military.<sup>xvii</sup>

An RDAP programming change in 2001 led to the exclusion of slightly over a quarter of all federal inmates – those with an immigration detainer<sup>xviii</sup> – from program participation. At that point the BOP, based upon a letter by the American Psychological Association, began to require that all inmates accepted into the residential portion of the program be transferred to a community correctional center (CCC) for up to six months to go through a transitional pre-release program, ideally immediately prior to their release.<sup>xix</sup> The BOP adopted community based treatment in conjunction with prison-based programs “as consistent with the latest research findings in the drug addiction field.”<sup>xx</sup> There is no indication that the BOP considered the impact of the change on inmates with detainees. Before that programming change, to receive a sentence reduction, inmates had to successfully complete the program and then succeed in either community corrections or transitional programming, which would take place within the institution.<sup>xxi</sup> As inmates under a detainer are ineligible for CCC placement, the now mandatory community placement component rather than the ultimate deportation seems to have determined the BOP’s decision to exclude non-citizens.

Courts have upheld this determination as rationally justified as “it is reasonable for the BOP to treat immigration detainees and non-citizen inmates differently than other

inmates with respect to community-based programs because immigration detainees and non-citizens may pose a greater flight risk.”<sup>xxii</sup> However, it may not be the program exclusion but rather the program structure that is incorrectly conceived and counterproductive to everyone’s interests. The American Psychological Association itself informed the BOP that the BOP had misunderstood its assessment. A mere preference for a specific form of treatment does not imply that it is necessary the best for everyone, let alone that all other avenues should be foreclosed.

## II. *Why expand the RDAP to include non-citizens?*

The RDAP program has been found to benefit prison authorities, the tax payer, the participants, and society.

### *A. Institutional Behavior and Prison Management*

RDAP assessments have confirmed the benefits of the program. The TRIAD Drug Treatment Evaluation Project, conducted by the BOP together with the National Institute on Drug Abuse, found that RDAP participants were less likely to be involved in institutional misconduct than non-participants, with the largest drop found within the female population.<sup>xxiii</sup> A larger number of participants, independent of their immigration status, would therefore increase institutional safety for U.S. citizens – inmates and correctional officers alike.

### *B. Savings*

An earlier release date would also provide substantial savings to the U.S. taxpayer, as one year in a federal prison costs approximately \$23,000 while the RDAP treatment comes in at about \$3,000. Transitional programming could be continued in prison, as was the case before the programming change, with inmates benefitting from the early release, which would alleviate the cost and space pressure on U.S. prisons.

### *C. Decreased Recidivism*

The TRIAD Project also found that RDAP participants had lower recidivism rates than non-participants. They were less likely to relapse into drug abuse. Female RDAP

participants, in particular, were more likely to be employed than those who did not participate.<sup>xxiv</sup> This may not be surprising as the RDAP program “incorporates a comprehensive lifestyle change philosophy, including elimination of any obstacles that could lead an inmate to relapse or recidivism.”<sup>xxv</sup> This includes educational training and vocational skills.

One of the justifications for permitting non-citizens with immigration detainers into the program includes our collective acceptance of some responsibility for the fact that many non-citizen substance abusers become abusers once in the United States.<sup>xxvi</sup> An individualized assessment of when the inmate became a substance abuser, however, is cost prohibitive and would merely lead to extensive fact-finding and the need for a hearing body. For that reason, all inmates with a detainer should be considered eligible, even if not all of them became abusers once in the United States.

Some of the inmates with immigration detainers may not be deported to their home countries upon a legal determination of their ineligibility for deportation or a favorable exercise of discretion.<sup>xxvii</sup> If that is the case, the benefits of RDAP participation to the United States, to the convicted person’s family, and to the inmate upon his release are obvious.

Since the program has been effective in the United States in decreasing relapse and recidivism, some positive effect could also be expected when the inmates are returned to their countries of citizenship, though it should be markedly lower in light of the other pressures on the returnees at that point. Nevertheless, such treatment provides the countries of citizenship with the opportunity to provide follow-up treatment, and makes it at least somewhat more likely that the returnees have the opportunity to lead law-abiding lives.<sup>xxviii</sup> This result would in turn benefit the families of returnees whether they remain in the United States or are in the former inmate’s home country. In both cases, the rehabilitated individual will be in a better position to assist his family financially, and therefore lessen the pressure to return to the United States without permission. While many may deem such indirect support of foreign economies inappropriate, it constitutes merely one form of economic assistance – all of which aims to decrease undocumented migration.

### III. Conclusion

With a program change that was based on a misinterpretation of the position of the American Psychological Association, the BOP excluded all non-citizen offenders with a detainer from participation in an immensely beneficial and cost-saving program. The popularity of the program indicates desire for ways in which inmates can productively cut the time to be served. Prison officials and society all benefit from such cost-cutting which comes in addition to drug rehab.

Even though the most principled and long-term most beneficial approach would be to open the RDAP program to non-citizens with a detainer, alternatively, we could decrease prisons costs by releasing offenders early for purposes of deportation. The United Kingdom, for example, allows for removal 135 days – 4 ½ months – before expiration of a determine sentence, subject to some exceptions, once an inmate has served a substantial part of his sentence.<sup>xxix</sup> To allow a foreign inmate to apply for deportation four and a half months early creates equality with nationals who may apply for Home Detention Curfew, with both groups subject to the same risk assessment. According to the British government, the early release will also “have a positive impact on the prison population as well as making a saving to the UK taxpayer.”<sup>xxx</sup> Why don’t we follow the British approach and create equity for all of our inmates?

### Endnotes

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<sup>i</sup>.James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 221 (1982).

<sup>ii</sup>.*Model Penal Code: Sentencing, Preliminary Draft*, §305.1.

<sup>iii</sup>.See Deji Olukotun, *Note: Harm Reduction Statutes and Immigrants in California: Removal of the Shadow-Class*, 19 GEO. IMMIGR. L.J. 429 (2005).

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<sup>iv</sup>.Olukotun, *supra* note \*, at 444-445 (discussing *People v. Espinoza*, 132 Cal. Rptr.2d 670 (20003); *People v. Buckius*, 2003 WL 21235473 (Cal. Ct. App. 2003)).

<sup>v</sup>.*Bureau of Prisons Program Statements* 5880.28, at 1-15A (Feb. 14, 1997). *See also* Stephen R. Sady & Lynn Deffebach, *The Sentencing Commission, the Bureau of Prisons, and the Need for Full Implementation of Existing Ameliorative Statutes to Address Unwarranted and Unauthorized Over-Incarceration* 25-26 (June 2008).

<sup>vi</sup>.Sady & Deffebach, *supra* note \*, at 26.

<sup>vii</sup>.Alan Ellis, J. Michael Henderson & James H. Feldman, Jr., *Reducing Recidivism: The Bureau of Prisons Comprehensive Residential Drug Abuse Program*,1. *See also* 28 C.F.R. § 550.57 (outlining current incentives other than early release).

<sup>viii</sup>.Bureau of Prisons, *1997 Substance Abuse Treatment Program in the Federal Bureau of Prisons, Report To Congress, As Required By the Violent Crime Control and Law Enforcement Act of 1994*, 12.

<sup>ix</sup>.Section 32001, codified at 18 U.S.C. § 3621(e)(2)(B). The legislation also required the BOP to provide such treatment for all “eligible” inmates, which the BOP subsequently defined as all those with a verifiable, documented drug, alcohol, or prescription abuse problem.

<sup>x</sup>.Pre-sentence data from fiscal years 2002 and 2003 indicate, for example, that approximately 40% of federal inmates meet the substance abuse disorder criteria. *See* U.S. Department of Justice, *Report to Congress on the Feasibility of Federal Drug Courts* 6 (June 2006) [hereinafter *Feasibility of Federal Drug Courts Report*].

<sup>xi</sup>.Ellis, Henderson & Feldman, *supra* note \*, at 4.

<sup>xii</sup>.28 C.F.R. 550.56.

<sup>xiii</sup>.*Feasibility of Federal Drug Courts Report, supra* note \*, at 6.

<sup>xiv</sup>.*Sentencing Reform*, 3, 7, in *SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE* (Michael Tonry & Kathleen Hatlestad eds., 1997). *See also* Jacobs, *supra* note \*.]

<sup>xv</sup>.Tim McSweeney et al., *Twisting Arms or a Helping Hand? Assessing the Impact of “Coerced” and Comparable “Voluntary” Drug Treatment Options*, 47 *BRIT. J. CRIMINOLOGY* 470, 470 (2007).

<sup>xvi</sup>.While debate continues as to whether coerced drug treatment is as effective as voluntary treatment, a substantial number of studies indicate that even coerced treatment results in “considerable and sustained reductions in reported substance use, injecting risk and offending behaviours. . . .” McSweeney, *supra* note \*, at 485.

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<sup>xvii</sup>.18 U.S.C. § 3621(c).

<sup>xviii</sup>.Sady & Deffebach, *supra* note \*, at 10.

<sup>xix</sup>.Ellis, Henderson & Feldman, *supra* note \*, at 3.

<sup>xx</sup>.69(126) Fed. Reg. 39887, 39888 (July 1, 2004).

<sup>xxi</sup>.Sady & Deffebach, *supra* note \*, at 10.

<sup>xxii</sup>.*Soler v. Warden*, case number 3:03-cv-515 (N.D. Fla. Oct. 11, 2005).

<sup>xxiii</sup>.Bureau of Prisons & National Institute on Drug Abuse, *TRIAD Drug Treatment Evaluation Project*, available at [www.bop.gov/news/research\\_reports.jsp#drug](http://www.bop.gov/news/research_reports.jsp#drug).

<sup>xxiv</sup>.*See also* 2006 Fed. Bureau of Prisons Annual Report on Substance Abuse Treatment Programs (Jan. 2007).

<sup>xxv</sup>.69(126) Fed. Reg. 39887, 39888 (July 1, 2004).

<sup>xxvi</sup>.Sady & Deffebach, *supra* note \*, at 10.

<sup>xxvii</sup>.Only incarcerated non-citizen offenders with aggravated felony convictions are automatically deportable. Other offenders with a drug addiction may be reluctant to request admission to the RDAP, as those non-citizens who admit to being drug abusers or addicts are removable under 8 U.S.C. §1227(B)(ii) and INA 212 (a)(1)(A)(iv).

<sup>xxviii</sup>.*See also* Sady & Deffebach, *supra* note \*, at 10.

<sup>xxix</sup>.Criminal Justice Act 2003, 260, available at [www.opsi.gov.uk/Acts/acts2003/ukpga\\_20030044\\_en\\_19](http://www.opsi.gov.uk/Acts/acts2003/ukpga_20030044_en_19).

<sup>xxx</sup>.*Foreign National Prisoners To Be Deported Early*, Oct. 30, 2003, available at [press.homeoffice.gov.uk/press-releases/Foreign\\_National\\_Prisoners](http://press.homeoffice.gov.uk/press-releases/Foreign_National_Prisoners).



## **Second-Look Provisions in the Proposed Model Penal Code Revisions**

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### **Introduction**

The latest installment in the Model Penal Code Sentencing project, Council Draft No. 2, proposes to abolish routine parole-release discretion. But the draft recognizes the need for such a determinate sentencing system to allow various “second looks” and other post-sentencing modifications of a prison sentence, particularly in the case of very long sentences. The draft further concludes that pardon and commutation powers do not provide adequate second-look authority.

Council Draft No. 2 proposes three types of post-sentencing modifications: 1) “good conduct” sentence reductions (Section 305.1); 2) release based on advanced age or infirmity (Section 305.7); and 3) release based on other changed circumstances of the offense or offender, after the sentence was imposed (Section 305.6). The first of these, like similar existing state and federal provisions, is administered entirely by correctional authorities, whereas the second and third would involve, in essence, a request for re-sentencing by the court. The second (age-infirmity) provision has many existing counterparts in state laws, but the third provision has almost none.

All three provisions focus on the offender’s acts and/or changed circumstances post sentencing. The intent is not to give the correctional authorities and the sentencing judge (or more often, a different judge) broad power to revisit the wisdom of the original sentence; nor are these provisions intended as a general attack on very long prison terms (that problem is addressed by other features of the revised Code, in particular: the use of an independent commission to draft recommended sentences which avoid disproportionately severe penalties and also reflect fiscal and demographic impact assessments). It is also important to note that Council Draft No. 2 does not address general retroactivity issues arising when guidelines are revised to lower sentence severity; that matter was already addressed in Section 6B.11(3) (Tentative Draft No. 1,

April 9, 2007).

At the time of this writing it appears that some of the second-look provisions in Council Draft No. 2 (especially the third) may be deleted or substantially modified by the ALI Council at its meeting on December 4, 2008. But whatever the fate of these particular provisions, the underlying policy issues and tradeoffs will remain. The specific proposals contained in Council Draft No. 2 provide as good a vehicle as any for identifying and discussing these important issues and tradeoffs.

This essay begins by summarizing the three second-look provisions noted above, in the context of the Draft's overall rejection of parole release discretion. Part II of the essay examines the substantive sentence-reduction rationales which underlie one or more of the three second-look provisions. Part III looks at the Draft's proposed second-look procedures. Part IV focuses on the third provision (other changed circumstances), which seems to be the most controversial, and examines various arguments against having any such provision. The essay concludes that, despite these arguments and the problems of substance and procedure examined earlier, the two most important policy recommendations in Council Draft No. 2 are sound – routine parole release discretion must be abolished, but several second-look options must be available, including *some* sort of general second-look provision (*beyond* pardon and commutation, good-conduct reductions, age-infirmity release, and retroactive application of reductions in guidelines severity). At a minimum, such a general provision is needed in the case of life sentences.

### **I. Summary of Second-Look Proposals in Council Draft No. 2**

An examination of the three second-look proposals in this Draft must begin by briefly considering their broader context – the Draft's rejection of routine parole-release discretion (or even parole discretion for life sentences), and its conclusion that the void left by parole abolition cannot be filled by existing or foreseeable executive pardon and commutation powers. The Draft concludes that state and federal experience inspires little confidence that parole and pardon-commutation procedures can make second-look decisions with consistency, transparency, and legitimacy.

Routine (or even lifers-only) parole release discretion assumes that a parole board or similar body can accurately assess a particular inmate's progress toward rehabilitation

and risk of post-release recidivism, based primarily on the inmate's conduct in prison and the evaluations made by prison staff. But prison environments bear little resemblance to life on the street; some inmates misbehave more after release than they did in prison and others misbehave less. Moreover, inmates (and perhaps some staff) have a strong incentive to deceive the parole board. It is thus no surprise that research finds parole assessments to be very unreliable (and probably also very inconsistent) unless they are based on the offender's current and prior convictions. But these factors are already known when the offender enters prison; sentencing judges can assess such factors with greater transparency and legitimacy.

Parole release discretion, at least when exercised by a single, state-wide body using some sort of offense/prior record guidelines, can still be helpful in systems that give sentencing judges unchecked discretion. But when judges use sentencing guidelines subject to appellate review their decisions are likely to be at least as consistent as the parole board's. Finally, broad parole release discretion causes serious problems of dishonesty and poor resource management. The public and especially crime victims lose respect for a system in which a lengthy prison sentence imposed in court turns into a far shorter term actually served. On the other hand, parole boards are increasingly risk averse, so the option of early release is often an illusion, disappointing inmates and their families, and escalating correctional costs. Contrary to the assumption that parole release discretion helps to control prison growth and overcrowding, data show prison populations growing less in states with guidelines combined with parole abolition.

As for pardon and commutation, these powers have been used so sparingly, and with so little transparency and consistency, that they do not commend themselves for broader use. Nor are such procedures an appropriate way to provide what is, or should be, essentially a re-sentencing based on changed sentencing facts. Judges should sentence, not governors and presidents.

#### ***A. The Draft's Proposed Good-Conduct Reductions***

Section 305.1 of the Draft provides that an inmate is presumptively entitled to a reduction in his or her court-ordered determinate sentence unless the Department of Corrections determines that the inmate has "committed a criminal offense or a serious violation" of institutional rules, and/or "has failed to participate satisfactorily in work,

education, or other rehabilitation programs” as ordered by the court or the Department. The Draft recommends a minimum credit of fifteen percent, and suggests that some states might wish to use a higher figure, and/or might provide that credits earned in a year or other time period would “vest” and not be subject to withdrawal for later misconduct.

The Draft strikes a balance between narrower and broader alternatives. It rejects arguments that participation in prison programs should be entirely voluntary and have no effect on “good time” reductions; on the other hand, the Draft also rejects arguments that the minimum credit should be much higher than fifteen percent, to give inmates a stronger incentive to participate in programming. And consistent with its rejection of broad parole release discretion, the Draft only requires “satisfactory” program “participation,” and does not appear to contemplate that corrections officials will attempt to assess and base the award of credits on the offender’s degree of progress toward rehabilitation.

### ***B. The Draft’s Two “Back-to-Court” Second-Look Provisions***

Section 610A of the Draft provides two procedures permitting judicial modification of a sentence based on changed circumstances. The first and more specific of these, Sec. 610A(2), allows the court to release an offender at any point in his or her sentence, based on advanced age or physical or mental infirmity, provided the Department of Corrections recommends release, and pursuant to the further provisions of Section 305.7. A more open-ended, but also more time-limited, provision, Section 610A(1), allows for a single petition for sentence reduction, based on “changed circumstances,” to be made with or without Department recommendation after the inmate has served at least 15 years in prison, and subject to the further provisions of Section 305.6.

Under both procedures, if a hearing is held the court may appoint counsel for indigent inmates (but under the second procedure, most petitions are expected to be denied without a hearing). The prosecution and crime victims or representatives may participate in such hearings; the court must then decide “within a reasonable time,” stating reasons; either side may then petition for discretionary appellate review; the modified sentence may be no more severe than the remaining sentence was before the hearing; it may be less severe than any applicable mandatory minimum term; and the

Sentencing Commission is directed to promulgate and periodically revise guidelines for courts to use when considering whether to grant either type of sentence modification.

Although the specific substantive grounds for sentence modification differ under the two procedures, they have a common normative frame of reference – the court is directed to consider whether the specific grounds (age-infirmity; other changed circumstances) “justif[ies] a different sentence in light of the purposes of sentencing in § 1.02(2).” The latter provision states the revised Code’s overall “limiting retributive” model: crime-control, restorative, and reintegrative purposes operate “within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders” (§ 1.02(2)(a)(i)); within that range, sentences must be “no more severe than necessary to achieve the applicable purposes” of the sentence (under the limiting retributive model above) (§ 1.02(2)(a)(iii)). The latter concept is sometimes referred to as sentencing “parsimony.”

1. Advanced age or physical or mental infirmity. The Comment to Section 305.7 implies that, in light of the purposes in Section 1.02(2), advanced age or serious infirmity would justify early release if, inter alia, the offender is so feeble as to no longer be dangerous. An alternative rationale would be that incarceration is much more onerous for such an offender, making continued custody disproportionate or even cruel. As noted above, the Section 305.7 procedure may be invoked at any time during an inmate’s prison term, and maybe be invoked more than once; but as also noted, such invocation requires a favorable motion by the Department of Corrections.

Although the grounds for modification under Section 305.7 as currently drafted are quite narrow, it is possible that this provision will be expanded (see further discussion below).

2. Other “change of circumstances” since the original sentencing. Section 305.6 directs the court to consider whether changed circumstances “justify a different sentence in light of the purposes of sentencing in § 1.02(2)” (under the “limiting retributive” model summarized above). The open-ended “change of circumstances” language is given more specific content in the Draft Comment, which gives a number of examples of sentences which, although not excessive when first imposed, have become so over time due to such things as: changed societal assessments of offense gravity; new technologies

of risk assessment or treatment; or major changes in the offender, the offender's family circumstances, the crime victim(s), or the community.

In procedural terms, this provision is both broader and narrower than Section 305.7 (the advanced age or infirmity provision, discussed above). Section 305.6 "change of circumstances" petitions do not require a supporting motion by the Department of Corrections; on the other hand, they may only be filed after the inmate has served at least 15 years (which, with a 15% good-conduct credit, effectively requires an original sentence of about 18 years), and such a petition may only be filed once, no matter how long the sentence.

There is apparently some support on the ALI Council to delete Section 305.6 because it has almost no existing state or federal counterpart, and could prove very burdensome to courts (see further discussion below). There is also support on the Council to expand Section 305.7 (above) to also include any "extraordinary and compelling circumstances" justifying modification (again, in light of the purposes in Section 1.02(2)). This is the modification standard found in the current federal second-look provision, 18 U.S.C. §3582(c)(1)(A)(i). The latter provision, like Section 305.7, requires approval by the Director of the Bureau of Prisons, and perhaps for that reason, seems to be very rarely invoked. Nevertheless, such an expansion of Section 305.7 seems likely if the Council decides to delete Section 305.6. Even without deletion, perhaps expansion of Section 305.7 is appropriate to supplement the procedure-limited Section 305.6 (after 15 years; only once).

## **II. Assessing the Substantive Standards and Rationales of the Draft's Second-Look Provisions**

The second-look sentence reduction provisions in Council Draft No. 2 assume that some offenders merit sentence reduction, in light of governing sentencing purposes, based on facts which could not be known at the time of the original sentencing. These standards and rationales seem to fall into at least four categories, discussed below: 1) changes in the offender; 2) the offender's meritorious post-sentencing acts; 3) changes in other people (the offender's family, the victim, the community); and 4) changes in how society views the offender's crime or specific relevant sentencing factors. The rationales

in the first category help to justify all three of the Draft's second-look provisions; those in the second are relevant to the Draft's good-time and changed-circumstances provisions; the third and fourth categories seem to apply only to the changed-circumstances provision (Section 305.6).

One overall question, which arises under each of the four categories, is whether the recognition of a given sentence-reduction rationale is consistent with the reasons (summarized above) behind the Draft's rejection of routine parole release discretion – if we don't trust parole boards to consider such factors in highly individualized offender assessments, why should such factors and assessments affect good-time and re-sentencing?

#### ***A. Change in the Offender or in Our Assessment of the Offender***

Various changes in the offender since the time of the original sentence could make that sentence excessive in light of one or more relevant sentencing purposes, thus justifying or perhaps even requiring a sentence reduction. Such offender changes are clearly at least part of the basis and rationale for the Draft's age-infirmity and general "change of circumstances" provisions, but offender change is arguably also part of the basis for the award of "good conduct" credits. Of course, such credits are primarily justified by the need to maintain order in prison, independent of sentencing purposes. But if an offender avoids serious prison rule violations, and/or "satisfactorily participates" in appropriate prison programming, such an offender has perhaps proven him/herself to be somewhat less likely to re-offend after being released from prison, and thus perhaps a lower risk than he/she seemed to be at the time of sentencing – all of which is relevant to offender-based crime control sentencing purposes.

1. Effects of age and/or infirmity (Section 305.7). Such effects are arguably more "objective" than other offender-change variables, but their relationship to risk or sentence disproportionality are not easily measured. Nevertheless, the widespread adoption of such "compassionate" release procedures, and the economic incentive prisons have to invoke them, suggest that age and infirmity are important and viable second-look criteria.

2. Treatment effects (Section 305.6) . If this rationale involves assessment of the offender's progress toward rehabilitation, it suffers from the same critique the Draft

levels against traditional parole. The Draft gives these decisions to courts, rather than an administrative board, but it is not clear that courts are any better suited to make these difficult assessments. On the other hand, the traditional parole system required such assessments in all cases, whereas the Draft views them as exceptional; some state guidelines reforms have made a similar distinction between routine versus exceptional (grounds-for-departure) assessments of risk and amenability to treatment.

3. Failure to satisfactorily participate in treatment (Section 305.1). Arguably, this criterion is easier to assess reliably and consistently than treatment progress, although the requirement of “satisfactory” participation brings back many of the problems of traditional parole assessments. And these good-time-related assessments under Section 305.1 apply to most offenders, not just exceptional cases. But the fact that Minnesota and some other guidelines states have included program participation in good-time provisions suggests that such assessments are a workable basis for second-look sentence modification.

4. Religious or other conversion (Section 305.6). It is not clear if the Draft endorses this rationale, although the Comment mentions “the possibility of transformation in an offender’s character.” Even in exceptional cases, however, such changes would seem to be extraordinarily difficult for a court to assess reliably and consistently.

5. New technologies of treatment and for assessing risk and progress in treatment. If the original prison term was enhanced based on predicted risk and/or a finding of unamenability to treatment, major subsequent improvements in risk assessment or treatment technology, combined with the overall parsimony principle described above (no more severe than necessary), justify and indeed require re-sentencing. But to avoid a mass of claims, many with battling experts, such technology improvements and their application to the inmate’s case must be clear. For these kinds of claims it might be particularly appropriate to seek the recommendation or at least the advice of correctional authorities (see further discussion of “gate keeping” issues, below).

### ***B. Meritorious Post-sentencing Behavior***

The criteria in this category do not necessarily presuppose any change in the



offender him- or herself. Instead, such sentence reductions provide incentives for highly desired behavior, and are also viewed as meriting a reward for its own sake. Similar important practical and moral considerations underlie plea bargaining concessions and charge or sentence reductions given in return for helpful prosecution testimony or other cooperation.

The Draft expressly recognizes only one form meritorious inmate conduct – his or her compliance with criminal laws, institutional rules, and requirements to participate in programs. Each of these bears on how much “good-time” credit the inmate will receive under Draft Section 305.1. But there are other kinds of post-sentencing meritorious conduct that might warrant sentence reduction. Section 305.1 of the original Model Penal Code provided that inmates could earn an additional six-days-per month sentence reduction (in addition to the basic six-day good-conduct credit) for “especially meritorious behavior or exceptional performance of his duties.” The former provision seemed to contemplate things like saving a guard or inmate’s life; the latter provision allowed parole authorities to distinguish superior versus merely adequate performance of institutional duties. The Draft implicitly handles such cases under the general changed-circumstances provision (Section 305.6). Perhaps they belong in an expanded Section 305.1

***C. Change in Offender Family Circumstances, the Victim, and/or the Community (Section 305.6)***

These sorts of changes are briefly mentioned in the Draft Comment. Although one can easily imagine post-sentencing changes in family, victim, or community circumstances that would appropriately bear on one or more purposes or limits of punishment (e.g., the death of the only suitable care giver to the offender’s small children; successful victim-offender mediation), the potential number and diversity of such claims could swamp courts with petitions that are impossible to distinguish without a hearing. Thus, such claims are probably best handled by a general “extraordinary and compelling circumstances” provision, applicable any time during a prison term.

***D. Change in Societal View of the Inmate’s Crime (Section 305.6)***

Such change might relate to a particular crime as a whole, certain aspects of the crime or of the offender’s role in it, or any other offense-related sentencing factor.

However, this category should be deemed to include only such societal changes as have not yet manifested themselves in the enactment of reduced penalties (such enactments are covered by the retroactivity provisions of Section 6B.11(3), Tentative Draft No. 1).

But in the absence of such an enactment, how are courts to determine whether and to what extent a new societal consensus has emerged? The Draft Comment cites, as examples, changing views about battered victims who kill their batterer; euthanasia or assisted suicide; and certain substance abuse crimes such as those involving alcohol, marijuana, and crack cocaine. Major change has surely occurred in how society views these crimes, but at what point was such change sufficiently clear and substantial to justify sentence modifications? And how can courts avoid appearing to invade the legislature's domain? This seems like an area much more appropriate for legislative or sentencing commission policy making and retroactivity, which courts would then apply to entire groups of offenders.

### **III. Assessing the Draft's Second-Look Procedures**

Several of the substantive second-look issues catalogued above also raised important procedural problems or alternative solutions. Here is a longer (though still not exhaustive) list.

#### ***A. Who Decides?***

The Draft's three second-look provisions take different approaches to this question: good-time credits are decided entirely by correctional authorities, whereas courts decide whether to reduce a sentence based on age-infirmity or other changed conditions. Since good-time is so central to maintaining prison security, and "unsatisfactory" program participation is so much of a judgment call, there is probably no way for courts to play a useful role in these decisions. The age-infirmity and most of the other changed-conditions cases are better suited to judicial control – indeed, these are essentially "re-sentencing" issues, which courts *should* control. But as was suggested in Part II.D, claims about changed societal views involve quasi-legislative issues that apply to whole groups of offenders; decisions about whether such a change has occurred, and to what extent, should therefore be left to the legislature or the sentencing commission.

The need for a gate-keeper. Even for those second-look claims which are suitable for judicial adjudication, there is a separate issue of whether the corrections department

or some other gate keeper is needed to screen these claims or assist courts in screening them. The current federal statute, 18 U.S. C. §3582(c)(1)(A)(I), gives the Bureau of Prisons a claim-barring role which arguably goes too far – corrections officials are not professional sentencers, and in some cases staff animosities or favoritism might distort the corrections position as to sentence reduction. On the other hand, corrections officials have more information than anyone else about the inmate, have a useful comparative perspective (claims or potential claims of other inmates), and are at least as expert as courts are on some matters related to sentencing such as risk and amenability assessment. It has already been noted that changed-conditions claims involving supposed new technologies are particularly suited for correctional gate-keeping. Perhaps age-infirmity claims are another example, but it can be argued that Section 305.7 goes too far, and that corrections officials should only state their views not act as a true gate keeper. Indeed, perhaps corrections officials should be expected to state their views in all cases. But in most if not all age-infirmity and other-changed-conditions cases, it should be made clear that the ultimate decision is for the court, and that courts must not reflexively rubber-stamp the corrections recommendation.

### ***B. Other Procedural Barriers to Relief***

1. The 15-year rule. The Section 305.6 changed circumstances procedure can only be invoked after the inmate has served at least 15 years. The rationale for this limitation seems to be both substantive and practical: most types of changed circumstances (surveyed in Part II) become more likely to apply over a lengthy period of time; if there is no gatekeeper for these petitions (see above) it is necessary to use some sort of arbitrary time-served measure to limit the burdens such petitions place on the courts. Still, many circumstances meriting sentence modification will arise long before 15 years have been served. One compromise solution to this problem would be to add a general “extraordinary and compelling circumstances” provision to Section 305.7 (a provision which can be applied at any time although, in this Draft, it also requires corrections department support).

2. Only one shot. The changed circumstances procedure provided in Section 305.6 can only be invoked once. This obviously can pose extremely difficult choices for inmates – apply early, to maximize the potential size of the sentence reduction; or apply

later, to present stronger arguments for changed circumstances after the original sentencing. The inmate's choice would be somewhat less difficult if there were a back-up procedure other than through the age-infirmity provisions of Section 305.7. Again, adding an "extraordinary and compelling circumstances" provision to that section might be the answer.

### ***C. Right to Counsel and Other Assistance***

Counsel can be appointed under either of the back-to-court provisions, but counsel's assistance seems unlikely to be available very often; either the corrections department will decline to make an age-infirmity motion (Section 305.7), or the Court will deny the inmate's petition without a hearing and without appointing counsel (Section 305.6; the Comment indicates that most petitions will be denied without a hearing, and that counsel would usually only be appointed if a hearing is granted). Given the potential volume of such petitions, this sparing grant of appointed counsel rights may be necessary. Still, inmates will need help in preparing their pro se petitions (and in deciding how soon to file them), so it seems appropriate to require the Department of Corrections to provide lay advisors (and sometimes access to free legal advice) to inmates who have become eligible to file a petition under Section 305.6.

### ***D. The Ban on Increasing the Severity of Modified Sentences.***

The provisions based on age-infirmity (Section 305.7) and general changed-circumstances (Section 305.6) both provide that a modified sentence may be no more severe than the sentence already being served. Such an asymmetric down-but-not-up rule is required by double-jeopardy principles. But it is not always self-evident what counts as a "more severe" sentence, if the old and new sentence are not directly commensurate, for instance, when a prison term is lowered but more onerous release conditions are added. To make the no-more-severe rule work in such cases it will be necessary to devise equivalency scales covering different sentence types.

## **IV. Arguments Against Including Any General Changed-Circumstances Resentencing Provision**

Beyond the substantive and procedural issues noted above (and the inevitable devils-in-the-details problems with any proposal), various arguments can be made against

even a narrow second-look provision – Section 305.6, or the alternative of deleting that section and adding a general “extraordinary and compelling circumstances” provision to Section 305.7. None of these arguments is fully persuasive, but they have considerable weight in the aggregate. However, the most likely alternatives to such a Code provision, pardon and commutation, must also be kept in mind – do they avoid all of these problems, as well as other ones?

***A. Will Even a Narrow Second-look Option Unduly Burden Courts and Counsel Resources?***

Since Section 305.6 includes no corrections or other gate-keeper role (unlike the age-infirmity provisions of Section 305.7), it can be assumed that virtually all inmates will file a petition at some point after they have served 15 years. It is hard to estimate the probable volume of these petitions, or the smaller volume of hearings that will be held, counsel appointed, etc. Although jurisdictions which take seriously the independent-commission, resource-management, demographic-impact, and overall “parsimony” provisions of the revised Code should not have a high volume of very long sentences, no one can know how strongly these provisions will be applied (this will undoubtedly vary considerably, across jurisdictions). On the other hand, the need for a vigorous second-look procedure becomes even stronger if, in fact, there are a large number of such long sentences. The ultimate issue is a familiar one; to paraphrase the question the lawyer put to his inmate client in the Wizard of ID – how much justice can we afford? And how much injustice?

***B. Would a Narrow Second-look Provision Prove Illusory or Freakish in Practice?***

Even if hearings are granted with some frequency (and especially if they aren’t), will inmates rarely see a significant or even any reduction in their sentences? Here too, it is very hard to predict how courts will apply a procedure which lacks any direct counterpart in current practice. If relief is highly sporadic inmates will be (further) disillusioned, unjustified lengthy sentences will remain in force, and the rare instances of relief will introduce a new form of disparity. On the other hand, the most likely alternative second-look procedures, pardon and commutation, face the same problems.

***C. Do Even Narrow Provisions Undermine Impact Assessments and Real-time***

### ***Discipline?***

One of the greatest practical benefits of commission-based, parole-abolition guidelines is their proven ability to generate accurate resource-impact predictions, which in turn have allowed the states using this approach to avoid prison overcrowding and court intervention, and set appropriate priorities in the use of scarce and expensive prison space. A related benefit of determinate sentencing is the discipline, greater honesty, and accountability it imposes on policy-making and adjudication. When offenders actually serve most of the sentence imposed, legislators, prosecutors, and judges cannot pretend to be “tough on crime ” while claiming that back-end discretion will avoid excessive punishment, spiraling costs, and overcrowding.

Do these problems reappear when a second-look, back-door release mechanism is reintroduced? To some extent that depends how often the procedure is used. But even if it is rarely used, legislators, prosecutors, and judges will know that any given law, charge, or sentence *could* be “adjusted” later and this knowledge encourages dishonest and irresponsible use of severe measures. If second-look sentence reductions are not rare their unpredictability at least partially diminishes the accuracy of resource-impact projections. But again, what are the realistic second-look alternatives? If they are so rarely invoked as to be effectively non-existent, the benefits of policy and adjudication discipline and resource management are purchased at the cost of injustice; the system openly tolerates very long sentences which become unjustified due to changed circumstances.

### **Conclusion**

Whether a general changed-circumstances provision is invoked rarely or with greater regularity, the arguments above, along with the difficult issues of substance and procedure discussed earlier, might suggest that even a narrow provision should be a bracketed (that is, optional) Code provision. But again, do the most likely alternatives, pardon and commutation, avoid these and other problems?

And what about life sentences? The Draft takes a strong position against life without parole (other than as an alternative to capital punishment), yet a life sentence without a regularly-invoked second-look provision is, in effect, life without parole. The

alternative of completely abolishing life sentences seems unrealistic, given the frequent use and long history of this penalty. Another alternative would be to retain traditional parole release solely for life sentences, as Minnesota did when it adopted sentencing guidelines. But Minnesota's experience suggests that a narrow exception to parole abolition may not remain narrow; the Minnesota legislature has been unable to resist making more and more crimes subject to life with parole. And even a limited version of traditional parole release discretion is highly problematic, for the reasons summarized earlier. Thus, some sort of non-optional, regularly-used, judicial second-look provision must be provided for life sentences (along with an exceptional-case provision for any offenders subject to life without parole).

For non-life prison sentences, it may be that the Code should bracket (make optional) a general changed circumstances provision like Section 305.6 or an expanded version of Section 305.7. But the numerous, valid grounds for sentence modification must be accommodated, to avoid the injustice and waste of sentences that no longer fit the crime and/or the offender. Determinacy and indeterminacy each have great value, and each has major drawbacks. An appropriate balance between them must be found, although the answers may not be the same in all jurisdictions.

## The Next Era of Sentencing Reform... Revisited

By

Mark Bergstrom, Jordan Hyatt, and Stephen Chanenson<sup>1</sup>

In one of a series of papers published nearly a decade ago on sentencing and corrections, Professor Michael Tonry wrote of ‘fractured and fracturing’ policies found throughout the United States: “Just as there is no single American approach to sentencing and corrections, there is no single approach to the way they (states) are organized.”<sup>2</sup> He identified four ‘contending conceptions of sentencing and corrections’... indeterminate, structured, community/restorative and risk-based... with the focus of his paper being indeterminate and structured sentencing<sup>3</sup>.

Professor Tonry described the development of the Model Penal Code in the 1950’s as the “high point of the conceptualization of indeterminate sentencing.”<sup>4</sup> However, he continued, “by the mid-1970’s, many of the rationales and practices of indeterminate sentencing began to be challenged.”<sup>5</sup> Professor Tonry summarized the attributes of indeterminate sentencing systems as follows<sup>6</sup>:

- Positive attributes: sentencing as a human process; rehabilitation as a goal; public safety as a goal; delegation of authority; professionalism; insulation from public emotion; administrative efficiency.
- Disadvantages: disparities; bias and stereotypes; inadequate implementation; deserved punishments; public sentiment; treatment effectiveness.

Tonry speculated that other qualities may help to explain the tendency of a majority of states to retain indeterminate systems, including “the focus of indeterminate sentencing on the offender as a unique individual, the administrative flexibility it provides managers,

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<sup>2</sup> Michael Tonry, *Reconsidering Indeterminate and Structured Sentencing*, Research in Brief-- Sentencing & Corrections: Issues for the 21<sup>st</sup> Century, No. 2, Washington, DC: US Department of Justice, National Institute of Justice/Corrections Program Office, September 1999, NCJ 175722.

<sup>3</sup> Tonry, *supra* note 2, at 2.

<sup>4</sup> Tonry, *supra* note 2, at 3.

<sup>5</sup> Tonry, *supra* note 2, at 5.

<sup>6</sup> *Id.*



and its relatively light focus on disparities measured solely in terms of crimes and criminal histories.”<sup>7</sup> He suggested that these system are “potentially more reconcilable with community/restorative sentencing and risk-based sentencing than is structured sentencing, with its emphases on detailed rules, ‘certain’ punishments, and public accountability.”<sup>8</sup>

While many jurisdictions continue to employ parole release and other indeterminate features<sup>9</sup>, there has been a steady decline in the percentage of discretionary releases by parole boards since 1980, from 55% of all releases in 1980 to 22% in 2003.<sup>10</sup> In 1995, 50% of adults entering parole did so as a result of a discretionary parole decision; this dropped to 37% in 2000 and to 31% in 2004.<sup>11</sup> A slight rebound was noted in 2006, with an increased to 33%.<sup>12</sup>

Tonry also discussed ‘comprehensive structured sentencing,’ initially presenting it as an alternative to indeterminate sentencing: “For much of the past two decades, it appeared that structured sentencing would gradually replace indeterminate sentencing, but this now looks less likely.”<sup>13</sup> As with indeterminate sentencing, he summarized the qualities of structured sentencing<sup>14</sup>:

- Strengths: set and change sentencing policies; project and regulate prison space needs; reduce sentencing disparities; provide impetus for community corrections funding.
- Disadvantages: unfulfilled promise; dehumanization.

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<sup>7</sup> Tonry, *supra* note 2, at 6.

<sup>8</sup> *Id.*

<sup>9</sup> Thomas P. Bonczar, *Characteristics of State Parole Supervising Agencies, 2006*, Bureau of Justice Statistics Special Report, Washington, DC: US Department of Justice, Office of Justice Programs, August 2008, NCJ 222180. Twenty-six of the 50 state parole supervising agencies reporting a role in releasing prisoners on parole, setting terms or conditions, or conducting parole revocation interviews. Nineteen of 50 state parole supervising agencies reported that they considered prisoners for release.

<sup>10</sup> Lauren E. Glaze and Seri Palla, *Probation and Parole in the United States, 2004*, Bureau of Justice Statistics Bulletin, Washington, DC: US Department of Justice, Office of Justice Programs, November 2005, NCJ 210676.

<sup>11</sup> Tonry, *supra* note 2, at .

<sup>12</sup> Lauren E. Glaze and Thomas P. Bonczar, *Probation and Parole in the United States, 2006*, Bureau of Justice Statistics Bulletin, Washington, DC: US Department of Justice, Office of Justice Programs, December 2007, NCJ 220218.

<sup>13</sup> Tonry, *supra* note 2, at 6..

<sup>14</sup> *Id.*

- Worries: diminishing corrections officials’ roles; constraints on the development of programs; continued politicization; diminution in the quality of justice.

In 2008, the National Center for State Courts (NCSC) published two reports on state sentencing guidelines. In the first, “Assessing Consistency and Fairness in Sentencing: A Comprehensive Study of Three States,”<sup>15</sup> the NCSC studied sentencing guidelines in Michigan, Minnesota and Virginia and found many of the strengths Tonry described:<sup>16</sup>

- Guidelines make sentences more predictable.
- Guidelines effectively limit undesirable sentencing disparity.
- Guidelines make sentencing patterns more transparent.
- Guidelines provide state officials with options for shaping judicial discretion.
- Active participation by a sentencing commission is an essential element of effective guidelines.

The second NCSC report, “State Sentencing Guidelines: Profiles and Continuum<sup>17</sup>,” profiles 21 state sentencing guideline systems and compares these systems on a 12-point ‘sentencing guideline continuum’ from ‘more voluntary’ to ‘more mandatory’ based on organizational aspects and structural features. Previously published profiles identified 23 state sentencing commissions in 2000,<sup>18</sup> and 18 state commissions in 1997.<sup>19</sup>

With the continued presence of indeterminate and structured sentencing, and the growth of restorative justice and evidence-based risk assessments practices, it appears that Tonry’s ‘contending conceptions of sentencing and corrections’ all remain in play. However, rather than being characterized as competing options, it may be better to view them as complementary approaches, building on the strengths and limiting the disadvantages each conception brings to achieving a coordinated system of criminal

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<sup>15</sup> Brian J. Ostrom, et al, *Assessing Consistency and Fairness in Sentencing: A Comprehensive Study of Three States*, National Center for State Courts, 2008.

<sup>16</sup> Id.

<sup>17</sup> Neal B. Kauder and Brian J. Ostrom, *State Sentencing Guidelines: Profiles and Continuum*, National Center for State Courts, 2008.

<sup>18</sup> Maury Mitchell, *Sentencing Commission Profiles*, National Association of Sentencing Commissions, 2000.

<sup>19</sup> Neal B. Kauder and Brian J. Ostrom, *Sentencing Commission Profiles*, NCSC, 1997.

justice which address multiple purposes. As Tonry concluded, “the diversity of American approaches to sentencing and corrections is the more important characteristic.”<sup>20</sup>

In early 2005, Villanova Law Professor Steven L. Channenson proposed a ‘new era of sentencing reform’ built around a concept he called Indeterminate Structured Sentencing (ISS)<sup>21</sup>. This new approach extended the reach of sentencing guidelines to address the unpredictable parole decision-making of an indeterminate sentencing system. This ISS model envisioned a single commission promulgating two sets of coordinated guidelines: one set that channeled a judge’s decisional authority while preserving important nodes of judicial discretion; and the other encouraging the predictable exercise of discretionary parole authority.

In 2008, the Commonwealth of Pennsylvania enacted a comprehensive package of sentencing and corrections reforms<sup>22</sup>, expanding the duties of the Pennsylvania Commission on Sentencing to include the development of parole guidelines and the collection, analysis and dissemination of information on decisions made by all paroling authorities. Consistent with the ISS model, this assigns to a single commission in an indeterminate sentencing system the responsibility for developing both sentencing and parole guidelines, and the opportunity to coordinate sentencing and parole policies that provide bounded discretion, limited retribution and risk-based release decisions.

This paper revisits the ISS model, comparing the aspirations of 2005 with the realities of the legislation enacted 2008, and charts the progress toward indeterminate structured sentencing.

### **A Recap of ISS**

Sentencing law in the United States has undergone significant revisions in the past few years: beginning with *Blakely v. Washington*,<sup>23</sup> and with *Booker*<sup>24</sup> and *Fanfan*<sup>25</sup>

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<sup>20</sup> Tonry, *supra* note 2, at 9.

<sup>21</sup> Steven L. Chanenson, *The New Era of Sentencing Reform*, Emory Law Journal, Vol. 54, No. 1 (Winter 2005).

<sup>22</sup> Acts 81, 82, 83 & 84 of 2008, enacted September 25, 2008, with most provisions taking effect November 24, 2008.

<sup>23</sup> *Blakely v. Washington*, 124 S. Ct. 124 S. Ct. 2531 (2004).

<sup>24</sup> *United States v. Booker*, 543 U.S. 220 (2005)

<sup>25</sup> *Id.* Following the 7th Circuit’s ruling in favor of *Booker*, that case was consolidated with *Fanfan*, due largely to the importance of the constitutional issues and the need to determine whether the Appendi

nipping at their heels, the Supreme Court has brought about one of the most rapid and far-reaching reforms in sentencing law to date. Despite beginning a time of transition and turmoil in sentencing reform, this presents a unique opportunity for philosophical and practical sentencing reform, as well as for a real-world evaluation of emerging approaches to systemic change in incarceration policies.

In *Blakely*, the Court held that since the Sixth Amendment requires a jury to find all facts, with the exception of prior convictions, that could increase the statutory maximum penalty. Accordingly, the top range of Washington State's guidelines, acting as such a limitation, also could not be transcended absent a jury's finding. Following this decision, the Court, in multiple, contentious 5-4 decisions in *United States v. Booker* and *United States v. Fanfan*, affirmed the applicability of this logic to the Federal Guidelines and clearly noted that the most appropriate path out of the woods would lie with the amputation of the mandatory parts of the standing policy and the demotion of sentencing schematics to an advisory position. Understandably, this sent state sentencing commissions and legislatures into damage control mode, with each searching out the least costly revisions that remained in accord with the new contours of the sentencing battlefield.

*Blakely* left many state sentencing systems in disarray. Policy makers, however, were left with some viable options to revise sentencing schemes in a manner consistent with their standing penological goals and the demands of the *Blakely* court. Many alternatives, including the obvious shift towards transforming all guidelines into non-binding recommendations, would have left those sentencing schemes unable to insure appropriate levels of fairness and homogeneity within the jurisdiction.<sup>26</sup> This could, as Justice Stevens feared, "extinguish alternative, nonjudicial, sources of ideas and experience."<sup>27</sup> Fortunately, even in the tumultuous wake of the *Blakely*, Indeterminate Sentencing Systems (ISS) stood as an option that offered accessible discretion and viable uniformity.<sup>28</sup>

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decision (530 U.S. 466 (2000)) applies to the Sentencing Guidelines and, accordingly, what portions of the standing Federal Guidelines were constitutional.

<sup>26</sup> Chanenson, *supra* note 21, at 408.

<sup>27</sup> *Ganz v. Bensinger*, 480 F.2d 88, 89 (7th Cir. 1973) (Stevens, J.).

<sup>28</sup> Chanenson, *supra* note 21, at 432.

A sentencing guideline that could meet both the ideological needs of the judicial system, effectively guide judicial discretion and respond to ever-shifting necessities was not placed completely out of reach after *Blakely*. An indeterminate sentencing system, with a system of clear, presumptive guidelines and directed parole authority, offers the ability to tailor sentences to the needs of the individual while preserving and channeling the state's authority in accordance with the Supreme Courts directives.<sup>29</sup>

At the heart of ISS lies the “Super Commission,” a body charged with the creation and promulgation of guidelines for both sentencing and parole release.<sup>30</sup> Modeled on the traditional sentencing commission, these Super Commissions would take a more consolidated role in setting guideline criteria, guiding both sentence length and parole release. Taking on a more central role in these decisions allows the Super Commission to wield authority in a manner that reflects the priorities of the system, while also allowing for an appropriate limitation on the discretionary aspects of sentencing. From this position, this commission is in the exceptional position to provide macro-level guidance to all of the sentencing actors and ensure that, within the bounds of appropriate prudence, sentence length is appropriately set from the outset and that release is granted when warranted. No other body with the necessary authority to effectuate change is placed in such an oversight role.<sup>31</sup>

Of utmost concern to those searching for a replacement to sentencing systems uprooted by *Blakely*, Indeterminate Sentencing Systems do not run afoul of the Sixth Amendment. This conflict is avoided because, when being sentenced under an ISS guideline, the defendant is aware that they will not, under any circumstances, be sentenced to more than the statutory maximum, thereby meeting the requirements of *Apprendi*.<sup>32</sup> Under ISS, this statutory maximum is identical to the *Blakely* court's upper limitation. This is precisely what the Court intended, as the ceiling is a direct function of judicial fact-finding or a party admission. The maximum is the sentence to which the defendant is “entitled;” the minimum sentence set by the sentencing court serves only as a benchmark after which release, or a consideration thereof, becomes appropriate. The

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<sup>29</sup> Id.

<sup>30</sup> Chanenson, supra note 21, at 433.

<sup>31</sup> Chanenson, supra note 21, at 434.

<sup>32</sup> Chanenson, supra note 21, at 405.

upper range of the sentence being imposed is seen only as a function of the minimum, generally a predetermined percentage, and the ISS guidelines are silent on the matter. By focusing only on the minimum amount to be imposed, ISS systems leave the “ceiling,” and so the Sixth Amendment, untouched.<sup>33</sup>

ISS sentencing systems dodge the *Blakely* bullet without resorting to flat sentencing tariffs or unconscionable uniformity in sentencing.<sup>34</sup> By reinforcing structural checks on discretion, the ISS model allows individual judges to exercise the necessary ability to tailor sentences to the unique aspects of the case while avoiding systemic and political pressures to increase sentencing norms uniformly. Similarly, discretionary parole release, a predictable and necessary authority, is also encouraged though ISS guidelines.<sup>35</sup> When considering parole, any changes would work towards mitigation, clearly outside the reach of *Blakely*. The net result of these modifications, taken in conjunction with a more active and meticulous review process, allows ISS systems to increase overarching goals of justice, uniformity and practicality

The guidelines systems necessary under ISS are not markedly different than the large majority of guideline systems already in place across the country. The ISS structure focuses on the channeling of judicial discretion within a presumptively valid range of sentencing options. Clearly defined mitigation and aggravation factors allow for delineated and justified departures outside this “heartland,” while additional guidance is provided to the court as to the imposition of concurrent and consecutive sentences.<sup>36</sup> Additionally, the ISS system relies on meaningful and consistent review of discretionary decisions at the appellate levels to reign in unfettered or unwarranted discretion.<sup>37</sup> The net result is a system that meets the requirements of *Blakely* and results in a uniform application of a consistent penological construction.

ISS guidelines do not eliminate judicial discretion. Though the initial range is set forth by the guidelines, there is ample room for adjustments within this array. For the circumstances when these sentences are simply not warranted, ISS systems have institutionalized the requisite flexibility by acknowledging the need for both

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<sup>33</sup> *Id.*

<sup>34</sup> Chanenson, *supra* note 21, at 408.

<sup>35</sup> Chanenson, *supra* note 21, at 448-9.

<sup>36</sup> Chanenson, *supra* note 21, at 441, 448.

<sup>37</sup> Chanenson, *supra* note 21, at 444.

aggravated/mitigated and full departure sentences. These intermediate departure sentences, exceeding the “heartland” set by the guidelines but falling short of a full departure from the Commission’s suggestions, allow the judge to sentence within the aggravated or mitigated range if the discrete circumstances warrant the variation. Though this justification falls short of that needed for a departure sentence, the rationale for imposing an aggravated or mitigated range sentence must be objectively defensible. This fully developed departure power is a hallmark of ISS and affords the requisite flexibility to adapt sentencing without bowing to unchecked disparities.

Discretionary parole release stands as another essential part of the ISS system. As noted, judges are directed to sentence a defendant to a range consisting only of a minimum and a maximum term of incarceration.<sup>38</sup> At the expiration of the minimum term of incarceration the individual becomes eligible for parole, though the release is never automatic; the parole board, guided by the Commission, must then determine when release is appropriate under those circumstances.<sup>39</sup>

*Blakely* and the Sixth Amendment pose no threat to the imposition of parole guidelines though the ISS structure. As parole release can only shorten a sentence, the Supreme Court will not concern itself, especially in the *Blakely* context, with modifications of incarceration terms in this direction. Additionally, the parole board does little to undermine the authority of the jury; the board is determining how much, if at all, modification of the judicially imposed maximum is appropriate by granting parole after the minimum sentence imposed has already elapsed. Moreover, parole hearings fall outside of the criminal prosecution; the trial, and its constitutional protections, have concluded well in advance of the board’s first actions.<sup>40</sup> Just as sentencing guidelines can channel a judge's power to mitigate the length of the sentence imposed while keeping within *Blakely*, parole release guidelines can similarly allow for the guidance of a parole board's ability to mitigate the total length of the sentence actually served.

In application, the parole and sentencing guidelines work in similar manners- in both cases, the guidance of the Super Commission would be employed to focus decision

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<sup>38</sup> Chanenson, supra note 21, at 449.

<sup>39</sup> Chanenson, supra note 21, at 456.

<sup>40</sup> Chanenson, supra note 21, at 448

maker discretion into a more universally applied framework.<sup>41</sup> Recognizing the weight of the trial court's opinion, as they remain the best-informed party, ISS parole guidelines would not seek to subvert the judicial role. Instead, the Commission would encourage the Board to exercise its own discretion, but do act in a manner that results in release at or close to the minimum term of incarceration imposed.<sup>42</sup> This role for the parole release board does allow for individualized retention, based on the individual offender and their circumstances, and includes authority parallel to the mitigation power of the courts.

Parole release, often criticized for being unstructured and inconstant, is subject to additional, significant guidance under ISS. Functioning in the same way sentencing guidelines rein in judicial discretion, so are parole boards limited in their authority. In this manner, the Super Commission only brings consistency and transparency to the parole process, as well as coordinating the sentencing and release practices. From a systemic perspective, this ensures clear uniformity throughout the entire penological process.

Parole release, regardless of the sentencing system, has also been routinely attacked as being incompatible with prevailing notions of punishment, as well as offering limited options over a determinate system.<sup>43</sup> Though, ideologically, we live in a retributive, 'just desserts' society, there is still a role for parole release. As decisions about the appropriateness of a sentence for any given crime are imprecise at best, prevailing philosophies can only narrow the acceptable punishments to a range. The discretion of the parole board, with the guidance of the Commission, can be wielded in a manner to ensure that the length of sentence served maintains the best possible fit with the offender and the offense.<sup>44</sup>

In traditional, determinate sentencing structures, 'good time' is used as an incentive to ensure inmate compliance in prison.<sup>45</sup> Though ISS lacks in such a feature, the discretionary nature of parole release can accommodate for its absence. The Board's ability to consider interim conduct allows for a delayed release for non-compliant

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<sup>41</sup> Chanenson, supra note 21, at 451.

<sup>42</sup> Id.

<sup>43</sup> Chanenson, supra note 21, at 451.

<sup>44</sup> Id.

<sup>45</sup> Chanenson, supra note 21, at 450.



prisoners.<sup>46</sup> Additionally, the aspect of discretionary release can add value as a part of a prisoner reentry program.<sup>47</sup> The net result, with regard to sentence length and behavior will likely remain the same under ISS.

As with ISS sentencing guidelines, this type of parole release necessitates meaningful review. This is essential to both effective implementation and to ensuring uniform application of guidelines.<sup>48</sup> Traditionally an area subject to flexible, administrative review, judicial review may give initial challenges, and their results, an air of legitimacy.<sup>49</sup> It is logical, therefore, to vary the degree of review with the nature of the departure itself; when considering the length of change, in either direction, routine matters could be dealt with at an administrative hearing, while significant departures could be heard in the appellate courts.<sup>50</sup>

ISS, in a post-*Blakely* world, offers the unique promise of a balance between uniformity and appropriate individualization. Through this system, the punishment system speaks with one voice and the potentially unbalancing discretionary aspects of the sentence are channeled in an appropriate, but not heavy-handed, manner.<sup>51</sup> ISS, standing alone among the viable post-*Blakely* options, presents a chance to ensure uniformity and expand the level of transparency, accountability and bounded discretion found in sentencing commissions to other aspects of incarceration process.<sup>52</sup>

### **Sentencing and Corrections Reforms in Pennsylvania**

If it is true that states are the laboratories of democracy,<sup>53</sup> then Pennsylvania is the laboratory for ISS. Reform legislation recently enacted substantially expands the role of the state sentencing commission, to include developing parole decision-making guidelines.<sup>54</sup> These reforms appear to address several of the disadvantages identified in

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<sup>46</sup> Id.

<sup>47</sup> Chanenson, *supra* note 21, at 454

<sup>48</sup> Chanenson, *supra* note 21, at 457.

<sup>49</sup> Id.

<sup>50</sup> Chanenson, *supra* note 21, at 458.

<sup>51</sup> Id.

<sup>52</sup> Chanenson, *supra* note 21, at 442-3.

<sup>53</sup> 285 U.S. 262, 311. Justice Louis D. Brandeis, "... a single courageous state may, if its citizens choose, serve as a laboratory."

<sup>54</sup> Acts 81, 82, 83 & 84 of 2008, enacted September 25, 2008, with most provisions taking effect November 24, 2008.

Professor Tonry's critique of indeterminate systems, and to incorporate many of structural provisions suggested in Professor Chanenson's ISS model. More importantly, it provides for the first time in Pennsylvania a public process for coordinated sentencing and parole guideline development and implementation, and a transparent system for the collection and dissemination of individual and aggregate parole information. In order to fully appreciate these changes, it is important to understand the current parole process and recent events which have led to a moratorium on parole.

The Pennsylvania Board of Probation and Parole (PBPP) was established in 1941 as an independent administrative board<sup>55</sup> with the "... exclusive power to parole and re-parole, commit and recommit for violating parole, and to discharge from parole..." offenders sentenced to a maximum term of two years or more.<sup>56</sup> The parole system is intended to provide "... adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison."<sup>57</sup>

In providing these benefits to the criminal justice system, the board shall first and foremost seek to protect the safety of the public. In addition to this goal, the board shall address input by crime victims and assist in the fair administration of justice by ensuring the custody, control and treatment of paroled offenders.<sup>58</sup>

Pennsylvania's indeterminate system provides a framework "... to provide offenders some incentive for good in-prison behavior, program participation, and post-release planning while they are still in prison."<sup>59</sup> Additionally, the consideration of risk and needs is central to the release decision, allowing the development of "... a strategy providing lower-risk offenders with lower levels of treatment and supervision... (and the use of) the higher risk and needs domains from the LSI-R... to establish parole conditions

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<sup>55</sup> 61 P.S. §331.2

<sup>56</sup> 61 P.S. §331.17

<sup>57</sup> 61 P.S. §331.1

<sup>58</sup> *Id.*

<sup>59</sup> Sherry Tate and Catherine C. McVey. *Rising to the Challenge of Applying Evidence-Based Practices Across the Spectrum of a State Parole System*. Topics in Community Corrections, 2007.

that target interventions toward dynamic characteristics that contribute to criminal behavior.”<sup>60</sup>

In Pennsylvania, “parole is a matter of grace and mercy shown to a prisoner;”<sup>61</sup> “(the) prisoner has no absolute right to be released from prison on parole upon expiration of prisoner’s minimum term; (the) prisoner has only a right to apply for parole at expiration of minimum term and have that application considered by the Pennsylvania Board of Probation and Parole.”<sup>62</sup> The PBPP identifies three key public safety benefits associated with discretionary parole: (1) releasing offenders from prison who are prepared to return to the community; (2) using risk assessment instruments which consider seriousness of the offense and the likelihood of re-offending prior to release; and (3) managing re-entry to the community through the imposition of conditions that secure behavior, environment and activities.<sup>63</sup>

The decisional instrument used by the PBPP takes into account actuarial information correlated to reduce risk of re-offending (e.g., violence; risk/needs; institutional programming; institutional behavior), professional judgment (e.g., offense and offender information; recommendations of judge, prosecutor and correctional staff; victim input) and the interaction of the two (e.g., demonstrated motivation for change; assessment of parole challenges; overall risk; re-entry plan).<sup>64</sup> This decisional instrument was developed internally by the PBPP, and until recently, was not available to the public or to the criminal justice community; the individual decisions rendered by PBPP members and the completed decisional document remain undisclosed. Even the PBPP has recognized how this isolation and lack of transparency has undermined the public understanding and support of parole...

As we have worked on this project, we’ve uncovered a major concern of certain stakeholders – such as judges, defense attorneys, and prosecutors – that they lack a clear understanding of the decisional instrument and the decision-making process as a whole... We recognize that it is inherently

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<sup>60</sup> Id.

<sup>61</sup> *Rummings v. Commonwealth*, 814 A.2d 795 (Pa. Cmwlth., 2002)

<sup>62</sup> *Rogers v. PBPP*, 724 A.2d 319 (Pa., 1999)

<sup>63</sup> Edward G. Rendell and Catherine C. McVey. *Parole 101: PBPP Toward Safer Communities*, Commonwealth of Pennsylvania, 2008.

<sup>64</sup> Rendell, *supra* note 63, at 6.

vital for key stakeholders to have a voice in the parole decisional process, because the Board's decisions significantly affect the prison population and ultimately affect public safety by determining which offenders to release.<sup>65</sup>

Although the PBPP, especially under its current Chairman, has embraced evidence-based practices and has greatly expanded its outreach to the criminal justice community and the public, the isolation of the past undermined confidence in the agency to act aggressively on proposed reforms, and brought into question the policies and practices of the agency when tragic events occurred. "The consequences of our actions grab us by the scruff of our necks, quite indifferent to our claim that we have 'gotten better' in the meantime."<sup>66</sup>

On September 29, 2008, just three days after he signed the comprehensive prison reform package, Governor Edward Rendell suspended the release of all offenders recommended for parole, pending a review of the process by which violent offenders are paroled.<sup>67</sup> The Governor was responding to the most recent murder of a Philadelphia police officer by a parolee, the second murder of a police officer by a parolee in four months. While the Board was permitted to continue to conduct parole hearings and case reviews, the Board was prohibited from granting parole. On October 20, 2008, the Governor lifted the moratorium on parole of non-violent offenders (i.e., no history of a violent offense), permitting the parole of non-violent offenders according to current parole procedures; the moratorium on paroles of all violent offenders remained in place.<sup>68</sup> Temple University Professor John Goldkamp, appointed by the Governor to review the parole process, reported that a "... sound and rational process, appropriate policy and best practices in the field of parole are followed when determining parole of non-violent offenders."<sup>69</sup>

Pennsylvania House Speaker Dennis O'Brien, the prime sponsor of one of the reform bills and a major force behind the enactment of the legislation, noted that the sentencing and corrections package "... was purposefully designed to address concerns

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<sup>65</sup> Tate, *supra* note 59, at 12.

<sup>66</sup> Friedrich Nietzsche (1886).

<sup>67</sup> Governor Edward G. Rendell, Commonwealth of Pennsylvania. *Press Release*. September 29, 2008

<sup>68</sup> Governor Edward G. Rendell, Commonwealth of Pennsylvania. *Press Release*. October 20, 2008.

<sup>69</sup> *Id.*

about the state and local parole processes... Some observers previously raised concerns that the PBPP is under intense pressure to manage the growing state prison population by releasing violent inmates who ultimately may victimize the public. Additional concerns exist about county judges who may grant parole to county prison inmates without having adequate information about the risk that those inmates pose to the public.”<sup>70</sup> Speaker O’Brien described several aspects of the reform legislation intended to address parole decision-making involving violent offenders<sup>71</sup>:

- Establishment of parole guidelines that will apply to all aspects of the paroling process by judges and the PBPP;
- That the parole guidelines make public safety and victim safety the top consideration in parole decisions; and
- That the parole guidelines use validated risk assessment tools and research that help predict the risk of recidivism and the risk to the public.

“The Sentencing Commission’s creation of these guidelines will take place through a public process, including hearings... It will recognize that dangerous offenders... must be considered differently when parole decisions are made. Risk assessment is a more important consideration at this time than when an offender is first sentenced.”<sup>72</sup>

In addition to the factors identified by the Speaker, the Commission is also required to address the following when developing parole guidelines<sup>73</sup>:

- Encourage inmates and parolees to abide by conditions and rules;
- Encourage inmates and parolees to participate in programming that has been demonstrated to be effective in reducing recidivism, including appropriate drug and alcohol treatment programs;
- Prioritize the use of incarceration, rehabilitation and other criminal justice resources for offenders posing the greatest risk to public safety;
- Take into account available research related to risk of recidivism, minimizing the threat posed to public safety and factors maximizing success of re-entry.

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<sup>70</sup> Speaker Dennis M. O’Brien, Commonwealth of Pennsylvania. *Press Release*. October 1, 2008.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Act 2006-81

What may be lost in this discussion of public safety and parole standards for violent offenders are the many other aspects of the legislation: incentives and streamlined processing for less serious offenders; insulation of decision-makers through the use of publicly-developed guidelines throughout the sentencing and parole process; and improved system-wide coordination, accountability, transparency, predictability and resource utilization.

In addition to its existing duty of the Sentencing Commission to adopt sentencing guidelines, the reform legislation adds not only the development of parole and re-parole guidelines, but also guidelines for re-sentencing following revocation of probation and intermediate punishment, recommitment ranges following revocation of parole, and the reporting of all sentencing and parole decisions to the Commission for analysis and dissemination. When adopting or re-adopting any guidelines, the Commission is required to use a correctional population simulation model to determine the resources required to carry out any proposed changes. And the Commission's membership is increased to include three ex-officio non-voting members to promote system-wide policy discussions: the Secretary of Corrections, the Parole Board Chairman, and the state Victim Advocate.

The reform legislation also includes a new Recidivism Risk Reduction Incentive (RRRI) program targeting less serious offenders committed to state prison. This pool of offenders is generally eligible for a number of sentencing alternatives, including county intermediate punishment, state intermediate punishment, state motivational boot camp, and incarceration in a county facility. If inappropriate or not selected for one of these alternatives, a new RRRI minimum sentence is imposed at the time of sentencing, along with the traditional minimum and maximum term. For a minimum sentence of 3 years or less, the RRRI minimum is  $\frac{3}{4}$  of the minimum term; for a minimum sentence of greater than three years, the RRRI minimum is  $\frac{5}{6}$  of the minimum term. Modeled on the successful recidivism reduction program in New York State, the RRRI program encourages eligible offenders to participate in institutional evidence-based programs proven to reduce recidivism. Those who successfully complete the programs and meet the other eligibility requirements are eligible for presumptive parole at the RRRI

minimum; and following successful completion of one year on parole, are placed on administrative parole.<sup>74</sup>

A final area of reform, somewhat removed from the mainstream of the ISS discussion, is medical release. Pennsylvania's 'compassionate release' was enacted in 1919, with relatively few changes over the past nine decades.<sup>75</sup> A key feature of this amendment is the change in the standard for transfer from "necessary that he or she be removed" to "medical needs... can be more appropriately addressed" in another facility.<sup>76</sup> The legislation also provides for broader participation (both the correctional facility and a person to whom the court grants standing on behalf of a prisoner are included) and increased public safety safeguards (notice provisions, required use of electronic monitoring, use of licensed facilities). The targeted populations are: (1) seriously ill inmates not expected to live for more than one year; and (2) terminally ill inmates, not ambulatory, and likely to die in the near future.<sup>77</sup>

### **Progress Toward 'Indeterminate Structured Sentencing' (ISS)**

The recently-enacted reforms in Pennsylvania hold great promise for an indeterminate sentencing system:

- A coordinated set of publicly-developed guidelines to be considered at each key decision point
  - providing insulation for decision-makers but not isolation from practitioners and the public;
  - providing 'bounded discretion' at sentencing and parole to promote uniformity while permitting individualized justice;
- The coordination of traditional and sometimes competing purposes at sentencing (retribution) and parole (risk; public safety);
- The coordination of collection and dissemination of offense-specific and offender-specific information (transparency);

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<sup>74</sup> Acts 2008-81, 83

<sup>75</sup> 61 PS §81

<sup>76</sup> Act 2008-84

<sup>77</sup> Id.

- Better sorting, better programs, better outcomes based on better information, better evidence, better targeting;
- Better use of criminal justice resources system wide, and including the use of risk reduction incentives, presumptive parole release, administrative parole supervision, and medical release.

While Pennsylvania's advisory guidelines and weak appellate review fall short of the ISS standards, and the present target for the RRRI program is narrow, the development and implementation of coordinated policies and guidelines will serve as that laboratory for indeterminate structured sentencing.