

SECOND CHANCES

IN THE CRIMINAL JUSTICE SYSTEM

*Alternatives to Incarceration
and Reentry Strategies*

COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS



Project of the American Bar Association
Commission on Effective Criminal Sanctions
740 15th Street, N.W., Washington, DC 20005-1009

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The resolutions of the Commission on Effective Criminal Sanctions contained herein were adopted on February 14, 2007 by the American Bar Association House of Delegates as Association policy. The resolutions of the Justice Kennedy Commission were adopted by the ABA House on August 9, 2004. The accompanying reports were not adopted and are therefore not Association policy, but are provided to explain the policy resolutions.

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AMERICAN BAR ASSOCIATION
COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS

MESSAGE FROM THE CO-CHAIRS

Four years ago, in a dramatic speech at the ABA Annual Meeting in San Francisco, Supreme Court Justice Anthony Kennedy challenged the legal profession to pay attention to what happens to people in this country after they are convicted and sent to prison. Justice Kennedy raised fundamental questions about the fairness and efficacy of a criminal justice system that imprisons so many people for such long periods of time, and that returns them to their communities in worse shape than when they left. The adverse impact on communities of color has been particularly severe. He pointed out that most states now spend more on their prisons than on their schools, and concluded that “our resources are misspent, our punishments too severe, our sentences too long.” He asked the ABA to help start a “new public discussion” about American sentencing and corrections policies and practices.

The ABA responded to Justice Kennedy’s challenge. First through the Justice Kennedy Commission, and then through the Commission on Effective Criminal Sanctions, we have engaged in a wide-ranging and penetrating discussion of subjects as diverse as mandatory minimum sentencing, racial disparity, prosecutorial discretion, executive clemency, the sealing of criminal records, and the legal and practical obstacles to offender reentry. We have held hearings throughout the country, published policy reports, and advocated for systemic reform. The work of these two commissions has been premised on a belief that the bar has a responsibility to see that our criminal sanctioning system does not exacerbate the problem of crime, and that people who have satisfied their court-imposed sentences are given a fair chance to build better lives in the community. Our work has benefited from the generous support of the Open Society Institute.

This compendium of the two commissions’ work is entitled “Second Chances in the Criminal Justice System” because it focuses not only on fairness and proportionality of punishment, but also on ways in which criminal offenders may avoid or escape the permanent legal disabilities and stigma of a criminal record. It is that possibility of starting over with a clean slate that we believe the system must make available to everyone who wishes to choose a different way. It is that possibility to which our work is dedicated.

The reports contained in this volume represent the ground-breaking work of these two commissions. We present it with pride, and with the hope that it will provide a blueprint for law reform efforts in the years ahead.

Stephen A. Saltzburg
James R. Thompson
December 2007

COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS

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INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

The ABA Commission on Effective Criminal Sanctions has developed a series of policy recommendations that it anticipates will provide the basis for a broad reform agenda to reduce reliance on incarceration and remove legal barriers to offender reentry that drive high rates of recidivism. These recommendations were approved in February 2007 by the ABA House, and have been endorsed by the National Association of Criminal Defense Lawyers, the National District Attorneys Association, and the National Legal Aid and Defender Association. They cover six areas:

- Community-based alternatives to incarceration that avoid a conviction record
- Improvements in parole and probation supervision that reduce revocations
- Employment and licensing of people with convictions
- Access to and use of criminal history information
- Representation relating to collateral consequences
- Training in the exercise of discretion

The effort by the organized bar that led to the development of these recommendations began more than three years ago, when Supreme Court Justice Anthony Kennedy challenged the legal profession to pay attention to what happens to people after they have been convicted and sent to prison: "When the door is locked against the prisoner, we do not think about what is behind it." In a speech to the ABA Annual Meeting, Justice Kennedy raised fundamental questions about the fairness and efficacy of a justice system that disproportionately imprisons minorities, forgets about them after they are imprisoned, and returns them to their communities in worse shape than they left it. He pointed out that most states now spend more on their prisons than on their schools, and concluded that "our resources are misspent, our punishments too severe, our sentences too long." He asked the ABA to help start a "new public discussion" about American sentencing and corrections policies and practices. In response to Justice Kennedy's speech, ABA President Dennis Archer established the Justice Kennedy Commission, whose report to the 2004 Annual Meeting was hailed as providing a blueprint for sentencing and corrections reform.

In 2005 the ABA received a grant from the Open Society Institute to continue the work begun by the Justice Kennedy Commission through the Commission on Effective Criminal Sanctions. The Commission committed itself to continuing the public discussion begun by the Justice Kennedy Commission, and to developing a broad consensus among the prosecutors, defenders, judges, and academics that comprise its members about what can and should be done to reduce reliance on incarceration and to reduce recidivism. In 2007 the

OSI grant was extended for a third year.

In 2006 the Commission held a series of hearings where it heard from top criminal justice officials from across the country about how the legal system in different jurisdictions supports or discourages diversion and treatment programs, and reentry and reintegration after conviction. Witnesses provided detailed information about programs and policies to steer less serious offenders into community corrections programs rather than prison, to help offenders gain job skills and secure housing, and to neutralize the effect of a criminal record for employment and other purposes. The Commission was particularly impressed by alternative sanctioning programs developed by prosecutors' offices, and by collaborative efforts among justice stakeholders under the auspices of the courts. The traditional advocacy model of criminal justice has been transformed in some places to a problem-solving approach that involves new roles for prosecutors, defenders, and judges, to address the social and economic problems that drive recidivism rates. The Commission also held a hearing in October 2006 entirely devoted to the subject of certificates of relief from disabilities and of good conduct. Throughout, we made a point of talking with those most directly affected by the criminal justice policies and practices we were studying: people with criminal records.

Based upon the information gathered at the hearings and other research, the Commission developed the policy recommendations that have now been approved as official ABA policy. A summary of these recommendations is attached. The full black letter text and accompanying reports, as well as minutes of the Commission's hearings, can be found on the Commission's website at <http://www.abanet.org/cecs>.

The Commission's recommendations represent a consensus, no small feat given the diversity of personal and institutional perspectives represented by its members. Even more remarkable, many of the Commission's recommendations were endorsed by national organizations representing both the prosecutor and defender communities. With support from these organizations, the Commission hopes that its recommendations will shortly become the basis for a reform agenda in jurisdictions across the country that are attempting to come to grips with the problem of over-incarceration and recidivism.

In the spring of 2007, the Commission organized a conference in Chicago on "Overcoming Legal Barriers to Reentry," which brought together policy-makers, government officials, business leaders, people with criminal records and community advocacy groups from across the country to explore ways to encourage employers to hire people with criminal records. At the conclusion of the conference, the Commission approved a broad policy recommendation urging jurisdictions to limit

access to certain criminal records when the risk that a person will reoffend is greatly reduced. It based its recommendation on social science research showing that employers and landlords are predisposed to reject a person with a criminal record without regard to the actual risk that person may pose, and notwithstanding laws that prohibit unreasonable discrimination against individuals with criminal histories. Recognizing that steady employment and stable housing are the two most reliable predictors of desistance from crime, this policy recommendation was designed to make some criminal history information unavailable when its relevance to employment and housing is minimal, without interfering inappropriately with

law enforcement or the public's need to know. This recommendation met strong opposition from press organizations and the business community, and was ultimately withdrawn from the ABA House agenda. In the coming year, the final one under its grant, the Commission will continue to work with various ABA entities and other organizations on ways to ensure fair use of criminal records in the employment context.

Margaret Colgate Love
Consulting Director
December 2007

SUMMARY OF POLICY RECOMMENDATIONS APPROVED BY ABA HOUSE

I. ALTERNATIVES TO INCARCERATION AND CONVICTION FOR LESS SERIOUS OFFENDERS:

- Jurisdictions should develop, with the assistance of prosecutors and others, community supervision programs that allow all but the most serious offenders avoid incarceration and a conviction record.
- Community-based treatment programs ought to be made available for persons whose crimes are related to substance abuse and/or mental illness even if they have more than one conviction or a history of minor violence, provided they meet other qualifications for community supervision.
- Prosecutors, defenders and courts are encouraged to form working groups to review, monitor, and improve systemic alternatives to incarceration and conviction.

II. IMPROVEMENTS IN PROBATION AND PAROLE SUPERVISION:

- Jurisdictions should develop meaningful graduated sanctions for violations of probation or parole (including brief periods of community detention where appropriate)
- Non-criminal violations of supervision conditions should result in imprisonment only when an individual engages in repeated violations and lesser sanctions have not been effective. In such cases, the length of incarceration should be that reasonably necessary to modify the individual's behavior and deter future violations.
- Jurisdictions should distinguish between offenders who would benefit from community supervision and those who would not, and should reduce probation and parole caseloads to improve the quality and intensity of supervision in appropriate cases.
- In judging the performance of probation and parole officers, consideration should be given to the number of individuals under an officer's supervision who successfully complete supervision, as well as to those who do not.

III. EMPLOYMENT AND LICENSURE OF PERSONS WITH A CRIMINAL RECORD:

- Government agencies and licensing boards should develop and enforce policy on the employment of people with convictions, including by the contractors and vendors who do business with the state.
- Ordinarily, a criminal record should be considered disqualifying only if the offense conduct substantially relates to the particular employment or license, or presents a present threat to public safety.
- Government agencies should inventory applicable employment restrictions and disqualifications; repeal or modify those that are not substantially related to the particular employment or that are not designed to protect the public safety; provide for an exemption process and a statement of reasons in the event a person is turned down for employment because of their criminal record; and, provide judicial or administrative review of a decision to deny employment based upon conviction.
- Jurisdictions should establish a judicial or administrative process for mitigating or relieving collateral penalties and disabilities imposed by law, and standards for determining when an individual is entitled to complete relief from collateral consequences based upon fitness of character.
- Jurisdictions should work with private employer groups to develop job opportunities for people with a criminal record, and hiring incentives.
- Jurisdictions should make evidence of an individual's conviction inadmissible in any action alleging an employer's negligence or wrongful conduct based on hiring as long as the employer relied on a judicial or administrative order relieving disabilities or certifying rehabilitation.

IV. ACCESS TO AND USE OF CRIMINAL HISTORY INFORMATION FOR NON-LAW ENFORCEMENT PURPOSES

- Jurisdictions should develop policies that limit access to and use of criminal history records for non-law enforcement purposes, which balance the public's right of access to information against the government's interest in encouraging successful offender reentry and reintegration.
- Jurisdictions should develop standards to maximize reliability and integrity of records in reporting systems, and should allow individuals and the government to challenge the accuracy and completeness of those records.
- Jurisdictions should establish standards for and controls over records reporting systems, and private screening companies should be restricted to the extent legally possible from reporting records that have been sealed or expunged.

V. LEGAL REPRESENTATION RELATING TO COLLATERAL CONSEQUENCES:

- Jurisdictions should assist defenders in advising their clients of the collateral consequences of conviction.

- Prosecutors should also be informed of collateral consequences that may apply in a particular case.
- Additional funds should be provided to public defender and legal aid offices to enable them to assist offenders in removing or neutralizing the collateral consequences of conviction.
- Prison, probation and parole officials should be required to advise offenders about how they may obtain relief from collateral consequences.

VI. TRAINING IN THE EXERCISE OF DISCRETION:

- Prosecutors and all criminal justice professionals who exercise discretion in the justice system – including judges, prosecutors, defense counsel, probation and parole offices, and correctional officials - should participate in training that will give them greater understanding of what elements should be considered in the exercise of their discretion. Such training should be credited towards continuing education program requirements.

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REPORT TO THE HOUSE OF DELEGATES ON ALTERNATIVES TO INCARCERATION AND CONVICTION

MIDYEAR MEETING, 2007

RECOMMENDATION

RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to develop, implement, and fund programs that prosecutors and other criminal justice professionals can utilize to enable an offender to be placed under community supervision in appropriate cases. While the qualifications for entry into the programs will vary among jurisdictions, generally the programs should be available when the offender:

- i) poses no substantial threat to the community;
- ii) is not charged with a predatory crime, a crime involving substantial violence, a crime involving large scale drug trafficking, or a crime of equivalent gravity;
- iii) has no prior criminal history that makes community supervision an inappropriate sanction; and
- iv) is not currently on parole or probation, unless the supervising authority specifically consents.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to develop, and to support and fund prosecutors and others seeking to develop, deferred adjudication/deferred sentencing/diversion options that avoid a permanent conviction record for offenders who are deemed appropriate for community supervision pursuant to the criteria set forth above.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to develop, support and fund programs that offer community-based treatment alternatives to incarceration, including inpatient treatment, to those offenders whose crimes are associated with substance abuse and/or mental illness; and for whom diversion has been deemed appropriate pursuant to the criteria set forth above.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to develop, support and fund prosecutors and other criminal justice professionals seeking to develop programs to train law enforcement officers to recognize the signs and symptoms of mental illness in order to facilitate the appropriate resolution by the police in those situations.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to encourage prosecutors and defenders, in close cooperation with the courts, to create working groups that include other stakeholders in the justice system to develop, review, monitor, and improve deferred adjudication/ deferred sentencing/diversion options.

REPORT

I. Background

In the late 1970s, pessimism about the possibility of rehabilitating criminals ushered in an era of harsh prison sentences.¹ Politicians on both the right and left embraced the work of social scientists like Robert Martinson, who concluded that correctional programming had little appreciable effect on recidivism rates.² The gloomy conclusion that “nothing works” to steer people away from crime both supported and advanced the “tough on crime” political agenda that dominated the 1980s and 90s, with its reliance on long mandatory prison sentences.

The War on Drugs that began in the mid-1980s, and the deinstitutionalization of the mentally ill that was already well underway, ensured that a large percentage of the people who were sentenced to prison were substance abusers, mentally ill, or both. The burden of these incarceration policies has fallen primarily on the minority community: of the 2.2 million people now in our prisons and jails, almost half are African-American, and another 20% are Hispanic. One of the most painful costs of incarceration is that one and a half million children in the United States under the age of eighteen have at least one parent in state or federal prison.³

In the past ten years there have been increasing doubts about the efficacy of increased incarceration as a general crime control measure, at least when unaccompanied by serious efforts to treat substance abuse and mental illness in the prison population.⁴ During this period, much data has been gathered concerning the economic and social costs of “mass imprisonment.”⁵ Two years ago, the Justice Kennedy Commission reported that “many prosecutors, judges, defense counsel and legislators who have differing attitudes toward crime and punishment share a feeling that more incarceration and longer sentences are not always in the public interest.”⁶

With more than two-thirds of those being released from prison rearrested within three years of release,⁷ and 42% of parolees returning to prison or jail within 24 months of their release,⁸ policy makers and law enforcement practitioners alike are re-thinking the practice of incarceration divorced from efforts to rehabilitate. The realization that 650,000 prisoners are returning each year to the communities they left, unimproved by their experience in the penitentiary, has inspired even some elected officials to take a new look at the old issue of rehabilitation.⁹ At the same time, social scientists and law enforcement practitioners are discovering that some things do “work” to turn an individual away from crime, under the right conditions.¹⁰

The Commission’s name reflects the growing public appreciation of the need to develop cost-effective sentencing strategies that take into account not just the short term goal of protecting the public by imprisoning people who break the law and threaten the safety of the community, but also the longer term goal of helping offenders avoid future criminal behavior, thereby reducing the number of future victims of crime. Social service and public health agencies will play a role in developing and implementing these sentencing strategies, as will law enforcement agencies. But lawyers have the primary responsibility for crafting and administering an effective sanctioning policy, whether it be at the legislative level or in a county prosecutor’s office. The overall goal is to produce sanctions that are more effective for the families and children of criminal offenders, more effective for their communities and for their victims, more effective for the criminal law practitioners who are committed to making the justice system work fairly and efficiently, and more effective in changing the lives of the people we label “criminals.”

II. Policy Recommendations

In exploring what constitutes an effective sanction, we began with the principles enunciated by the Justice Kennedy Commission that:

- (1) Lengthy periods of incarceration should be reserved for offenders who pose the greatest danger to the community and who commit the most serious offenses.
- (2) Alternatives to incarceration should be provided when offenders pose minimal risk to the community and appear likely to benefit from rehabilitation efforts.¹¹

In order to develop a broader perspective on the different “alternatives to incarceration” that might be recommended, the Commission decided to find out what was actually being tried in the field. At hearings in Washington, D.C., and Chicago in the Spring of 2006, we heard from officials from a number of

different state jurisdictions¹² that are experimenting with programs that offer less serious offenders a chance to avoid prison and a conviction record, and with innovative community-based interventions for drug-related crimes. We learned that prosecutors have been particularly effective in many jurisdictions in advocating for diversion and deferred adjudication programs, which enable offenders to avoid incarceration and to be placed under community supervision. Often these programs are focused on individuals with substance abuse problems or mental illness, or both, who need treatment. (A number of these programs are described in the third section of this report.)

But we also learned that neither researchers nor practitioners have reached any firm conclusions about which sanctions or programs reduce recidivism in the most cost-effective manner. The Urban Institute’s Nancy LaVigne testified before the Commission in Chicago about the types of programs that have been shown to result in reduced re-arrest rates, but she cautioned against extrapolating from these results because researchers have found that the effectiveness of particular programs can depend upon unquantifiable variables relating to the administration of the program. In other words, from Ms. LaVigne we learned that some programs have worked in some places, but that the experts are still undecided as to what kinds of programs are most likely to work in all places.¹³

Because of continuing uncertainty about what works to reduce recidivism and what does not, the Commission’s recommendations on alternative sentencing strategies deal as much with process as with the actual content of programs. Our first recommendation is couched in general terms, but is actually aimed at encouraging prosecutors and other criminal justice professionals to take a leading role in developing programs to enable offenders to avoid incarceration and to be placed under community supervision.¹⁴ Our recommendation recognizes that prosecutor-developed programs, which will find widespread community support, are likely to exclude from consideration people charged with certain very serious offenses (“a predatory crime, a crime involving substantial violence, a crime involving large scale drug trafficking, or a crime of equivalent gravity”) as well as those who pose a risk to public safety or whose record makes them otherwise inappropriate for community placement. Offenders who are not charged with one of the excluded crimes, and who are not excluded under one of the other two rubrics, should be eligible for community placement, and for community-based treatment programs, diversion and deferred adjudication.

One of the factors that prosecutors, judges and others involved in making community supervision decisions may take into account is the impact of incarceration on families. The increase in the female prison population in particular poses an increasing risk to family stability, since women are typically

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the caretakers of children.¹⁵ In some cases, incarceration of a parent will have a deleterious effect on children and family relationships, and thus on the community as a whole. Although some children live with a relative during their parent's incarceration, many enter the foster care system because no family member is available to care for them. In many cases it would be better for the children if they could stay in close touch with their caretaker parent in their own community. And, regaining custody of their children and re-establishing family relationships is a major task for women offenders coming home from prison. On the other hand, there may be cases where children would benefit from being separated from an abusive or addicted caretaker parent.

The fact that a community sanction program developed in a particular jurisdiction might be generally designed to exclude those charged with certain kinds of offenses does not mean that a prosecutor could not occasionally choose to seek, or a court choose to impose, a community-based sanction notwithstanding a particular individual's ineligibility for the general program. ABA sentencing policy provides that a prison sentence should be mandated by law for a particular offense only in the narrow circumstances where "the legislature can contemplate no mitigating circumstance that would justify a less restrictive sanction." ABA Standards for Criminal Justice on Sentencing, Standard 18-3.11(c).

Similarly, the provision that generally an offender should be ineligible for community supervision when he/she is not currently on parole or probation, unless the supervising authority specifically consents to community supervision recognizes the practical reality that community supervision is not likely to be available if a parole board or a judge with authority over probation has decided to return an offender to prison or jail. The provision encourages judges to consult with probation and parole officials to determine what sanction for a new offense will best serve the offender while protecting the safety of the community, and recognizes that judges may impose a community supervision sentence when doing so does not result in any conflict between an existing probation or parole status.

The testimony also suggested to the Commission that community-based sanctioning programs will be most effective if they hold out the prospect of the offender's ending up with no criminal record. The collateral consequences triggered by a conviction record make it very difficult for offenders to get a job or housing and, generally, to put their lives back on track after their court-imposed sentence has been served. Sometimes the collateral consequences of conviction are far more severe than the direct ones, and it is therefore of considerable concern to defenders, in assessing whether to recommend a guilty plea to their clients, whether their client will end up with a felony conviction on their record.

Therefore, when a deferred adjudication/deferred sentencing/diversion option requires a defendant to enter a guilty plea as a condition of participation, such programs should also offer the incentive to defendants and their counsel of having the charges dismissed and the record expunged if the terms of probation are successfully completed, so that collateral consequences will not be triggered. Defenders are often placed in a difficult position in counseling their clients about whether to participate in a treatment program. Frequently the terms of probation are quite strenuous, and may include extended periods of time in in-patient drug treatment, and the possibility of failure or drop-out is very real.¹⁶ On the other hand, the possibility that their client could end up with no record of conviction

– and in some jurisdictions no publicly accessible record at all – may make defenders see their way clear to encouraging their clients to enter a plea and get the treatment they need.¹⁷

The Commission urges jurisdictions not to exclude people from consideration for community-based treatment programs solely because they may have more than one conviction, or some history of minor violence. In too many cases, treatment programs are limited, by statute or by policy, to the so-called "non-violent first offender." Anyone who has dealt with addiction and mental illness understands that relapse is a predictable part of getting well, and that slips are to be expected and should be tolerated to some degree. Restricting recovery programs to people who have had no prior run-ins with the law, or who have never gotten into a bar fight or street altercation, is to rule out a large population that could benefit from a second chance. The resolution adopts no exclusionary criteria, but provides instead that a person should be ineligible for community supervision only when his/her offense conduct and/or criminal history makes such a sanction inappropriate.

This permits flexibility and individualized considerations of offenders and the charges brought against them, not ruling out of consideration categorically anyone because of the nature of the offense or the extent of the person's criminal record.

The Commission also heard testimony about the beneficial effects of having law enforcement personnel trained to recognize the signs and symptoms of mental illness in order to facilitate appropriate handling of their cases and, in some instances, to avoid unnecessary arrests. Police are generally the first on the scene when a person with mental illness creates a disturbance or commits a crime; they have the discretion to determine whether to arrest, refer the person to community based treatment services, take other action as might be appropriate. We recommend that all jurisdictions provide this training.¹⁸

The Commission recommends that prosecutors and defenders, in close cooperation with the courts, create working groups that include other stakeholders in the justice system to review, monitor, and improve systemic alternatives to incarceration

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and conviction. The Commission heard from many witnesses that systemic change is necessary, both in the law and in attitudes, and that change comes fastest when all key stakeholders within the criminal justice system work together. Edwin Burnett, Public Defender for Cook County (IL), emphasized the importance of all stakeholders' being at the table in developing the policies in order for them to succeed.¹⁹ This theme was also echoed by District Attorneys Michael Schunk, Multnomah County (OR), and Charles "Joe" Hynes, Kings County (Brooklyn, NY), and others who stated that prosecutors, defenders, and the court system must work collaboratively to reduce recidivism. A good example of such a partnership is the Brooklyn District Attorney's ComALERT (Community and Law Enforcement Resources Together) program, which provides substance abuse treatment and transitional employment and counseling to approximately 1,000 formerly incarcerated inmates each year. When such collaborative working groups meet on a regular basis, they can foster continuous evaluation and improvement of programs, account for a variety of viewpoints, and provide an opportunity to create better working relationships among all participants in the justice system.

III. Field Program Notes and Findings

The Commission's overall impression from the prosecutors, defenders, judges, and corrections officials who appeared before it, is that in most state jurisdictions stakeholders in the criminal justice system are working hard and resourcefully to manage what amounts to a public health crisis. Substance abuse and mental illness eat up the lion's share of criminal justice budgets and skew the priorities of the criminal justice system. Officials from every jurisdiction admitted that an overwhelming portion of their cases involved elements of substance abuse and mental illness. While only 20% of state prison and jail populations are charged or convicted of a drug offense, a much higher percentage of crimes are related to substance abuse. Cook County (IL) Public Defender Edwin Burnett reported that almost 70% of crimes in the county are drug-related, and 82% of those arrested tested positive for drugs. Moreover, jails and prisons have become the institution most likely to house the mentally ill. The Cook County jail holds the largest number of institutionalized mentally ill people in Illinois: 1,000 of the 11,000 people confined there have been diagnosed as mentally ill.²⁰ At the March 31 Commission hearing, Judge Paul Biebel, Presiding Judge of the Criminal Division in Circuit Court of Cook County, testified that 16% to 20% of the Illinois prison population have mental health problems. The Women's Program at the Cook County jail reported that 80% of its clientele have mental health issues, often resulting from abusive family relationships.

While the Commission was impressed and encouraged by the energy and ingenuity of the criminal justice professionals on the front lines, it observed that in some states the legislature has been more helpful than in others in creating a structure conducive to developing community-based treatment programs, and has funded those programs comparatively generously. Arkansas and Connecticut stand out in this category.

Since 1993, Arkansas has had a separate Department of Community Correction that is independent of the state system. In cooperation with the courts, the DCC is responsible

for the administration of several statutory diversion programs that allow certain less serious offenders to avoid a conviction record if they successfully complete a community-based treatment program in one of five Community Correction Centers located around the state.²¹ Any person who is eligible to be placed on probation, or who is given a "judicial transfer" sentence to DCC for a "target offense,"²² may upon completion of probation have the charges dismissed and the record expunged. DCC Director David Guntharpe testified that offenders may be placed in one of several different programs, including community-based residential treatment centers, whose goal is to encourage offenders to change the way they relate to the world around them.²³ Still in its early stages, the residential treatment center program has already resulted in a drop in the recidivism rate among participants from 38% to 31%, and its administrators expect much greater reductions as more personnel are trained.²⁴ DCC also offers non-residential probation services, including community-based substance abuse and mental health treatment services, day reporting centers, intensive supervision, and drug courts.²⁵ Once participants successfully complete their required program, DCC issues a certificate of completion and in addition a draft order to submit to the court to have the charges dismissed. Once the charges are dismissed offenders are eligible to have the record expunged ("sealed"), as long as they have no more than one prior felony, and that prior felony is not a serious violent offense.²⁶ The Arkansas Department of Community Corrections also has a Special Needs Unit for dually-diagnosed offenders who have records of substance abuse, mental health, and/or medical issues. The Arkansas program operates within a therapeutic community model, and it has seen the recidivism rate drop to 25%.

The Arkansas DCC has committed itself to reducing recidivism rates among the population that comes through its programs. Its efforts extend to assisting "graduating" probationers in obtaining an expungement of their criminal record.²⁷ The DCC has evidently been successful in persuading the Arkansas legislature that its efforts to facilitate offender reentry are cost-effective, because it has been generously funded and otherwise supported in its efforts to approach the problem of recidivism in a comprehensive manner. The governor has also been supportive of its efforts, according to Milton Fine, Legal Counsel to Governor Huckabee, who testified to the governor's interest in offender reentry.

Connecticut is another state that has given high priority to the development of community-based alternatives to incarceration. William Carbone, Executive Director of Court Support Services Division in the State of Connecticut Judicial Branch, told the Commission that since the 1980s Connecticut has implemented community-based alternatives so that prison, the most costly punishment option, becomes the option of last resort. The Office of Alternative Sanctions in the Judicial Branch now serves more than 6,000 offenders daily in a statewide continuum of treatment, services and community-based monitoring for both pre-trial and sentenced offenders placed on probation with an annual operating budget of over \$41 million. At each Connecticut court location, offenders are screened to determine if they are appropriate for alternative programming, and the Office of Alternative Sanctions

provides recommendations to the sentencing judge. Programs are designed for first-time offenders, for chronic offenders who would otherwise be faced with a prison term, for substance abusers and those with mental health issues, domestic violence, school violence, and hate crimes. Every court location in the state has access to mental health and substance abuse evaluations and outpatient treatment through a specialized network of advanced behavioral health services.

For Connecticut's more risky and chronic offenders, an Alternative Incarceration Center offers daily group programming for more than 1,200 pre-trial and sentenced offenders in the areas of drug abuse, anger management, employment, and community service. In addition, the Office of Alternative Sanctions has 450 residential treatment beds for offenders in need of inpatient care. The inpatient programs can range from 30 days to over one year, providing services ranging from substance abuse to halfway houses for the youthful offender programs. About two-thirds of offenders successfully completed the programs offered by the Office of Alternative Sanctions, and the programs have been shown to produce lower recidivism rates among their participants.²⁸

In New York and Oregon, prosecutors have taken the lead in developing drug treatment and community corrections programs. The Kings County (Brooklyn, NY) District Attorney's office offers a wide range of rehabilitative and educational programs designed to reduce recidivism and provide the defendant with rehabilitative, educational and service opportunities that will result in a dismissal of the new arrests. District Attorney Joe Hynes has developed numerous programs aimed addressing the underlying issues behind the criminal behavior, such as substance abuse, mental health issues, and lack of job opportunities. Kings County offers felony diversionary programs through the Brooklyn Treatment Court and the Mental Health Court, and many of the programs are available to offenders with prior convictions. The DTAP program (described in the Justice Kennedy Commission Report) specifically targets repeat felony drug offenders who are facing lengthy prison term, and makes exceptions for some violent offenders with the victim's consent.²⁹ The District Attorney's TADD Program (Treatment Alternatives for Dually Diagnosed Defendants) diverts mentally ill persons charged with felonies and misdemeanors from incarceration in all of Brooklyn's criminal courtrooms. Kings County also offers ten diversionary programs and two specialty courts for misdemeanor charges.³⁰ Brooklyn has seen serious crime drop overall by 75% from 1990 to 2005.

The prosecutor's office in Multnomah County (OR) offers the Sanction Treatment Options Progress (STOP) Program to persons charged with criminal possession of relatively small (personal use) quantities of a controlled substance the

opportunity to successfully complete drug treatment and avoid prosecution. Multnomah County District Attorney Mike Schrunk testified that the offender must plead guilty or no contest and meet other eligibility requirements in order to be admitted into the program. The STOP program is typically 12 to 15 months in duration and provides treatment, random drug testing, and regular court appearances before the STOP judge. Upon satisfactory completion of the program, the court will dismiss the charges with prejudice.

The District Attorney's office also sponsors Project Clean Slate, through which offenders who have served their sentence are given an opportunity to have their records expunged by the court. In Multnomah County, expungement requests are brought to the court by the DA's office, and the court generally grants any request upon the prosecutor's recommendation. Mr. Schrunk testified that he regards expungement as a critical service for former offenders, since a conviction record can hinder them in getting jobs and housing.³¹ He recommended

that the Commission advocate for a national standard on record-clearing.

In all of the states that the Commission heard from, prosecutors take advantage of laws that authorize diversion of offenders into probation programs, with the promise of a clear record upon successful completion. In Maryland, prosecutors may allow a defender to obtain "probation before judgment" ("PBJ") to avoid a criminal conviction. The court may defer judgment and place a defendant on probation subject to reasonable conditions, if (i) the court finds that the best interests of the defendant and the public welfare would be served; and (ii) if the defendant gives written consent after determination of guilt or acceptance of a nolo contendere plea.³² If probation is successfully completed, the court discharges the defendant from probation without judgment of conviction, and such discharge "is not a conviction for the purpose of any disqualification or disability imposed by law because of conviction of a crime."³³ The person discharged from probation may also petition the court for expungement of police or court records relating to the charges after a three-year waiting period, as long as

the petitioner has no subsequent offense that involved a possible sentence of imprisonment.³⁴ In addition, under Maryland law, judges have sentence revision authority for five years after imposition of sentence, and may reduce the sentence to "probation before judgment" in order to accomplish expungement of the criminal record. Baltimore States Attorney Patricia Jessamy testified she has available several community corrections programs, including a drug court.

In Michigan, according to Saginaw County DA Michael Thomas, prosecutors are beginning to recognize the importance from a public safety perspective of keeping less serious offenders from going to prison through diversion programs, and of helping those who have gone to prison reenter the

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community. Yet reentry concepts are relatively new ones. Mr. Thomas, who co-chairs the Reentry Committee of the National District Attorneys Association with Ms. Jessamy, noted ruefully that “You have to explain reentry to most prosecutors.”

Kansas recently enacted a drug treatment program for non-violent offenders charged with drug possession, called Senate Bill 123.³⁵ The program provides up to 18 months of drug treatment through state-approved community providers, and subsequent intensive supervision by a probation officer who assists with job training, housing, and other social services. An innovative aspect of Senate Bill 123 is that it recognizes that relapse is a part of recovery, and a person is eligible for the program more than once so long as he or she is charged with a non-violent drug possession offense. One shortcoming of the program is that the offender still ends up with a criminal conviction upon completion of the program. (Kansas does, however, offer judicial expungement to most felony offenders after a waiting period.)

Many jurisdictions have developed diversion programs for mentally ill offenders. The Commission heard from three jurisdictions that have established Mental Health or Community Courts to meet the special needs of mentally ill offenders, Kings County (NY), Cook County (IL), and Multnomah County (OR). The creation of diversion programs is very important to this population because a conviction may render them ineligible for much-needed government assistance programs, such as Medicaid, which compromises their mental health treatment programs.

Community Courts are also being used in many jurisdictions. Multnomah County (OR) established the first Community Court in 1998 to target offenders charged with quality-of-life crimes that diminish citizens’ pride and sense of safety in their neighborhoods. The goal of this court was to provide the offender with underlying services to address the issues that led them into the criminal justice system.³⁶ When a person is arrested for a non-violent, non-traffic misdemeanor or violation, he or she is cited for arraignment in Community Court by the arresting officer. At arraignment, the person may decide to enter the Community Court program or the traditional trial docket. If the person chooses Community Court, a member of the social services team interviews and assesses him or her for social services needs. During assessment, the social services staff may make referrals to social services such as Oregon Health Plan, state public assistance, mental health or drug and alcohol counseling. The Community Court judge receives the social service assessment and may assign the person to social services, community service, or a combination of both as a part of the Community Court sanction. Once the person completes the assignment, the case is closed, and the charges are dismissed.

The Red Hook Community Court in Brooklyn, New York is a shining example of an innovative community based program. Red Hook Judge Alex Calabrese told the Commission how the court was born in response to a community tragedy, the death of a popular school principal in the cross-fire of a drug gang fight. Red Hook is a multi-jurisdictional court where one judge has jurisdiction over all of the issues facing a criminal defendant, including housing and domestic matters. More importantly, the court seeks to address the problems that led to

the defendant’s criminal behavior, which may include addiction, homelessness, lack of education, or mental health issues. A typical sentence may include mandatory drug treatment, job training, adult education classes, community service, or a combination of these services.

One of the pioneering aspects of Red Hook is that it offers people in the community the opportunity to obtain social services even if they are not charged with a crime. Because the court has a single focus, it is able to focus on prevention, by providing social services in order to help troubled young people avoid continued interaction with the criminal justice system. The Red Hook court participates in community outreach, even sponsoring a local youth baseball league. The Kings County District Attorney and the Legal Aid Society both sponsor and coach local teams. Red Hook’s idea of engaging the community to assist with crime prevention and to solve local problems before they end up in court is quite impressive and has made a dramatic change in the attitudes of the community of Red Hook toward the justice system.

CONCLUSION

The testimony taken by the Commission, and its field findings, establishes the beneficial effects, in terms of reducing recidivism, of programs providing alternatives to incarceration and a conviction record. These programs seem to be particularly effective when they are initiated by a prosecutor’s office, or when they are the product of working groups composed of prosecutors as well as defenders. The Commission believes that these programs, whether they are denominated diversion or deferred adjudication or some other name, should be open to all but the most serious offenders. The Commission also believes that if these programs become more widely known they can be emulated to good effect across the country, and that this will not only reduce the prison population but will also reduce the incidence of criminal behavior and enhance public safety.

Respectfully submitted,
Stephen A. Saltzburg, Co-Chair
James R. Thompson, Co-Chair
February 2007

ENDNOTES

1. See, e.g., Marc Mauer, *RACE TO INCARCERATE* at 40-54 (revised and updated, 2006).
2. See, e.g., Douglas Lipton, Robert Martinson, and Judith Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (Praeger Press, 1975). A series of articles in the popular press by Professor Martinson popularized the idea that “nothing works” to reform criminals, and that society’s only hope of reducing crime lies in the deterrent value of harsh prison sentences (or death). See, e.g., Robert Martinson, “The Paradox of Prison Reform,” *The New Republic*, 166, April 1, 6, 15 and 29, 1972; Martinson, “What Works? - Questions and Answers About Prison Reform,” *The Public Interest*, Spring 1974, at 22-54. In 1984, the United States Supreme Court noted that “Rehabilitation as a sound penological theory came to be questioned and, in any event, was regarded by some as an unattainable goal for most cases the trend.” See *Mistretta v. United States*, 488 U.S. 361, 363 (1989), citing Norval Morris, *The Future of Imprisonment* 24-43

(1974), and Frederick Allen, *The Decline of the Rehabilitative Ideal* (1981).”) In upholding the federal sentencing guidelines, which gave little weight to such factors as amenability to treatment, personal and family history, previous efforts to rehabilitate oneself, or possible alternatives to prison, the Supreme Court cited a Senate Report that “recognized that the efforts of the criminal justice system to achieve rehabilitation of offenders had failed.”

3. “In 1999 an estimated 721,500 State and Federal prisoners were parents to 1,498,800 children under age 18.” U.S. Department of Justice, Bureau of Justice Statistics, August 2000, NCJ 182335.

4. The Justice Kennedy Commission analyzed data from a number of state jurisdictions and concluded that “It is not even clear that the increased use of incarceration has enhanced public safety, although lawmakers for twenty years have acted in reliance on the claimed crime-preventive effect of harsh and certain punishments. . . . The numbers do suggest . . . that there may well be an over-reliance on incarceration in some criminal justice systems, and there is reason to doubt whether constantly increasing the use of incarceration is cost effective.” Report of the ABA Justice Kennedy Commission at 20, 21. http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/JusticeKennedyCommissionReports_Final_081104.pdf. See also *Incarceration and Crime: A Complex Relationship* by Ryan S. King, Marc Mauer, and Malcolm C. Young, available at <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>. A report of the Washington State Institute for Public Policy noted that, at least as to incarceration in that state, “Diminishing returns means that locking up the fifth person per 1,000 did not, on average, reduce as many crimes as did incarcerating the second, third, or fourth person per 1,000.” Steven Aos, *The Criminal Justice System in Washington State: Incarceration Rates, Taxpayer Costs, Crime Rates and Prison Economics*, <http://www.wsipp.wa.gov/rptfiles/SentReport2002.pdf> (January 2003).

5. See, e.g., *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney-Lind eds., 2002); Dina R. Rose, Todd Clear and Judith A. Ryder, *Drugs, Incarcerations and Neighborhood Life: The Impact of Reintegrating Offenders in the Community* (Washington, DC: National Institute of Justice 2000); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, in *PRISONS* (Michael Tonry & Joan Petersilia eds., 1999).

6. Justice Kennedy Commission Report, *supra* note 4 at 22. This apparent change in attitude by policy-makers notwithstanding, the most recent Justice Department data shows prison and jail populations continuing to increase, by 2.7% overall between December 2004 and December 2005. See Paige M. Harrison and Alan J. Beck, Bureau of Justice Statistics, *Prisoners in 2005* available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf>

During 2005, the number of inmates in State prisons increased 1.3%; in Federal prisons 5.1%; and in local jails, 4.7%. Overall, the state incarceration rate rose about 14% between yearend 1995 and yearend 2005, from 379 to 491 prisoners per 100,000 U.S. residents. At the same time the federal incarceration rate rose 72%, from 32 to 55 prisoners per 100,000 U.S. residents. The rate of incarceration in prison and jail in 2005 was 738 inmates per 100,000 U.S. residents, up from 725 the year before. At yearend 2005, one in every 136 U.S. residents were in prison or jail. An estimated 12% of black males, 3.7% of Hispanic males, and 1.7% of white males in their late twenties were in prison or jail. A total of seven million people in the United States — one in every 32 adults — were currently serving time in prison or jail, or on probation or parole. See Lauren E. Glaze and Thomas P. Bonczar,

Bureau of Justice Statistics, *Probation and Parole in the United States*, 2005, <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus05.pdf>.

7. Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994*, June 2002, NCJ 193427

8. *Reentry Trends in the U.S.: Success rates for State Parolees*, Bureau of Justice Statistics, available at <http://www.ojp.usdoj.gov/bjs/reentry/success.htm>. See also Amy Solomon, *Does Parole Supervision Work?* at 27 (Urban Institute 2005), citing Glaze, L.E. and S. Palla, *Probation and Parole in the United States*, 2004., Bureau of Justice Statistics Bulletin 2005 (46% of parolees do not complete term successfully)

9. See Jeremy Travis, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* (THE URBAN INSTITUTE, 2005); Joan Petersilia, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (Oxford University Press, 2004).

10. See Joan Petersilia, J. *What Works in Prisoner Reentry? Reviewing and Questioning the Evidence*. Federal Probation. Volume 68, Number 2 (2004), Available at http://www.uscourts.gov/fedprob/September_2004/whatworks.html; Steve Aos, Marna Miller, and Elizabeth Drake, *Evidence-based Adult Corrections Programs: What Works and What Does Not* (2006).

11. Justice Kennedy Commission Report, *supra* note 4 at 9.

12. Witnesses from Arkansas, Connecticut, Maryland and New York (Brooklyn) testified in Washington, D.C. on March 3, 2006. Witnesses from Illinois (Chicago), Kansas, Michigan, and Oregon testified in Chicago on March 31, 2006. Notes from both hearings and a list of witnesses are posted at <http://www.abanet.org/cccs>. Every state delegation included at least one prosecutor (though Arkansas DA H.G. Foster was unable at the last minute to attend the hearing in Washington, and so did not testify in person).

13. For example, while boot camps and other “shock” incarceration programs have generally not been successful in reducing recidivism, the boot camp administered by the Cook County Sheriff’s Office (which several commissioners visited) has a solid record of accomplishment, possibly because of the continuity of services after “graduation” and sustained aftercare in the community. According to Ms. LaVigne, long-term residential drug treatment programs that are based on a therapeutic model (such as the Brooklyn DTAP program and the Arkansas Community Correction Centers described *infra*) have been shown to be quite successful in dissuading individuals from criminal activity. Most diversion programs, including drug courts, have not been subjected to rigorous social science analysis because of the difficulty of collecting data on participants. Faith-based programs have been particularly difficult to study because of the absence of data.

14. We use the term “incarceration” to refer to a secure jail or penitentiary-like environment, in contrast to “community supervision,” which refers to a range of community-based custodial options (including half-way houses, community corrections centers, drug treatment facilities, and even home detention), which permit sentenced defendants (or defendants who have been deferred to probationary status) to remain connected to their own communities and families, even if they are not entirely free to come and go at will. The term “imprisonment” is often used more broadly to refer to both incarcerative and community-based custodial placements. See, e.g., Todd Bussert, Peter Goldberger, and Mary Price, “New Time Limits on Federal Halfway Houses: Why and how lawyers challenge the Bureau of Prisons shift in correctional policy and the courts’ response,” *Criminal Justice Magazine* (Spring 2006) (describing litigation over efforts by the federal correctional authorities to limit their own ability to designate sentenced offenders to community corrections centers as “places of imprisonment” under 18 U.S.C.

33621(b)). The ABA has found “troubling” BOP’s efforts to impose regulatory limits on its own ability to designate sentenced offenders to community corrections centers, in light of contrary judicial holdings, and in light of the government’s stated commitment to facilitate offender reentry. See Letter to the Bureau of Prisons Rules United, dated October 15, 2004, from James Felman and Todd A. Bussert, co-chairs of the ABA Criminal Justice Section’s Corrections & Sentencing Committee.

15. Ann Jacobs, Director of the Women’s Prison Association, comments in her introduction to a new study of women in prison that “The cycling of women through the criminal justice system has a destabilizing effect not only on the women’s immediate families, but on the social networks of their communities. They are, more often than not, primary caretakers of young children and other family members.” Introduction to Natasha Frost, Judith Greene and Kevin Pranis, *The Punitiveness Report - Hard Hit: The Growth in Imprisonment of Women, 1977-2004* (2006), available at <http://www.wpaonline.org/institute/hardhit/foreword.htm>. This recent study tracks changes in the incarceration rate of women between 1977 and 2004, a period in which the number of women serving sentences of more than a year grew by 757% — nearly twice the 388 percent increase in the male prison population. Most of the increase can be accounted for by the drug war: the percentage of women serving time for drug offenses grew from 11% in 1979 to 32% in 2004. In most cases. Women arrested for involvement in the drug trade tend to play peripheral or minimal roles, selling small amounts to support a habit, or simply living with intimates who engage in drug sales. Lenora Lapidus, Namita Luthra & Anjali Verma, Deborah Small, Patricia Allard & Kirsten Levingston. *Caught in the Net: the Impact of Drug Policies on Women and Families*. Available at <http://www.fair-laws4families.org/> A second volume of the study will look more deeply at factors that increased the risk of imprisonment for women arrested for felony offenses and increased the amount of time spent behind bars.

16. Lisa Schreibersdorf, Executive Director of the Brooklyn Defenders Office, reminded the Commission that constitutional safeguards must always be observed when an alternative therapeutic program is being developed. Confidentiality must be protected in these programs when clients are provided counseling and other services, and attorney consent should be received before a client is interviewed. Also, the constitutional right against cruel and unusual punishment must be monitored by courts, because the practices of some programs could amount to violation of defendants’ constitutional rights.

17. Some defenders are reluctant to counsel their clients to plead guilty if there is a reasonable chance they can win an acquittal, even if it is evident that the clients are in need of drug treatment or other intervention to help them from coming back into the justice system. A program that offers the possibility of complete expungement at the end may present to a conscientious defender an offer that tips the balance in favor of treatment.

18. Judith Rossi, Connecticut Executive Assistant States Attorney, highlighted in her testimony before the Commission the Memphis Police Crisis Intervention Team (“CIT”) as an example of a law enforcement agency that has specially trained officers to provide an immediate response to a crisis involving mentally ill people. The officers in this unit are trained to interact with the mentally ill, defuse potentially volatile situations, assess medical information, and evaluate the individual’s social support system. The CIT program transformed the traditional enforcement-oriented police response to the mentally ill to one that is both more effective and more humane. As a result, arrests and use of force in dealing with mentally ill offenders has decreased dramatically. See <http://www.memphispolice.org/Crisis%20Intervention.htm>.

19. March 31 Hearing Notes available at <http://www.abanet.org/cecs>.

20. *Mentally Ill Offenders in the Criminal Justice System: An Analysis and Prescription*, The Sentencing Project (2002), <http://www.sentencingproject.org/pdfs/9089.pdf>.

21. See, e.g., the legislative findings of the Community Punishment Act of 1993, Ark. Code Ann. §16-93-1201 et seq.: “The State of Arkansas hereby finds that the cost of incarcerating the ever-increasing numbers of offenders in traditional penitentiaries is skyrocketing, bringing added fiscal pressures on state government, and that some inmates can be effectively punished, with little risk to the public, in a more affordable manner through the use of community correction programs and nontraditional facilities.” Ark. Code Ann. §16-93-1201(a).

22. Ark. Code Ann. §16-93-1207(b)(1)(A)-(C). Under Ark. Code Ann. §16-93-1202(j)(1)(A), “target group” means a group of offenders and offenses determined to be, but not limited to, theft, theft by receiving, hot checks, residential burglary, commercial burglary, failure to appear, fraudulent use of credit cards, criminal mischief, breaking or entering, drug paraphernalia, driving while intoxicated, fourth or subsequent offense, all other Class C or Class D felonies which are not either violent or sexual and which meet the eligibility criteria determined by the General Assembly to have significant impact on the use of correctional resources, Class A and Class B controlled substance felonies, and all other unclassified felonies for which the prescribed limitations on a sentence do not exceed the prescribed limitations for a Class C felony and that are not either violent or sexual.

23. The residential programs are organized on a therapeutic model, and offer structure, supervision, drug/alcohol treatment, educational and vocational programs, employment counseling, socialization and life skills programs, and other forms of treatment and programs. When an offender is assigned to a community-based correctional center the treatment focus is a multi-level approach designed to re-socialize the pattern of thinking and behavior, and the goal is for pro-social choice and actions to become automatic and reflexive for the offender. To achieve the desired re-socialization, the residents are taught new concepts, new values, and rules of expected conduct. The program also provides substance abuse treatment. Another key aspect of the program is peer mentoring. Through peer mentoring, offenders are able to see another person with similar circumstances living a new way of life.

24. Prior to DCC moving to the therapeutic community concept, the DCC conducted a 3-year recidivism study of 322 residents released from community corrections centers between March 1995 and March 1998. Results indicate a composite recidivism rate of 38% for the 3 year period. Another study was conducted of 900 randomly selected male and female offenders released from the CCC which operated in the therapeutic community environment prior to March 1, 2000 and yield a 38% recidivism rate.

25. Arkansas Department of Community Corrections supervises 28 drug courts, which are usually post-adjudication courts that handle probation cases involving drug addicted offenders through intense supervision, monitoring, and treatment programs. Successful completion of the drug court can result in the dismissal of charges, reduced or set aside sentences, lesser penalties, or a combination of these. Generally, a post-adjudication drug court program lasts for an average of twelve months with a 2 year strictly supervised probation aftercare program.

26. See Ark. Code Ann. §§ 16-90-901 through 16-90-905. One reported shortcoming of the Arkansas diversion programs is that the state police and other record-retention agencies are not properly updating the records to reflect the dismissals and expungements, so that offenders are facing challenges in explaining arrest record to employers even if

no conviction is listed in the system. Public Defender Commission Director Didi Sallings told the Commission that many offenders are in need of legal assistance in expunging criminal records, and that the state public defender commission is seeking additional resources to provide these services.

27. David Guntharpe testified that his legal staff had recently discovered a little-known Arkansas statute that allows probationers who have successfully completed all of the terms of their probation to petition the court to dismiss the charges against them and expunge the record. Under Ark. Code Ann. § 5-4-311(a) and (b), probationers for whom a judgment of conviction was not entered, including those who went to trial, are entitled to apply to the sentencing court upon completion of supervision for an order dismissing the charges, and “expunging” the record. Understanding that many of the people supervised by his agency do not have the means to hire a lawyer and go to court, Mr. Guntharpe directed his staff to prepare a model petition form to give to each probationer as he or she “graduates,” so that they can easily file the form with the court and obtain expungement. A person whose record is expunged “shall have all privileges and rights restored, shall be completely exonerated, and the record which has been expunged shall not affect any of his civil rights or liberties, unless otherwise specifically provided for by law.” § 16-90-902(a). Upon the entry of the order to seal, the underlying conduct “shall be deemed as a matter of law never to have occurred, and the individual may state that no such conduct ever occurred and that no such records exist,” including in response to questions. § 16-90-902(b).

28. A 1990 University of Connecticut study compared offenders placed in alternative programs with a control group of incarcerated offenders, and concluded that offenders placed in alternatives had substantially lower rearrest rates; the best rates involved the youngest offenders where the rate differentials were 3 to 1. An investigation by the Connecticut General Assembly’s Legislative Program Review and Investigations Committee found in 2005 that two-thirds of the offenders in the Alternative to Incarceration network had not recidivated at the one-year follow-up point. Another study of Connecticut alternative programs, conducted by Justice System Assessment and Training consulting firm from Boulder, Colorado, found that 72% of program participants had not recidivated during the 14 month follow-up period. Domestic Violence (“DV”) offenders have even promising figures with 90% not being rearrested for a DV offense and 75% not rearrested at all for any offense, according to a 2005 National Institute of Justice funded study.

29. The National Center on Addiction and Substance Abuse at Columbia University (CASA) conducted an extensive study of the DTAP

program, and concluded that the average cost of placing a participant in DTAP, including drug treatment, vocational training and support services was \$32,975 as compared to an average cost of \$64,338 if the participant had been placed in prison. See *Crossing the Bridge: An Evaluation of the Drug Treatment Alternative-to Prison (DTAP) Program* (March 2003).

30. Misdemeanor diversionary programs include: TIP (2 day drug awareness program); STOP LIFT (shoplifting awareness program); TASC (inpatient/outpatient drug treatment); KCDA AA (10 week alcohol program); Driver Improvement (Driver Safety Course); Community Service (defendants sentenced to perform work in the community); Mental Health Diversion (immediate treatment offered at night arraignments to non-violent minor offenders with mental illness); Project Respect (provides education for those arrested for patronizing prostitutes); STARS/EPIC- Intensive multidiscipline treatment/assistance/counseling for prostitutes; YCP (Faith-based youth mentoring) YCP and TASC are also available to felons. In addition, misdemeanor drug court, domestic violence court and a community court also provide diversionary programs.

31. Or. Rev. Stat. § 137.225(1) through (12) authorizes sentencing court to “set aside” misdemeanors and minor felonies (Class C, except sex and traffic offenses, and some other minor crimes). Upon application, order must issue unless the court makes written findings by clear and convincing evidence that granting the motion would not be in the best interests of justice. § 137.225(11). A set-aside restores all rights and relieves all disabilities – conviction deemed not to have occurred. “Upon entry of such an order, such conviction, arrest or other proceeding shall be deemed not to have occurred, and the applicant may answer accordingly any questions relating to their occurrence.” Or. Rev. Stat. § 137.225(4).

32. Md. Code Ann., Crim. Proc. §6-220(b)(1).

33. Md. Code Ann., §6-220(g).

34. Md. Code Ann., §§10-105(a)(c)(2)(ii). A PBJ record that has been expunged may be opened only upon court order, with notice to person concerned and a hearing, or upon ex parte application by the states attorney and a showing of good cause. § 10-108(a) through (c). PBJ conviction that has been expunged need not be reported, § 10-108, and an expunged conviction may not be used to deny employment or licensure. § 10-109. A PBJ sentence, if expunged, may not be used to enhance subsequent sentence. See *U.S. v. Bagheri*, 999 F.2d 80 (4th Cir. 1993).

35. March 31 Hearing Notes, available at <http://www.abanet.org/cecs>.

36. <http://www.co.multnomah.or.us/da/cc/faq.php#30>

REPORT TO THE HOUSE OF DELEGATES ON IMPROVEMENTS IN PROBATION AND PAROLE SUPERVISION

MIDYEAR MEETING, 2007

RECOMMENDATION

RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to develop and implement meaningful graduated sanctions for violations of parole or probation as alternatives to incarceration. Incarceration may be appropriate when:

- i) an offender commits a new crime or engages in repeated violations;
- ii) lesser sanctions, including appropriate treatment options, have not been effective; or
- iii) the offender poses a danger to the community.

In those cases where an individual is sent to jail or prison as a sanction for a violation of probation or parole, the period of incarceration should be that reasonably necessary to modify the individual's behavior and deter future violations.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to distinguish between probation/parole violators who would benefit from community supervision and those who would not, and to deploy community supervision resources accordingly.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to provide adequate resources and funding to ensure that the quality and intensity of supervision for offenders is significantly increased. Manageable case-loads for probation and parole officers ensure that sanctions imposed in lieu of incarceration are meaningful; reduce the likelihood of recidivism; and increase the chances for successful rehabilitation.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments, to create standards for the performance of probation or parole officers that will consider, in addition to other appropriate factors, the number of individuals under an officer's supervision who successfully complete supervision, as well as those whose probation or parole is appropriately revoked, taking into account the nature of the officer's caseload.

REPORT

Parole and probation supervision is an important part of any discussion of sentencing alternatives and recidivism. The number of people returned to state prison for a parole violation increased sevenfold between 1980 and 2000, from 27,000 to 203,000, and parole violators now account for more than one third of all prison admissions.¹ Almost half of all parolees return to prison or jail within 24 months of their release.² As prison populations grow and increasing numbers of offenders are released on parole, it is not surprising to find some increase in parole violations. But, the magnitude of the numbers involved suggests that substantial resources are being devoted to identifying every violation of parole conditions and to making revocation the preferred sanction for all violations. There is a growing body of evidence suggesting that this practice results in an expenditure of resources that does not improve public safety. Indeed, a recent study by the Urban Institute calls into question the extent to which parole and probation supervision, as currently administered, is effective in reducing recidivism rates or otherwise enhancing public safety. The study found that offenders under supervision are re-arrested for new crimes at about the same rate as offenders released unconditionally.³

In 2004, the Justice Kennedy Commission recognized the enormity of the problem raised by the state of parole and probation supervision in this country. The revolving door in which inmates were released to the community and returned to prison for minor violations of their release conditions was most evident in California, where the cost of incarcerating parole violators was estimated at \$900 million. In the words of California's Little Hoover Commission, "California has created a revolving door that does not adequately distinguish between parolees who should be able to make it on the outside, and those who should go back to prison for a longer period of time."⁴ But this problem is not unique to the state of California, and parolees and probationers account for a majority of prison admissions in most states. Moreover, of the parole violators returned to prison, more than two-thirds were incarcerated for a violation of the conditions of their release, rather than commission of some new criminal violation.⁵

It became abundantly clear to the Commission in the course of our hearings that parole and probation supervision is a critical part of the recidivism puzzle, for two reasons: first,

probation and parole agents exercise tremendous discretion through their revocation power in deciding whether an offender has violated conditions of supervision in the first place, and whether an offender should be returned to prison. Second, probation and parole agents are in a position to play a key role in assisting people returning home from prison to readjust to the community and stay out of trouble. Many jurisdictions are re-evaluating their approach to offender supervision and realizing that the successful reintegration of the offender must be a primary goal of community supervision. Offenders who successfully rejoin the community are less likely to commit future crimes than offenders who fail. The bottom line is that reintegration of offenders promotes public safety and should therefore be the primary goal of any system of community supervision.

The policy recommended by the Justice Kennedy Commission, subsequently adopted by the ABA House of Delegates, was that jurisdictions should develop graduated sanctions for probation and parole violations, and reserve incarceration for cases where “a probation or parole violator has committed a new crime or poses a danger to the community.” The Commission reaffirms this position, and makes several further recommendations to make parole and probation systems more efficient and more likely to promote public safety. First, jurisdictions should continue to develop meaningful graduated sanctions for violations of parole or probation, as recommended by the Justice Kennedy Commission, as an alternative to incarceration. They should not return an offender to prison for a violation of the conditions of release, unless that individual has committed a new crime, engaged in repeated violations, lesser measures have been unsuccessful, or the offender poses a danger to the community.⁶ A brief period of re-incarceration in a community custody facility may benefit a parolee who is having difficulty adjusting to freedom. But an automatic return to the penitentiary for violations that do not amount to a crime, without addressing the reasons for the non-compliance, is unlikely to be beneficial to the individual, is costly, and may actually be harmful to the community in the long run. The Urban Institute study found that parolees returned to prison for the remainder of their sentence for minor violations, and finally released without supervision, were more likely to be re-arrested for a new crime than any other release group.⁷

Ordinarily, less serious violations of the terms of supervision can be better addressed through community-based sanctions other than incarceration that focus on the reasons for non-compliance, because many violators suffer from treatable issues such as substance abuse, mental illnesses, or lack of life skills that could be remedied through treatment services. The Commission heard testimony from many witnesses that parolees and probationers will often slip up several times before they

adjust, particularly where they have a substance abuse problem. It concluded therefore that a return to prison will be appropriate only where an individual engages in repeated violations and lesser sanctions, including appropriate treatment options, have not been effective. In cases where imprisonment must be used as a sanction, the length of incarceration should be determined by what is reasonably necessary to modify the individual's behavior and deter future violations.⁸ If incarceration is deemed appropriate at all, a short-term return to jail will often be more useful than a return to the penitentiary.

A second way that jurisdictions can improve their proba-

tion and parole systems is to distinguish between offenders who would benefit from community supervision and those who would not, and to deploy community supervision resources accordingly. The ultimate goal of preventing re-offending, breaking substance abuse habits, and, in the end, changing parolees' lives for the better is elusive for many parole and probation officers because of the everyday realities of high caseloads and lack of resources. A study of reentry policies published by the Council of State Governments reported that parole officers' caseloads may average 70 parolees each, translating to one or two 15-minute meetings a month.⁹ Probation caseloads are even larger, averaging roughly 130 probationers per officer. And, these numbers are on the low-end for many jurisdictions. While lower caseloads do not ensure success, such high caseloads make it virtually impossible for the parole officer to address the needs of the offender. It is not surprising, in the view of the poor preparation that most prison inmates receive for their release and the lack of support services

available to them in the community to assist with reentry, that many who are released on parole may find adjustment to freedom difficult. And once they are faced with these challenges, it is virtually impossible to receive the support needed during “15-minute visits” with their parole officers.

Research has shown that the first weeks after an offender's return to the community are critical. It is this period in which offenders require additional support in order to ensure that they do not slip back into old patterns of criminal behavior.¹⁰ The Commission recognizes that additional resources may not be available to provide additional assistance during the early weeks of supervision. However, it is imperative that existing resources be allocated so that offenders who need the most help get it. Research has shown that some offenders do not need intensive supervision and may be better off without any at all.¹¹ If resources were targeted to high-risk offenders who evidently need assistance in adjusting to release, especially in the first weeks of supervision, overall caseloads could be reduced. Reduced caseloads may actually result in fewer violations, since parole and probation officers will be focusing their efforts on offenders who pose the greatest risk of returning to

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criminal behavior. Success with these individuals holds out the promise of reducing overall recidivism and promoting public safety.¹² The goal is to significantly increase the quality and intensity of supervision so that sanctions imposed in lieu of incarceration are meaningful, thereby increasing the chances for successful rehabilitation while reducing the likelihood of recidivism.

A third way jurisdictions can improve their parole and probation systems is to change the way probation and parole agencies perceive their role in offender supervision and the way in which probation and parole officers are themselves evaluated. In recent years, some parole and probation officers have come to view themselves as functioning in a law enforcement rather than social service capacity, and see themselves as adversaries of rather than mentors to an offender. This perception produces a mode of performance that is more oriented toward surveillance than assistance. Officers work to catch an offender in some act of disobedience and are unwilling to tolerate the predictable slips that accompany adjustment, particularly where substance abuse is involved. In too many jurisdictions, probation and parole officers play the role of enforcer, identifying with the police more closely than with community institutions that might offer support to an individual trying to stay out of trouble.¹³ This culture is reinforced when job performance is measured by the number of parole and probation revocations issued and the number of people sent to or returned to prison.

If parole and probation officers are empowered and encouraged to utilize sanctions other than outright revocation when offenders violate the conditions of supervision, if they are permitted to focus their energy on offenders who need the most help, and if an important factor in assessing the performance of officers is their success in helping offenders reintegrate, there is a greater opportunity to enhance public safety by enabling offenders to overcome addictions, find housing, receive job training and placement assistance, and other services. Public safety must remain the central responsibility of parole and probation agencies, but it is not enhanced by taking offenders whose behavior could be modified and recycling them in and out of prison without providing them the tools they need to change. When offenders successfully transform their lives, they are by definition no longer a threat to the community.

The Commission heard testimony about encouraging changes beginning in the culture of parole boards to meet the new understanding of the ways in which successful reentry enhances community safety. Jorge Montes, Chair of the Illinois Prisoner Review Board, testified at the Commission's March 31 hearing that when he joined his Board in the 1990s, it tended to view parole enforcement in black and white terms, and to treat any violations with zero tolerance.¹⁴ He shared the story of one young man who appeared before him at a parole revocation hearing. This parolee was required to stay within a certain geographic area as a condition of his release, which was monitored by an electronic device. His parole was revoked because he strayed outside of the allowed area for a period of thirty minutes. The young man explained to Montes at his hearing that he had been driving home from work and gotten a flat tire, and had been forced to detour from

his regular path in order to get assistance. After hearing this story and considering other factors, such as the fact the young man maintained full time employment and was the sole provider for his family of three children, Montes refused to revoke his parole. However, Montes' colleagues at the parole board did not agree with his decision and voted to override his decision. Fortunately, Montes was able to convince his colleagues to re-consider their vote. But for Montes the original and the reversed decisions illustrated the difference between the old and new approach to parole revocation in Illinois.

Mr. Montes testified that he has been committed to changing the culture at the Illinois Prisoner Review Board throughout his tenure as Chair of the Board. He pointed out that when he first joined his board, none of its members had been trained on issues related to offender reentry and alternatives to incarceration. The members did not feel that the personal issues facing offenders under their supervision were any of their concern, and failed to appreciate that successful re-entry of offenders was a critical link to sustaining public safety. Montes testified that the culture of the Illinois Board began to change in 2002, when board members were required to consider the impact of their decisions on the recidivism rate. The Board realized that it was not a law enforcement agency and should be addressing offender re-entry and recidivism. As in many other jurisdictions, the traditional approach is changing as parole agencies realize that they have a stake in successful reentry, and work to help the parolee contribute positively to their community.

The Illinois Prisoner Review Board is also instituting new programs to handle parole revocation cases more efficiently, so as to avoid unnecessary incarceration. Through this new program, parole revocation cases are reviewed during initial jail intake to determine if there are alternative programs available in the community as opposed to incarceration. If alternative programs are available, then the detention hold is lifted and the person is released under community supervision.

Some of the other states whose officials testified have also begun taking a new approach to parole violators. The Arkansas Department of Community Correction instituted a formal Technical Violators ("TV") Program two years ago, which provides community based treatment services to parole violators for a period of 30 to 90 days as a prison alternative sanction.¹⁵ The TV Program is an intensive residential program followed by aftercare under community supervision. A resident completes the following stages of the program:

- Intake: a three day processing period.
- Orientation: a five day period where resident receives an overview of the purpose and structure, rights and responsibilities, assessment of factors contributing to violations, and strategy developments for compliance through treatment. This phase includes a counselor and may include a supervising parole/probation officer.
- Treatment: a four to five week period devoted to fulfilling the treatment plan requirements.
- Pre-Release: the last three weeks of confinement include activities and classes focusing on transition and practical matters associated with relapse prevention and increased parole/probation officer involvement.

Throughout the entire program, the parole/probation officer maintains contact with the offender at least once a day, either through a personal visit or telephone call. This contact fosters a continuous relationship between the offender and the parole/probation officer, demonstrates the officer's interest in the offender's progress, and allows discussion of aspects of the parole plan for release.

The Arkansas Technical Violators program began two years ago with female offenders. To date, only 14% of the participants have committed new crimes and been sent back to prison. In March 2005, a new 300-bed program for men was started, and in its first year 1200 people have gone through centers with only 2% of the participants returning to prison. This program serves as an inspiring example of how recidivism rates can be lowered by addressing the causes of non-compliance with the terms of supervision through therapeutic methods.

Connecticut also has an Offender Re-entry and Technical Violations Program to reduce parole and/or probation violations.¹⁶ Connecticut understood it had a problem when it was incarcerating over 2,000 people on non-criminal violations each year, and instituted reforms to prevent re-incarceration by intervening and assisting offenders who are violating their terms of release and are on the brink of returning to prison. The offender is referred to a special probation unit, where each officer has only 25 cases and is able to devote additional time and resources in assisting the offender with the issues relating to their non-compliance.

In addition, Connecticut began a Probation Transition Program in October 2004 to prepare offenders for community supervision prior to release. The program educates inmates on how to successfully work with community supervision officers. Probation officers meet with clients 90 days prior to their projected release date, to explain the terms and conditions of release and to develop a re-entry plan. The probation officers assigned to this program only have 25 cases and are able to devote more time to each client during the offender's initial transitional phase from prison. Offenders remain in this program for a four month period after release, and then their cases are transferred to a traditional probation officer who has a much heavier caseload. This program has proven successful; a study conducted by Central Connecticut State University indicated a nearly 40% reduction in non-criminal violations among participants in the transition program as compared to a matched control group. The key to this program's success seems to be its provisions of additional support for the critical months just after release, when the danger of recidivism is greatest.

Both Georgia and Ohio have taken a different approach, offering "incentive" programs centered around rewards for good behavior and program accomplishments. The Georgia Parole

Board's Behavior Response and Adjustment Guide describes different levels of suggested responses ("incentives") for positive accomplishments by parolees. Low-level incentives include verbal recognition, a letter of recognition, a certificate of completion, or a 6-month compliance certificate. Medium-level incentives include a one-year compliance certificate, Mr./Ms. Clean Award, supervision level reduction, or reduced reporting requirements. The high-level incentives might include a commutation recommendation, cognitive skills graduation, lifestyle commitment award, or reduced reporting.¹⁷ The State of Ohio created a similar program through the Supervision Accountability Plan, which provides incentives to offenders for compliance and successful reintegration.¹⁸ These programs aim to encourage parole compliance by re-enforcing

and rewarding the accomplishments of offenders under their supervision, rather than punishing their small and predictable failures.

Each of these states has taken a different approach to dealing with parole violations, but all recognize the need to provide additional support to some offenders during the re-entry process. Both the Arkansas and Connecticut programs address the reasons for non-compliance rather than incarcerating parolees without any treatment. Connecticut's reduction of its parole and probation caseloads improved the quality and intensity of supervision, and lessened the likelihood of parole revocations. In most jurisdictions, high caseloads make it virtually impossible for probation and parole officers to provide offenders with the level of services needed to both assist with reentry and to ensure public safety. But states are coming to appreciate that incarceration is the most costly form of punishment to both society and the offender, and it should be used as a sanction only after all other remedies are exhausted or when the offender poses a threat to the community.

Some of the success of these reforms may be facilitated by extrinsic considerations peculiar to the states themselves.

Both Arkansas and Connecticut are relatively small states, and both administer their community corrections programs on a centralized basis. Both have had a good deal of success in convincing the state legislature that money is well spent on reentry programs, both in short run prison savings, and in longer range community stability as prisoners return and reestablish themselves with their families. Both collaborate with a centralized public defender system and, in Connecticut, a centralized appointed prosecutor staff. In Arkansas, the Community Corrections Department is independent of the prison system, and has the ear of the governor. Both the Georgia and Ohio Parole Boards have had strong and forward-looking leadership in recent years. It is harder to imagine accomplishing these kinds of reforms in states where community supervision is

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handled at the county level, where the political establishment still believes that locking people up is the way to make communities safer, and where funds are allocated accordingly.

Discussions with the National District Attorney's Association led the Commission to emphasize that different jurisdictions will find different ways to improve the quality of supervision and the performance of probation and parole officers. In each jurisdiction, it is important that standards be set for probation and parole officers that recognize that they are responsible for protecting the community and for facilitating successful re-entry. It would be undesirable for a jurisdiction to measure the performance of officers solely on the basis of the number of individuals whose probation or parole was revoked, or on the number of offenders who completed probation or parole without being revoked. There is nothing commendable about a system that revokes individuals unnecessarily and imposes the costs of jail or prison on them and the community while depriving them of the services and resources that might enable them to successfully complete probation or parole. Similarly, there is nothing commendable about a system that encourages officers to let offenders remain in the community when they pose a danger to public safety. Each jurisdiction ought to encourage its officers to find the right balance and to use meaningful graduated sanctions to encourage successful re-entry while simultaneously protecting community safety. This means that officers should be encouraged and trained how to decide when to revoke the probation or parole and for how long (i.e., for periods that are reasonably necessary to modify the individual's behavior and deter future violations), and when to use graduated sanctions that permit an offender to remain free from jail or prison and to learn from his/her mistakes. The goal is to reward officers for making the best decisions from the standpoint of the community and the offender.

Respectfully submitted,
Stephen A. Saltzburg, Co-Chair
James R. Thompson, Co-Chair
February 2007

ENDNOTES

1. Jeremy Travis & Sarah Lawrence, *Beyond the Prison Gates: The State of Parole in America* at 21, The Urban Institute Justice Policy Center, November 2002, available at http://www.urban.org/UploadedPDF/310583_Beyond_prison_gates.pdf.

2. *Reentry Trends in the U.S.: Success rates for State parolees*, Bureau of Justice Statistics, available at <http://www.ojp.usdoj.gov/bjs/reentry/success.htm>. See also Amy Solomon, *Does Parole Supervision Work?* at 27 (Urban Institute 2005) (available at http://www.urban.org/UploadedPDF/1000908_parole_supervision.pdf) citing Glaze, L.E. and S. Palla, *Probation and Parole in the United States*, 2004., Bureau of Justice Statistics Bulletin 2005 (46% of parolees do not complete term successfully).

3. Amy Solomon found that mandatory parolees released conditionally were re-arrested at approximately the same rate as prisoners released unconditionally, without supervision. Solomon, note 2 *supra*. Discretionary parolees released conditionally under supervision (who, unlike mandatory parolees, have been the subject of a discretionary parole board decision that they are ready to return to the community) were somewhat less likely to be rearrested, but the difference is relatively small.

4. Little Hoover Commission, *Back to the Community: Safe and*

Sound Parole Policies, Executive Summary, at i (November 2003). In her recent study of the California correctional system, Joan Petersilia describes the parole system in California as a "nonstop game of catch-and-release," in which 66% of parolees were back behind bars within three years, 27% for a new crime, and 39% for a "technical" parole violation. Joan Petersilia, *Understanding California Corrections* at 71 (California Policy Research Center, 2006), citing Ryan Fischer, *Are California's Recidivism Rates Really the Highest in the Nation? It Depends on What Measure of Recidivism You Use*, UCI Center for Evidence-Based Corrections, Irvine, California, Vol. 1, September 2005. Available at <http://ucicorrections.seweb.uci.edu/>. California's abscond rate of 17% is the highest of any state in the nation, and far above the national average of 7%. Professor Petersilia echoes the concerns of other criminal justice researchers that the misallocation of community supervision resources is one cause of this problem: many high-risk offenders on parole receive too little monitoring while many non-dangerous offenders stay on parole too long, so that sooner or later they will be caught up in some trivial indiscretion and sent back to prison. Also, the lack of treatment resources provided by community supervision agencies can result in high re-incarceration rates. For example, California routinely orders near-universal drug testing for all parolees, although two-thirds of them have substance abuse histories and only 2.5% receive any professional drug treatment while in prison, compared to a national average of 19%. *Id.* at 41. See also Petersilia and Weisberg, *Parole in California: It's a crime*, Los Angeles Times, April 23, 2006, available at <http://www.latimes.com/news/opinion/commentary/la-op-petersilia23apr23,1,3727887.story>. Thus, parolees invariably fail the test which results in a violation and a return to prison. The state should either provide more drug treatment in prison, or less testing in the community, or at least a more flexible approach to test failures.

5. Travis, *et al. supra* note 1 at 22, citing U.S. Department of Justice, Bureau of Justice Statistics, NCJ178234. Typical noncriminal violations of parole involve the obligation to report regularly to a parole officer, keep a curfew, stay within a particular geographic area, avoid the use of drugs and the company of known felons, and participation in treatment programs. A violation of any of these conditions can result in revocation of parole or probation and incarceration. In some cases a system may use the revocation violation process as a short-cut administrative route, including its lower standard of proof, to return people to prison who are alleged to have committed serious new crimes. See, e.g., Joan Petersilia, *Understanding California Corrections*, *supra* note 4 at 73 ("California uses technical violations to address a wide range of serious criminal behavior that other jurisdictions would handle through re-arrest and prosecution.").

6. The Commission is aware of the criticism leveled at the California parole system, and does not endorse routine use of an administrative recommitment process, with its less adversarial process, lower burden of proof, and shorter periods of commitment, to address serious new crimes committed by parolees. See Petersilia, *supra* note 4 at 73-75.

7. Solomon, *supra* note 3 at 33. A recent study released by The Women's Prison Association found that

Supervision conditions set by probation and parole authorities can scuttle a woman's best efforts to comply with an overload of rigid rules and requirements. Policy changes designed to reduce technical violation rates, such as the use of intermediate sanctions, should have favorable results for women, since many are revoked to prison for violations of community supervision requirements related to substance abuse or conflicts between reporting requirements and family responsibilities.

Hard Hit: The Growth in Imprisonment of Women, 1977-2004 (2006)

8. The Commission considered and rejected a proposal to recommend that “offenders under community supervision should be sent or returned to prison only as a last resort, and generally only upon commission of a new crime that would warrant incarceration if committed by someone not subject to conditional release.”

9. *Report of the Re-entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community* (Council of State Governments) at 372, available at <http://www.reentrypolicy.org/rp/AGP.Net/Components/DocumentViewer/Download.aspx?DocumentID=1152>.

10. *Report of the Justice Kennedy Commission* at 82. Available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>

11. See Petersilia, *supra* note 4 at 70:

For some inmates, who are unlikely to reoffend and pose a low safety risk to the community in any case, this type of arrangement [minimal supervision] may be just fine—except in that case it is not clear why the State of California should bother keeping them on parole. For other, more risky inmates, the abrupt reintegration into wholly unstructured life is likely to spell trouble. In those cases, allocating resources for more intensive parole supervision could help prevent problems before they start.

Professor Petersilia reports that only one in five California parolees supported themselves through money earned from employment during their first year after prison release:

Work that is available to parolees is often unskilled, with restricted opportunities to advance or to assume a supervisory role, and it therefore often provides a minimum-wage salary that supports a subsistence-level existence. . . . Unfortunately, the potential for material gain through criminal behavior looks more realistic to some parolees than the prospect of escaping poverty through legitimate employment.

12. Reduced parole caseloads are an important feature of the model reentry programs offered by the Illinois Department of Corrections through the Sheridan Correctional Center. The goal of the Sheridan program is to prepare offenders for reentry while they are still in custody,

and provide a continuum of care when they reenter the community. The Gateway program offers substance abuse programming, and the Safer Foundation offers job training and placement. Re-arrest rates for graduates of the Sheridan program in 2003 were 5%, as opposed to 51% for the rest of the population under supervision.

13. The Commission was told that in Cook County, Illinois, parole officers wear sidearms and ride in squad cars. We understand that this is not unusual, and that in many jurisdictions parole officers have come to look and act as if they are performing primarily a law enforcement function.

14. March 31 Hearing Notes, available at <http://www.abanet.org/cecs>.

15. Testimony of David Guntharpe, Director of the Arkansas Department of Community Corrections, ABA Commission on Effective Criminal Sanctions Hearing, March 3, 2006, available at <http://www.abanet.org/cecs>. In addition, information about the Arkansas program is also available on this website under Hearing Materials.

16. Testimony of William Carbone, Executive Director of Connecticut Court Support Services Division of the Judicial Branch, ABA Commission on Effective Criminal Sanctions Hearing, March 3, 2006, available at <http://www.abanet.org/cecs>.

17. See Nancy Lavigne and Cynthia Mamalian, *Prisoner Reentry in Georgia*, available at http://www.urban.org/UploadedPDF/411170_Prisoner_Reentry_GA.pdf. Low level incentives may be awarded if the offender is clean of drugs or steadily employed for 90 days, or if the offender has six months of stable residence. Medium-level incentives can come from 12 months stable employment/residence, few or no violations, six months clean from substance abuse, or outpatient program completion. High-level incentives may be awarded for completion of school/GED program, 12 months of a clean drug record, 24 months of stable residence, or a record of pro-social activities.

18. In Ohio, incentives are given based on a parolee’s Supervision Accountability Plan (SAP) as well as suggestions from the multi-disciplinary Community Reentry Management Teams that oversee the plan. Their program is also structured based upon low-level, medium-level, and high-level incentives, which are rated according to the completion SAP related programs and activities.

REPORT TO THE HOUSE OF DELEGATES ON EMPLOYMENT AND LENSURE OF PERSONS WITH A CRIMINAL RECORD

MIDYEAR MEETING, 2007

RECOMMENDATION

RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to develop policy on the employment of persons with a criminal record by government agencies, and the contractors and vendors who do business with those agencies. Professional and occupational licensing authorities should develop similar policy for the issuance of licenses. Except in cases where there is an absolute statutory prohibition on employment or licensure of persons because of a criminal conviction, as permitted by Standard 19-2.2 of the ABA Standards for Criminal Justice on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, and that prohibition has not been waived or modified, the conduct underlying the conviction should be considered disqualifying only if it substantially relates to the particular employment or license, or presents a present threat to public safety, consistent with Criminal Justice Standard 19-3.1. Jurisdictions should develop criteria for determining when such a substantial relationship exists.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local legislatures to compile an inventory of all collateral sanctions relating to employment and licensure in the law codes for which they are responsible; where an absolute statutory disqualification cannot be justified, the legislature should either eliminate it, or modify it to authorize the employer or licensing authority to waive the disqualification on a case-by-case basis. Jurisdictions should also inventory all statutes and regulations specifically authorizing consideration of conviction as a basis for discretionary disqualification from employment or licensure.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to require that each government agency, and professional and occupational licensing authority, take the following steps:

- 1) Conduct an inventory of employment and licensing restrictions and disqualifications based upon a criminal record for each occupation under the agency's jurisdiction;
- 2) Eliminate or modify, to the extent authorized, any such

restrictions or disqualifications that are either (i) not substantially related to the particular employment or (ii) not designed to protect the public safety;

- 3) Provide for a case-by-case exemption or waiver process to give persons with a criminal record an opportunity to make a showing of their fitness for the employment or license at issue, and provide a statement of reasons in writing if the opportunity is denied because of the conviction; and
- 4) Provide for judicial or administrative review of a decision to deny employment or licensure based upon a person's criminal record.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to authorize a court or administrative agency to enter an order waiving, modifying, or granting relief from a particular collateral sanction, in order to facilitate an offender's reentry into the community, in accordance with Standard 19-2.5(a). Such an order should be available upon request at the time of sentencing or release from imprisonment, or at any time thereafter, upon a finding that such relief would be consistent with the rehabilitation of the offender and the safety of the public, and in the public interest. Where a sentence has not been fully discharged, relief may be temporary or conditional, and it may be enlarged or modified by the court or administrative agency at any time upon a showing of good cause. Such an order will not preclude employers or licensing boards from considering the conduct underlying the conviction as a factor in discretionary employment and licensing decisions, if that conduct is substantially related to the particular employment or license sought.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to establish a process whereby a convicted person may, upon completion of sentence or at some reasonable time thereafter, obtain a judicial or administrative order relieving the person of all collateral sanctions imposed by the law of that jurisdiction, as provided by Standard 19-2.5(c). Such an order should be predicated upon a finding that the person has conducted

himself in a law-abiding and productive manner since the conviction, and should create a “presumption of fitness” that should be taken into account in all discretionary decision-making by public employers and licensing boards, even if the conduct underlying the conviction is substantially related to the particular employment or license sought. Such an order may be conditional upon good conduct where an offender is still under supervision, and may leave in place a specific collateral sanction if appropriate.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to work with private employer groups to develop job opportunities for people with a criminal record, and incentives for private employers to hire people with criminal records.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to work with employers and others who have a legitimate need for access to criminal record information to permit its more efficient use, so as to encourage the employment of persons with criminal records where appropriate. In particular, they should:

- 1) to the extent constitutionally permissible, require all agencies and employers seeking access to a person’s criminal record to rely upon an officially approved system of records;
- 2) except in cases where there is a statutory requirement that an agency or employer conduct a criminal background check, require non-law enforcement agencies and employers seeking access to an individual’s criminal record to demonstrate that the public interest in receiving such information clearly outweighs the individual’s interest in security and privacy.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to make evidence of an individual’s conviction inadmissible in any action alleging an employer’s negligence or wrongful conduct based on hiring as long as the employer relied on a judicial or administrative order granting relief from statutory or regulatory barriers to employment or licensure based upon conviction.

REPORT

The ability to get and maintain employment has been identified as a reliable predictor of a criminal offender’s ability to successfully reenter society after a term in prison, and remain law-abiding.¹ One recent study of reentry in a large metropolitan area showed that those who are unable to get a job are three times more likely to return to prison than those who find

steady employment.² Unfortunately, that same study showed that 60 percent of former prisoners were still unemployed one year after their release from prison.

Most people would agree that people who have committed a crime should be entitled to a second chance after paying their debt to society. Very few jurisdictions have figured out how to accomplish this successfully, however. The statute books in every state are filled with laws that disqualify people from jobs and licenses based on a criminal record. Even where it does not mandate exclusion, the law generally allows rejection of applicants for employment (and termination of existing employees) based solely on the fact of a criminal record. Some private employers have adopted sweeping policies against employing people with criminal records, including those who were arrested and never convicted. The increased reliance

since 9/11 on criminal records checks as a screening mechanism makes it much more difficult for the millions of Americans who have a criminal record to find employment and become productive citizens in our society.³

The inability of persons with criminal records to secure employment stems from a number of factors, including lack of training and skills, and risk-averse attitudes of employers. Moreover, many of these offenders are returning to communities that are already plagued with high unemployment rates, which puts them at an even greater disadvantage. But the legal system itself contributes heavily to the inability of criminal offenders to get and keep jobs, restricting employment and licensure in numerous professions based solely on a criminal record. While some restrictions are narrowly tailored to protect against an identified public safety risk, more often they are categorical and arbitrary, bearing little or no apparent relationship to particular offense conduct, and

without consideration of a particular individual’s post-conviction rehabilitation.

Moreover, in most jurisdictions, there is no reliable and generally accessible way of avoiding or waiving legal disqualifications, or of reassuring an employer that an offender is rehabilitated and fit for the employment.⁴ And yet, a recent study has shown that people with a criminal record that is more than seven years old are no more likely to commit a new crime than people who have no criminal record at all.⁵

The bottom line is that many people who are willing and able to work, and who pose little or no risk to the community, are being shut out of decent jobs because of their criminal record. This has obvious negative implications for the successful functioning of the criminal justice system, whose goal, after all, is to reduce crime and make communities safer. Admittedly, this phenomenon is not new;⁶ what is new is the scale of the problem. To the extent it is a function of flaws in the legal system, the legal profession has a responsibility to address it.⁷ Existing ABA Policy on Systemic Relief from Employment Barriers

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The ABA has developed a body of policy relating to the employment of people with criminal convictions. In the Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons (3d ed.), the ABA has urged the repeal of laws that automatically exclude people from particular jobs or licenses solely because of a conviction. Standard 19-2.2 takes the position that such automatic categorical disqualifications should be very narrowly drawn: “The legislature should not impose a collateral sanction on a person convicted of an offense unless it determines that the conduct constituting that particular offense provides so substantial a basis for imposing the sanction that the legislature cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified.”⁸

The Standards also address situations in which a conviction is not automatically disqualifying but rather is considered (or, more properly, the conduct underlying the conviction is considered) as a basis for disqualification. The Standards on Collateral Sanctions require that disqualification in such circumstances should be permitted only if “engaging in the conduct underlying the conviction would provide a substantial basis for disqualification even if the person had not been convicted.” Standard 19-3.1. The Standards also provide for waiver, modification or “timely and effective” relief from particular collateral sanctions, by a court or administrative agency, and for relief from all collateral sanctions, in recognition of an offender’s record of good conduct since conviction. Standard 19-2.5(a) and (c). Relief from particular collateral sanctions might be to facilitate reentry, while the more comprehensive form of relief might recognize a sustained period of good conduct since conviction. Finally, the Standards also call for a process by which an offender may obtain review of, and relief from, discretionary disqualifications. Standard 19-3.2.

Two years ago, the House adopted recommendations of the Justice Kennedy Commission urging jurisdictions to provide prisoners, from the beginning of their incarceration, with educational and job training opportunities, and give credit toward satisfaction of sentence for successful completion of such programs. The Justice Kennedy Commission also recommended that jurisdictions provide prisoners returning to the community with job placement assistance. Finally, it urged that jurisdictions limit situations in which a convicted person may be disqualified from otherwise available benefits and opportunities, including employment, to the greatest extent consistent with public safety.

It is time to take the Collateral Sanctions Standards and the Justice Kennedy Commission’s recommendations a further step, to address in operational fashion the systemic legal and attitudinal barriers that keep qualified people from getting and keeping a job simply because of a conviction record. At a

meeting in Chicago in March of 2006 with offenders working with the Safer Foundation, members of the Commission heard moving testimony from people with marketable skills who had served a term in prison and then struggled, upon their return to their communities, to find work.⁹ Other witnesses spoke of the importance of making job placement a central part of a reentry program. In October, the Commission held a full day’s hearing in Brooklyn, and heard testimony suggesting that New York’s venerable certificate program may not work as well as it might, largely because offenders are not made aware of it, either by their defense counsel, by the courts, or by probation and parole officers who supervise them in the community. The New York program is also hampered by a certain degree of confusion about the legal effect of certificates even among

those officials responsible for administering the program. The Commission heard testimony about similar relief programs in operation in Illinois, Connecticut, and Arizona. Many of the witnesses, particularly those from the advocacy community, spoke of the substantial obstacles facing people seeking employment after a stint in prison, obstacles that may take the form of legal barriers and prejudice against people with a criminal record, but more frequently take the form of lack of job skills and work experience on the part of the offenders seeking employment. Witnesses spoke of the importance of having some assistance in overcoming these legal barriers as well as job training programs as early as sentencing or release from prison.

The Commission came away from the October hearing convinced that government needs to make a concerted effort to address the problem of employment barriers, both legal and attitudinal, and that it

needs to bring the private sector into the discussion. This effort must begin with the legislature, the statute books are filled with collateral sanctions that absolutely prohibit people with criminal convictions from being considered for certain jobs, no matter how dated the offense and no matter how heroic their rehabilitation, and without regard to whether the offense conduct is related in any way to the job or license sought. Three years ago the ABA called upon legislatures to collect all collateral sanctions in their statute books in a single chapter or section of the jurisdiction’s criminal code, and to identify with particularity the type, severity and duration of collateral sanctions applicable to each offense. See Standard 19-2.1. We know of no legislature that has even begun work on this important task since the Standards were adopted by the House.¹⁰

Public Employment Policies Toward People with Criminal Convictions

The executive branches of two major urban centers and one large state have in the past year announced sweeping changes in public employment policies relating to people with criminal convictions. These changes, described below, inspired the

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Commission's own more general recommendations. We do not hesitate to admit that we borrowed heavily from these commendable efforts, particularly the extraordinary Executive Order issued by Florida's Governor Jeb Bush in April of 2006, directing all state agencies and licensing boards to review and revise their policies relating to the employment and licensure of people with criminal convictions, imposed similar obligations on any employers subject to state regulation (including contractors, vendors and regulated entities) and encouraged private employers to do likewise. Also in 2006, Boston and Chicago adopted sweeping new hiring policies applicable to all municipal agencies in an effort to encourage employment of people with conviction records.

The Chicago order came in response to recommendations of the Mayoral Policy Caucus on Prisoner Reentry. Chicago Mayor Richard Daley announced that the City would begin to "balance the nature and severity of the crime with other factors, such as the passage of time and evidence of rehabilitation" in their hiring decisions. The City Department of Human Resources issued guidelines imposing standards on all city agencies regulating hiring decisions related to people with criminal records, requiring that agencies consider the age of an individual's criminal record, the seriousness of the offense, evidence of rehabilitation, and other mitigating factors before making their hiring decisions. Mayor Daley observed wisely that "we cannot ask private employers to consider hiring former prisoners unless the City practices what it preaches."

In Boston, the City Council passed an ordinance, which was effective July 1, 2006, prohibiting municipal agencies and their vendors and contractors from conducting a criminal background check as part of their hiring process until the job applicant is found to be "otherwise qualified" for the position.¹¹ The ordinance also requires that the final employment decision considers the age and seriousness of the crime and the "occurrences in the life of the applicant since the crime(s)." Finally, the ordinance creates appeal rights for those denied employment based on a criminal record and the right to present information related to "accuracy and relevancy" of the criminal record. This measure ensures that everyone is given an opportunity to be considered in the early stages of the employment process without regard to their criminal record, and encourages employers to consider rehabilitation and other factors that may neutralize or overcome the negative effect of the criminal record.¹²

In Florida, responding to the findings and recommendations of his Ex-Offender Task Force, Governor Jeb Bush put in place a system of state employment practices "to facilitate the re-entry of ex-offenders into our communities and reduce the incidence of recidivism."¹³ Executive Order 06-89, issued on April 26, 2006, requires each state agency to 1) conduct an inventory of employment and licensing restrictions and disqualifications based upon a criminal record for each occupation under the agency's jurisdiction; 2) determine the impact of such restrictions and disqualifications and eliminate or modify any such restrictions or disqualifications that are not tailored to protect the public safety; and 3) describe the exemption, waiver or review mechanisms available to seek relief from the disqualification or restriction. The order extends not simply to employment within the agencies, but also to employment in

facilities licensed, regulated, supervised or funded by the state, employment pursuant to contracts with the state, and employment in which the state licenses or provides certifications to practice. The order encourages other public entities and private employers, "to the extent they are able, to take similar actions to review their own employment policies and provide employment opportunities to individuals with criminal records."

Before leaving the area of systemic approaches to the employment of people with convictions, it is worth describing the promising scheme developed by the federal government for employment in the transportation industries. A series of laws and policies developed after 9/11 to screen workers in the air, sea and ground transportation industries have produced a generally flexible regulatory scheme that balances government security interests on the one hand, with employee rights and reentry considerations on the other. The central features of this scheme are mandatory (or presumptive) disqualification is applicable only to specified serious felonies; most mandatory disqualifications lapse after a certain period of time, generally seven to ten years; within the mandatory disqualification period, state pardons and expungements are given effect; and waivers may be granted by the employing agency within the period of mandatory disqualification if no other exception applies. Though serious crimes may still be the basis of exclusion or termination, the requirements applicable in each of the three industries recognize the importance of a case-by-case approach to consideration of conviction in employment.¹⁴

The Commission commends these pioneering efforts. It recommends that other municipal jurisdictions take steps to emulate Chicago and Boston, and that other state governors consider following the example of Governor Bush. Specifically, the Commission recommends that jurisdictions develop policy on the employment of persons with a criminal record by government agencies, and the contractors and vendors who do business with those agencies. Professional and occupational licensing authorities should develop similar policy for the issuance of licenses.

The Commission urges federal, state and local governments to set an example by amending their hiring policies to require that a conviction should be considered disqualifying only if the conduct underlying it "substantially relates" to the particular employment or licensure, or presents a present threat to public safety, consistent with Criminal Justice Standard 19-3.1. The only exception is for the small category of cases where an absolute statutory prohibition on employment or licensure of persons with a conviction can be justified under Standard 19-2.2 (see discussion above), and that prohibition has not been waived or modified. In extending the requirements of Standard 19-3.1 to private contractors and vendors, this recommendation would expand existing ABA policy. Jurisdictions should develop criteria for determining when particular offense conduct "substantially relates" to the employment or license sought.¹⁵

The Commission also urges that state legislatures examine each absolute statutory disqualification in state law and regulation, to determine whether it can be justified under Standard 19-2.2 ("the conduct constituting that particular offense provides so substantial a basis for imposing the sanction that the legislature cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified").¹⁶ The commentary

to Standard 19-2.2 provides that “absolute barriers to employment or licensure are problematic, particularly where no time limitation is specified and no waiver or relief mechanism is provided.” If an absolute disqualification cannot be justified, the legislature should either eliminate it, or modify it to authorize the agency to waive the disqualification on a case-by-case basis. Even where the legislature can identify a “close connection between the offense and the collateral sanction,” relief from the sanction should still be available, if warranted. *See* Standard 19-2.5.¹⁷

In addition to a legislative review of absolute statutory barriers that are not waivable at the administrative level, the Commission also recommends that each government agency, and each professional and occupational licensing authority, undertake the sort of systemic review of discretionary employment barriers contemplated in Governor Bush’s executive order. Specifically, state agencies should 1) conduct an inventory of employment and licensing restrictions and disqualifications based upon a criminal record for each occupation under the agency’s jurisdiction; 2) eliminate or modify, to the extent authorized, any such restrictions or disqualifications that are either (i) not substantially related to the particular employment or (ii) not designed to protect the public safety; 3) provide for a case-by-case exemption or waiver process to give persons with a criminal record an opportunity to make a showing of their fitness for the employment or license at issue, and provide a statement of reasons in writing if the opportunity is denied because of the conviction; and 4) provide for judicial or administrative review of a discretionary decision to deny employment or licensure based upon a person’s criminal record.¹⁸

These recommendations amplify the requirements of the Collateral Sanctions Standards relating to discretionary disqualification.¹⁹ Indeed, the commentary to Standard 3.3 foreshadows many of the Commission’s recommendations directed to state officials.²⁰ Unless there is an absolute statutory disqualification from employment that satisfies the strict standard of Standard 19-2.2 (“the conduct constituting that particular offense provides so substantial a basis for imposing the sanction that the legislature cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified”), agencies must eliminate or modify any restrictions and disqualifications based solely upon conviction. If the restrictions or disqualifications are not eliminated, agencies must provide for a case-by-case exemption or waiver process, if authorized to do so.²¹

The Commission stopped short of extending these affirmative obligations to government contractors, vendors, and private employers that are regulated by the state, as provide in Governor Bush’s Executive Order. While the Commission does not discourage such extended efforts by states to regulate private employment, it seems an ambitious beginning just for state agencies to impose the new requirement on “occupations under their jurisdiction.”²²

Relief from Collateral Sanctions and Disqualification from Employment Opportunities

One of the glaring flaws in the legal system of most states is the absence of an effective mechanism whereby people who have committed a crime may avoid or mitigate statutory disqualifications based on conviction, and demonstrate their record of fitness for purposes of employment and licensing.²³

The Commission heard testimony from state officials in over a dozen states about the legal mechanisms they have in place to help people overcome the legal barriers to reentry and reintegration. Some of these states have anti-discrimination laws that prohibit denial of employment and/or licensing opportunities solely because of a criminal record.²⁴ For example, New York’s fair employment practices law extends its protections to people with a criminal record, and prohibits public and private employers and occupational licensing agencies from discriminating against employees based upon convictions and arrests that did not result in a conviction, unless disqualification is mandated by law.²⁵ While many other states have some form of nondiscrimination law, they are generally more limited than New York’s. Many apply only to professional licensing decisions, and few have any provision for enforcement, a regrettable omission in the Commission’s view.

In addition to non-discrimination laws, states have developed a variety of other mechanisms to “neutralize” the effect of a criminal record for employment purposes after the prison portion of the sentence has been served, including executive pardon, judicial sealing and expungement. The Commission heard testimony about each one of these restoration mechanisms operating in different settings: executive pardon in Arkansas, Connecticut and Maryland; expungement and sealing laws in Kansas and Oregon; and certificates of relief from disabilities in New York and Illinois. In most jurisdictions, there seems to be considerable resistance to the idea of judicial expungement for any but minor offenses, and some general unease about the idea of relief built upon a fiction that the conviction did not take place, particularly in light of the ubiquity of information in the internet age.

Pardon also seems unsuitable as a general relief mechanism, at least in states where the power is exercised by the governor. Pardon in Maryland and Arkansas is a considerably more vital relief mechanism than it is in most states, but this is only because of the personal commitment of the governors who were in office at the time of the Commission’s hearings, Robert Ehrlich of Maryland and Mike Huckabee of Arkansas. And despite this commitment, the pardon program in both states operates on a comparatively small scale, constrained by political considerations to distribute relief on what appears to be almost a symbolic basis. It appears that only where the pardon power is administered by an appointed board, as it is in Connecticut, is it capable of functioning in a more regular and useful fashion.

At its hearing in Brooklyn in October 2006, the Commission heard additional testimony about the administrative and judicial relief schemes implemented by New York, Illinois, Arizona, and Connecticut. All four of these states recognize the need to give criminal offenders a way to avoid specific legal disabilities as early as sentencing, and at some later point to show that they have paid the full price for their crime and earned the right to return to responsible membership in society. And all four seek to accomplish an offender’s reintegration into society not by trying to conceal the fact of conviction, but by advertising evidence of rehabilitation. The Commission was most impressed by Connecticut’s recently enacted “provisional pardon,” by which relief from specific “barriers or forfeitures” maybe obtained from the Pardon and Parole

Board as early as sentencing. A person who has been awarded a provisional pardon may later seek a full pardon, which evidences rehabilitation and “erases” the conviction record.

The Commission was persuaded by testimony at its three hearings, and particularly by the witnesses at its Brooklyn hearing, that offenders need to have access to timely and effective relief from the collateral consequences of conviction, whether those consequences are automatic and statutory, or discretionary and attitudinal. There is also a clear need to make available immediate targeted relief in appropriate cases from specific disabilities as early as sentencing (e.g., to permit an offender placed on probation to keep a job). A full certification of “rehabilitation,” however denominated, logically could be granted only after a waiting period following sentencing, when an offender has demonstrated a sustained record of good conduct

The Commission therefore determined that it should propose a more nuanced two-tiered process, as contemplated by the ABA Standards on Collateral Sanctions and the Model Penal Code.²⁶ First-tier relief from a particular collateral sanction should be available at an early point (even as early as sentencing for those sentenced to probation, or release from imprisonment) by order of the sentencing court or an administrative agency such as the paroling authority, as called for by Collateral Sanctions Standard 19-2.5(a). The relief would be “to facilitate reentry,” and call for a finding that “such relief would be consistent with the rehabilitation of the offender and in the public interest.” This finding would be something short of a full certification of “rehabilitation” or “good conduct”, and its purpose would be to serve as some reassurance to a prospective employer, public or private. Once the absolute bar had been removed, the person could be considered for the job, and disqualified only if the conduct underlying the conviction was “substantially related” to the job or license. The purpose of this targeted relief would be to give people something to ward off automatic rejection even before they have completed their sentences and established a track record of law-abiding conduct.²⁷

It is important to note that the power to grant relief from a particular collateral sanctions under this provision (as under Standard 19-2.5(a)), would not be limited to employment and licensing. The Commission believes it is important for a court or administrative agency to be able to grant relief from disqualifications affecting housing or welfare benefits or drivers licenses as well as from employment. In addition, relief from collateral penalties imposed by state law should be available to federal offenders, as well as people with out of state convictions. See Standard 19-2.5(b).

More complete relief from all collateral sanctions would be accomplished at a later time, after a period of law-abiding conduct, and would in effect operate as a sort of judicial or

administrative pardon, in accordance with Collateral Sanction Standard 19-2.5(c). This order would be predicated upon a finding that “the person has conducted himself in a law-abiding and productive manner since the conviction,” and it would create a “presumption of fitness” that would apply even where there is a substantial relationship between the conduct and the employment. The “presumption of fitness” would apply to all discretionary decision-making by public employers and licensing boards, and be given teeth through the enforcement provision of the fourth clause of the third Resolved clause. While it would not apply to private employment, such an order would be reassuring to private employers as a sign of “official forgiveness.”²⁸

One obstacle to employment for convicted persons is an employer’s concern about exposure to charges of negligent hiring. There is a need for employers to feel comfortable hiring

people with convictions, without having to worry constantly that they will be sued in the event something goes wrong. Judicial or administrative relief orders may serve a useful function in limiting an employer’s exposure to negligent hiring suits based upon an employee’s conviction record. Therefore, the Commission recommends that jurisdictions make evidence of an individual’s conviction inadmissible in any action alleging an employer’s negligence or wrongful conduct based on hiring, as long as the employer relied on a judicial or administrative order granting relief from statutory or regulatory barriers to employment or licensure based upon conviction when hiring.²⁹ In order for such orders to be truly effective in encouraging employment of convicted persons, the private sector must be educated about them and view them as a reliable tool for measuring a prospective employee’s likely success on the job.

Jurisdictions should also work with employers and others who have a legitimate need for access to criminal record information to encourage its more efficient use, and thus to encourage employment of persons with criminal records where appropriate. We believe that jurisdictions should require (to the extent the law permits) all individuals and agencies seeking access to an individual’s criminal record to rely upon an officially approved system of records. Private individuals seeking access to an individual’s criminal record from such a records system should be required to demonstrate that the public interest in disseminating such information clearly outweighs the individual’s interest in security and privacy. Certain individuals and entities, such as employers or agencies that have a statutory obligation to conduct background checks on applicants for employment or licenses, would be excepted from this obligation. This is the system employed in Massachusetts for thirty years, and at least in concept it appears to have worked well there.³⁰

As important as it is to remove legal barriers to employment and discourage discrimination, it is even more important to

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encourage the private sector to employ persons with criminal records.³¹ Joan Petersilia reports that “employers are more receptive to the idea of hiring an ex-felon if a third party intermediary – a counseling program or other service provider in their community – is available to mentor and to help avert any problems.”³² This approach has been pioneered by Chicago’s Safer Foundation, which has been working for over thirty-five years to assist people with criminal records find employment in the private sector.³³ Safer recruits and recommends candidates for particular jobs, and it takes the further step of continuing to sponsor and mentor the people it places with private employers, essentially acting as a subcontractor. While Safer has been successful in persuading small to medium companies to participate in their programs because these companies lack the resources to hire employment agencies to provide the mentoring and the training services that Safer provides, larger corporations have been harder to convince. There is a need for colleague-to-colleague dialogue to encourage larger corporate employers to employ offenders.³⁴ Certificates of relief from disabilities may be helpful in overcoming employer reluctance to hire people with convictions.

The Commission urges jurisdictions to work with private employer groups to create decent job opportunities for people with criminal records, and to develop incentives for private employers to hire people with criminal records. The structure and function of the Safer Foundation’s program could be emulated in other jurisdictions, and will be all the more necessary as governments begin to dismantle the structure of exclusion and discrimination as the Commission recommends.

Respectfully submitted,
Stephen A. Saltzburg, Co-Chair
James R. Thompson, Co-Chair
February 2007

ENDNOTES

1. See, e.g., Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* at 196 (Oxford Univ. Press 2003) (“Research has also consistently shown that if parolees can find decent jobs as soon as possible after release, they are less likely to return to crime and to prison.”). Programs devoted to finding work for parolees like the Texas RIO (Re-integration of Offenders) Project, the New York City Center for Employment Opportunities, and the Safer Foundation in Chicago, have been found to produce greatly reduced recidivism rates. *Id.* at 197.

2. *Rebuilding Lives. Restoring Hope. Strengthening Communities: Breaking the Cycle of Incarceration and Building Brighter Futures in Chicago*, final Report of the Mayoral Policy Caucus on Prisoner Reentry at 15 (2006).

3. The Bureau of Justice Statistics reports that as of December 31, 2003, over 71 million criminal history records were in the criminal history files of the State criminal history repositories. Some individuals had a record in more than one state. *Survey of State Criminal History Information Systems*, 2003 at 2, Bureau of Justice Statistics, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sschis03.pdf>. A decade earlier, over six million arrest records were reported to state criminal history repositories. *Use and Management of Criminal History Record Information: A Comprehensive Report, 2001 Update*, Bureau of Justice Statistics, Table 6, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/umchri01.pdf>

4. See Margaret Colgate Love, *Relief from the Collateral Consequences*

of a Criminal Conviction: A State by State Resource Guide, (W.S. Hein, 2006), condensed at <http://www.sentencingproject.org/rights-restoration.cfm>. It bears emphasis that it is very much in the government’s interest to help people lead law-abiding and productive lives after they have served their court-imposed sentences. Unfortunately, this does not seem to have occurred to the legislators and administrators who continue to make and enforce blanket policies of exclusion that provide for no exceptions.

5. Kurlychek, Brame, Bushway, “Scarlet Letters and Recidivism: Does An Old Criminal Record Predict Future Offending?,” 5 *Criminology and Public Policy* 1101, 1117 (2006) (after five to seven years of law-abiding conduct “the risk of a new criminal event among a population of nonoffenders and a population of prior offenders becomes similar”).

6. See, e.g., Final Report of the ABA Commission on Correctional Facilities and Services, *When Society Pronounces Judgment – The Work of the Commission on Correctional Facilities and Services. Five Year Report, 1970-1975*, available from the ABA Criminal Justice Section offices.

7. The Justice Kennedy Commission framed the issue eloquently:

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

Report of the Justice Kennedy Commission at 80 (2004), available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>

8. The courts have frequently invalidated laws that categorically exclude people with a criminal record based on a rational basis analysis. See Miriam Aukerman, *The Somewhat Suspect Class: Toward a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 *Wayne St. J. Law & Soc.* 1 (2006) for an extensive analysis of the legal protections available to people rejected for employment based on their criminal record. Aukerman finds that “in a surprising number of cases related to occupational restrictions, the courts have used rational basis review to invalidate laws that limit the employment opportunities of people with criminal records. The pattern that emerges from the cases is that courts are willing to strike down laws which categorically bar large groups of former offenders from particular occupations, but will generally uphold laws where the relationship between the offense and the restricted occupation is more carefully tailored.” *Id.* at 3.

9. Joe Cassily, the elected prosecutor from Harford County, Maryland, who testified at our Washington, D.C. hearing, told of a young man whose dated and minor drug conviction from another jurisdiction was proving an insuperable obstacle to getting a decent job, and proposed a number of reforms in the legal system to address the need to see that offenders have a decent chance to prove themselves in the workplace.

10. Law students in Maryland and Ohio have compiled partial inventories of the collateral consequences applicable in those states. See Kimberly R. Mossone and Cara A. Roecker, *Ohio Collateral Sanctions Project*, 36 *U. Toledo L. Rev.* 611 (2005); see also University of Maryland School of Law Reentry of Ex-Offenders Clinic, *A Report*

on Collateral Consequences of Criminal Convictions in Maryland (October, 2004). At the time of this writing, a report from the University of Arizona's James E. Rogers College of Law was in draft form (Collateral Consequences: A Comprehensive Study of the Ongoing Effects of Criminal Convictions in Arizona, Preliminary Draft by the Law, Criminal Justice and Security Program, November 2005). In addition, since adoption of the Collateral Sanctions Standards in 2003, the National Conference of Commissioners on Uniform State Laws has begun a uniform law drafting project on collateral Sanctions and disqualification of people with convictions that covers much of the same area as the ABA Standards. (Indeed, the NCCUSL project was avowedly inspired by the ABA Standards.) In particular, the current draft contains a provision limiting consideration of conviction in employment, licensing, housing and education, and allowing disqualification only if the person is judged "unfit." See § 6 of draft dated November 27, 2006, discussed at note 28, *infra*.

11. A copy of the Boston Ordinance is available at <http://www.nelp.org/docUploads/BostonCORIOrdinance%2Epdf>. The press release announcing the Chicago Mayor's policy is at <http://www.chicagometropolis2020.org/documents/prisonerreentrypressrelease.pdf>. See also National Employment Law Project summary of the two ordinances, as well as San Francisco's "Ban the Box" initiative, available at http://www.nelp.org/nwp/second_chance_labor_project/cityolicies.cfm?bSuppressLayout=1&printpage=1. Under Massachusetts law, both public and private employers are limited in what they may ask of job applicants: Massachusetts' general fair employment practices law makes it unlawful for any covered employer to request any information from an employee or applicant for employment about: (1) an arrest without conviction; (2) a first conviction for misdemeanors such as simple assault or minor traffic violations; and (3) any conviction of a misdemeanor that occurred five or more years before the application date. Mass. Gen. Laws ch. 151B, § 4(9) ("any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information").

12. Just prior to publication of this report, in December 2006, the Mayor of St. Paul, Minnesota, signed an Executive Order removing the standard question regarding a criminal background from the City's job application form. Background checks will still be conducted for many jobs but only after the applicant has been determined to be "otherwise qualified". Job applicants with a criminal record will then be given an opportunity to explain what they have done to deserve a second chance before the City makes a final decision. See <http://www.twincities.com/mld/pioneerpress/16181165.htm>. Similar reform efforts are under way in Minneapolis, and nearby Ramsey and Hennepin Counties.

13. See Exec. Order No. 06-89, April 25, 2006, available at http://sun6.dms.state.fl.us/eog_new/eog/orders/2006/April/06-89-exoftf.pdf

14. The TSA scheme is described in greater detail in National Employment Law Project, *A Summary of the New Federal Security Standards Regulating Transportation Workers*, March 8, 2005, <http://www.nelp.org/docUploads/TransportationLaws%2Epdf>; See also Margaret Colgate Love, Relief from the Collateral Consequences of Conviction: Notes from the 'Laboratories of Democracy', The National HIRE Newsletter (Spring 2006.) Modeled generally on the approach taken in the federally regulated banking and securities industries, the TSA scheme distinguishes between serious offenses whose nature would raise a reasonable

question about the individual's fitness for employment in the particular job, and less serious offenses that should not result in automatic or presumptive disqualification, but can be considered as part of a general inquiry into an applicant's character and fitness. It imposes a temporal limit on the presumptive disqualification, and adds a presumption of rehabilitation after a certain period of law-abiding behavior, similar to the English Rehabilitation of Offenders Act, under which a conviction is "spent" after a certain period of time, and may no longer be considered as grounds for disqualification. It gives effect, within the period of presumptive disqualification, to a state's determination in a particular case that a conviction record should not be a black mark on an individual's record, whether because the charges were dismissed or set aside at the front end, as a result of deferred adjudication or other diversion program, or the conviction pardoned or expunged at the back end. Finally, it allows the employing authority to consider exceptional circumstances even where there has not been a pardon or other external certification of an offender's rehabilitation, and to take a chance on an individual where the facts seem to justify.

15. New York is one of the few states that has enacted a statutory definition of the "direct" or "substantial" relationship test. See N.Y. Correct. Law § 752 ("the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license or employment sought.") A number of other states have codified multi-factor tests for determining when there is a "substantial" or "direct" relationship" between a conviction and a job or license offer). See, e.g., Conn. Gen. Stat. 46a-80; KY. Rev. Stat. Ann. § 335B.020(2); Minn. Stat. § 364.01; N.D. Cen. Code § 12.1-33-02.1; N.J. Stat. Ann. § 2A:168A-2; N.Y. Correct. Law § 753; Va. Stat. Ann. § 54.1-10H(B)

16. The commentary to Standard 19-2.2 provides that there is a "heavy burden of justification" on the legislature where absolute collateral penalties are concerned:

"There are certain situations in which a collateral sanction will be so clearly appropriate given the nature of the offense that case-by-case evaluation at the time of sentencing would be pointless and inefficient. . . . It might well be appropriate to provide for automatic suspension of a driver's license where the offense conduct is related to driving or motor vehicles, or to exclude from educational institutions those who sell drugs there. And, it may be appropriate to revoke a driver's license or exclude from aid on a case-by-case basis, subject to Standard 19-3.1. But it is unreasonable and counterproductive to deny all drug offenders access to the means of rehabilitating themselves and supporting their families, thereby imposing a cost upon the community with no evident corresponding benefit.

Collateral Sanctions Standard 19-2.2, commentary at 24-25 (footnotes omitted).

17. Standard 19-2.5(a) provides that "The legislature should provide a should authorize a court, a specified administrative body, or both, to enter an order waiving, modifying, or granting timely and effective relief from any collateral sanction imposed by the law of that jurisdiction." Standard 19-2.5(c) provides that "The legislature should establish a process by which a convicted person may obtain an order relieving the person of all collateral sanctions imposed by the law of that jurisdiction."

18. Standard 19-3.2 provides that "The legislature should establish a process for obtaining review of, and relief from, any discretionary disqualification." The commentary states that

On review, an individual might seek to argue that engaging in the conduct underlying the conviction is not a substantial basis for imposing the penalty; or that individuals who engage in the conduct but are not convicted are not subject to the same penalty. The procedures for review and the standard of review should be the same as those applied to review of other decisions by the decisionmaker.

19. See Standard 19-3.1 (prohibits disqualification “grounds related to the conviction, unless engaging in the conduct underlying the conviction would provide a substantial basis for disqualification even if the person had not been convicted”); Standard 19-3.2 (“The legislature should establish a process for obtaining review of and relief from, any discretionary disqualification”) and Standard 19-3.3 (“Each jurisdiction should encourage the employment of convicted persons by legislative and executive mandate, through financial incentives and otherwise.”)

20. The commentary to Standard 19-3.3 recognizes that “private employment opportunities are critical to a successful program of offender reentry.” Thus Standard 19-3.3 calls upon the legislative and executive branches of government to create additional employment opportunities for convicted persons in the private sector through financial and other incentives: “if large numbers of private employers impose broad and absolute bars on hiring individuals with criminal records, offenders will have limited opportunities for employment. Indeed, it would seem a reasonable public safety measure for the government to take affirmative steps to help offenders obtain jobs, for there is a high correlation between steady employment and successful completion of a term of supervision.” The commentary concedes that “there is a tension between facilitating reentry of convicts and the appearance of rewarding criminality by giving offenders special benefits that are not available to the law-abiding majority.

21. As noted, if the restriction or disqualification is absolute and mandated by law, and cannot be justified under Standard 19-2.2, the legislature should create a waiver or exemption process.) As suggested by the commentary to Standard 19-3.2, “[o]n review, an individual might seek to argue that engaging in the conduct underlying the conviction is not a substantial basis for imposing the penalty; or that individuals who engage in the conduct but are not convicted are not subject to the same penalty.”

22. The Florida executive order by Governor Bush interprets this phrase to mean “including but not limited to employment within the agency; employment in facilities licensed, regulated, supervised, or funded by the agency; employment pursuant to contracts with the agency; and employment in occupations that the agency licenses or provides certifications to practice.” The Commission did not adopt this expansive definition, and leaves it to each jurisdiction to decide how far to extend the obligation to inventory, modify or eliminate disqualifications, and provide for review and a statement of reasons.

23. The Justice Kennedy Commission urged that jurisdictions establish an accessible process by which offenders who have served their sentences may obtain relief from the collateral consequences of conviction, in the form of an absolute statutory bar to convicted persons, or a discretionary disqualification based on conviction. The Collateral Sanctions Standards also promote the idea that jurisdictions should have a way for offenders to avoid particular collateral sanctions, see Standard 19-2.5(a), and also to obtain the kind of “general forgiveness” contemplated by Section 306.6 of the Model Penal Code. See Standard 19-2.5(c), commentary at 35-36.

24. See Love, *supra* note 4, chart No. 6 (Consideration of Criminal Record in Licensing and Employment). See also Love, Relief from the

Collateral Consequences of Conviction: State Laws Limiting Consideration of Conviction in Employment and Licensure, The National HIRE Network Newsletter, November 2005, available at <http://www.hirenetwork.org/pdfs/HIRE%20Newsletter%20Nov%2005.pdf>.

25. N.Y.S. Human Rights Law, N.Y. Exec. Law § 296(16). Employers may not discriminate against applicants with criminal records unless: (1) there is a “direct relationship” between one or more of the previous criminal offenses and the specific license or employment sought, or (2) the issuance of the license or the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. The law sets out additional factors to determine whether the “direct relationship” is “sufficiently attenuated” to warrant the issuance of the license or employment: (1) “the public policy of this state . . . to encourage the licensure and employment of all persons previously convicted of one or more criminal offenses;” 2) specific duties necessarily related to the employment; (3) the relation of the conviction to the applicant’s ability to perform his responsibilities; (4) amount of elapsed time since conviction; (5) the age of the person at the time of offense; (6) the seriousness of the offense; (7) any efforts toward rehabilitation; and (8) the interest of the employer of protecting property, and the safety and welfare of individuals or the general public. New York’s law is incorporated into and enforced through its more general fair employment practices law.

26. See Standards on Collateral Sanctions, commentary at 34-36, and note 42. See generally Margaret Colgate Love, *Starting Over With a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URBAN LAW JOURNAL 101 (2003).

27. For example, Judge Matthew D’Emic of the Brooklyn mental health court recounted that he had recently given a limited certificate of relief from disabilities to a defendant under his supervision who had been offered a job as a bus driver by the City of New York but was otherwise barred from accepting because of his criminal record.

28. As noted above, the National Conference of Commissioners of Uniform State Laws (NCCUSL) is drafting a uniform law on Collateral Consequences and Disqualification of Convicted Persons, and NCCUSL in fact was a co-sponsor of the Brooklyn hearing. Evidently the testimony at that hearing had essentially the same effect on the NCCUSL drafting committee, since its most recent draft dated November 27, 2006, also proposes a two-stage relief procedure. At the first stage, a “certificate of relief from disabilities” would be available as early as sentencing, while the second-stage “certificate of good conduct” would be available after a further waiting period. These certificates would relieve collateral sanctions as specified, but would not preclude a decisionmaker from considering the facts underlying the conviction.

29. In the most recent NCCUSL draft, see note 28 *supra*, certificates would render the underlying convictions inadmissible in a negligent hiring lawsuit.

30. Under the Massachusetts Criminal Offender Records Information (CORI) system there are four categories of access. Law enforcement has unrestricted access to conviction records, including those that have been sealed. A few non-law enforcement public entities have similar unrestricted access, notably the Department of Social Services and the Department of Early Education and Care. Certain employers (schools, nursing homes) have similar unrestricted access, except to sealed records. A third category of access is “discretionary,” under which a wide variety of designated agencies (such as security companies, insurance agencies, ground transportation carriers, hotels and restaurants) may apply for “special certification” from the Criminal History Systems Board to receive an offender’s record—usually only

conviction data and pending cases, which will be granted if the Board determines by a two-thirds vote that “the public interest in disseminating such information to these parties clearly outweighs the interest in security and privacy.” Mass. Gen. Laws ch. 6 § 172(c). Private individuals (including the press) may obtain information through a “public access record check” only if the offender is incarcerated, or has been recently released (one year for misdemeanants, two for felony offenders, three for persons ineligible for parole). A comprehensive review of the CORI system, published by the Boston Foundation in May of 2005, notes that the use of CORI for non-law enforcement purposes has increased in recent years, and that the number of persons and entities exempted from its requirements has been growing. See Boston Foundation, *CORI: Balancing Individual Rights and Public Access*, available at <http://www.tbf.org/uploadedFiles/CORI%20Report.pdf>. Additional recommendations relating to criminal records are contained in Report 103D.

31. Standard 19-3.3 provides that “Each jurisdiction should encourage the employment of convicted persons by legislative and executive mandate, through financial incentives and otherwise.” See note 17, *supra*, for a discussion of the commentary to this standard.

31. Petersilia, *supra* note 1 at 196.

32. Safer is now the largest community-based provider of support services for people with criminal records in the United States. The organization recognizes that individuals leaving prison face a stigma that make finding employment difficult, yet this population desperately needs jobs if they are going to turn their lives around and support their families. The Safer Foundation, *Letter from the President*, available at <http://www.saferfoundation.org/viewpage.asp?id=269>. The Commission met twice with officials from the Safer Foundation, on February 10 and March 30, 2006, and attended a meeting at which formerly incarcerated people described their positive experiences in Safer’s employment programs.

33. The Commission is aware that some large private corporations have an official policy against hiring or retaining anyone with a criminal record. See, e.g., *Wright v. Home Depot*, 142 P. 3d 265 (HI, 2006) (under Hawaii fair employment practices law, employer may not terminate employee unless prior convictions bears a “rational relationship” to his employment). Such blanket exclusionary policies are regrettable. It is hoped that such policies will be reviewed with the same care that public employers review their exclusionary employment policies, in light of new concerns about offender reentry, to determine if they are necessary and appropriate.

REPORT TO THE HOUSE OF DELEGATES ON ACCESS TO AND USE OF CRIMINAL RECORDS

MIDYEAR MEETING, 2007

RECOMMENDATION

RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to develop policies governing access to and use of criminal records for non-law enforcement purposes that would balance the public's right to information against the government's interest in encouraging successful offender reentry and reintegration.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to develop systemic reporting systems that will maximize reliability, integrity, authenticity and accuracy of criminal records. Where records are to be made available for non-law enforcement purposes, jurisdictions should implement procedures to present records to the lay reader in comprehensible form.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to develop and implement procedures to permit an individual or the government to challenge the accuracy of criminal history record information in an official system of criminal records. Any record determined to be inaccurate or incomplete should be promptly corrected, and all determinations should be reported to the individual and the government in a timely fashion.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to establish standards and appropriate controls to ensure accuracy and reliability of criminal records. Private companies should be restricted to the extent legally possible from reporting records that have been sealed or expunged. If such companies are permitted to reveal a sealed or expunged record, they should be required at the same time to report the fact that the record has been sealed or expunged and the legal effect of such action.

REPORT

In the past ten years, criminal records¹ have become widely available and put to use for a variety of non-law enforcement purposes.² Technological advances coupled with heightened security concerns have enabled and encouraged employers and landlords to seek access to criminal history information about applicants for jobs and housing, and even about incumbent employees.³ Private screening companies have taken most of the work out of finding out an individual's complete criminal

record, making it practicable for an employer in Colorado to find out about the trouble that his newest employee got into as a youngster 20 years ago in New Jersey.⁴

In some states, criminal history information—including arrest records that did not result in a conviction—is freely available on the internet to members of the public. A “Google” search for someone's name may bring up an unsolicited offer from a private screening company to do a criminal background check on the person for a nominal fee.⁵ Even some courts are taking steps to make their records more generally accessible to the public.⁶

Particularly since 9/11, a heightened concern for internal security has translated into a spate of new laws requiring records checks upon application for various professional occupations and employments.⁷ Numerous federal and state laws bar people with a criminal record from working in areas with some security nexus, such as transportation, and with vulnerable populations such as children and the elderly, without regard to the nature of the conviction, how long ago it occurred, or what the people have since made of their lives.⁸ Even if a law does not create an absolute bar to employment or licensing, people with a record are unlikely to be given an opportunity in a climate that rewards risk-avoidance.⁹ Quite apart from the devastating effect on individuals who have worked hard to put their past behind them, serious problems of inaccuracy and misidentification are making life miserable for people who in fact have no record at all.

In most states, a routine background check can also bring up criminal records that did not result in conviction (including arrest records that resulted in no charges, charges that were dismissed, acquittals/reversals, and deferred adjudication or probation before judgment). While some states prohibit employers from taking arrest records into account in an employment decision, most do not. For a variety of reasons, it is more likely that the average African-American male will have accumulated an arrest record by the time he reaches his early twenties. It is therefore all the more imperative that the disqualifying effect of arrest records by themselves be addressed.

Taken together, these trends have made it more difficult than ever to overcome the stigma of a conviction or the associated legal disabilities. Most troublesome for public safety, they have created an environment in which even the most motivated ex-offenders cannot provide for themselves and their families, making them likely candidates for recidivism.

Ironically, well-intentioned government efforts to enhance security may be taking us in the opposite direction.

To be sure, employers are entitled to know whether the person who is applying for a job has a criminal record that would cast doubt upon his or her fitness for the position being applied for, just as they are entitled to know that an existing employee has been arrested for conduct that would jeopardize the public safety or public trust. To take the most extreme example, an airline should be entitled to know if an applicant for a pilot's job has a record of DUI or drug possession arrests, just as it should be entitled to know if one of its current pilots has been arrested as the result of a bar fight. A bank or store should be entitled to know if an applicant for employment has been convicted of embezzlement or theft, just as a pharmacist should be entitled to know if a prospective employee has a lengthy record of drug arrests. Crafting a balanced records access policy that satisfies an employer's legitimate need to know as well as an employee's equally legitimate need to be able at some point to move on with his life — and the government's interest in helping him do so — is one of the more important challenges of an effective criminal records policy.

The resolutions recommended by the Commission urge jurisdictions to establish records systems that control access to and use of criminal history information for non-law enforcement purposes, balancing the public's reasonable right to know against the government's compelling interest in encouraging successful offender reentry and reintegration. States that have open access policies should consider whether systems that regulate public access, such as the Massachusetts CORI system, would better serve the several competing social interests.¹⁰ Open access systems, like some registries, tend to be ineffective in enhancing public safety, because they tend to discourage the sort of offender reintegration that reduces recidivism. The citizenry cannot and should not be put in the position, as individual employers and landlords and neighbors, of making public policy through ad hoc individual decisions based solely upon an individual's criminal record.¹¹

The Commission also urges that jurisdictions take steps to maximize the reliability and accuracy of criminal records. The Commission heard testimony about the hardship caused by inaccurate and incomplete reporting, by mistaken identity and false positives based on similar names, and by the growing phenomenon of criminal identity theft.¹² Compounding these record inaccuracies is the difficulty of correcting them. Jurisdictions should therefore implement procedures to minimize the possibility of false positives, to allow individuals or the government to challenge the accuracy of criminal history record information, and to remedy the problem of inaccurate or incomplete records in a timely manner.¹³ Finally, we recommend that all dispositions be reported in a timely fashion, which is particularly important where a disposition is favorable to the defendant.

The question of public access to criminal records is a nettlesome one with which the Commission wrestled. Because unrefined criminal record information can be difficult to read and misleading to lay readers, it should be presented to members of the public in a comprehensible and useful form. In addition, the Commission considered whether jurisdictions should take steps to ensure that only law enforcement agencies have access to records of closed cases that did not result in a conviction, including arrest records that resulted in no charges, charges that were dismissed, acquittals/reversals, and deferred adjudication or probation before judgment. Most statewide criminal record repositories limit public inspection of records of closed cases that did not result in a conviction, including cases where charges were dismissed or set aside after successful completion of a period of probation, pursuant to a deferred adjudication or deferred sentencing scheme. The Commission's decided to defer, until the August 2007 House meeting, making a recommendation on what if any limits ought to be placed on access to criminal history information.

Finally, the Commission urges jurisdictions to establish standards for and monitor the activities of entities that are in the business of conducting criminal background checks for employment and other purposes, and to establish appropriate controls for accuracy and reliability of records. The Federal Trade Commission has taken the position that the Fair Credit Reporting Act covers the activities of private screening companies, which means that an employer seeking information about an applicant's criminal record from a screening company must first get the applicant's written authorization, then provide the applicant with the copy of any investigative report generated, and notice of any adverse action taken.¹⁴ With stepped-up

education of employers about the requirements of the FCRA, and enforcement of its requirements by the FTC, individuals should have greater protections from mistake, and from unwarranted invasions of privacy.

Apart from whatever limits on public access are imposed by the state repository of records, the Commission notes that in many states courts are given authority, upon an individual's petition, to seal (or expunge, set aside, vacate, annul) that individual's record of conviction, upon successful completion of sentence, or at some reasonable time thereafter. Most states provide that such judicial sealing or expungement orders restore recipients to the legal status he or she enjoyed prior to conviction, and permit them to deny that they were ever convicted, including when asked to report prior convictions on an employment application. In a few states the record is destroyed entirely.¹⁵ The Commission determined to defer action on a proposal to endorse judicial sealing or expungement as a general restoration mechanism, instead endorsing the more transparent relief orders called for in the Commission's Report No. 103C.¹⁶ However, the Commission does believe that private screening companies should be restricted to the

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portunity in a climate that
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extent legally possible from reporting records that have been sealed or expunged, or whose public availability has been otherwise limited.¹⁷ If such companies are permitted to reveal a sealed or expunged record, they should be required at the same time to report the fact that the record has been sealed or expunged and the legal effect of such action.

Respectfully submitted,
Stephen A. Saltzburg, Co-Chair
James R. Thompson, Co-Chair
February 2007

ENDNOTES

1. The Commission was assisted in the preparation of this report by a paper presented at its March 3 hearing by Sharon M. Dietrich, Managing Attorney, Community Legal Services, Inc., *Expanded Use of Criminal Records and Its Impact on Re-entry*, available at <http://www.abanet.org/cecs>. Ms. Dietrich points out in her paper that there is no monolithic “criminal record” being examined by employers and others. Rather, criminal history record information is generally made available to the public through a variety of sources: state criminal record “central repositories” (often maintained by the State Police), the courts, private vendors which prepare reports from public sources, and even correctional institutions and police blotters. A few states have a central repository of all criminal records information. For example, Massachusetts has its Criminal Offender Record Information (CORI) system, a computerized system established in the 1970s that tracks information about anyone in Massachusetts who has been arraigned on a criminal charge. See Boston Foundation, *CORI: Balancing Individual Rights and Public Access*, available at <http://www.tbtf.org/uploadedFiles/CORI%20Report.pdf>. (“CORI Report”).

2. A survey conducted more than a decade ago for the U.S. Justice Department found that 47.3 million individuals had state criminal histories, and 25 million individuals had criminal history records in the FBI’s NCIC. Some FBI criminal information is duplicative of state records. *Use and Management of Criminal History Record Information: A Comprehensive Report* at 25, Bureau of Justice Statistics (1993), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cchuse.pdf>.

3. For example, from June 1, 2001 through May 31, 2002, noncriminal justice requests comprised more than half of the fingerprints submitted to the FBI for processing, compared to around nine percent in 1993. Paul L. Woodard and Eric C. Johnson, *Compendium of State Privacy and Security Legislation: 2002 Overview* at 9, NJC 200030 (U.S. Department of Justice, Bureau of Justice Statistics, Nov. 2003) (“Compendium”).

4. A recent report estimated that there are hundreds, maybe even thousands, of regional and local screening companies, in addition to several large industry players. See SEARCH, *The National Consortium for Justice Information and Statistics, Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (2005); see also Compendium, *supra* note 3 at 7-8. Among the latter, the report noted that ChoicePoint conducted around 3.3 million background checks in 2002, most of which included a criminal record check. USIS Transportation Services reported having 30,000 clients and processing more than 14 million reports per year.

5. According to a national task force report, “[T]he Internet greatly facilitates (and encourages) access to information for which the browser would not be inclined to make a trip to the courthouse.” Compendium, *supra* note 2 at 29. Ms. Dietrich testified that in Pennsylvania, for instance, accessibility to records from both the Central Repository and the

courts has been greatly facilitated by the Internet. In November 2002, the Pennsylvania State Police implemented its “PATCH system,” a mechanism for ordering a criminal record over the internet. In the first year that the PATCH system was in operation, the PSP completed 567,209 background checks, up from 412,324 requests processed the previous year. At the PSP’s budget hearing before the Senate Appropriations Committee in the spring of 2005, its Commissioner testified that the State Police had performed 1.7 million criminal record checks in the prior year. See Dietrich, *supra* note 1 at 3; see also Glenn May, *Online Background Checks Booming*, Pittsburgh Tribune-Review (Nov. 30, 2003).

6. Ms. Dietrich testified that the Administrative Office of Pennsylvania Courts (“AOPC”) is planning to make criminal record information even more readily available to the public. It has established a website on which the criminal court docket sheets from the entire state will be made available to anyone with Internet access. Unlike a PSP record check through the Internet, the AOPC record check is nearly instantaneous and requires no fee.

“Advocates have argued that AOPC’s website will greatly increase the barriers already encountered by [people with criminal records] in Pennsylvania. The response has been that court records have always been publicly available, so why should someone who wants to see them be forced to undergo the effort of traveling to the courthouse? The answer is in a concept known as “practical obscurity.” The making of records available to the public at the courthouse balances public access with some privacy for [convicted persons], because it requires some effort to obtain the information. This balance is upset when information is available at the click of a computer mouse.”

Dietrich, *supra* note 1 at 4.

7. The commercial vendors reported significant increases in business immediately after 9/11, with ChoicePoint reporting a 30% increase and HireCheck reporting a 25% increase. See SEARCH, *supra* note 4 at 32. Employers confirm that criminal record checks have increasingly become what Ms. Dietrich calls “a staple in their hiring processes.” A member survey conducted by the Society for Human Resource Management in 2003 revealed that 80% of its organizations conduct criminal background checks, up from a 51% response rate in a 1996 survey.

8. Ms. Dietrich reported that in Pennsylvania, 43 different occupations in which some people with convictions are barred from working have been identified, from accountants through veterinarians. See Community Legal Services, Inc., *Legal Remedies and Limitations on the Employment of Ex-Offenders in Pennsylvania* (Oct. 2004). Law students at the University of Toledo Law School compiled an inventory of the conviction-related employment disqualifications applicable in Ohio, and came up with well over 200. See Kimberly R. Mossoney and Cara A. Roecker, *Ohio Collateral Sanctions Project*, 36 U. TOLEDO L. REV. 611 (2005).

9. The press has managed to inflame public sentiment, with sensational headlines trumpeting the shocking news that a certain employer or industry employs people who have at some point in the past been convicted of a crime. See e.g., Sherri Ackerman, *Felons Can Be Child Care Workers*, Tampa Tribune (Dec. 18, 2005), available at <http://news.tbo.com/news/MGBYVZEVCH.html>. Recent research shows that almost 16 million people in the United States have a felony record. See Christopher Uggen, et al., “Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders,” *Annals, AAPSS*, 208 (May 2006). Given the ever-expanding reach of the criminal justice system, one can imagine that at some point in the not-too-distant future more people might have a criminal record than not.

10. See CORI Report, *supra* note 1. In Massachusetts access to court records is not subject to the same constraints as the state-wide CORI system, but court records are not centralized nor are they conveniently available by electronic means. See *Globe Newspapers v. Fenton*, 819 F. Supp 89 (D. Mass. 1993)(CORI violated First Amendment to extent it denied public access to court-maintained alphabetical indices of defendants in closed criminal trials without an individualized judicial determination on an adequate record that a particular defendant's name had to be sealed or impounded to serve a compelling state interest). Under Massachusetts law, records of felony convictions may be "sealed" by the office of probation after 15 years (ten years for misdemeanors), a remedy that has apparently not attracted the same challenge from the press. See Mass. Gen. Laws ch. 276, § 100A

11. Elsewhere in our recommendations (see Report No. 103C, *supra*) we urge jurisdictions to work with employers and others who have a legitimate need for access to criminal record information to encourage its more efficient use, and thus to encourage employment of persons with criminal records where appropriate. Except in cases where there is a statutory requirement that an agency or employer conduct a criminal background check, non-law enforcement agencies and employers seeking access to an individual's criminal record should be required to demonstrate that the public interest in receiving such information clearly outweighs the individual's interest in security and privacy.

12. See Dietrich, *supra* note 1 at 8-13. Criminal identity theft is a particularly pernicious type of erroneous criminal record, occurring when a person who is arrested gives the name, date of birth, and/or social security number of another person. Criminal identity theft is not an uncommon occurrence. The primary criminal justice report examining this phenomenon estimated that 400,000 Americans were victimized by criminal identity theft in a year's period. See *Report of the BJS/SEARCH National Focus Group on Identity Theft Victimization and Criminal Record Repository Operations* at 2 (Dec. 2005), available at <http://www.search.org/files/pdf/NatFocusGrpIDTheftVic.pdf>.

13. Ms. Dietrich recommends that, in order to avoid false positives, "date of birth and social security number should be mandatory search criteria. Never should "matches" be provided for solely a name match. Moreover, because false positives can be avoided in a fingerprint-based system, the FBI should continue to avoid providing name-based checks." See Dietrich, *supra* note 1 at 16.

14. Where an employer requests a criminal record report from a commercial vendor for purposes of a hiring decision it is regarded as a "consumer report" and is thus governed by the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.* Among the duties that FCRA imposes in such a situation are the following: 1) The employer must provide a clear written notice to the job applicant that it may obtain a consumer report. 15 U.S.C. § 1681b(b)(2). 2) The employer must obtain written authorization from the job applicant to get the report. 15 U.S.C. § 1681b(b)(3). 3) If the employer intends to take adverse action based on the consumer report, a copy of the report and a Federal Trade Commission Summary of Rights must be provided to the job applicant before the action is taken. 15 U.S.C. § 1681b(b)(3). This requirement permits a job applicant to address the report before an

employment decision is made. Afterwards, the employer, as a user of a consumer report, must notify the job applicant that an adverse decision was made as a result of the report and must provide, among other things, the name, address and telephone number of the credit agency and the right to dispute the accuracy or completeness of the report. 15 U.S.C. § 1681m(a).

15. The Bureau of Justice Statistics reports that 26 states, the District of Columbia, Puerto Rico, and the Virgin Islands have statutes that provide for the expungement of at least some felony convictions, and that in 10 of those states, Puerto Rico, and the Virgin Islands, the record is destroyed by the State criminal history repository. In 12 States and the District of Columbia, the record is retained with the action noted on the record. See *Survey of State Criminal History Information Systems*, 2003, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sschis03.pdf>. However, even expunged convictions generally remain available to courts and law enforcement agencies, and ordinarily revive in the event of a subsequent offense. See Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* at 39-61 (W.S. Hein, 2006), condensed at <http://www.sentencingproject.org/rights-restoration.cfm>.

16. See Report 103C on Employment and Licensure of Persons with a Criminal Record, *supra*. Only a handful of jurisdictions make judicial sealing or expungement generally available for adult felony convictions (Arizona, Kansas, Massachusetts, Nevada, New Hampshire, Puerto Rico, Utah, Washington). Most of these states impose an eligibility waiting period that varies depending upon the seriousness of the offense, and exclude the most serious offenses altogether. For example, Nevada courts have authority to seal all records related to a conviction, upon the offender's request, after an eligibility waiting period ranging from three years for misdemeanors, to 15 years for more serious felonies. Nev. Rev. Stat. § 179.245(1)(a). This relief is unavailable to sex offenders, and also to anyone who has been arrested during the eligibility waiting period. In New Hampshire, convictions may be "annulled" following completion of the sentence and expiration of a waiting period ranging from 1 to 10 years. N.H. Rev. Stat. Ann. §§ 651:5(III) and (IV). Washington courts are authorized to "vacate" the record of conviction, upon application, for Class B felonies after 10 years, and for Class C felonies after five. Wash. Rev. Code §§ 9.94A.640, 9.95.240, 9.96.060. Class A felonies are ineligible for this relief. Oregon's expungement remedy applies only to minor (Class C) felonies. Or. Rev. Stat. § 137.225(1) through (12). An additional number of states offer an expungement or sealing remedy to first offenders and/or non-violent offenders, or to probationers or misdemeanants, or to those who have received an executive pardon. The purpose of these statutes is generally rehabilitative, and most of them permit an applicant for employment to deny having been convicted. See Love, *id.* at 39-61. Sealing remedies may permit individuals to deny the fact of their conviction on employment applications, but they generally do not limit access by law enforcement agencies, or preclude reliance on the conviction in a subsequent prosecution or sentencing.

17. See SEARCH report, *supra* note 4 at 22-26.

REPORT TO THE HOUSE OF DELEGATES ON REPRESENTATION RELATING TO COLLATERAL CONSEQUENCES

MIDYEAR MEETING, 2007

RECOMMENDATION

RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to assist defense counsel in advising clients of the collateral consequences of criminal convictions during representation.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial, and local governments to encourage prosecutors to inform themselves of the collateral consequences that may apply in particular cases.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to authorize and fund public defender services, legal aid services, and/or other legal service providers, to provide offenders with appropriate assistance in removing or neutralizing the collateral consequences of a criminal record.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to require prison officials to ensure that prisoners are informed prior to release about the process for removing or neutralizing the collateral consequences of a criminal record, and to require probation and parole officials similarly to advise persons under their supervision about this process.

REPORT

In his 2003 address to the American Bar Association, Justice Anthony M. Kennedy specifically asked the legal community to re-evaluate its “obsessive focus” on the process for determining guilt or innocence to the exclusion of considering what happens to a person once finally convicted and “taken away.” As Justice Kennedy said, “When the door is locked against the prisoner, we do not think about what is behind it.”¹ Traditionally, the role of both defense attorney and prosecutor ended after sentencing. The case was closed and the client went away, either to prison or back to the community. It was not the responsibility of either the defender or the prosecutor to monitor or even be concerned with what happened to a person after that. Defenders and prosecutors alike have assumed that social workers and parole supervision agencies will do what is necessary to ensure that offenders successfully complete

their sentences and take the necessary steps to stay out of further trouble with the law. In short, offender reentry, a new term for an old concept, was not the business of the bar. Long prison terms and the increasingly severe effect of collateral consequences are forcing a change in this traditional way of looking at the responsibility of defenders and prosecutors alike.

In light of the severity of the collateral sanctions and disqualifications facing many offenders, and the discouraging effect these legal barriers have on successful reentry and rehabilitation of offenders, the legal community can no longer turn the blind eye to them. By providing the offender with the knowledge about collateral consequences at the front-end of the system, and later with adequate legal assistance to relieve the disabilities on the back-end, the chances of individuals getting their life back on track are increased. When offenders are able to successfully return to their communities and become law abiding citizens, public safety is enhanced and justice is truly served.

The ABA Criminal Justice Standards on Pleas of Guilty, and the Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, both require that a defendant be advised of collateral consequences before plea and at sentencing.² The Collateral Sanctions Standards also provide that jurisdictions, in order to facilitate this duty of advisement, should collect all collateral sanctions in their statute books in a single chapter or section of the jurisdiction’s criminal code, and identify with particularity the type, severity and duration of collateral sanctions applicable to each offense.³ The recommendations of the Justice Kennedy Commission, adopted by the House of Delegates as ABA policy in 2004, urged bar associations to establish programs to encourage and train lawyers to assist prisoners in applying for relief from collateral sanctions. We take the further step of urging states, in the first Resolved Clause, to assist defense counsel in advising clients of the collateral consequences of criminal convictions during representation.⁴

The Collateral Sanctions Standards already require a court “to ensure, before accepting a plea of guilty, that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction.” Standard 19-2.3(a). The court’s duty may be satisfied by confirming on the record that defense counsel’s duty of advisement has been discharged.

Id. The effect of the resolution is to make advice about collateral consequences as much of a part of defense practice as is the investigation and preparation of the client's case, and to insist that governments make it easier for defense counsel in carrying out this responsibility. The most helpful form such assistance can take is to collect and make available specific information about applicable collateral consequences to all criminal justice practitioners.

Traditionally, the role of the defender was to minimize the pain the clients suffer, and the pain was defined as incarceration or financial penalties. Today, the severity of collateral consequences has changed the parameters of that calculation, and defenders must reorient their thinking about what minimizing their clients' pain now means. Collateral consequences of conviction may pose barriers to employment, housing, education, and, for non-citizens, their ability to remain in the United States. Before a defendant pleads guilty and at sentencing, defense counsel should assure that the defendant understands what a conviction means and be prepared to argue for a sentence that provides the defendant with as few detrimental collateral consequences as possible. Defenders must begin to interview every client about their immigration, housing, employment status, and other relative issues in order to determine if civil disabilities will apply. If a red flag is raised concerning any of these issues, that client should be referred to a civil legal attorney or specialist for advice concerning the extent and direction of any potential collateral consequences. Upon receiving this crucial information, the client will be in a better position to make an informed and knowing decision about how to proceed in the case.

The Commission believes that sentencing courts should ensure that defenders have carried out their obligation to advise the client about collateral consequences before accepting a plea and at sentencing. One of the core concerns underlying this obligation is that people who plead guilty should know and understand the consequences of their guilty plea. Under the current system, courts shoulder virtually no responsibility for ensuring that defendants are adequately aware of the consequences, outside of the criminal justice system, that they may face after conviction.⁵ There still remains a tremendous need for courts and legislatures to address the collateral consequences problem, and we urge jurisdictions to move in this direction.

Relatedly, in the second resolved clause, prosecutors are asked to inform themselves about the collateral consequences that may apply in particular cases. The goal is ensure that prosecutors are knowledgeable regarding the consequences of their charging decisions and sentencing recommendations, beyond the amount of time a person may be incarcerated or placed on probation and the amount of a fine. All participants in the criminal justice system should understand that the collateral consequences of conviction may impose as great a

burden or detriment upon a convicted offender as the sentence itself. It is important for prosecutors to exercise their discretion with an eye to the overall impact of a charging decision or sentencing recommendation upon a particular individual.

Robert M.A. Johnson — District Attorney of Anoka County, Minnesota and Chair-Elect of the ABA Criminal Justice Section, and a Liaison Member of the Commission — has stated that in seeking justice, prosecutors must consider the circumstances of the offense, the offender, and the consequences of the conviction. Mr. Johnson, a former president of the National District Attorneys Association, stated in his 2001 NDAA President's message that:

At times, the collateral consequences of a conviction are so severe that we are unable to deliver a proportionate penalty in the criminal justice system without disproportionate collateral consequences. There

must be some reasonable relief mechanism. It is not so much the existence of the consequences, but the lack of the ability of prosecutors and judges to control the whole range of restrictions and punishment imposed on an offender that is the problem. As a prosecutor, you must comprehend this full range of consequences that flow from a crucial conviction. If not, we will suffer the disrespect and lose the confidence of the very society we seek to protect.⁶

It is encouraging that the National Association of District Attorneys has begun to address the issues involved in offender reentry, with an eye toward engaging more in the process.⁷ The responsibility of a prosecutor differs from that of the usual advocate, because the prosecutor is charged with seeking justice and not merely winning convictions. Accordingly, prosecutors should consider the important implications of collateral consequences if they are to ensure that justice is achieved.

In the third resolved clause, the American Bar Association urges legislatures to authorize and fund public defender services, legal aid services, and/or other legal service providers, to provide offenders with assistance in mitigating or neutralizing the collateral consequences of a criminal record. As the discussion below indicates, the issue of who should provide services to offenders seeking to remove or ameliorate collateral sanctions is a controversial one in the defense community.

There is on-going debate within the defense community about whether the role of the defender should be expanded to include reentry services. During the Commission's hearings, that debate was fully aired. Peter Ozanne, Executive Director of the Oregon Office of the State Public Defender, testified that public defenders should concentrate on becoming great lawyers in the court room and undertake no role in community corrections or reentry. Edwin Burnett, Public Defender in Cook County, Illinois, stated in his testimony that treatment and re-entry are not on the defense counsel priority list, and

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that defender offices are not set up to handle clients after their cases are adjudicated. He further stated that the natural focus is on the courtroom, because the defense bar is measured by effective representation and not social referrals. The views of Msrs. Ozanne and Burnett reflect the concern of many within the defense bar who argue that if a public defender office elevates social work and community-outreach practice institutionally, it risks professional imbalance with its lawyers losing focus on their core role of plea negotiation and trial litigation.

The opposite viewpoint was expressed by three other senior public defenders who testified. Paul DeWolfe, Montgomery County (MD) Public Defender, participates in the Montgomery County Jail's Pre-Release Center, working with social workers and probation officers in a multi-disciplinary team approach to reentry. He even has an office inside the jail itself. He has organized a program whereby private law firms working under his supervision provide pro bono legal services to the offenders returning to the community through the Pre-Release Center.⁸ Jim Neuhard, Director of Michigan's State Appellate Defender Office, agreed that defenders should form partnerships with other service organizations to provide re-entry legal services. He believes that the traditional public defense system model does not sufficiently consider the long-range outcomes for the client, and that defenders should concern themselves with the civil consequences of criminal convictions during legal representation. Indeed, he urged that it should be an ethical responsibility for the defense bar to understand the collateral consequences facing their clients. Didi Sallings, Executive Director of the Arkansas Public Defender Commission, told the Commission that her office has already expanded the defender's role outside of the courtroom to provide clients with assistance in expunging criminal records. She stated that there is a tremendous need for public defenders to provide post-adjudication services to assist their clients in getting their lives back on track. These three represent the view that defenders must take a broader approach to their responsibilities to clients if they want to avoid having those clients come back into the system again and again.

The Commission believes that public defenders and the criminal defense bar generally must re-evaluate traditional philosophies and practices relating to the scope of legal representation. Over the past two decades, many public defender offices across the country have broadened the range of defense services provided to indigent clients to include what is now commonly referred to as "holistic representation" or "whole client representation." These concepts are born out of the concept of therapeutic jurisprudence,⁹ which stems from the legal academy, and the problem-solving lawyering concept,¹⁰ which stems from practitioners. The holistic model recasts the defense role by considering the social, psychological and

socioeconomic factors that drive criminal behavior. Robin Steinberg of the Bronx Defenders has stated that "working compassionately with indigent clients means seeing firsthand that the problems and challenges they face stretch farther than the confines of the criminal cases before them."¹¹

In a traditional public defender office, the goal is to remove the immediate threat of legal jeopardy, not address larger issues. The traditional approach does not allow the defender to delve deeper to address the issues that contributed to the client's involvement with the criminal justice system. The holistic representation model does not change the fundamental and compelling value of getting an acquittal, less jail time, or avoiding prison altogether for a client. It merely adds the goal of making a long-term difference in the life of the client. By providing civil legal services to address offender's civil disabilities, defender offices are encouraged to see beyond the courtroom disposition of their criminal cases and address the underlying social issues hindering their client's successful reintegration into the community.

Several public defender organizations have already begun providing reentry-related services or are soon to begin. Some of these services include representation in employment-related proceedings, deportation-related proceedings, and housing-related proceedings, as well as assistance with expunging criminal records. In addition to the Maryland and Arkansas programs described above, the Bronx Defenders, a community defender organization has instituted a Civil Action Project that provides comprehensive legal services to clients and their families by fully integrating civil representation with their criminal defense practice.¹² Its goal is to develop proactive approaches to minimize the severe and often unforeseen consequences from criminal proceedings and facilitate the reentry of clients into the community. The Bronx Defenders is

also dedicated to addressing the underlying issues that led to their client's involvement with the criminal justice system in the first place.

The Neighborhood Defender Services ("NDS") of Harlem, also has a team of attorneys to represent its clients in the civil matters that arise from their criminal cases.¹³ NDS realizes that the potential consequences of those civil matters are often more severe than the disposition of the criminal case. The NDS civil team represents clients in a broad range of civil matters, principally police brutality and misconduct, housing matters and family court child protective proceedings. Similarly, the Public Defender Service of the District of Columbia has a civil legal services unit that will shortly begin to handle a wide range of cases involving the collateral consequences of a criminal arrest, conviction or an extended period of incarceration, such as civil forfeiture, eviction, denial of public benefits, termination of parental rights, deportation and academic expulsion.¹⁴

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It helps defenders take the broader approach to helping their clients if the legal system is flexible enough to ensure a good outcome for the client and the prosecutor is willing to buy into a utilitarian approach. For example, if the law provides for deferred adjudication and eventual expungement of the record upon successful completion of probation, as it does in Arkansas and Connecticut and many other states, a defender is naturally more willing to encourage the client with a substance abuse problem to plead guilty and participate in a community-based therapeutic treatment program. If it does not, and the client is going to end up with a record anyway, it makes an onerous treatment regime seem comparatively unappealing.

If a conviction occurs and collateral consequences are imposed, offenders need legal assistance in seeking restoration of their rights and privileges. In urging authorization and funding of public defender services, legal aid services, and/or other legal service providers, to provide offenders with assistance, the Commission calls on governments to provide new funds for this purpose, not to shift funds so that for every extra social worker or civil attorney the public defender office hires, there will be one less attorney that the office can employ in criminal representation. The Commission recognizes that the overwhelming caseload and diminishing resources currently available to support the fundamentals of criminal defense representation make this recommendation unattainable for most public defense practitioners without additional funding. Problem solving approaches demand more resources if they are to be practiced effectively, and most defenders barely have the time or resources to perform the basic responsibilities of client representation.

Assistance in overcoming collateral consequences may also come from other sources, namely prosecutors and correctional officials. District Attorney Michael D. Schrunk of Multnomah County, Oregon, testified that his office had recently sponsored a program called "Project Clean Slate," to provide county residents with an opportunity to apply for expungement, handle outstanding warrants, clear unpaid fines, and clear driver's license suspensions, and received an overwhelming response.¹⁵ On the scheduled day of the program local law enforcement officials and attorneys met with 800 people to attempt to resolve various outstanding problems related to their criminal records and court orders; an additional 1700 individuals who registered for the program were assisted over the course of nine weeks following the event. In Multnomah County, expungement requests are brought to the court by the DA's office, and the court generally grants any request upon the prosecutor's recommendation. Mr. Schrunk testified that he regards expungement as a critical service for former offenders, since a conviction record can hinder them in getting jobs and housing.¹⁶

David Guntharpe of the Arkansas Department of Community Corrections testified that his legal staff had recently discovered a little-known Arkansas statute that allows probationers who have successfully completed all of the terms of their probation to petition the court to dismiss the charges against them and expunge the record.¹⁷ Understanding that many of the people supervised by his agency do not have the means to hire a lawyer and go to court, Mr. Guntharpe directed his staff to prepare a model petition form to give to

each probationer as he or she "graduates," so that they can easily file the form with the court and obtain expungement.

Law school clinics can serve as a critical link in providing legal services to people seeking relief from the collateral consequences of conviction. Law schools today are generally doing little to prepare future lawyers to deal with the legal, social, and administrative problems arising from criminal convictions in this country. Training lawyers to become social engineers¹⁸ who are highly skilled, perceptive, sensitive lawyers who understand the importance of solving "problems of local communities" and "bettering conditions of the underprivileged citizens" is generally not emphasized in traditional legal education, where the focus tends to be on the workings of the adversary system.¹⁹ Clinical legal education has been and remains available as a tool to sensitize future attorneys to the social, economic, and political forces that affect their lives of their clients and strengthen their concern for social justice. An understanding of these critical issues will arm the next generation of attorneys with problem-solving techniques that can be used to improve the overall efficacy of the criminal justice system.

The Justice Kennedy Commission urged law schools to establish reentry clinics to assist individuals returning from prison or with criminal convictions regain legal rights and privileges. Two universities, New York University ("NYU") and University of Maryland, have already established reentry clinics. NYU launched the first-ever Offender Reentry Clinic in 2002, and the clinic's goal was to provide direct representation for ex-offenders and also to expose students in the clinic to a wide range of policy and administrative issues involved in reentry.²⁰ The objectives of the clinic were twofold. First, the course sought to familiarize students with the range of legal, administrative, and social restrictions imposed on individuals with criminal records as well as their families and communities. Second, the course was designed to examine the role that lawyers might play in helping ex-offenders navigate the legal obstacles they face upon return from prison. To date, the students have covered a range of substantive legal issues, including felon disenfranchisement and laws governing occupational bars and licensing restrictions. Because students represent actual clients, the course also offers training in litigation to help the students develop theories and hone formal advocacy skills.

The University of Maryland Law School also offers a Re-Entry of Ex-Offenders Clinical Program. The students' work include individual representation on issues related to expungement of criminal records, partnering with the social work clinic to assist individuals on the verge of release from correctional facilities, and community presentations.²¹ Students also work with community organizations providing assistance to ex-offenders, attend legislative hearings, and meet with correctional and law enforcement agencies to advocate on behalf of offenders. The clinic offers an ambitious and exciting opportunity for students to engage in a critical examination of important and complex criminal justice issues.

In its final resolved clause, the Commission urges governments to require prison officials to ensure that prisoners are informed prior to release about the process for removing or neutralizing the collateral consequences of a criminal record, and to require probation and parole officials similarly to advise persons under their supervision about this process. Many

offenders are not informed of the available remedies, and these agencies have the unique opportunity to reach offenders in order to provide this important information. The efforts of the Arkansas Department of Community Correction described above could be a model for other supervision agencies. Legislatures are also beginning to recognize this need.²²

Respectfully submitted,
Stephen A. Saltzburg, Co-Chair
James R. Thompson, Co-Chair
February 2007

ENDNOTES

1. An Address by Anthony M. Kennedy Associate Justice, Supreme Court of the United States, American Bar Association Annual Meeting (August 9, 2003) at 2-3, available at <http://www.abanet.org/cecs>.

2. Standard 14-1.4(c) provides that before accepting a plea, the court should advise the defendant of the possibility of various collateral sanctions. Standard 14-3.2(f) provides that defense counsel should advise the defendant of collateral sanctions before the entry of a plea of guilty "to the extent possible." Standards 19-2.3(a) and 19-2.4(a) both require that the defendant be notified of the collateral sanctions that will result from the conviction, by the court or defense counsel, before pleading guilty and before sentencing, respectively.

3. Standard 19-2.1.

4. In its original recommendation to the House, the Commission urged jurisdictions to assist defenders in carrying out their "ethical duty" to advise clients about collateral consequences. In further discussions, the Commission was persuaded that it is neither necessary nor useful to categorically identify defense counsel's obligation to advise of collateral consequences as an "ethical" one. In some cases, depending upon the nature and severity of the collateral sanction in relation to the pending criminal charges, a defender's failure to advise might amount to professional incompetence. A noncitizen client's exposure to almost certain deportation in the event of a felony conviction is the paradigmatic case in which failure to advise of collateral sanctions would raise competency questions. In many other cases, however, failure to advise of each and every collateral penalty would not raise any such questions, particularly where information about those collateral penalties was not readily available.

5. Courts have held that while a judge taking a guilty plea must advise of the "direct" consequences (e.g., imprisonment and fine), defendants need not be told by the court or their counsel about collateral sanctions. See, e.g., *Foo v. State*, 102 P.3d 346, 357-58 (Hawaii 2004); *People v. Becker*, 800 N.Y.S.2d 499, 502-03 (Crim. Ct. 2005); *Page v. State*, 615 S.E.2d 740, 742-43 (S.C. 2005). For a discussion of this principle, see Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002). Even in the absence of constitutional requirement, however, a majority of the states provide for disclosure of some collateral sanctions. For example, at least two dozen jurisdictions by court rule or statute require the court to advise defendants of potential immigration consequences before accepting a guilty plea. For complete statutory citations, see National Conference of Commissioners on Uniform State Laws, Uniform Law on Collateral Sanctions and Disqualifications, Draft dated November 27, 2006, at notes 87-91.

6. Robert M.A. Johnson, *Message from the President: Collateral Consequences*, The Prosecutor, May-June 2001, available at http://www.ndaa-apri.org/ndaa/about/president_message_may_june_2001.html.

7. In July 2005, the National District Attorneys Association adopted "Policy Positions on Prisoner Reentry Issues," available at http://www.ndaa-apri.org/pdf/policy_position_prisoner_reentry_july_17_05.pdf. This document affirms prosecutors' interest in offender reentry as a public safety issue, stating that "America's prosecutors should, where practicable, be participants in addressing th[e] issue [of offender reentry] in an effort to reduce recidivism and ensure the safety of victims and the community." It recommends that "prosecutors should educate themselves regarding the reentry programs that are provided or being proposed in their local jails and state prisons in addition to those reintegration plans that are being supervised by probation, parole, or their local community services board and be supportive of appropriate programs and plans."

8. The Jail's reentry program, organized by Montgomery County Corrections Chief Art Wallenstein and Jail Administrator Rob Green, is six to nine months in duration, and during this period participants are allowed to work during the day and receive counseling and other supportive services at night. They are permitted to save all their earnings from work in order to help them obtain housing and other services upon release.

9. Therapeutic jurisprudence is the "study of the role of the law as a therapeutic agent." It focuses on the law's impact on emotional life and on psychological well-being. Therapeutic jurisprudence focuses attention on humanizing the law and concerning itself with the human, emotional, psychological side of law and the legal process. See David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. Cooley L. Rev. 125, 125 (2000).

10. Problem solving lawyering provides integrated services to clients; promotes collaboration between civil legal aid and public defense practitioners to help clients and communities; relies on other professionals such as social workers, mental health experts and mitigation specialists to address the accused person's underlying problems. See, e.g., Cait Clarke and James Neuhard, *Making the Case: Therapeutic Jurisprudence and Problem Solving Practices Positively Impact Clients, Justice Systems and Communities They Serve*, by 17 St. Thomas L. Rev. 781, 781 fn 3 (2005).

11. Robin G. Steinberg, *Beyond Lawyering: How holistic representation makes for good policy, better lawyers and more satisfied clients*, at 2, available at <http://www.pili.org/2005r/dmdocuments/IV.Panel%20Robin%20HolisticRepres.pdf>

12. <http://www.bronxdefenders.org/comm/006.html>

13. <http://www.ndsny.org/programs.htm#civildefense>

14. <http://www.pdsdc.org/Civil/index.asp>

15. March 31 Commission Hearing Notes, available at <http://www.abanet.org/cecs>. In addition, information on Project Clean Slate is available under "Hearing Materials" on this website.

16. Under Or. Rev. Stat. § 137.225(1) through (12), the sentencing court is authorized to "set aside" misdemeanors and minor felonies (Class C, except sex and traffic offenses, and some other minor crimes). Upon application and a determination of eligibility, an order must issue unless the court makes written findings by clear and convincing evidence that granting the motion would not be in the best interests of justice. § 137.225(11). "Upon entry of such an order, such conviction, arrest or other proceeding shall be deemed not to have occurred, and the applicant may answer accordingly any questions relating to their occurrence." Or. Rev. Stat. § 137.225(4).

17. Under Ark. Code Ann. § 5-4-311(a) and (b), probationers for whom a judgment of conviction was not entered, including those who went to trial, are entitled to apply to the sentencing court upon

completion of supervision for an order dismissing the charges, and “expunging” the record. According to the Arkansas Department of Community Correction, a judgment of conviction is not entered in any case where a prison term or fine is not imposed, so that the relief afforded by this statute is potentially available to all persons sentenced to probation only. A person whose record is expunged “shall have all privileges and rights restored, shall be completely exonerated, and the record which has been expunged shall not affect any of his civil rights or liberties, unless otherwise specifically provided for by law.” § 16-90-902(a). “Expunge” is defined to mean that the record “shall be sealed, sequestered, and treated as confidential in accordance with the procedures established by this subchapter,” but “shall not mean the physical destruction of any records.” Ark. Code. Ann. § 16-90-901(a). Upon the entry of the order to seal, the underlying conduct “shall be deemed as a matter of law never to have occurred, and the individual may state that no such conduct ever occurred and that no such records exist,” including in response to questions. § 16-90-902(b). Records may be disclosed if the person applies for employment with a criminal justice agency or is subsequently prosecuted for a new crime. § 16-90-903(a)(2)-(4). A conviction that has been expunged may not be used as a predicate offense. See *State v. Ross*, 39 S.W. 3d 789 (Ark. 2001).

18. The concept of the lawyer as social engineer was originated by Charles Hamilton Houston, civil rights attorney and former Dean of

Howard Law School, who conceived of and developed the legal strategy that resulted in the end of legalized racial segregation in the United States. He taught and mentored Thurgood Marshall and others who argued and won the 1954 U.S. Supreme Court decision in *Brown v. Board of Education*. See Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and The Struggle for Civil Rights*. Philadelphia, University of Pennsylvania Press, (1983) at 84. Charles Hamilton Houston’s credo guides the Howard University School of Law’s mission to this day: “A lawyer’s either a social engineer or he’s a parasite on society.”

19. *Id.*

20. <http://www.law.nyu.edu/clinics/semester/offender/index.html>

21. http://www.law.umaryland.edu/course_info.asp?coursenum=598D

22. The Florida legislature recently passed a bill requiring county and local jails to assist inmates in applying for restoration of their civil rights by providing them upon release with the necessary forms. See Debbie Cenziper and Gary Fineout, *Ex-Felons get help regaining civil rights*, Miami Herald, May 2, 2006. Florida law has for some years required the Department of Corrections to assist inmates released from state prison or supervision with this process, and to forward their names upon release to the Clemency Board for consideration for restoration of rights, though recent litigation suggests that these obligations have been honored in the breach.

REPORT TO THE HOUSE OF DELEGATES ON TRAINING IN THE EXERCISE OF DISCRETION

MIDYEAR MEETING, 2007

RECOMMENDATION

RESOLVED, That the American Bar Association urges federal, state, territorial and local governments, and licensing authorities to support professional associations and organizations in order to develop programs to train all criminal justice professionals — including judges, prosecutors, defense counsel, probation and parole officers, and correctional officials — in understanding, adopting and utilizing factors that promote the sound exercise of their discretion.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments and licensing authorities to recognize that such training should be credited towards continuing education program requirements.

REPORT

The criminal justice system in the United States is uniquely decentralized. Approximately ninety-five percent of criminal cases are prosecuted at the local level, and about 2500 jurisdictions have elected chief prosecutors.¹ Within a particular county or judicial district, a variety of line prosecutors and law enforcement agents exercise discretion independently of one another. Probation and parole officers operate with broad discretion at the field level, sometimes reporting to state correctional agencies or courts, and sometimes reporting to the county. Judges, corrections officials, and parole board members also make independent discretionary decisions.

The discretionary decisions these officials make independently on a daily basis have one thing in common: they have a profound influence on the lives of criminal defendants, on their families, and on the community. Ultimately, the decisions could affect whether a defendant will be able to return to society and remain law-abiding at the conclusion of a court-imposed sentence, whether the victim will be able to overcome the impact of the crime, and whether the community will accept that justice has been accomplished. However, despite the impact these decisions can have, the assumptions underlying them are rarely articulated or examined. Officials in different jurisdictions rarely compare notes on the use of discretion, and the exercise of discretion is even more rarely made the subject of systematic training or regulation.

The Commission was persuaded by Robert Johnson, the elected prosecutor from Anoka County, MN, and a liaison to the Commission from the Criminal Justice Section, that it is

important to identify the significant amount of discretion that exists throughout the criminal justice system, to highlight the importance of exercising that discretion wisely, and to recommend that criminal justice professionals and their associations and organizations develop training programs that will assist them in understanding, adopting and utilizing factors that promote the sound exercise of discretion.

The resolution urges training for all criminal justice professionals who exercise discretion. These include judges, prosecutors, defense counsel, probation and parole officers, and correctional officials. It emphasizes that for helpful training to occur three ingredients are essential. Most important is funding — i.e., new funds are needed for training that does not now occur. Funding alone is not sufficient, however. Jurisdictions must assure that the work schedules of those to be trained accommodate new training programs, and that the new training programs should be credited toward any continuing education requirements imposed upon criminal justice professionals.

Judges

The American Bar Association has consistently worked to shore up the discretionary role of judges in criminal sentencing. The ABA Sentencing Standards (3d ed.) opt for some form of guidelines to avoid unwarranted disparities in sentencing while assuring that a sentencing judge may consider the unique characteristics of each offender and the circumstances in which an offense was committed. The standards assume that judges will exercise their discretion appropriately, but the fact is that in many jurisdictions judges, whether elected or appointed, receive little training in the range of options available to them and in the factors that might warrant consideration when these options are considered. Judicial conferences are common throughout the United States, and CLE for judges serves the important function of keeping judges current on legal developments. Training in the appropriate exercise of discretion should be an important part of judicial training. It is also important to keep judges aware of sentencing options, including rehabilitative programs that may be available within their jurisdiction. Accurate and complete information will help to ensure that a judge is able to develop the most appropriate sentence in each case.

Sentencing guidelines systems have been adopted in the federal system and some states. One principal goal is

avoidance of unwarranted disparities in sentencing. Guidelines may work to avoid such disparities, but training in the exercise of discretion holds out some promise of also helping to reduce unwarranted disparities.

Prosecutors

Prosecutors act as gatekeepers. No person may be convicted of a crime unless a prosecutor brings and pursues a charge against him.² Prosecutors have traditionally controlled programs that divert offenders out of the criminal justice system and into social service treatment, and programs that work to defer adjudication and sentencing. In recognition of their responsibility for public safety, prosecutors have more recently become involved in crime prevention strategies.³ Prosecutor-driven prevention programs may deal with issues ranging from community prosecution, mental health, child protection, and juvenile justice, to violence against women, gun violence, and white collar crime.

Since successful reentry and reintegration of offenders means less crime and fewer victims, prosecutors have also taken an interest in reentry programs and the collateral consequences of conviction.⁴ But this is a new role for prosecutors, and it may mean new responsibilities for defense counsel who must learn how to talk with prosecutors about new prosecutorial alternatives. The fact is that as new programs develop, both prosecutors and defense counsel need to understand the factors that may result in an offender receiving the benefit of a sentence alternative to incarceration.

In jurisdictions that have adopted determinate sentencing with guidelines and mandatory minimums, prosecutors have effective control over some sentences by virtue of the charges they bring. The charging decisions in these jurisdictions may be especially important, both prosecutors and defense counsel need to understand the factors that are likely to be considered as charging decisions are made.

During the course of its hearings, the Commission heard from a number of prosecutors who have developed innovative community-based sanctioning programs, including community courts in Oregon, therapeutic community-based treatment centers in Arkansas, and extended in-patient drug treatment in New York.⁵ Many of the prosecutors who participated in the hearings have been leaders in the development of partnerships with defenders and courts and other justice stakeholders, partnerships that have yielded impressive reductions in the number of people returning to prison, or going there in the first place. Robert Johnson, himself a long-time leader in his own district and in the larger community of prosecutors, expressed concern that there is no forum in which prosecutors can share their experiences and learn about the variety of innovative crime prevention approaches being developed around the country – often under the auspices of the local prosecutor's office.

Mr. Johnson pointed out that prosecutors themselves tend to set funding priorities for training in order to carry out their responsibilities to the public. Thus, they have developed training in the mechanics of prosecution — such as search and seizure, confessions, lineups, DNA, cybercrime, and other trial-related aspects of their work — because they believe that trial tactics training improves their ability to win cases. But, he emphasized that the public does not ask prosecutors simply to win cases. It asks prosecutors to reduce crime and victimization, which requires development of a broader and more nuanced crime control strategy. Mr. Johnson urged that training in the exercise of discretion – arguably the most important aspect of a prosecutor's responsibility – might improve prosecutorial effectiveness because the exercise of discretion is at the core of an overall strategy to reduce crime.

Training may encourage prosecutors to experiment with

programs that divert an offender into an alternative sanctioning system that may benefit both the victim and society. Training programs can enable prosecutors who have such programs to share information about successes and failures with other prosecutors and compare notes on the best ways of training subordinates in making discretionary decisions. Training programs may help prosecutors to develop partnerships with courts, defenders, other actors in the justice system, community service providers, and community groups – all of whom are stakeholders in public safety and crime control.

Defense Counsel

It is not as common to think of defense counsel exercising discretion as it is to think of judges, prosecutors, probation and parole officers, and correctional officers exercising discretion. Yet, there are at least two aspects of discretion in which defense counsel should be trained. First, they should know and understand the fac-

tors most likely to influence the other criminal justice actors in making decisions in order to be able to offer evidence and to make arguments designed to assist clients in benefiting from discretionary decisions. Second, they need to understand the options available to defendants in a variety of community supervision or diversion programs, and the various risks and benefits of each program in order to be able to offer sound legal advice to clients about which options are best for them.

It is probably true that defense counsel have less power than other criminal justice professionals to initiate actions, as opposed to responding to the initiations of other actors. But, it is vital for defense counsel to understand the extent of discretion employed by others, the standards governing the exercise of discretion, and the ways in which discretionary decisions can enable defense counsel to seek the best possible result for their clients.

It is equally important for defense counsel to understand the programs and policies underlying the programs that are

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available to their clients. Most criminal defendants rely heavily upon the advice of their counsel in deciding whether to plead guilty or go to trial, to opt for an alternative disposition or to prefer the traditional adjudicatory approach to a criminal case, or to enter a treatment program or simply serve a sentence. Defense counsel is called upon daily to exercise careful judgment in considering the options available to a defendant and the characteristics of that defendant. These judgments are in the nature of discretionary recommendations, and they require as much careful thought and assessment as the decision of prosecutors in making charging decisions.

The Commission also heard from defense counsel that the success or failure of prosecutorial diversion/community supervision programs may turn on the willingness of defense counsel to support the programs and recommend them to their clients. The best prosecutorial programs are those in which defense counsel, the courts and other criminal justice professional support. Some of the best programs are influenced by suggestions of defense counsel as they persuade prosecutors that programs can be improved in order to both increase the likelihood of a defendant's rehabilitation and decrease the likelihood of recidivism.

Probation and Parole Officials, and Correctional Officials

The Commission also heard testimony about the extent to which probation/parole and correctional officials exercise great power over a criminal defendant's freedom. Probation and parole officials are responsible for supervising probationers and parolees who are given provisional freedom and whose liberty may be limited or controlled by the supervising officials. Correctional officials make the myriad day-to-day decisions that determine the conditions and often the duration of the court-imposed sentence. The parole board makes a discretionary decision to release an inmate under the indeterminate sentencing model, and the parole officer responsible for supervising the offender after release (or the probation officer in the case of a suspended sentence) has the power to recommend whether the offender should return to prison in the case of non-compliance with release conditions, or to give the offender another chance. The efforts of Jorge Montes, Chair of the Illinois Prisoner Review Board, to change the culture of the Board, described in the report on our recommendations on parole supervision,⁶ strikingly illustrate how changing concepts of what constitutes an effective sanction can influence the exercise of discretion on the part of paroling officials.

In jurisdictions that have adopted determinate sentencing and abolished discretionary parole, executive clemency may provide the only possibility of release before the expiration of the sentence. In some jurisdictions parole boards are charged with making clemency recommendations to the governor, as in Illinois, Maryland and Arkansas, and in some jurisdictions a separate clemency board has this function. In a handful of states, including Connecticut, parole and clemency functions co-exist in a single board, which is responsible for making the clemency decision independent of the governor.⁷ Of all the decisions made in the course of a criminal case, the decision whether or not to pardon or commute a sentence is perhaps the most obvious and formal exercise of discretion. Yet few parole boards (or clemency boards) have articulated the

considerations that go into exercise of that discretion, established standards, or even shared their experiences with other boards that have the same responsibility.⁸

As a general matter, perhaps out of an abundance of caution, corrections and parole officials do not see their role as involving the exercise of discretion as much as they see it as involving the enforcement of rules. It is important for them to recognize that it involves both, and that the balance of rule and discretion is an elusive and important one in the criminal justice system. Whether or not they are aware of it, that balance is struck by them personally on an almost daily basis.

It is always less risky for a deciding official to opt for incarceration over release to the community. This was brought home to the commissioners at its Chicago hearing, where Patricia Caruso, Director of the Michigan Department of Corrections, there to testify about her agency's reentry programs, was simultaneously dealing long-distance with the political fall-out from a high profile murder committed by a parolee who had apparently been mistakenly released. The decision to release a prisoner always involves some "political" risk. Yet, the just exercise of discretion means that officials who seek to do justice must be willing to accept the responsibility that accompanies release decisions. The Commission was impressed by testimony from Arkansas and Maryland officials that their respective governors take their clemency responsibilities seriously and have commuted sentences in appropriate cases.⁹

Corrections and parole officials should also be trained in the factors that should be considered when discretionary decisions are made that can have profound implications not only for an individual's freedom, but also for the prospect of successful reentry. In order to assure that officials make informed decisions, jurisdictions should provide them with training on the most accurate and current research and findings available as to the effectiveness of the available range of criminal sanctions.

Training and Cross-functional Communication

The Commission believes that it would be particularly helpful if judges, prosecutors, defense counsel, probation/parole and corrections officials, and others who exercise discretion could share with one another their experiences in balancing respect for and observance of rules with the discretionary power to make exceptions to those rules. There is no reason why prosecutors should not share with judges the factors they consider in making charging decisions, or why judges should not share with prosecutors the factors they consider in imposing sentences. Both prosecutors and judges should understand the factors considered by corrections and supervisory officials in deciding when a person should be released and when returned to prison. The standards governing the exercise of executive clemency or other discretionary pardoning authority should also be made clear to all actors in the system.

The sound exercise of discretion is likely to be improved if the actors in the criminal justice system talk to each other about what matters, how much it matters and why it matters. Indeed, the sound exercise of discretion could also be promoted if officials who exercise discretion would include defenders, community representatives, mental health professionals and drug counselors in their training programs. There is a danger when prosecutors train only with prosecutors, judges only with

judges, etc. that preconceptions or misconceptions may be reinforced rather than challenged.

In the end, officials with discretion must decide how best to exercise it. The goal should be, however, to provide them with as much valid information and thoughtful guidance as possible. As the Commission has previously recommended,¹⁰ criminal justice officials can benefit from a broader understanding of how they interact with others to accomplish the common goals of justice and public safety.

Respectfully submitted,
Stephen A. Saltzburg, Co-Chair
James R. Thompson, Co-Chair
February 2007

ENDNOTES

1. In Alaska, Rhode Island, and Delaware, the elected attorney general is the chief prosecutor. In Connecticut and New Jersey, as in the federal system, the chief prosecutor is appointed by the Governor. *U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Bulletin, National Survey of Prosecutors in State Courts, 2001, May 2002*, available at <http://www.ojp.usdoj.gov/bjs/pub/ascii/psc01.txt>. There is no qualification (other than a license to practice law) for the office of district attorney.

2. ABA Standards for Criminal Justice Prosecution Function and Defense Function (3rd Ed.), Standard 3-2.1 (Prosecution Authority to be Vested in a Public Official), Standard 3-3.4 (Decision to Charge); NDAA National Prosecution Standards (2nd Ed.), § 43.1 (Charges, Prosecutorial Discretion), § 44.1 (Diversion, Prosecutorial Discretion).

3. Some of the innovative prevention programs initiated and administered by prosecutors are encouraged and funded by the United States Department of Justice, and some are developed and funded locally. The American Prosecutors Research Institute (APRI), founded by the National District Attorneys Association in 1984, tracks the development of these programs nationally, to ensure that state and local

prosecutors have access to the most up-to-date and relevant research. See the APRI's Major Program Areas at <http://www.ndaa-apri.org/apri/programs/index.html>.

4. In July 2005, the National District Attorneys Association adopted "Policy Positions on Prisoner Reentry Issues," available at http://www.ndaa-apri.org/pdf/policy_position_prisoner_reentry_july_17_05.pdf. This document affirms prosecutors' interest in offender reentry as a public safety issue, and recommends that "prosecutors should educate themselves regarding the reentry programs that are provided or being proposed in their local jails and state prisons in addition to those reintegration plans that are being supervised by probation, parole, or their local community services board and be supportive of appropriate programs and plans." It states that "America's prosecutors should, where practicable, be participants in addressing th[e] issue [of offender reentry] in an effort to reduce recidivism and ensure the safety of victims and the community."

5. Many of these prosecutor-driven programs are described in other sections of the Commission's report. See particularly Report I on Alternatives to Incarceration and Conviction for Less Serious Offenders.

6. See Recommendation on Improvement in Probation and Parole Supervision, *supra*.

7. Other states that follow this model are Alabama, Georgia, Idaho, South Carolina, and Utah. See Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State by State Resource Guide*, (W.S. Hein, 2006), condensed at <http://www.sentencing-project.org/rights-restoration.cfm>.

8. The ABA has taken the position, in response to a recommendation of the Justice Kennedy Commission in 2003, that jurisdictions should "establish standards governing applications for executive clemency." See Report No. 121C, Annual 2003.

9. See March 3 Hearing Notes, available at <http://www.abanet.org/cecs>.

10. See Recommendation on Alternatives to Incarceration and Conviction for Less Serious Offenders, *supra*.

CERTIFICATES OF REHABILITATION AND OTHER FORMS OF RELIEF FROM THE COLLATERAL CONSEQUENCES OF CONVICTION: A SURVEY OF STATE LAWS

by Margaret Love and April Frazier

October 1, 2006

The statute books in every jurisdiction are filled with laws that disqualify people with a criminal record from jobs, occupational licenses, housing, and other benefits and opportunities. Some restrictions on employment of convicted persons are narrowly tailored to protect against an identified public safety risk, but others are categorical, arbitrary, and without temporal limitation, without regard to any post-conviction rehabilitation. Even where there is no legal basis for disqualification, and even where jurisdictions have adopted a policy of encouraging reintegration of offenders, employers and others are still hesitant about giving this population a second chance. Given the ease of conducting background checks, it is harder and harder for people who have been convicted of a crime to escape their past.

People who have served their sentences need to be able to reestablish themselves as law-abiding members of society. At the same time, employers and other decision-makers need to have some reassurance of a person's reliability. The ABA Commission on Effective Criminal Sanctions has been looking into the ways in which jurisdictions now relieve legal disabilities and certify an offender's suitability for employment and other appropriate opportunities, looking toward the development of a model administrative or judicial relief procedure.

Every jurisdiction in the United States has some legal mechanism for mitigating or avoiding the collateral consequences of a felony conviction, and for certifying an ex-offender's rehabilitation.¹ Pardon is of course the "patriarch" of relief procedures, but as a practical matter these days pardon is a realistic option in only a handful of states. Judicial remedies like expungement, sealing and set-aside are available in some states, but are usually restricted to first-time offenders or misdemeanants. A surprisingly large number of states have laws prohibiting denial of employment or licensure based solely upon a previous felony conviction, but very few provide any effective enforcement mechanism. Only one state, New York, offers an administrative certificate that both relieves specific disabilities and evidences rehabilitation for employment and licensing purposes.

Some state relief mechanisms work better than others, and no two are exactly alike. Ten years after the Justice Department issued its study of collateral consequences in the United

States, we still have a "national crazy-quilt of disqualifications and restoration procedures."² While New York's administrative certificate program is unique in its scope, a number of other jurisdictions have relief mechanisms that are fairly effective in restoring criminal offenders to the legal rights and status they enjoyed prior to their conviction. The following brief descriptions are intended introduce the reader to some of the more functional aspects of our "national crazy-quilt."

I. ADMINISTRATIVE CERTIFICATES OF REHABILITATION

Six jurisdictions offer administrative "certificates of rehabilitation"³ that restore some or all of the legal rights and privileges lost as a result of conviction, and in some cases evidence good character. New York's certificates have the most far-reaching legal effect, but Illinois and Connecticut have recently enacted certificate programs of their own to facilitate offender reentry. The certificates offered by California, Nevada, and New Jersey are not new, and appear to have little operational usefulness.⁴

New York: New York offers two types of certificates: a certificate of "relief from disabilities" ("CRD") and a certificate of "good conduct" ("CGC"). See N.Y. Correct. Law §§ 700-705, 703-a, 703-b. These two certificates have more or less the same legal effect, and differ primarily in their eligibility requirements. The CRD is available to misdemeanants and first-time felony offenders, and may be awarded at any time after sentencing by a court where no prison term is involved, or after release from confinement by the state Board of Parole. The CGC is available from the Parole Board to repeat offenders, and requires a waiting period of one to five years of "good conduct," depending on the seriousness of the offense. The statutory criteria for the two certificates ("consistent with rehabilitation" and "public interest") are otherwise the same. Both types of certificate have more or less the same legal effect: they relieve an eligible person of "any forfeiture or disability," and "remove any barrier to . . . employment that is automatically imposed by law by reason of conviction of

the crime or the offense.” In addition, the CRD and CGC create a “presumption of rehabilitation” that must be given effect by employers and licensing boards.⁵ Either certificate may be temporary or limited to particular disabilities, and the relief may be enlarged by the court or Board of Parole at any time. Federal and out-of-state offenders residing in New York may qualify for relief from the Parole Board, if they can show they are suffering from a particular disability under New York law. The entire Parole Board process can take from six months to a year to complete. Approximately 1000 applications are made to the Parole Board for both kinds of certificates annually, of which about half are granted. The bulk of the remaining grants (about 2500) are made by the courts. A recent report of a New York State Bar Association committee speculated that the relatively low number of certificates issued each year can be attributed by the fact that most offenders are not told about them.⁶

Illinois: Illinois also offers certificates of relief from disabilities and certificates of good conduct, but its certificate program differs significantly from New York’s in its eligibility criteria and legal effect. Eligibility for both certificates is restricted to persons with no more than two non-violent felony convictions. More importantly, Illinois’ certificates do not have the general effect of relieving disabilities and removing employment barriers. The Illinois CRD is narrowly tailored to facilitate licensing in 27 specified occupational areas, by creating a “presumption of rehabilitation” that must be considered by the licensing board. The CGC evidences a finding by the Illinois Prisoner Review Board (PRB) that an individual “has demonstrated that he or she has been a law-abiding citizen and is fully rehabilitated,” but it has no independent legal effect.⁷ The CRD is available as early as sentencing, while the CGC requires a waiting period of one to three years depending upon the seriousness of the offense. Federal and out-of-state offenders are eligible for either certificate as long as they reside in the state. The Illinois certificate program is a new one, and few certificates have been granted to date. The PRB is in the process of developing regulations for both certificates.

Connecticut: The Connecticut Board of Pardons and Parole has recently been given authority to supplement its regular pardon program⁸ through issuance of “provisional pardons,” which will give relief from specific “barriers or forfeitures” relating to employment or licensing. The only findings necessary are 1) that it “may promote the public policy of rehabilitating ex-offenders through employment” and 2) that it “is consistent with the public’s interest in public safety and the protection of property.” Employers may not deny or terminate employment solely on the basis of a prior conviction for which the person received a provisional pardon. Federal and out-of-state offenders are eligible as long as they reside in the state. A provisional pardon does not appear to have any effect of certifying an offender’s rehabilitation.⁹

California: California’s “certificate of rehabilitation” is the first step in the pardon process, and has only a limited independent legal effect. A person may apply to the court in the county of residence after a seven-to-nine year “period of rehabilitation” after completion of sentence. The statute requires that the person live an “honest and upright life”, “conduct himself with sobriety and industry”, “exhibit a good moral character”, and “obey the laws of the land.” CAL. PENAL CODE §4852.05. If the Court finds that the petitioner has demonstrated rehabilitation, it issues a certificate and forwards the case to the Governor (or Supreme Court in the case of recidivists) with a recommendation that the individual be pardoned. The certificate of rehabilitation is recognized as relevant in a few licensing schemes,¹⁰ but only a gubernatorial pardon can lift occupational licensing bars. California pardons have been very rare in the past decade, and Governor Schwarzenegger has to date issued only three.

Nevada: The State Board of Pardons Commissioners (a panel consisting of “the governor, justices of the supreme court, and attorney general, or a major part of them.”) has authority to issue a “certificate of good conduct” five years after a person’s release from custody, pursuant to Nev. Admin. Code § 213.130. Such a certificate may issue: 1) to remove a particular legal disability incurred through conviction; 2) to furnish evidence of good moral character where it is required by law; or 3) “upon proof of the person’s performance of outstanding public services or if there is unusual and compelling evidence of his rehabilitation.” See Op. Nev. Att’y Gen. (Nov. 18, 2003). However, the Board has not issued a certificate of good conduct in many years, because certificates are considered effectively indistinguishable from a full pardon.¹¹

New Jersey: An individual who has been previously denied a license because of his conviction may apply seek reconsideration after a two-year period with a certificate of rehabilitation from the federal or state parole board, or from the responsible chief probation officer, certifying that he “has achieved a degree of rehabilitation indicated that his engaging in the proposed employment would not be incompatible with the welfare of society” Upon receipt of this certificate, the licensing authority “shall [be] preclude[d] from disqualifying or discriminating against the applicant.” N.J. STAT. ANN. §168A-3. No certificate has been sought or granted in the past 15 years.

In addition to the above-described certificate programs, here are a variety of other ways to establish a convicted person’s rehabilitation and facilitate employment.

II. PARDON AS CERTIFICATION OF REHABILITATION

Like *Connecticut*, *Alabama*, *Georgia*, *Idaho*, *South Carolina*, and *Utah* all have independent administrative pardon boards, that operate independent of the governor to relieve disabilities imposed under state and, in certain cases, federal law. Georgia’s restoration of

rights certificate (available immediately upon completion of sentence) restores the right to sit on a jury and run for public office, although a full pardon (available after an additional five-year waiting period) is necessary to remove licensing and employment restrictions. The Georgia Board of Pardons and Paroles issues between 400 and 500 full pardons each year, and about the same number of “restoration of rights” certificates.¹² South Carolina’s board typically grants 60-70% of the 200-odd cases it hears each year. The Alabama board granted 158 full pardons in 2003, and over 2,000 applications for restoration of voting rights. In Idaho the grants are fewer in absolute number (20-30 per year), but still represent 2/3 of all applications received. (Idaho also provides for a set-aside of conviction and dismissal of charges for probationers upon successful completion of sentence.)¹³ In all of these states pardon relieves disabilities, but does not expunge the conviction.

Delaware, Pennsylvania, and Oklahoma administer the governor’s pardon power through an appointed board with gate-keeping authority (the governor cannot act without their approval), and all three states have a functioning pardon program that issues over 100 pardon grants annually. All three states subject an applicant a formal hearing process, with input from prosecutor and victims. **Arkansas** also has an operational pardon program administered through that state’s Parole Board, though the Board’s recommendations are not binding on the governor and there is no formal hearing. The current governor of **Maryland** (Robert Ehrlich) has issued a substantial number of pardons, but the operation of the power has not been institutionalized in that state. In all of these states pardon relieves most legal disabilities imposed by law and signifies rehabilitation.

Pardon Grounds for Expungement: Pardon is grounds for judicial expungement in three of the states that have an operational pardon process: Arkansas, Connecticut, and Pennsylvania. In Maryland and Oklahoma pardon is grounds for expungement only for non-violent first-offenders. Pardon is also grounds for expungement in Indiana, Massachusetts, Ohio, South Dakota, Texas, and Washington, but very few pardons have been issued in those states in recent years.

III. AUTOMATIC PRESUMPTION OF REHABILITATION

More than half the states have laws regulating the extent to which public employers and/or licensing authorities may consider a felony conviction in connection with deciding whether to hire or license, or whether to terminate employment.¹⁴ These laws generally provide that employment or a license cannot be denied “solely because of” a conviction, but only if the conviction is “directly related” (or “reasonably” or “substantially” related) to the particular employment or profession. Most states give no guidance as to how to establish this relationship, though a few states define it by reference to an individual’s “rehabilitation.” As we have seen, New York issues certificates that attest to an offender’s rehabilitation for

public and private employment and for occupational licensing, and it appears to be the only state that provides for such case-by-case certification.¹⁵ But the law in five states accords an automatic statutory “presumption of rehabilitation” to individuals who have a clear record for a certain period of time. However, only two of these five states provide a mechanism for enforcement of their nondiscrimination provisions.¹⁶ Moreover, in most states there are many occupations that are excepted from the nondiscrimination obligation, including those in health, education and care-giving.

Arkansas creates a presumption of rehabilitation for occupational licensing purposes five years after release or the completion of parole or probation supervision if a person has no subsequent convictions with an exception for teacher and nursing licenses. The licensing authority is required to state in writing the reasons for denial of the license if the decision is based, in whole or part, on conviction of a felony, and a person may file a complaint under the state administrative procedure act in cases of violations. ARK. CODE ANN. § 17-1-103.

Minnesota bars public employers and licensing agencies from disqualifying a person “solely or in part” based on conviction unless 1) there is a “direct relationship” between occupation or license and conviction history, measured by the purposes of the occupation’s regulation and the relationship of the crime to the individual’s fitness to perform the duties of the position; and 2) individual has not shown “sufficient rehabilitation and present fitness to perform” the duties of the public employment or licensed occupation. Minn. Stat § 364.03, subd. 1. Rehabilitation may be established by a record of law-abiding conduct for one year after release from confinement, or successful completion of probation or parole. § 364.03, subd. 2. Once a person establishes “sufficient rehabilitation and fitness to perform the duties of the public employment sought or the occupation for which the license is sought,” that person “shall not be disqualified from the employment or occupation” even if the conviction “directly relates to the public employment sought or to the occupation for which a license is sought.” Enforced through state administrative procedure act.

Montana: A person is entitled to a presumption of rehabilitation for occupational licensing purposes once he or she successfully completes probation or parole supervision without any subsequent criminal convictions. Mont. Code Ann. §3 7-1-205.

New Mexico: In application for public employment or occupational license, a “presumption of sufficient rehabilitation” is recognized after a period of “three years after final discharge or release from any term of imprisonment without any subsequent conviction” when the criminal conviction does not directly relate to the particular employment, trade, business or profession. N.M. STAT. ANN. § 28-2-4. Presumption does not apply to

convictions that directly relate to the profession or to persons seeking licensing or employment in education and child-care facility licenses if they were convicted of drug trafficking, sexual offenses, or child abuse.

North Dakota: A person may be denied license because of a prior conviction only “if it is determined that such person has not been sufficiently rehabilitated, or that the offense has a direct bearing upon a person’s ability to serve the public in the specific occupation, trade, or profession.” Completion of five years after final discharge without subsequent conviction “shall be deemed prima facie evidence of sufficient rehabilitation.” If conviction is used “in whole or in part” as a basis for disqualification, it “shall be in writing and shall specifically state the evidence presented and the reasons for disqualification.” N.D. Cent. Code § 12.1-33-02.1.¹⁷

IV. JUDICIAL EXPUNGEMENT

In eight states the courts have primary responsibility for administering the state’s certification scheme through statutory expungement-type relief that is available to most adult felony convictions. In Arizona, Kansas, Massachusetts, Nevada, New Hampshire, Oregon, Utah, and Washington, judicial relief from collateral legal disabilities is available for all but serious and violent crimes and sex offenses. In every jurisdiction but Arizona, a person whose conviction has been expunged or sealed may deny its existence in response to most inquiries. Most expungement schemes include an eligibility waiting period, which in several cases is quite lengthy (e.g., 15 years for felonies in Massachusetts).

Arizona: Arizona law permits all state offenders except those convicted of serious violent offenses, to have their convictions “set aside” or “vacated” by the sentencing court, and the charges against them dismissed, upon successful completion of probation or sentence and discharge. Ariz. Rev. Stat. Ann. §§ 13-907(A). Convicted persons are entitled to be informed of their “right” to a set-aside at the time of discharge. *Id.* See also Ariz. R. Crim. P. 29.1, requiring notice to probationers at time of discharge of right to have conviction “vacated.” This relief restores all rights and generally releases the person “from all penalties and disabilities resulting from the conviction.” However, it does not relieve the offender from having to report the conviction if asked.

Kansas: Kan. Stat. Ann. § 21-4619 (expungement). Some serious offenses (murder, rape, sex offenses) are excluded from the procedure, and a waiting period is imposed of three to five years after discharge from probation or parole, depending on the offense. After expungement, person shall be treated “as not having been convicted,” and an order of expungement “erases” the conviction, save that it may be brought up in subsequent prosecutions and may be used in connection with licensing decisions. A person must be informed at each stage of the criminal process about the possibility of obtaining expungement. § 21-4619(g).

Massachusetts: Mass. Gen. Laws Ann. ch., 276, § 100A (sealing). A state felon may apply to court to have his record sealed after 15 years, provided he has no subsequent conviction (misdemeanant 10 years). An applicant for employment whose record has been sealed may deny the existence of the conviction and licensing authorities are prohibited from disqualifying the applicant based on the record, though the conviction may still be taken into account for law enforcement purposes. In addition, governor’s pardon accomplishes sealing of record. Mass. Gen. Laws Ann. ch. 127, § 152.).

Nevada: Nev. Rev. Stat. § 179.245 (sealing). After an eligibility waiting period that varies depending on the seriousness of the offense (seven to 15 years after the date of conviction or release from actual custody, whichever is later, three years for misdemeanors), a person may petition the court in which he was convicted to seal all records related to the conviction. Nev. Rev. Stat. § 179.245(1)(a). If the court seals the records, “all proceedings recounted in the record are deemed never to have occurred” (with exceptions related to law enforcement and subsequent offenses), and the person “may properly answer accordingly to any inquiry concerning the arrest, conviction, or acquittal and the events and proceedings related to the arrest, conviction, or acquittal.” Nev. Rev. Stat. § 179.285.

New Hampshire: Convictions for all but serious violent crimes may be “annulled” following completion of the sentence and waiting periods ranging from 1 to 10 years. N.H. Rev. Stat. Ann. §§ 651:5(III) and (IV). Those convicted of more than one offense may have a longer waiting period. Upon entry of an order of annulment, the person “shall be treated in all respects as if he had never been arrested, convicted, or sentenced”, except that, upon conviction of any later crime, the annulled conviction may be taken into account for sentencing purposes and may be counted toward habitual offender status. N.H. Rev. Stat. Ann. § 651:5(X)(a).

Oregon: Adult felony offenders (except for violent, sex, and traffic offenses) may apply to the sentencing court to have conviction “set aside” three years after sentence served. Must have no pending criminal proceedings, and no conviction within 10 years. Misdemeanors have a one-year waiting period. If conviction set aside offender may deny its existence. Or. Rev. Stat. § 137.225(1) through (6).

Utah: Expungement is available from sentencing court for most offenses. Eligibility waiting period seven years for felonies, three to five for misdemeanors. Longer (10 years) for alcohol- and drug-related offenses. Utah Code Ann § 77-18-11(1), (11). Certain violent and sex offenders categorically ineligible. Recidivists must wait 20 years. § 77-18-12(3) amended by 2005 Utah Laws 2. If eligible, expungement “shall issue” unless contrary to public interest. Recipient may deny conviction, though

it may be used for various purposes, as in sentencing and firearms prosecutions. §§ 77-18-13(3), 77-18-15(4), (7).

Washington: After discharge, after a specified period of time (5 or 10 years) certain offenders may apply to have sentence “vacated,” and may then deny having been convicted. Wash. Rev. Code §§ 9.94A.640, 9.95.240, 9.96.060 (vacation). Governor’s pardon also has effect of vacating conviction, but very few are given. Wash. Rev. Code. § 9.94A.030.

Michigan, New Jersey, Ohio, and Rhode Island make some form of expungement or sealing available to some or all first felony offenders upon completion of sentence, including those sentenced to prison. Rhode Island’s expungement provisions are widely used, with 4,201 misdemeanors and 490 felonies expunged in 2004 alone. Ohio’s sealing statute is also widely used, but applies only to non-violent offenses that are not subject to a mandatory prison term.

Deferred Adjudication: A growing number of jurisdictions expunge or seal the entire record where an offender successfully completes probation pursuant to a deferred adjudication agreement, and the charges are dismissed or the conviction set aside. Arkansas, Connecticut, Iowa, Louisiana, Missouri, Nevada, South Dakota, Texas, and Vermont all provide for expungement or sealing of the entire record in deferred adjudication cases. Iowa, Mississippi, Montana, Oklahoma, and South Dakota make this relief available only to first offenders.

Pardon Grounds for Expungement: See p. 6, *supra*.

ENDNOTES

1. This paper deals primarily with relief from the collateral consequences of a felony conviction, which tend to be more severe and less tractable than the collateral consequences associated with misdemeanors and juvenile offenses, offenses in which adjudication has been deferred, or with arrest records not resulting in conviction.

2. Office of the Pardon Attorney, U.S. Dep’t of Justice, “Civil Disabilities of Convicted Felons: A State-by-State Survey” 1 (1996).

3. The term “certificate of rehabilitation” is used in a generic sense to describe an official recognition that a criminal offender deserves to regain legal rights and status lost as a result of conviction, and has demonstrated reliability and good character over a period of time.

4. Connecticut’s “certificate” is called a “provisional pardon”, and it is included here because it is awarded by an appointed board and its effects are narrowly defined by statute. The state of Mississippi also offers a “certificate of rehabilitation,” but it appears intended exclusively to restore firearm rights. See Miss. Code Ann. § 97-37-5 (1) and (3). See also Op. Atty. Gen. No. 2005-0143, (April 1, 2005) (certificate does not “remove” a conviction or allow a convicted felon to be qualified as a candidate for public office.)

5. See N.Y. Correct. Law § 753(2); *Arrocha v. Bd. Of Education*, 712 N.E.2d 669 (1999). The “Certificate of Good Conduct” originated in the 1940’s as a kind of administrative pardon given by the Parole Board after a five-year waiting period. The certificate program was expanded in the 1960’s to include a “Certificate of Relief from Disabilities” as a

way for first-time felony offenders to regain their rights more quickly. Governor Nelson Rockefeller’s Memorandum accompanying the legislation makes the intent clear: “This bill will reduce the automatic rejection and community isolation that often accompany conviction of crimes and will thus contribute to the complete rehabilitation of [felons] and their successful return to responsible lives in the community.” In 1976 both certificates were given additional legal effect (“presumption of rehabilitation”) under the broad nondiscrimination provisions of N.Y. Correct. Law §§ 750-755, which prohibit denial of employment or licensure based on conviction absent a public safety risk or a “direct relationship” between the conviction and the employment sought. It might be argued that there is little or no difference in legal effect between the CRD and the CGC, although even first offenders who have a CRD must obtain a CGC if they want to qualify for “public office,” including such public employment as firefighter or correctional officer. See § 701(1).

6. See “Reentry and Reintegration: The Road to Public Safety: Report and Recommendations of the Special Committee on Collateral Consequences of Criminal Proceedings” at 99-106 (May 2006), http://www.nysba.org/MSTemplate.cfm?Section=Report_Re-Entry_and_Reintegration_The_Road_to_Public_Safety&Site=Special_Committee_on_Collateral_Consequences_of_Criminal_Proceedings&Template=/ContentManagement/HTMLDisplay.cfm&ContentID=74434.

7. The process for obtaining a CRD is described in 730 Ill. Comp. Stat. 5/5-5.5-5 through 20, and its effect in the context of licensing decisions is set forth in 5/5-5.5(h). The process for obtaining at CGC is described in 730 Ill. Comp. Stat. 5/5-5.5-25(a) through 30. In the bill as originally introduced, the CGC would have “relieve[d] an eligible offender of any disability, or . . . remove[d] any bar to his or her employment.” However, this provision was rewritten in the House so that the entire legal effect of the CGC is contained in the provision describing criteria for its award (“he or she has been a law-abiding citizen and is fully rehabilitated”).

8. The Connecticut Board of Pardons and Parole operates wholly independently of the governor, and issues about 200 full pardons each year, acting favorably on about 25% of the applications it receives. A person may apply for a full pardon five years after the completion of the sentence; if successful, the record of conviction is “erased” and the person may deny ever having been convicted.

9. A provision similar to New York’s fair employment practices law, which would have given the provisional pardon the effect of creating a “presumption of rehabilitation,” was excised from the bill shortly before its passage.

10. A certificate of rehabilitation is given independent legal effect to avoid exemption from employment in a few specific professions. See, e.g. Health & Saf. Code, § 1522, subd. (g)(1)(A)(ii) (licensed community care facilities); Cal. Admin. Code tit. 10, § 3723 (real estate license); *Newland v. Board of Governors* (1977) 19 Cal.3d 705, 712-714 (teaching certificate).

11. In Nevada, a full and unconditional pardon removes all disabilities, including licensing barriers, but does not “erase” conviction or remove stigma of conviction.

12. Georgia also has a first offender expungement law, by which all first offenders may be placed on probation or sentenced to confinement without an adjudication of guilt. Upon successful completion of probation or sentence, they are “not considered to have a criminal conviction,” and “suffer no adverse effect upon [their] civil rights or liberties.”

13. The Utah board receives only about three to five requests for pardon a year, and there have been only about 10 pardons issued in the

past decade. The relative paucity of pardon applications and grants in Utah can be explained by the general availability of expungement as an alternative restoration mechanism for all but the most serious offenders. In Utah, most felony offenders are entitled to judicial expungement after a relatively short waiting period, unless the court finds that this would be “contrary to the public interest.” The only people who need a pardon to restore rights in Utah are those who have been convicted of serious violent felonies.

14. See Margaret Colgate Love, *RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE* (2006). See also <http://www.sentencingproject.org/rights-restoration.cfm>.

15. Illinois’ certificates also carry a “presumption of rehabilitation,” but only within the context of a limited number of licensing schemes.

16. In addition to New York, Wisconsin and Hawaii provide for enforcement of their nondiscrimination provision through a fair employment practices law. Massachusetts’ nondiscrimination law also provides for FEP enforcement, but it extends only to misdemeanor offenses. A few other states (*e.g.*, Arizona, Arkansas, Louisiana, Minnesota) authorize complaints to be brought under the state’s administrative procedure act.

17. The “direct bearing” standard and “rehabilitation” tests of this statute are incorporated into dozens of licensing statutes in the N.D. Cent. Code, including: liquor licenses (§ 5-03-01.1); teachers (§ 15.1-13-25); residential treatment centers for children (§ 25-03.2-04); architects and landscape architects (§ 43-03-13); lawyers (§ 27-14-02); barbers (§ 43-04-31.1); electricians (§ 43-09-09.1); funeral service director (§ 43-10-11.1);

JUSTICE KENNEDY COMMISSION

REPORT TO THE HOUSE OF DELEGATES
AUGUST 2004

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INTRODUCTION

A. JUSTICE KENNEDY'S CHALLENGE

Supreme Court Justice Anthony M. Kennedy's dramatic address to the American Bar Association on August 9, 2003 at its annual meeting in San Francisco raised fundamental questions about the fairness, wisdom and efficacy of criminal punishment throughout the United States. Justice Kennedy recognized that arrests, prosecutions and highly publicized trials often command public attention, but there is rarely much interest on the part of the public, including its lawyers, after a person has been convicted and sentenced. What happens to those who are punished is a mystery to many. As he spoke about corrections and punishment, Justice Kennedy anticipated that many of the lawyers in the audience might not warm to his subject:

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

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

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

In my submission you have the duty to stay tuned in. The subject is the concern and responsibility of every member of our profession and of every citizen. This is your justice system; these are your prisons. The Gospels' promise of mitigation at judgment if one of your fellow citizens can say, "I was in prison, and ye came unto me," does not contain an exemption for civil practitioners, or transactional lawyers, or for any other citizen. And, as I will suggest, the energies and diverse talents of the entire Bar are needed to address this matter. . . .

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

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

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

Justice Kennedy expressed a number of concerns.

- (1) About the sheer number of people locked up in the United States as compared to other civilized nations: Were we to enter the hidden world of punishment, we should be startled by what we see. Consider its remarkable scale. The nationwide inmate population today is about 2.1 million people. In California, even as we meet, this State alone keeps over 160,000 persons behind bars. In countries such as England, Italy, France and Germany, the incarceration rate is about 1 in 1,000 persons. In the United States it is about 1 in 143.
- (2) About the disproportionate impact of incarceration on minorities:

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

- (3) About the costs and length of incarceration:

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

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

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

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

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

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

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

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

- (6) About the atrophy of the pardon power:

The pardon process, of late, seems to have been drained

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

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

The debate over the goals of sentencing is a difficult one, but we should not cease to conduct it. Prevention and incapacitation are often legitimate goals. Some classes of criminals commit scores of offenses before they are caught, so one conviction may reflect years of criminal activity. There are realistic limits to efforts at rehabilitation. We must try, however, to bridge the gap between proper skepticism about rehabilitation on the one hand and improper refusal to acknowledge that the more than two million inmates in the United States are human beings whose minds and spirits we must try to reach. . . .

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

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

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

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

B. ACCEPTING THE CHALLENGE

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

We determined early on that we needed to gather as much information about current sentencing practices, correctional practices, pardon systems and reentry issues as possible. In November 2003, we held three days of hearings in Washington, D.C., and explored a wide range of issues with the help of some of the nation's leading experts. We held additional hearings in San Antonio, Texas, in February 2004, during the ABA Mid-Winter Meeting. Our focus was on the Texas criminal justice system as an illustration of how one state was dealing with the expense of incarceration and many issues similar to those raised by Justice Kennedy. In March, representatives of the Commission met with the Chair of the Criminal Law Committee of the Judicial Conference of the United States. In April, we held hearings in Sacramento, California, explored issues faced by the state with the largest prison population, and learned about reforms that were being considered in that state. Commission representatives engaged in a discussion at the Stanford Law School with the Latino Law Students Association, which was especially interested in disparities in sentencing disfavoring minority offenders. In May, Commission representatives interviewed Maryland officials responsible for the state criminal justice system concerning reforms that have been adopted and are under consideration.

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

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

The unsurprising conclusion that we reached is that we cannot

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

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

C. TEN BASIC PRINCIPLES

- (1) There is no universally accepted view of what the goal or purpose of punishment is, but there is something of a growing consensus that (a) while incarceration is an appropriate punishment for many crimes, it is not the only punishment option that should be available in a comprehensive sentencing system; (b) when incarceration is imposed as all or part of a sentence, society and offenders benefit when offenders are prepared to reenter society upon release from incarceration; (c) while there is a place for harsh punishment in a sentencing system, there also is a place for rehabilitation of offenders; and (d) community-based treatment alternatives to prison may be both cost-effective and conducive to safer communities.
- (2) It is possible to differentiate among crimes, rank them in relative order of seriousness, and tailor sentences in order to further public safety, economic efficiency, and the ends of justice. Some crimes, but not all, involve egregious conduct. Some crimes, but not all, pose grave danger to the community. Criminal codes in the United States have become enormously complex and cover an incredible array of human conduct. Some crimes require no *mens rea* at all, while others require specific intent. Some crimes have no readily identifiable victims, while others have identifiable victims who have lost lives, health and property.
- (3) For offenders who commit the most serious criminal acts, particularly acts of violence against others, lengthy terms of incarceration are generally warranted to recognize the magnitude of the antisocial act (or as retribution or "just desserts"), incapacitate the offender for the safety of the community, and send a deterrent signal to others.
- (4) As the seriousness of crime and threat of harm diminishes, the need for lengthy periods of incarceration also diminishes. Indeed, in many instances society may conserve scarce

resources, provide greater rehabilitation, decrease the probability of recidivism and increase the likelihood of restitution if it utilizes alternatives to incarceration like drug treatment. For treatment type alternatives to work, a genuine program must be established and sufficient resources must be devoted to it.

- (5) Sentencing guidelines or other systems that guide sentencing courts in sentencing can, as the ABA Standards for Criminal Justice: Sentencing (3d ed. 1994) recognized, help to minimize unwarranted and unjustified disparities in punishment among similarly situated offenders. However, any system that guides the discretion of sentencing courts runs a risk of becoming too wooden unless it permits sentencing courts to take into account individual characteristics of an offense or offender that support an increase or decrease in the guideline or presumptive sentence that might otherwise be imposed. A combination of guidance and an ability to depart offers some hope of a sentencing system in which like offenders are treated alike, while differences among offenders are not overlooked. There is no need for mandatory minimum sentences in a guided sentencing system. As long as there is transparency – i.e., judges explain an increase or decrease in an otherwise applicable sentence – and review of such decisions, the right balance between avoiding unwarranted disparities while recognizing individual characteristics of offenses and offenders can be maintained, and judges can be held accountable for their decisions. This balance can be aided if there is an entity provided with sufficient resources and charged with monitoring the sentencing system, providing public reports on its operation, and recommending changes in light of crime rates, observed sentencing patterns, racial disparity in sentencing and the availability of sentencing alternatives. Guided discretion may also be useful when probation and parole revocation decisions are made.
- (6) Offenders who serve substantial terms of imprisonment and who will be released back into society often are unprepared for their release. If offenders cannot successfully reenter their communities, the chances increase that they will commit future criminal acts. Offenders who serve substantial terms of imprisonment often do not possess the tools necessary to prepare themselves to reenter society. Successful reentry depends upon education, training, and treatment while in prison, and lawful means of supporting oneself in the community after release. Prison conditions should support education, training and treatment of offenders. Inhumane and cruel conditions decrease the likelihood that prisoners will be able to prepare themselves for a successful return to the community.
- (7) Collateral disabilities imposed upon convicted offenders may make it difficult for them to resume their place in society. The most important predictive factor as to whether an offender will become a recidivist appears to be employment. Those who find work are less likely to re-offend. Those who cannot find legitimate work are more likely to engage in criminal acts. To the extent that legal and attitudinal barriers to employing people with convictions can be removed, the chances of work increase and the likelihood of recidivism decreases.
- (8) As President Bush said in his 2004 State of the Union address which proposed a \$300 million prisoner re-entry initiative, “America is the land of the second chance.”* But, it is also a nation in which too often the second chances are not good chances. Compassionate release of offenders based upon circumstances arising after they have been sentenced is theoretically possible, but is rarely provided. It has a proper place in a correctional system. There also is a place for forgiveness. Those offenders who have served their sentences and have demonstrated through years of law-abiding conduct that they have earned forgiveness should receive greater consideration than they now do in the pardon process. Pardons need not only be for the innocent or wrongly convicted, but can be used to recognize the former offender who has seized his or her second chance and made it a success.
- (9) Given the history of race in America – e.g., slavery, Jim Crow laws, segregation, Japanese internment, urban ghettos – there is reason for concern when two-thirds of those incarcerated are African-American or Latino. Even though offenders of color may commit a disproportionate percentage of certain types of criminal acts as the result of socio-economic disadvantage and the many other complex causes of crime, there is also evidence of discriminatory treatment of defendants and victims of color at various stages of the criminal process. Every jurisdiction should examine whether conscious or unconscious bias or prejudice may affect investigatory, prosecution, or sentencing decisions and take steps to eliminate such bias. All participants in the criminal justice system, including legislators, should strive to eliminate the racial impact of their decisions.
- (10) There is, as Justice Kennedy noted, a crying need for the lawyers of America to involve themselves in the national conversation about these issues. It is long past due for lawyers to understand what happens to people after they are arrested and are convicted and sentenced. There is much that lawyers who understand might do to assist prisoners serving long terms who have been largely forgotten, even if that assistance is only to help them maintain connections with the families and communities they left behind. There is much they might do to assist offenders who have been released from prison to reintegrate into their communities, and thereby increase the likelihood that they will not commit additional crimes. Lawyers who assist convicted offenders may not only help them, but they may simultaneously decrease future crime rates and thereby reduce the number of future victims throughout the United States.

ENDNOTES

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

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

RECOMMENDATIONS

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

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

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

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

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

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

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

REPORT

A. Shifting Sentencing Models: From Rehabilitation to Retribution

For most of the twentieth century prior to the Sentencing Reform Act of 1984 (the "SRA")¹ and sentencing reform measures enacted in many states, the rehabilitative² or "medical" model³ of sentencing prevailed in the federal (and state) courts.⁴ The assumption upon which sentencing rested was that, through a combination of deterrence motivated by the unpleasant experience of incarceration, and personal renewal spurred by counseling, drug treatment, job training and the like, criminal deviance could be treated like any other disorder. The system recognized, albeit grudgingly, that some defendants were, in effect, "incurable" and thus could only be quarantined through lengthy or life sentences, and that in a

few cases the crime was so egregious that the public demand for retribution outweighed rehabilitative considerations.⁵ But the dominant paradigm was rehabilitative. Therefore, sentences were supposed to be “individualized,” in the way that medical treatment is individualized, according to the symptoms and pathology of the offender.⁶

Before the advent of guideline systems of sentencing, state and federal sentences were described as “indeterminate,” a word often used to refer to two different, but related, ideas in the sentencing context. First, an indeterminate sentencing system is one in which the judge sentences a defendant either to a specified term, or to a range of years (e.g., 520), but the number of years the defendant *actually* serves is determined later by an administrative body like a parole board.⁷ For most of the twentieth century, state and federal sentencing was indeterminate in this sense and still is in many states for some or all crimes.⁸ For example, a federal judge would sentence a federal defendant to a specific term of years, but the proportion of the announced term that the defendant would actually spend in a cell was controlled primarily by the United States Parole Commission.⁹ The Parole Commission, an executive branch agency, not only created its own guidelines for determining release dates,¹⁰ but retained discretionary power to set individual release dates anywhere within the broad parameters dictated by those guidelines.¹¹

Second, federal sentencing before the Guidelines was said to be “indeterminate” in the sense that the judge had virtually unlimited discretion to sentence a convicted defendant anywhere within the range created by the statutory maximum and minimum penalties for the offense or offenses of conviction.¹² As long as the judge kept within the statutory range, there were virtually no rules about how he or she made the choice of sentence.¹³ There was no limitation on either the type or quality of information a judge could consider at sentencing.¹⁴ Moreover, none of this information was subject to filtering by the rules of evidence,¹⁵ and the judge was required to make no findings of fact. Moreover, so long as the final sentence was within statutory limits, it was essentially unreviewable by a court of appeals.¹⁶

The pre-Guidelines federal sentencing system was indeterminate in both senses of the word because its objectives were primarily (though never exclusively) rehabilitative. At the time of sentencing, the system assumed that judges expert in the law and the social sciences, and seasoned by the experience of sentencing many offenders, would choose penalties that maximized the rehabilitative chances of offenders.¹⁷ After sentencing, the assumption was that trained penologists could determine when a prisoner had been rehabilitated¹⁸ and thus advise the Parole Commission about release dates.¹⁹

The rehabilitative model was not necessarily favorable to defendants, and it was not necessarily fair. Two defendants committing the same crime under the same circumstances could receive very different sentences depending on a particular judge’s or jury’s sentencing idiosyncrasies. A parole board could prevent some harshness, but could not assure that a defendant did not serve a much longer term than most similar offenders. The unguided nature of the system, which still exists in some states, is strange in American law, as one commentator has noted:

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

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

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

In the 1970’s and 1980’s, the rehabilitative model of sentencing fell into disfavor in state and federal courts for a variety of reasons,²⁰ including rising crime,²¹ mounting evidence that prisoners were not being rehabilitated,²² and increasing concern that indeterminate sentencing produced unjust disparities among similarly situated offenders.²³ A combination of conservatives inclined toward tougher sentences and liberals inclined toward checking sentencing disparity coalesced to produce sentencing reform in the federal system and in many states. The result was the determinate sentencing revolution, which has been characterized by (a) limitations on front-end judicial sentencing discretion through passage of mandatory minimum sentences for certain offenses and sentencing guidelines that narrow the scope of unconstrained judicial sentencing discretion for all offenses, (b) elimination of or drastic limitations on parole or other forms of administrative early release authority, thus requiring defendants to serve a larger proportion of their judicially imposed sentences, and (c) in most places, increases in the statutory and/or guidelines penalties for most serious crimes, particularly violent crimes involving firearms and drug offenses.

The effect on sentencing decisions was enormous. Beginning in the late 1970s, the United States began to respond to concerns about rising crime by implementing an array of policy changes which, in the aggregate, produced a steady, dramatic, and unprecedented increase in the population of the nation’s prisons and jails. Between 1974 and 2002, the number of inmates in federal and state prisons rose from 216,000²⁴ to 1,355,748,²⁵ a more than five-fold increase. Between 1974 and 2001, the rate of imprisonment rose from 149 inmates to 628 inmates per 100,000 population, a more than four-fold increase.²⁶ Jail populations have also increased markedly. Between 1985 and 2002, the number of persons held in local jails

more than doubled, from 256,615²⁷ to 665,475.²⁸ By mid-year 2002, the combined number of inmates in federal and state prisons and jails exceeded two million.²⁹

The average length of time spent in prison has also increased. Alan J. Beck of the Bureau of Justice Statistics described the increase in his April 16, 2004 Remarks to the National Committee on Community Corrections. The average time served in prison was about five years between 1992 and 2001. Between 1980 and 1992, the average time served was only 18 months.

These numbers are unprecedented in American history and represent a marked departure from a long period of relative stability in imprisonment rates. During the 45-year period leading up to the 1970s, rates of imprisonment in the U.S. (excluding jail populations) held roughly steady at about 110 per 100,000.³⁰ Moreover, as Justice Kennedy noted in his address to the Association, current rates of incarceration in the United States are strikingly different than the practices of most of the rest of the world, particularly in comparison with other developed countries. The United States now imprisons a higher percentage of its residents than any other country, surpassing Russia, South Africa, and the states of the former Soviet Union.³¹ And the U.S. incarcerates its residents at a rate roughly five to eight times higher than the countries of Western Europe, and twelve times higher than Japan.³²

The costs of the American experiment in mass incarceration have been high. Between 1982 and 1999, direct expenditures by federal, state, and local governments on corrections jumped from \$9 billion to \$49 billion, an increase of over 440%.³³ During the same period, combined criminal justice expenditures (for police, judicial, and corrections activities) by federal, state, county, and municipal governments rose from \$35.7 billion in 1982 to \$146.5 billion in 1999.³⁴ Moreover, the costs of an aggressive program of incarceration extend beyond the direct dollar outlays of governments on functions easily identifiable as part of the criminal justice system. Governments themselves incur a variety of collateral costs when a defendant is sent to prison or jail, including increased expenditures for the maintenance and health care of dependents of inmates, lost tax revenues from income that would have been earned or expenditures that would have been made by defendants left free in the community, etc.

Finally, and not least, the families and communities from which inmates come suffer a wide variety of tangible and intangible harms from the absence of the inmate. These include the emotional, economic, and developmental damage to the children of incarcerated offenders,³⁵ and the disenfranchisement and consequent political alienation of a significant portion of the young men in the minority communities in which both crime and punishment are most frequent.³⁶

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

B. Punishment and Crime

It is unclear what effect increased incarceration has had on crime rates. The homicide rate, which had held steady at five or fewer per 100,000 throughout the 1950s and early 1960s, began rising steeply in 1966 and had nearly doubled by 1974.³⁷ Between 1974 and 1991, homicide rates fluctuated between a low of 7.9 per 100,000 in 1984-85 and highs of 10.2 in 1980 and 9.8 in 1991.³⁸ Property crime rose steadily throughout the 1960s and 1970s, peaking in around 1979-80, and thereafter declining gradually.³⁹ Violent crime increased steadily throughout the 1960's and 1970's, declined slightly in the early 1980's, but rose again in the latter half of the decade, peaking at all-time highs in the early 1990s.⁴⁰ Similarly, the use of illegal drugs became a common feature of the American scene for the time in the 1960s,⁴¹ continued to increase until about 1985,⁴² and remains a significant social problem.

The decline in property crimes has been steady, and in recent years there has been a decline in violent crime, as well as a dramatic drop in homicides and firearm-related violent offenses. Between 1991 and 2002, the number of homicides in the United States fell from its all-time high of 24,700 to 15,517, and the rate of homicide per 100,000 population dropped from 9.8 to 5.5.⁴³ From 1994 to 2002, the absolute number of firearm crimes dropped from 1,248,250 to 442,880, a decline of 64.5%. In the same period, the rate of firearm crime per 100,000 declined from 6.0 to 1.9, a decrease of 68.3%.⁴⁴

Some conservative writers have concluded that increased imprisonment has been the most important cause of the crime drop. As Charles Murray of the American Enterprise Institute wrote in 1997, "We figured out what to do with criminals. Innovations in policing helped, but the key insight was an old one: Lock 'em up."⁴⁵ Most academic criminologists have been more skeptical, emphasizing that crime rates are affected by a wide array of factors, including changing demographics (particularly the changing proportion of crime-prone young males in the population), fluctuating economic conditions, changes in the drug trade, the availability of firearms, and changes in law enforcement practices.⁴⁶ For example, Professor William Spelman studied violent crime and prison data between 1972 and 1997 and concluded that violent crime would have declined when it did even if the prison buildup had never occurred, although the decline was 27% greater than it otherwise would have been because of the prison buildup.⁴⁷ But, Spelman also concludes that the benefits of incarceration in terms of crimes avoided drops off sharply after a certain point, and that the marginal benefit to society of additional incarceration after that point in terms of crimes avoided is very slight.⁴⁸

Researchers are just beginning to explore the implications of the dramatic growth in incarceration rates for crime rates, for families and communities, for prison management, and for politics.⁴⁹ It is not even clear that the increased use of incarceration has enhanced public safety, although lawmakers for twenty years have acted in reliance on the claimed crime-preventive effect of harsh and certain punishments. It is hard to say for certain whether recidivism rates are rising or falling at a particular moment in time, because of the different measurements used, and because numerous variables (e.g., California's extraordinarily high parole revocation rate) can skew the figures – though the consensus among a number

of researchers is that recidivism is not rising.⁵⁰ Psychological research has concluded that the effects of a prison stint are minimal, and that “prisoners cope surprisingly well despite an initial period of disorientation and serious anxieties about family and friends.”⁵¹ This literature also concludes that prisoners can readjust fairly quickly to life in the free community.

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

The Texas Criminal Justice Policy Council provided the Commission with extensive data it compiled comparing incarceration and crime rates in several jurisdictions. During our San Antonio hearings, judges, prosecutors and defense counsel uniformly praised the accuracy and integrity of the Council’s work (and bemoaned the fact that it was effectively abolished when the Governor zeroed it out of the current budget). The Council compared Texas with the nation as a whole and also with other large states. Some of the numbers are instructive. Between 1991 and 2001, there was a 51.6% increase in the national incarceration rate and a 29.5% reduction in the crime rate. In Texas, the incarceration rate for the same period rose 139.4%, while the crime rate was reduced 34.1%. By increasing the incarceration rate by almost three times the national average, Texas decreased the crime rate only slightly more than the national average. California increased its incarceration rate by 42.5% during the 10-year period, and reduced its crime rate by 42.4%. New York increased the incarceration rate for the same period by 10.9% and reduced its crime rate by 53.2%. Thus, California and New York obtained greater reductions in the crime rate than Texas without increasing incarceration at the same pace as Texas. Pennsylvania increased its incarceration rate for the period by 61.5%, while reducing the crime rate by only 16.8%.⁵²

There are various explanations for the various incarceration increases and crime decreases, and the Commission cannot explain precisely why some states achieved greater success in reducing crime with less incarceration. The numbers do suggest, however, that there may well be an overreliance on incarceration in some criminal justice systems, and there is reason to doubt whether constantly increasing the use of incarceration is cost effective. The Washington State Institute for Public Policy has done an analysis that supports these conclusions, at least as to its own state.⁵³ The Institute reports that

The key to understanding the costs and benefits of prison as a crime-control strategy is the economic concept of diminishing marginal returns. When applied to prison policy, this fundamental axiom of economics means that, as Washington increased the incarceration rate significantly in the last two decades, the ability of the additional prison beds to reduce crime has declined. In 1980, the

state had about two people per 1,000 behind DOC bars; today the rate is over five people per 1,000. Diminishing returns means that locking up the fifth person per 1,000 did not, on average, reduce as many crimes as did incarcerating the second, third, or fourth person per 1,000.⁵⁴

Washington State is not alone in seeking to determine whether the use and length of incarceration should be reduced. In the past several years, there has been substantial activity in a number of states to modify corrections and sentencing policy by reducing sentence length or relying on alternatives to incarceration. Much, if not most, of this activity, originated because of a concern about budget deficits, but there is clear evidence that policy makers in many states believe that they are getting “smarter” on sentencing, rather than relying on the notion that getting “tougher” is always the best policy. In 2003 alone, at least nine states applied prospective and retroactive increases to existing early release credits to shorten time served by incarcerated offenders. Some increases were substantial.⁵⁵

In New York, for example, where draconian drug laws are in place, the state enacted two earned-release provisions. One granted the highest-level drug offenders, who were previously ineligible for any early release credit, twice the merit time available to other inmates. The other created a “presumptive release” system that allows those who have completed a correctional program to be released when eligible for parole without review by the parole board.⁵⁶ Five states reduced sentences for nonviolent offenders in 2003, four states reduced or eliminated mandatory minimum sentences, and in some states “there is an emerging consensus that sentences for drug offenses, particularly low-level possession offenses, should be revisited, and that treatment alternatives may not only be more cost effective but also more appropriate than prison.”⁵⁷

[Sections C through K of the original Report I have been omitted, on grounds that they are either duplicative of material elsewhere in this volume, or no longer relevant in light of changes in federal sentencing laws. The full report of the Justice Kennedy Commission can be found at www.abanet.org/cecs.]

Respectfully submitted,
Stephen Saltzburg, Chairperson Justice Kennedy Commission
August 2004

ENDNOTES

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

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

3. Michigan purportedly was the first state to adopt a sentencing system based at least in part on a “medical model,” *United States v. Scroggins*, 880 F.2d 1204, 1207 n. 6 (11th Cir. 1989). See also PAMALA L. GRISET, DETERMINATE SENTENCING: THE PROMISE AND REALITY OF RETRIBUTIVE JUSTICE 11(1991) (discussing the “rise

of the rehabilitative juggernaut” between 1877-1970, and noting that “[a] medical analogue was frequently invoked.”); and ALLEN, *supra* note 2, at 35 (referring to the “medical model” of sentencing).

4. Professor Allen notes that “rehabilitation ... seen as the *exclusive* justification of penal sanctions ... was very nearly the stance of some exuberant American theorists in mid-twentieth century...” ALLEN, *supra* note 2, at 3. See also, American Friends Service Committee, STRUGGLE FOR JUSTICE 83 (1971) (“Despite [its] shortcomings the treatment approach receives nearly unanimous support from those working in the field of criminal justice, even the most progressive and humanitarian.”).

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

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

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

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

9. The district court had three options when imposing a sentence of imprisonment: (a) It could impose a sentence under 18 U.S.C. §4205(a) (repealed 1984), in which case the defendant was obliged to serve one-third of his sentence before becoming eligible for parole. (b) Pursuant to 18 U.S.C. §4205(b)(1)(repealed 1984), the court could impose a maximum term of imprisonment, but reduce the minimum term required before parole eligibility to less than one-third of the maximum

sentence. (c) The court could fix a maximum term and specify that “the prisoner may be released on parole at such time as the [Parole] Commission may determine.” 18 U.S.C. §4205(b)(2) (repealed 1984). When the court imposed a minimum term under either 18 U.S.C. §4205(a), or 18 U.S.C. §4205(b)(1), the Parole Commission retained control over when the defendant would be released after he served the minimum and achieved parole eligibility. In the pre-guidelines period, “federal courts normally sentenced adult offenders pursuant to” §4205(a). *United States v. Scroggins*, 880 F.2d 1204, 1207 (11th Cir. 1989).

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

10. The creation of parole guidelines was mandated by 18 U.S.C. §4203(a)(1) (repealed 1984). For a discussion of the federal parole guidelines and their operation, see GOTTFREDSON, WILKINS, AND HOFFMAN, *supra* note 8, at 22-37. See also, Kate Stith and Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 22829 (1993) (discussing the genesis of the parole guidelines).

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

- (a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:
 - (1) that release would not depreciate the seriousness of the offense or promote disrespect for the law; and
 - (2) that release would not jeopardize the public welfare; subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

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

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

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

15. Federal Rule of Evidence 1101(d)(3) (Federal Rules of Evidence

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

16. See *Koon v. United States*, 518 U.S. 81 (1996) (“Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal.”); *Dorszynski v. United States*, 418 U.S. 424, 431 (1974) (reiterating “the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.”) See also, *Solem v. Helm*, 463 U.S. 277, 290, n. 16 (1983) (“[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.”) Although the appellate courts lacked the power to review the substance, which is to say the length, of sentences imposed by district courts, they retained some ability to review the *process* through which sentences were determined. The outer limits of the district court’s discretion were set by concepts of due process. See, e.g., *Townsend v. Burke*, 334 U.S. 736 (1948) (holding that a sentence based on erroneous factual information violated due process); and *United States v. Tucker*, 404 U.S. 443 (1972) (vacating on due process grounds a sentence that relied on prior uncounseled convictions); *United States v. Clements*, 634 F.2d 183, 186 (5th Cir. 1981) (holding that court would “not review the severity of a sentence imposed within statutory limits, but will carefully scrutinize the judicial process by which the punishment was imposed”); *Herron v. United States*, 551 F.2d 62, 64 (5th Cir. 1977) (“The severity of a sentence imposed within statutory limits will not be reviewed.”); *United States v. Cavazos*, 530 F.2d 4, 5 (5th Cir. 1976) (same); *United States v. Espinoza*, 481 F.2d 553, 558 (5th Cir. 1973) (“[The] discretion [of sentencing judges] is not, and has never been absolute, and while the appellate courts have little if any power to review substantively the length of sentences [citation omitted], it is our duty to insure that rudimentary notions of fairness are observed in the process at which the sentence is determined.”). See also, Stith and Koh, *supra* note 10, at 226 (“For over two hundred years, there was virtually no appellate review of the trial judge’s discretion.”); Fisher, *supra* note 12, at 745 (noting that before the SRA there was no appellate review of sentencing decisions).

17. GRISSET *supra* note 3, at 1 (discussing the premises of the “rehabilitative regime” and noting that it rested on the assumptions that “case by case decisionmaking should be encouraged; that future behavior could be predicted; that criminal-justice practitioners possessed the expertise required to make individualized sentencing decisions”).

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

19. For a discussion of how social scientists advising the Parole Commission designed and tested statistical models in order to generate predictions about the risk of recidivism for potential parolees, see GOTTFREDSON, WILKINS, AND HOFFMAN, *supra* note 8, at 41-67.

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

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

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

23. One of the first and most influential critics of pre-guidelines sentencing on the ground of unjustifiable sentence disparity was Judge Marvin E. Frankel. He said of the indeterminate sentencing system in the federal courts that “the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.” MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973); see also Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CINN. L. REV. 1 (1972). See also, PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 23 (Government Printing Office 1967) (finding sentencing disparity to be pervasive); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 142 (Government Printing Office 1973) (same); Peter B. Hoffman and Barbara Stone-Meierhoefer, *Application of Guidelines to Sentencing*, 3 LAW AND PSYCHOLOGY REVIEW 53, 53-56 (1977) (describing criticisms of then-extant sentencing practices on the ground of “unwarranted sentencing disparity”). Peter Hoffman later became the principal draftsman of the Federal Sentencing Guidelines.

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

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

26. BJS, *Prevalence*, *supra* note 24.

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

28. BJS, *Prison and Jail, 2002*, *supra* note 25, at 1.

29. *Id.*, at 2, tbl. 1.

30. MARC MAUER, RACE TO INCARCERATE 16 (1999).

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

32. *Id.*

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

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

35. See generally MARC MAUER AND MEDA CHESNEY-LIND,

INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT. See also Collateral Casualties: Children of Incarcerated Drug Offenders in New York, Human Rights Watch Reports, Vol. 14, No. 3 (June 2002) (available at <http://www.hrw.org/reports/2002/usany/USA0602.pdf>).

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

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

38. *Id.*

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

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

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

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

43. Bureau of Justice Statistics, Homicide Trends in the U.S., Long

term trends (available at <http://www.ojp.usdoj.gov/bjs/homicide/tables/totalstab.htm>).

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

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

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

47. William Spelman, *The Limited Importance of Prison Expansion*, in Blumstein and Wallman, *supra* note 46, at 123.

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

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

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

51. See Alison Liebling, *Prison Suicide and Prisoner Coping*, in Tonry & Petersilia, *supra* note 49, at 284, and authorities cited.

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

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

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

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

56. *Id.*

57. *Id.* at 7.

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

RECOMMENDATIONS

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

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

REPORT

A. Introduction

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

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

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

Disparities also exist for Latino men and women, although to a lesser degree.⁶ In fact, the number of African-American and Latino men, women and juveniles in prisons and jails and at every stage of the criminal justice process is vastly disproportionate to their numbers in the overall population.

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

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

- African-American and Latino youth are treated more severely than their similarly situated white counterparts.
- In 1997, white youth represented 71% of the youth arrested for crimes across the country but only 37% of detained or committed juveniles.
- African-American youth were 48 times as likely as

white youth to be sentenced to state juvenile facilities for drug offenses. Latino youth were 13 times as likely.

- Among those not previously admitted to a secure facility, African-American youth were six times as likely as white youth to be incarcerated. When charged with a violent offense, they were nine times as likely to be incarcerated.
- For youth charged with violent offenses, the average length of incarceration was 193 days for whites, 254 days for African-American youth, and 305 days for Latino youth.⁹

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

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

U.S. Department of Justice, Bureau of Justice Statistics, *Race of Prisoners Admitted to State and Federal Institutions, 1926 – 1986*, February 1994, p. 14, Table 7. on the individuals who are incarcerated, their families, and society as a whole. That Justice Kennedy noted the problem in a major address to the largest organization of lawyers in the country speaks to its import. The ramifications of the disproportionate involvement of African-Americans and Latinos in the criminal justice system extend to issues as broad and significant as disenfranchisement, disqualification from public housing and welfare benefits, and the dissolution of families.¹¹ The financial costs to society are as predictable as the costs of building and maintaining prisons. When society incarcerates an individual it not only punishes that person, but it deprives families of financial support. There are real costs imposed upon those who are dependent upon the economic support of a father, mother, or other family member who is incarcerated. The costs increase along with the length of the sentence.

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

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

B. Discrimination or Disproportionate Offending?

“All three of my boys smoked pot [growing up]. I knew it. But I also knew if one was caught he would never go to prison. But if

any of my neighbors got caught,” Carter said, adding that his neighbors were black, “they would go to prison for 10, 12 years.”¹²

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

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

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

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

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

would need to be addressed to successfully resolve the problem.

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

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

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

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

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

their criminal acts, but also because of the discretionary decisions made at various stages of the criminal process.

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

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

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

Such decisions are made daily. They involve judgments that are made on the basis of experience and intuition, and that often are random and not based on any firm set of charging policies or procedures. The potential for unconscious views to influence judgments about criminality is great. A white criminal justice official — police officer, prosecutor or judge — may empathize with a white, first-offender arrested with a small quantity of drugs, viewing his involvement in the criminal justice system as a youthful mistake. The official may think “there but for the Grace of God go I” while reflecting on

what are regarded as the prosecutor's own youthful "indiscretions." The same official may view a similarly-situated black first-offender in a very different light based upon experience with a greater number of similar defendants. These nebulous, subconscious views, although not quantifiable, are very significant because they form the basis for important, discretionary decisions that result in racial disparity.

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

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

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

The relationship between race (and ethnicity) and social class adds to the difficulty of attributing racial explanations to official decisions. It is frequently difficult to distinguish whether an individual experiences different treatment because of his socio-economic status or because of his race or ethnicity. There are a disproportionate number of African-Americans and Latinos living in poverty,²⁰ and the vast majority of criminal defendants are indigent.²¹ Indigence affects not only the quality of counsel and therefore the effectiveness of representation, but also the availability of community-based alternatives to incarceration.

For example, an overworked public defender with a heavy caseload and without substantial resources might be unable to locate a drug program or other alternative to incarceration for an African-American defendant that might be acceptable to a prose-

cutor. A white defendant with resources to pay for drug treatment in a residential facility, represented by private counsel with time to devote to the defendant, might be offered a plea bargain that would permit this outcome. In this example, socio-economic advantage (or disadvantage, depending on where the emphasis is placed) may have more to do with the disparate outcomes than race. Often, both race and class play a role in the decision-making process, and rarely in an intentional or even conscious way.

D. The Impact of the War on Drugs

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

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

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

If African-Americans are not using or selling drugs more than whites (either in overall numbers or proportionately), why then do they constitute an overwhelmingly disproportionate number of arrests and convictions for drug possession and distribution? Law enforcement practices and policies provide one answer. Because so many inner-city drug sales take place in public spaces, these arrests are easier to conduct than the suburban sales that frequently occur in private establishments. In addition, there is more demand for a law enforcement presence in

the inner city where the sale of drugs on public streets often endangers the residents and destroys their neighborhoods. Racial profiling, discussed below, is also a major factor that contributes to racial disparity in drug arrests and convictions.

E. Racial Profiling

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

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

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

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

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

F. Prosecution and Race

Through the exercise of prosecutorial discretion, prosecutors make decisions that contribute to the disparate treatment of

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

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

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

G. The Indigent Defense Crisis

Forty years ago, the Supreme Court guaranteed the right to counsel to every individual facing the threat of incarceration, regardless of ability to pay.³⁷ That guarantee has yet to be fulfilled. The American Bar Association's Standing Committee on Legal Aid and Indigent Defendants (SCLAID) held four public hearings in 2003 to determine whether the states are fulfilling the constitutional requirement of providing effective representation to persons charged with crimes. They heard from public defenders across the country, and the results were discouraging. In far too many jurisdictions, representation for indigent defendants is either nonexistent or inadequate.³⁸ The effect of this crisis is particularly alarming in death penalty cases, where effective representation has been proven to make the difference between life and death.³⁹

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

H. The Impact of Sentencing Laws and Practices

Racial disparity in the criminal justice system is most frequently described in terms of the phenomenal number of African-Americans and Latinos who disproportionately occupy the nation's jails and prisons. Yet, the African-American or Latino criminal defendant who receives a criminal sentence

has already experienced the cumulative effect of race or ethnicity at each previous stage of the process. The sentencing stage perpetuates this unfortunate pattern.

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

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

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

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

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

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

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

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

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

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

One of the goals of enhancing the penalty for drug dealing near schools or day care centers is to protect children. However, it may not be fair to punish a drug dealer in an urban area more harshly than his similarly situated counterpart in the suburbs if he has no intent to sell near a school or day care center but cannot avoid the enhancement because it applies to the entire city. The statute permits the suburban drug dealer to

avoid the enhancement if he sells to a school age child as soon as the child walks outside of the 1,500 foot radius. However, the urban drug dealer who sells the same amount of drugs to an adult within 1,500 feet of a school when there are no children in the area will receive an enhanced sentence.

I. A Case Study: Monroe County, Indiana

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

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

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

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

pleted its work and published the completed report in October 2003. It is beginning the process of implementing the report's recommendations.

J. Recommendations

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

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

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

Respectfully submitted,
Stephen Saltzburg, Chairperson Justice Kennedy Commission
August 2004

ENDNOTES

1. August 9, 2003, Address to ABA House of Delegates.
2. Marc Mauer, *Race to Incarcerate* 124 (1999).
3. David Cole, *No Equal Justice* 4 (1999).
4. Marc Mauer and Tracy Huling, *Young Black Americans and the Criminal Justice System: Five Years Later*, The Sentencing Project (1995). A recently released report by the Sentencing Project reveals that fifty years after the Supreme Court's decision in *Brown v. Board of Education* nine times as many African-Americans are in prison or jail as in 1954 (884,500 versus 98,000).
5. Press Release, Bureau of Justice Statistics, Prevalence of Imprisonment in the U.S. Population, 1974-2001 (Aug. 17, 2003) available at <http://www.ojp.usdoj.gov/bjs/abstract/piusp01.htm>.
6. Statistics for Latinos are difficult to obtain due to differences in classification and other causes. For statistics showing the disproportionate representation of Hispanics at every step of the process in the federal system, see Angela Arboleda, *Latinos and the Federal Criminal Justice System*, National Council of La Raza, Statistical Brief No. 1 (July 2002).
8. Human Rights Watch, *World Report 2002*, p. 4.
9. Testimony of Judge Ernestine Gray, Justice Kennedy Commission Hearings, November 14, 2003, p. 3 (citing the Building Blocks for

Youth reports *And Justice for Some: Differential Treatment of Minority Youth in the Justice System* and *Donde Esta La Justicia? A Call To Action on Behalf of Latino Youth in the U.S. Justice System*).

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

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

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

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

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

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

16. *Supra* note 15.

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

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

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

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

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

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

23. *Id.* (citing FBI data).

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

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

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

27. *Id.* at 150.

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

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

30. U. S. Constitution, Amendment IV.

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

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

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

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

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

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

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

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

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

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

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

42. Mauer, *Race to Incarcerate* 136.

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

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

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

46. Mauer, *Race to Incarcerate* 139.

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

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

49. C.G.S.A. § 21a-278a(b)

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

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

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

RECOMMENDATIONS

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

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

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

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

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

FURTHER RESOLVED, That the American Bar Association urges states, territories and the federal government to establish an accessible process by which offenders who have served their sentences may request pardon, restoration of legal rights and privileges, including voting rights, and relief from other collateral disabilities.

FURTHER RESOLVED, That the American Bar Association urges bar associations to establish programs to encourage and train lawyers to assist prisoners in applying for pardon, restoration of legal rights and privileges, relief from other collateral consequences, and reduction of sentence.

REPORT

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

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

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

power to provide a mechanism for early release in the same kinds of compelling equitable circumstances that historically have resulted in executive mercy.¹

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

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

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

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

The Commission reviewed the state of pardoning in the United States and found that in most jurisdictions the pardon power is rarely utilized to reduce sentences or to promote reentry of individuals to the community. Although procedures are in place in all jurisdictions for convicted persons to apply for commutations and post-prison pardons, and although the pardon power appears to be administered efficiently in most jurisdictions, the end result is almost universally the same: i.e., with only a few exceptions the pardon process produces very few grants. The atrophy of the clemency function is trouble-

some not for its own sake, but because the legal system in many jurisdictions offers no dependable alternative relief.³

A. Background—The Changing Role of Pardon

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

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

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

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

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

Witnesses before the Commission made the point that highly publicized crimes often accounted for strong executive and legislative calls for increased punishment. Few voices of

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

The federal government led the retreat. Historically stable pardon grant rates fell dramatically during the Reagan administration, and continued to slide for the ensuing two decades.⁹ The decline in federal pardoning was, not accidentally, accompanied by a degradation of the process for its administration, so that clemency policy and clemency recommendations are now effectively controlled by prosecutors. If federal prosecutors oppose clemency, it is extremely unlikely to be granted. There is no other generally available remedy for someone who has been convicted. The only statutory mechanism for federal sentence reduction is controlled by prison officials, who use it only in cases of imminent (and certain) death.¹⁰ There is no general mechanism for relief from disabilities imposed on convicted persons under federal law, either for state or federal offenders.¹¹

In the states, the practice of pardoning varies so widely that it is difficult to accurately offer many generalizations. However, two things appear to be true: 1) in almost every jurisdiction the instance of pardoning decreased markedly after 1990; and 2) the vitality of the pardon power in a particular state jurisdiction varies depending upon the extent to which its decision-maker is insulated from politics. Thus, pardons tend to be granted more regularly and generously in the five states where the pardon power is exercised by an independent board with no involvement by the governor,¹² than it is in the 22 states where the governor exercises the power subject to no procedural constraints.¹³ Pardoning tends to be somewhat more frequent in the ten states where the governor may act only upon the advice of a board,¹⁴ though sometimes the board doesn't recommend (Texas) or the governor denies in spite of a favorable Board recommendation (Arizona) or the governor doesn't act at all (Delaware). Ironically, pardon has

continued to perform a useful role in mitigating sentences only in jurisdictions that also have a healthy parole system, with the two forms of early release often administered by the same personnel.¹⁵

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

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

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

B. The Contemporary Need for a Pardoning Mechanism

The Commission concludes that every just system of punishment must include some accessible mechanism for reducing a prison sentence or mitigating other penalties in extraordinary circumstances, particularly those that could not be foreseen at sentencing. Such a safety valve was considered an essential component of a sentencing scheme prior to the advent of determinate sentencing. Today it remains essential, because no court is capable of predicting the changed circumstances that might transform a sentence that appears fair and reasonable at the time of imposition into a cruel and unreasonable punishment that may have tremendously undesirable side-effects.

For example, a healthy prisoner sentenced to a term of imprisonment may develop a serious or deadly illness not foreseen at the time sentence was imposed; or, an inmate with a diagnosed illness or condition may suffer a turn for the worse to a degree unforeseeable at the time of sentencing. Similarly,

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

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

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

Just last year the ABA House of Delegates approved policy urging jurisdictions to evaluate their practices and procedures relating to prisoner requests for reduction or modification of sentence based on extraordinary and compelling circumstances arising after sentencing, to ensure their timely and effective operation. As part of this same resolution, the ABA urged jurisdictions to develop criteria for evaluating such prisoner requests, and procedures to assist mentally or physically disabled prisoners in making them. The Commission believes that the ABA must do more. Specifically, it should specify the criteria for sentence reduction in a broad range of exceptional circumstances arising after imposition of sentence, both medical and nonmedical, including but not limited to old age, disability, changes in the law, exigent family circumstances, and heroic acts or extraordinary suffering. It also calls upon jurisdictions to ensure that there are procedures in place to assist prisoners who are unable to advocate for themselves, for example by reason of mental or physical disability. State bars should take the lead in implementing this resolution, and specifically endorse more expansive non-medical criteria for early release. If executive clemency is the only avenue within

a particular jurisdiction by which such prisoner requests may be made, then that mechanism should be the subject of review and evaluation.

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

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

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

Accordingly, the recommendations presented by the Commission urge jurisdictions to expand the use of the pardon power, both to commute sentences and to restore legal rights lost as a result of conviction. Jurisdictions should also make clear the standards that govern applications for commutation

and pardon; specify the procedures that an individual must follow in order to qualify for a grant of clemency; and ensure that clemency procedures are reasonably accessible to all persons. In this fashion, states may share information about “best practices,” and ensure that the pardon process can work to promote justice without jeopardizing safety, and to restore its “moral force.”¹⁹

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

The Commission believes that state bars can play an important role in encouraging the responsible exercise of the pardon power by creating programs and training lawyers so that they may become involved in the pardon process by representing individual clemency applicants. Bar programs would be capable of advertising the availability of clemency and encouraging bar members to represent prisoners with meritorious cases, on a pro bono basis if necessary. Bar programs should encourage broad participation and not seek to impose an obligation only upon criminal law practitioners. The ordinary non-capital clemency case requires neither special skills nor a major commitment of time or resources. Clemency representation should become a staple in pro bono bar programs. Bar members who take on clemency representation should be encouraged to propose recommendations for improving the clemency process and making it more accessible.

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

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

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

Respectfully submitted,
Stephen Saltzburg, Chairperson Justice Kennedy Commission
August 2004

ENDNOTES

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

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

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

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

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

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

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

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

9. During the Reagan and first Bush administrations there were only 16 commutations, compared to 111 during the preceding 12 years (Nixon, Ford and Carter), and 348 in the 12 years preceding that

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

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

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

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

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

14. Arizona, Delaware, Indiana, Maine, Massachusetts, Montana, Oklahoma, Pennsylvania, Rhode Island, Texas. In another seven states (Arkansas, Illinois, Iowa, Kansas, Michigan, New Hampshire, and Ohio), the governor is required to seek a board's advice, but may override its negative recommendation.

Georgia and Oklahoma, for example, appear to treat parole and commutation decisions more or less interchangeably. In Georgia, the pardon

power is administered by an independent Board, and the Governor has no part in the process. In Oklahoma, the Governor retains the ultimate power, but the Parole Board effectively makes the release decision.

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

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

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

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

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

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

RECOMMENDATIONS

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

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

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

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

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

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

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

disqualified from otherwise available benefits and opportunities, including employment, to the greatest extent consistent with public safety.

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

REPORT

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

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

Justice Kennedy expressed a concern that prison conditions are degrading and likely to lead inmates to continue criminal activity when released. Identifying this concern as important,

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

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

When the Commission began to prepare for its first hearing in November of 2003, none of its members – including its criminal practitioners – was totally familiar with the facts and figures we considered relating to corrections law and practice, recent research into the causes and effects of increased reliance on incarceration, or the legal rights of prisoners. Some of our members had greater knowledge than the average citizen, or the average lawyer, but even they lacked detailed information concerning the controversies over the impact of incarceration on crime rates, the collateral effects of imprisonment on families and communities, the net-widening effect of intensive supervision strategies, and the efficacy and cost-effectiveness of treatment alternatives to confinement. We knew that the prison infrastructure had grown exponentially since the early 1980s, and as we did our work we saw that state budget deficits have begun to encourage legislators to get “smart on crime” by reducing their prison populations (or, in a few states, cutting prison programming).

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

major programs were the National Volunteer Parole Aide Program, the BASICS (Bar Association Support to Improve Correctional Services) program, and the Resource Center on Correctional Law and Legal Services.¹

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

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

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

In its hearing in Sacramento in April of 2004, the Commission heard testimony from officials and prison advocates alike about the documented cases of abuse in California prisons that

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

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

Spurred initially by budgetary concerns, a number of states have been developing alternatives to incarceration, particularly for the high percentage of prisoners whose offenses are linked to substance abuse.⁴ There is also evidence that many state jurisdictions have recently been willing to consider and approve that early release of inmates as a way to reduce budget deficits and control spending.⁵ These early release programs, while often driven by the common concern about resources, operate quite unevenly from state to state. From what we have been able to determine, there is a consistent effort made by states considering early release to reduce inmate populations without necessarily cutting back on prison programming. Some prison systems are beginning to focus on the importance of developing programs to prepare prisoners for reentry, and to support them in the first critical weeks after their return to the community.⁶ Research has identified the moment of "hand-off," when a prisoner is released back into the community, as a critical time when the offender needs support in order to avoid slipping back into old patterns, and committing new crimes. Yet in many states the traditional send-off of "\$50 and a bus ticket" seems still to be the norm.

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

convictions from participation in a wide variety of federal programs and benefits, including food stamps, housing, insurance, educational assistance, parenting, and drivers' licenses.

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

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

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

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

must be addressed, including in particular parole revocation and supervision policies and collateral sanctions.

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

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

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

opposed to the number of revocations, a community increases the probability that of successful reintegration of offenders into the community, and thus the level of public safety.

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

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

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

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

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

The goal of these recommendations is to ensure humane conditions of confinement for prisoners, to avoid recidivism, and to maximize the chances that former prisoners will work,

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

Respectfully submitted,
Stephen Saltzburg, Chairperson Justice Kennedy Commission
August 2004

ENDNOTES

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

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

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

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

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

6. Much recent research on prisoner re-entry has been conducted by the Washington-based Urban Institute. Studies on the experience in Illinois, Maryland, New Jersey, and Ohio, can be found on the institute’s

web site, <http://www.urban.org/content/PolicyCenters/Justice/Projects/PrisonerReentry/overview.htm>. The Commission was particularly impressed by what it learned from Maryland’s Secretary Saar about the efforts underway in that state to implement drug treatment programs in prison, and to begin reentry programming at the moment a prisoner enters the system. See David Nitkin, *Ehrlich set to sign bill to expand prisoner drug treatment*, Baltimore Sun, May 11, 2004.

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

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

9. See, e.g., “Back to the Community: Safe and Sound Parole Policies,” Report of the Little Hoover Commission, November 2003, documenting the failure of California’s correctional system to prepare prisoners for reentry and its easy resort to parole revocation. The Commission heard testimony from Michael Alpert, Chair of the Little Hoover Commission, who spoke of the same “disconnect” between prison administrators and parole officials, and the communities to which prisoners return.

10. See note 2, *supra*.

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

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