

ARTICLE

PRISON-BY-DEFAULT: CHALLENGING THE FEDERAL SENTENCING POLICY'S PRESUMPTION OF INCARCERATION

*Melissa Hamilton**

ABSTRACT

The United States has earned its nickname as a mass incarceration nation. The federal criminal justice system has contributed to this status with its own increasing rate of incarceration. The federal system now ranks as the largest population of sentenced prisoners in the country; it is even larger than the national prisoner populations among all European countries, save one. This is a recent phenomenon. This Article ties the increase in the federal incarceration rate to policies adopted by the U.S. Sentencing Commission since its inception that presume imprisonment as the default sentence. Since the Sentencing Commission's creation in 1984, the proportion of federal sentences requiring incarceration increased from under 50% to over 90%. This Article provides evidence that the prison-by-default position by the Sentencing Commission is contrary to congressional intent when the Legislature passed sentencing reform laws in the 1980s, has contributed to a federal prison system that is operating over capacity, and wastes resources. The increasing rate of imprisonment at the federal level conflicts with the downward trend in national crime rates and with the states' sentencing experiences in which probation sentences continue to be preferred. Potential alternative explanations for the

* Visiting Criminal Law Scholar, University of Houston Law Center; J.D., The University of Texas School of Law; Ph.D., The University of Texas at Austin. The Author thanks the symposium commentators, Robert Stabe and Brent Newton, for their helpful suggestions on this Article.

significant trend toward the affirmative use of imprisonment in federal sentences are outlined, yet the available statistical evidence generally rules them out. Finally, suggestions on changes to the sentencing guidelines and to judicial sentencing practices are offered.

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I. INTRODUCTION

The United States' criminal justice system has earned the dishonorable nickname "mass incarceration" to describe the country as achieving the world's highest rate of incarceration, despite representing the wealthiest democracy.¹ A writer cynically refers to the nation's plight as "the caging of America."² Recent measures show that, per 100,000 persons in the national population, America's incarceration rate is 716.³ The next highest in the world are St. Kitts & Nevis at 714 and Seychelles

1. ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 1 (10th ed. 2013), available at http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wpp1_10.pdf; Lynn Adelman, *What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295, 295-96 (2013).

2. Adam Gopnik, *The Caging of America*, NEW YORKER, Jan. 30, 2012, at 72, 72.

3. WALMSLEY, *supra* note 1, at 1 (including pretrial detainees).

at 709.⁴ Comparing the United States to other Westernized countries, the radical nature of the former's prison situation becomes clear. Canada's incarceration rate is 118 while the median for Western European countries is 98.⁵ Another measure is equally striking: the United States' general population comprises 5% of the world's total population, yet the United States' prison population constitutes 25% of the world's prison population.⁶ By these yardsticks, America does not appear to truly exemplify the "land of the free."⁷

The country's extreme incarceration rate has attracted international attention, virtually all negative. Foreign newspapers variously chastise the United States for being "in another universe when it comes to incarceration rates,"⁸ exhibiting likely the highest imprisonment rate ever in history,⁹ and sustaining a "sprawling penal archipelago of federal, state[,] and county prisons that has sucked up public money for decades."¹⁰ A Bangladesh news column compares the United States' prison system to those of Russia and China, in which they all "spotlight the medieval mind-set and contemporary totalitarian practices of the societies that created them."¹¹

As a result, a robust coalition of interested parties has developed, demanding substantial changes to reduce America's penchant for incarcerating people.¹² Others have contended that a primary method of reducing a prison population is to dramatically lower the length of prison sentences

4. *Id.*

5. *Id.* at 1, 3 tbl.2.

6. JUSTICE POLICY INST., HOW TO SAFELY REDUCE PRISON POPULATIONS AND SUPPORT PEOPLE RETURNING TO THEIR COMMUNITIES 2 (2010), available at http://www.justicepolicy.org/images/upload/10-06_fac_forimmediaterelease_ps-ac.pdf.

7. See Eli Lehrer, *Responsible Prison Reform*, NAT'L AFF., Summer 2013, at 19, 25 ("[T]here is something deeply hypocritical about a country that claims to prize freedom having the world's highest incarceration rate.").

8. Andrew Sullivan, Op-Ed., *The Crack Dens Are Closed, so Can We Try a Little Tolerance Now?*, SUNDAY TIMES, Aug. 18, 2013, at 20.

9. Lisa Kerr, Op-Ed., *Our Aboriginal Prison System*, TORONTO STAR, Mar. 12, 2013, at A23 (observing that "[n]o other country matches [the size of the U.S. prison population], not by a long shot").

10. Peter Huck, *Tough Times Force Rethink on Prisons*, N.Z. HERALD (Apr. 23, 2011), http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10721089.

11. Sherwood Ross, *U.S., Russia, China, All Torture Prisoners*, OPEDNEWS (Aug. 11, 2013, 2:09 PM), <http://www.opednews.com/articles/U-S--Russia-China-All-T-by-Sherwood-Ross-130811-719.html>, reprinted in *Prisoners Are Subjected to Tortures Globally*, NEW NATION, Aug. 14, 2013.

12. See David Dagan & Steven M. Teles, *The Conservative War on Prisons*, WASH. MONTHLY, Nov./Dec. 2012, at 25, 25–27 (noting that countering the incarceration epidemic has attracted a combination of liberal and conservative figures and organizations).

systematically.¹³ A suggestion relative to the federal prison system is to scale back what is perceived as federal overcriminalization and surrender most prosecutions to the states, considering the federalist system of government and the traditionally primary role that states have held in prosecuting crimes.¹⁴ A focus on incarceration at the federal level appears justified. While the world's high of 716 prisoners per 100,000 residents represents the entire country's combined correctional facilities, the federal government's role in prosecuting and imprisoning offenders has grown substantially over the last thirty years.¹⁵ Today, the federal prison system is the largest in the country in terms of the number of people it houses.¹⁶

Concerning the federal prison system, then, suggestions for reducing the length of prison stays and the reach of federal crimes represent admirable and reasonable policy proposals. Yet another policy recommendation that is at least equally relevant, though it has received far less attention, is to overhaul the so-called in/out decision¹⁷—that is, the determination as to whether a convicted defendant is sentenced to any term of imprisonment, as compared to some alternative to prison, such as fine-only, probation, or other type of community supervision.¹⁸ An important contributor to the overcapacity of federal prisons today is the dramatic change over time in the in/out decision. Over a

13. See, e.g., Lehrer, *supra* note 7, at 27 (“[S]entences should be assigned to maximize punishment rather than to simply warehouse people.”).

14. See Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 523–27 (2011) (chronicling the rapid growth of federal criminal law and its conflict with traditional federalism concerns and judicial criticism of the overfederalization of criminal law). *But see* Susan R. Klein & Ingrid B. Grobey, *Overfederalization of Criminal Law? It's a Myth*, CRIM. JUST., Spring 2013, at 23, 31–32 (contending major issues lie not with overfederalization but in differences in moral decisions by federal and state authorities, disparities due to prosecutorial discretion, and “draconian” length of sentences).

15. See WALMSLEY, *supra* note 1, at 1 (“The United States has the highest prison population rate in the world, 716 per 100,000 of the national population . . .”); *infra* Figures 2–3 (highlighting the rapid rise in the number and rate of federally sentenced prisoners).

16. See *infra* Figure 4.

17. See NANCY LA VIGNE & JULIE SAMUELS, URBAN INST., *THE GROWTH & INCREASING COST OF THE FEDERAL PRISON SYSTEM: DRIVERS AND POTENTIAL SOLUTIONS 3* (2012), available at <http://www.urban.org/UploadedPDF/412693-The-Growth-and-Increasing-Cost-of-the-Federal-Prison-System.pdf> (recognizing two main contributors to the federal prison population are front-end decisions regarding the volume of admissions and the length of time served); Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POLY REV. 307, 312 (2009) (“[T]he size of a prison population is completely determined by two factors: *how many people go to prison and how long they stay.*”).

18. See Gerald R. Smith, *A Renewed Call for an “In/Out” Guideline*, 12 FED. SENT’G REP. 110, 110 (1999).

twenty-five-year period, the rate of alternative sentences in the federal system plummeted from over 50% to 10% in fiscal 2012.¹⁹ The federal system is an outlier here where probation sentences, for example, remain the norm in the states.²⁰

This Article contends that the time is ripe for the institutions comprising the federal sentencing system to implement an in/out policy that prefers a nonprison sentence unless there are substantial reasons in the individual case that indicate imprisonment is necessary. Such a policy would provide benefits such as reducing federal prison overcrowding, lowering the overall rate of imprisonment, allowing for rehabilitative results, and providing more equitable and just outcomes. The argument proceeds as follows. Part II outlines how prison became the default sentence in the federal system and why such policy is contrary to congressional intent when the Legislature overhauled the federal sentencing system in the 1980s. Part III advances a host of reasons why a policy reversal that reengages alternatives is timely. It also sets forth how changes in law and culture can bring about the policy change. Conclusions then follow. Throughout the Article, statistical measures are utilized to support and visually illustrate the concepts presented. The years represented in the empirical measures will vary, based largely on the purpose for the particular observation, as well as on the availability of relevant data.

II. THE PRESUMPTION OF PRISON IN FEDERAL SENTENCING

The premise of this Article is that imprisonment has regrettably become the clear default sentence in the federal criminal justice system.²¹ Notably, this is a relatively contemporary phenomenon since as recently as three to four decades ago the likelihood of a prison or alternative sentence (e.g., straight probation, probation plus some community-based program, or fine-only) in federal corrections was roughly equal. The divergence is evidenced in Figure 1. Ever since the 1980s,

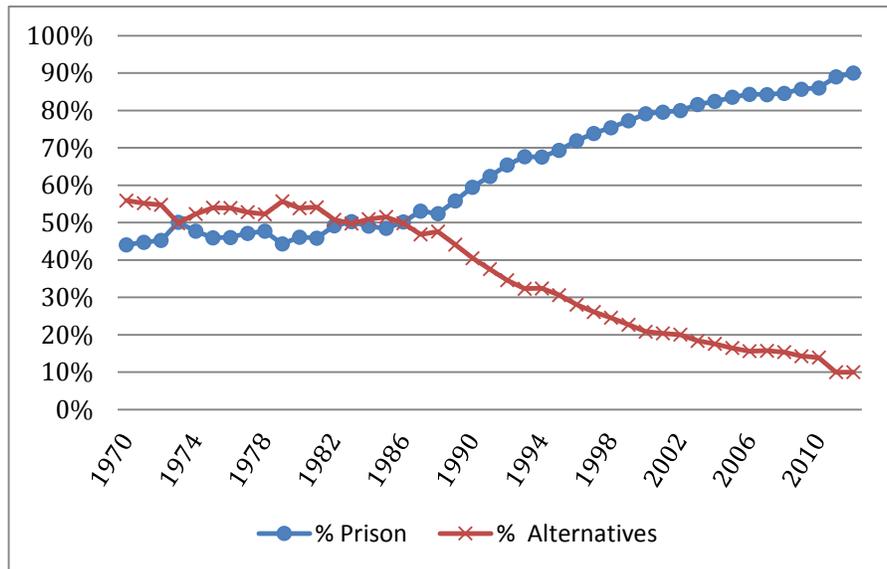
19. See *infra* Figure 1.

20. See Andrew Horwitz, *The Costs of Abusing Probationary Sentences: Overincarceration and the Erosion of Due Process*, 75 BROOK. L. REV. 753, 753–54, 759–60 (2010) (“[P]robation has become by far the most common form of criminal sentencing. . . . Probation cases accounted for . . . three quarters of the growth in the number of offenders under community supervision in 2007. Projections predict continued growth.” (footnote omitted)); *infra* Figure 1 (illustrating that the federal system significantly favors imprisonment over other sentencing alternatives, including probation).

21. Ryan S. King, *A Change of Course: Developments in State Sentencing Policy and Their Implications for the Federal System*, 22 FED. SENT’G REP. 48, 51 (2009) (referencing “incarceration first” mentality).

the consistent trend away from any sentence other than one requiring imprisonment has been marked and is concerning. In fiscal 2012, only about one out of ten sentenced federal defendants was spared a prison sentence, and preliminary estimates for fiscal 2013 are consistent therewith.²²

Figure 1: Federal Defendants Sentenced Each Year to Prison or Alternatives²³



The reasons for the significant decline are explored herein. It will become evident that the particular years at the beginning of the plunge, i.e., the mid-1980s, are meaningful in that it was during this same time period that federal sentencing experienced significant changes in law and policy. A major shift in sentencing philosophy developed, Congress passed sentencing law reforms, and the agency that Congress in its reform legislation created—

22. U.S. SENTENCING COMM'N, PRELIMINARY QUARTERLY DATA REPORT: FOURTH QUARTER 2013, at 30 tbl.18 (2013), http://www.usc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2013_Quarter_Report_4th.pdf.

23. Data compiled from U.S. SENTENCING COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.D (2013) [hereinafter 2012 SOURCEBOOK]; U.S. SENTENCING COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.D (2012); UNIV. AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.5.23.2010 (2010), <http://www.albany.edu/sourcebook/pdf/t5232010.pdf>. The Commission's Sourcebooks, which are referenced throughout this Article, can be found at http://www.usc.gov/Publications/Annual_Reports_and_Statistical_Sourcebooks/index.cfm. The 1996–2011 Sourcebooks can be found under the “Archives” link.

the U.S. Sentencing Commission—adopted policies representing an overt objective of assuming prison as the default sentence.

A. *Philosophical Shift*

The federal system of punishment traditionally represented an indeterminate system in which federal judges possessed broad discretion to determine sentences in individual cases.²⁴ In 1910 a federal parole board was established.²⁵ While judges still maintained dominion over the type and length of the sentence issued, subject to a few statutory limitations, parole officials generally controlled if and when prisoners would be released early.²⁶

The indeterminate system was justified at the time considering that the correctional philosophies for the federal prison system then relied upon rehabilitation as an appropriate goal.²⁷ A rehabilitative model appropriately relies on an assessment of the individual offender and his experiences, capabilities, and recidivism risk.²⁸ The philosophy of rehabilitation also explains the commonality of probation in an indeterminate system since many believe that probation is primarily for corrective purposes.²⁹ By the 1970s, however, critics objected to the system. Complainants alleged that the indeterminate structure led to unappealing results, such as too lenient sentences for certain offenses, disparities in sentences among similarly situated offenders, discrimination against

24. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993) (“From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion—a fact that proponents of mandatory guidelines have been reluctant to acknowledge.”).

25. Act of June 25, 1910, ch. 387, § 2, 36 Stat. 819, 819.

26. Stith & Koh, *supra* note 24, at 226.

27. See Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 304 (2000) (“[T]he system assumed that judges, expert in the law and the social sciences and seasoned by the experience of sentencing many defendants, would choose penalties that maximized the rehabilitative chances of offenders.”); Stith & Koh, *supra* note 24, at 227 (“The motivating rationale for the movement toward indeterminacy and parole was the rehabilitation of prisoners.”).

28. See Ely Aharonson, *Determinate Sentencing and American Exceptionalism: The Underpinnings and Effects of Cross-National Differences in the Regulation of Sentencing Discretion*, 76 LAW & CONTEMP. PROBS. 161, 165 (2013) (explaining that judicial and parole authorities were trusted to tailor each penalty to the individual offender).

29. See Horwitz, *supra* note 20, at 754, 756–58 (noting that the “historically intended purpose” of probation is rehabilitation and reviewing the history of probation and the rehabilitative ideal). Though Horwitz also recognizes that probation has shifted to being seen as a punishment in and of itself. See *id.* at 762.

minority defendants, and uncertainty in release decisions.³⁰ Equally important was the newly adopted assumption across the country that the rehabilitation model was fundamentally flawed. The infamous Martinson Report, which purportedly denounced rehabilitative programming as ineffective, was touted with the slogan “Nothing Works” in terms of reducing recidivism.³¹ In its place, the country’s politicians, with the widespread approval of the public, embarked in the 1980s on a tough-on-crime agenda that emphasized the punishment philosophies of deterrence and retribution.³²

This disenchantment with any rehabilitative potential of criminal offenders likely fueled the nationwide belief that only prison terms could be sufficiently punitive and possess the ability to control crime rates.³³ A sentencing policy analyst reflects on the impact the get-tough policies had on the American prison population: “[T]he last [forty] years have seen nothing less than a tectonic shift. Incarceration has moved from the option of last resort for the most recalcitrant individuals to the predominant public policy model of addressing crime. Consequently, the prison population has expanded exponentially.”³⁴ The number of federal and state prisoners increased more than threefold between 1980 and today, with a current count at just under 2.25 million imprisoned.³⁵

The situation has led critics to declare that the United States is a country of “mass incarceration.”³⁶ While certainly the states collectively are mainly responsible,³⁷ federal sentencing

30. Stith & Koh, *supra* note 24, at 227–28 (noting that such criticisms emerged as early as the 1950s, but that “[b]y the mid-1970s, there existed a large and growing academic literature critical of indeterminate sentencing and parole”).

31. See Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, PUB. INT., Spring 1974, at 22, 48–50 (“Do all of these studies lead us irrevocably to the conclusion that nothing works, that we haven’t the faintest clue about how to rehabilitate offenders and reduce recidivism?”). The author later essentially rescinded this infamous conclusion. Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 252–54 (1979).

32. Michael Tonry, *Sentencing in America, 1975–2025*, in 42 CRIME AND JUSTICE IN AMERICA, 1975–2025, at 141, 159–60 (Michael Tonry ed., 2013).

33. Joshua C. Cochran, Daniel P. Mears & William D. Bales, *Assessing the Effectiveness of Correctional Sanctions*, J. QUANTITATIVE CRIMINOLOGY, Aug. 13, 2013, at 1, 2–3, <http://link.springer.com/article/10.1007/s10940-013-9205-2/fulltext.html>.

34. King, *supra* note 21, at 48.

35. *Prison Reform: An Unlikely Alliance of Left and Right*, ECONOMIST, Aug. 17, 2013, at 23, 23.

36. See Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 426 (2013).

37. See E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, PRISONERS IN 2012—ADVANCE COUNTS 7 tbl.6 (2013), *available at*

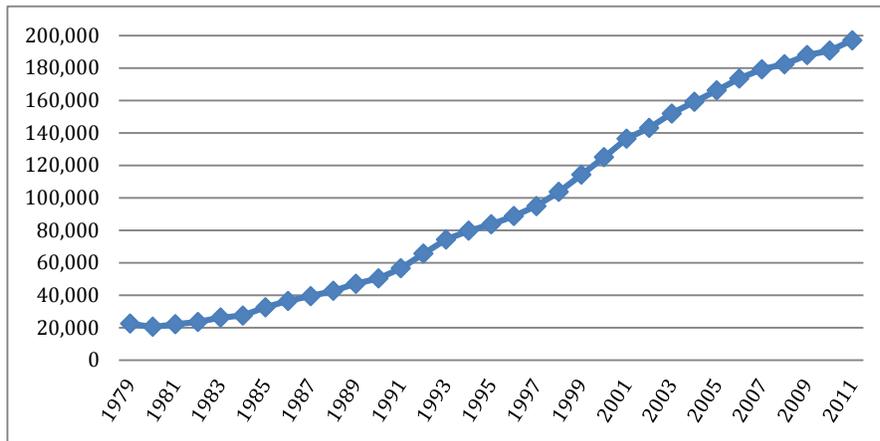
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policy is also a major contributor to the problem of mass incarceration. The federal government in recent decades has achieved a record every year for the number of people incarcerated in its prisons.³⁸ Figure 2 graphically represents the number of sentenced prisoners in the custody of federal authorities over time. By the end of 2011, there were almost 200,000 sentenced inmates in the federal system.³⁹

Figure 2: Federal Sentenced Prisoners⁴⁰



The increase in numbers of defendants sentenced is not explained merely by a growing general population. Figure 3 shows the increasing rate of persons sentenced to prison in the federal system as a measure of the overall national population. Clearly, federal incarceration has far outpaced population growth in America.

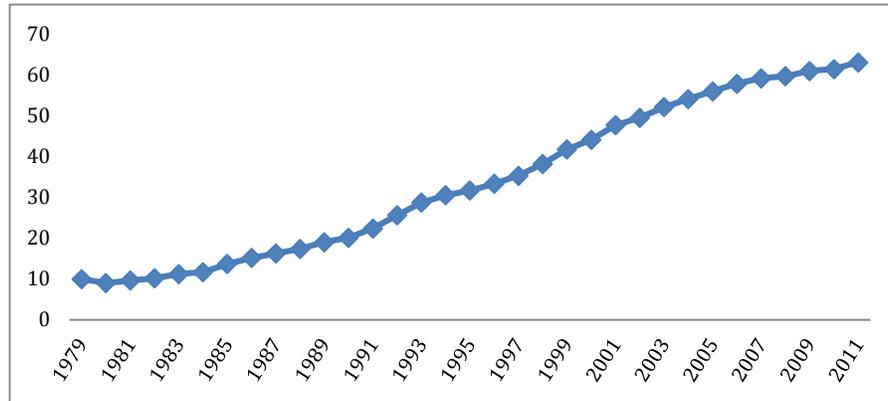
<http://www.bjs.gov/content/pub/pdf/p12ac.pdf> (revealing that state penal systems accounted for 1,315,817 of the 1,512,391 total U.S. sentenced prisoners in 2012).

38. Adelman, *supra* note 1, at 296.

39. The 2011 number excludes pretrial detainees, immigration detainees who are not criminally sentenced, and District of Columbia prisoners.

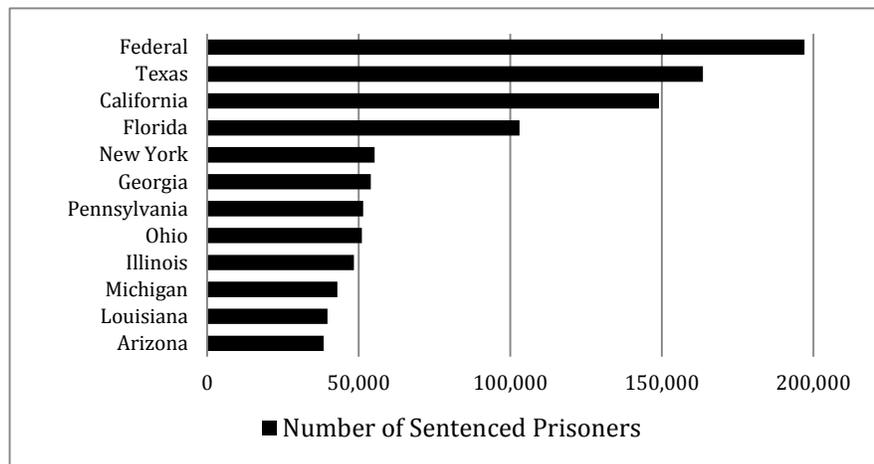
40. Data derived from E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, SENTENCED PRISONERS UNDER THE JURISDICTION OF STATE OR FEDERAL CORRECTIONAL AUTHORITIES, DECEMBER 31, 1978–2012 (2013), http://www.bjs.gov/nps/resources/documents/QT_sentjur_tot.xlsx. The 1978–2000 numbers include federal and District of Columbia prisoners sentenced to more than a year but exclude pretrial detainees and immigration detainees not otherwise sentenced. The 2001–2012 numbers do not take into account District of Columbia prisoners.

Figure 3: Federally Sentenced Defendants per 100,000 U.S. Residents⁴¹



The federal justice system’s contribution to mass incarceration in the country is evident, as well, in the fact that it now comprises the largest prisoner population in the country, despite the expectation in our federalist system that the states are the primary criminal justice jurisdictions.⁴² Figure 4 presents a comparative ranking of the top twelve prison populations in America.

Figure 4: Sentenced Prisoners in 12 Largest U.S. Prison Populations, 2011⁴³



41. Data derived from E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, IMPRISONMENT RATE OF SENTENCED PRISONERS UNDER THE JURISDICTION OF STATE OR FEDERAL CORRECTIONAL AUTHORITIES PER 100,000 U.S. RESIDENTS, DECEMBER 31, 1978–2012 (2013), http://www.bjs.gov/nps/resources/documents/QT_imp%20rate_tot.xlsx.

42. See *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (“Under our federal system, the ‘States possess primary authority for defining and enforcing the criminal law.’” (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)) (internal quotation marks omitted)).

43. CARSON & GOLINELLI, *supra* note 37, at 7 tbl.6.

Combined, the federal custodial population itself is larger than the prison populations of all European countries other than Russia.⁴⁴ Explaining the numbers depicted in Figures 1–4 is not limited to the fundamental change in sentencing philosophy from a theoretical perspective. Statutory reforms and critical policy choices of an administrative agency created to guide sentencing decisions are highly relevant as well. Embracing the new crime control ideology, Congress almost four decades ago adopted sentencing reforms, which included establishing this agency.

The most dramatic congressional reform specified a mandatory system of guidelines that were meant to systematize sentencing outcomes, principally by restraining judicial discretion.⁴⁵ Aptly titled, the Sentencing Reform Act of 1984 (Reform Act) instituted a guidelines system to be engineered under the auspices of a newly created agency named the U.S. Sentencing Commission (the Commission or Sentencing Commission).⁴⁶ This Article next addresses the roles that Congress and the Commission may have played in the significant trends, as graphically depicted earlier in Figures 1–3, of a declining rate of nonprison sentences, a climbing federal prison population, and an increasing rate of federally sentenced defendants, respectively.

B. The Sentencing Reform Act of 1984

In the body of the Reform Act, Congress charged the Commission with the responsibility of promulgating presumptive

44. Compare *supra* Figure 4, with PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 35 tbl.A-7 (2008), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf.

45. I have referred to the system before as *McSentencing*, as in the McDonaldization of federal sentencing. The contention is that the Guidelines operate to commodify federal sentences by producing uniform outcomes through discrete quantifications of harm while reducing individualized and humanized assessments of culpability. See generally Melissa Hamilton, *McSentencing: Mass Federal Sentencing and the Law of Unintended Consequences*, 35 CARDOZO L. REV. (forthcoming 2014), available at <http://ssrn.com/abstract=2315187> (arguing that “the federal criminal justice model as framed by the reform legislation is akin to *McSentencing* . . . entail[ing] mass sentencing on a scale that aggrandizes mass sentencing procedures while downgrading the values of individuality, creativity, and even humanization” and applying “the four tenets of McDonaldization”—predictability, calculability, efficiency, and control—to federal sentencing reforms).

46. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, § 217(a), 98 Stat. 1987, 2017–26 (providing for the establishment of the Sentencing Commission and its power to promulgate sentencing guidelines). At the same time, Congress passed a truth-in-sentencing statute to prospectively abolish parole. See 18 U.S.C. § 3624(a) (2012).

Sentencing Guidelines.⁴⁷ The Commission-instituted Guidelines were intended to be essentially binding on the courts, though a judge was granted limited discretion to depart if there was an aggravating or mitigating factor in the case that the Commission had not adequately considered when formulating the Guidelines.⁴⁸ At the same time, Congress outlined certain factors that should be considered in determining a reasonable sentence for a convicted defendant. These factors, codified at 18 U.S.C. § 3553(a), include the recommended punishment range set by the Sentencing Guidelines and the Commission's policy statements; the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence imposed considering the seriousness of the offense, retribution, deterrence, protecting the public, and the offender's rehabilitative needs; and the need to avoid unwarranted sentencing disparities among similarly situated offenders.⁴⁹

Despite the Guidelines initially being intended as substantially compulsory, the U.S. Supreme Court rendered them advisory in nature in the seminal case of *United States v. Booker* in 2005.⁵⁰ In that case, the Court found that the federal determinative sentencing system operated in an unconstitutional manner.⁵¹ Bestowing advisory status was the Supreme Court's remedial fix for the constitutional violation.⁵² Yet the *Booker* fix did not return to the judiciary the wide discretion that existed pre-Guidelines. In a series of cases since then, the Supreme Court has reaffirmed that federal judges are significantly circumscribed by the Commission's Guidelines and policies, albeit alongside considerations of the other statutory Section 3553(a) sentencing factors.⁵³

Based on *Booker* and its progeny, as well as on the Guidelines' based instructions, the current process of selecting a particular punishment generally involves a series of steps. The

47. 28 U.S.C. § 994(a)(1).

48. 18 U.S.C. § 3553(b). The Guidelines incorporated this provision. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2013).

49. 18 U.S.C. § 3553(a).

50. *United States v. Booker*, 543 U.S. 220, 245 (2005).

51. The Court ruled that the mandatory sentencing system violated defendants' Sixth Amendment rights to a jury trial by requiring judges, rather than juries, to make determinations of fact that would enhance the punishment for defendants' crimes. *See id.* at 226–27, 244–45.

52. *Id.* at 245.

53. *See Peugh v. United States*, 133 S. Ct. 2072, 2080 (2013) (discussing how subsequent cases “clarified the role the Guidelines play in sentencing procedures, both at the district court level and when sentences are reviewed on appeal”).

sentencing judge first calculates the base offense level from the applicable offense guideline.⁵⁴ She does this by determining the initial base offense level and then making appropriate adjustments provided by relevant Guidelines to reach a final base offense level.⁵⁵ These adjustments are generally facts related to the offense or characteristics related to the offender that the Commission perceives as aggravating or mitigating culpability.⁵⁶ Second, this point total, together with a criminal history score, is translated through the principle Guidelines grid into a sentencing range (such as 24–30 months).⁵⁷ Next, the judge considers whether any of the general departure standards should be applied, such as a reward for substantial assistance to authorities.⁵⁸ Thus, the Guidelines provide a framework, or starting point, for any sentencing decision.⁵⁹ According to the Supreme Court, correctly calculated Guidelines sentencing ranges normally provide a “rough approximation of sentences that might achieve [Section] 3553(a)’s objectives” in a mine-run case.⁶⁰ This is because the ranges generally represent decisions by the Commission’s “professional staff with appropriate expertise”⁶¹ after “careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions” nationwide.⁶²

In sum, the *Booker* remedy means that, while a court must give thoughtful consideration to the Guidelines, it must also be mindful of whether a Guidelines-based sentence properly encapsulates the Section 3553(a) statutory sentencing factors.⁶³

54. *Gall v. United States*, 552 U.S. 38, 49 (2007).

55. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)(1)–(2) (2013).

56. *See id.* §§ 3A1.1–3C1.4 (providing for adjustments to sentencing levels based on factors such as the status of the victim, aggravating or mitigating roles in the offense, obstructing the administration of justice, or the commission of the offense while on release).

57. *Id.* § 1B1.1(a)(6)–(7); *id.* ch. 5, pt. A.

58. *See id.* §§ 1B1.1(b), 5H1.1–12, 5K1.1–2 (instructing courts to consider departures from the guideline ranges for specific offender characteristics such as education, family ties, and responsibilities, as well as for substantial assistance to authorities and other grounds).

59. *Gall*, 552 U.S. at 49.

60. *Rita v. United States*, 551 U.S. 338, 350 (2007). “The term ‘mine-run’ deserves to be Googled and then forgotten. Think run-of-the-mill.” *United States v. Grober*, 595 F. Supp. 2d 382, 403 n.12 (D.N.J. 2008).

61. *Kimbrough v. United States*, 552 U.S. 85, 108–09 (2007) (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007)).

62. *Gall*, 552 U.S. at 46.

63. *Rita*, 551 U.S. at 358 (stating that a sentencer’s “reasoned sentencing judgment rest[s] upon an effort to filter the Guidelines’ general advice through § 3553(a)’s list of factors”).

Thus, the fourth step is for the judge to reflect upon these statutory sentencing factors in determining whether a within-Guidelines or, alternatively, a non-Guidelines sentence is proper.⁶⁴ In the final decision, the sentencer sets a parsimonious punishment, i.e., one that is “sufficient, but not greater than necessary” to accomplish the statutory sentencing goals.⁶⁵

The foregoing represents the basics for current federal sentencing decisions. But it does not directly account for the sharp decline in nonprison sentences, as reflected in Figure 1. As will be explained below in Part II.C, a primary explanation can be traced to the initial—and currently prevailing—policy choices of the Commission to presume a term of imprisonment, while at the same time substantially limit the availability of alternatives that do not also include a prison stay. The Commission’s policy decisions here were not a foregone conclusion in terms of whether they complied with Congress’s intent. As with many legislative acts which are the products of bipartisan compromise, the history of the Reform Act yields various—sometimes somewhat conflicting—perspectives.⁶⁶ Certainly, the philosophical preference for retribution and deterrence over rehabilitation at the time might suggest an intention to focus on imprisonment. But does this necessarily mean that Congress as a whole desired for the then-rate of about half of sentences not including imprisonment to drop so dramatically? Did legislators generally come to feel that probation or a fine, for instance, failed to constitute a sufficiently punitive sentence for criminal conduct as a general rule? There is considerable language and sentiment in the Reform Act itself and the legislative reports accompanying the reform initiatives to support the notion that Congress did not actually mean to repudiate alternative sentences.

In fact, Congress expressed a preference for the judicious and conservative use of prison beds. The Reform Act itself states that “sentencing decisions should be designed to ensure that prison resources are, first and foremost, reserved for those violent and serious criminal offenders who pose the most dangerous threat to society.”⁶⁷ Further, “in cases of nonviolent and nonserious offenders, the interests of society as a whole as

64. *Gall*, 552 U.S. at 49–50.

65. *Id.* at 43–44 (citations omitted).

66. *See, e.g.*, Stith & Koh, *supra* note 24, at 258–66 (relating the contentious history of the Act during its development in the 1980s, with particularly conflicting positions emerging between the Senate and the House Judiciary Committee on the issue of sentencing reform).

67. 18 U.S.C. § 3551 note (2012).

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well as individual victims of crime can continue to be served through the imposition of alternative sentences, such as restitution and community service.”⁶⁸ Indeed, Congress reiterated these sentiments in a specific mandate to the Sentencing Commission, instructing it to

insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.⁶⁹

The Legislature was clearly concerned with avoiding prison overpopulation, indicating in the legislation that prison capacity at that time posed an “impending crisis” such that “available [f]ederal prison space must be treated as a scarce resource in the sentencing of criminal defendants.”⁷⁰ The Commission was, therefore, instructed that one of its duties was to formulate guidelines to minimize the likelihood that the prison population would exceed capacity.⁷¹

A Senate Report underlying the legislation represents that committee members actually intended that probation and intermediate sanctions be available *more often* than they had been before the Guidelines.⁷² One of Congress’s chief complaints about sentencing practices before the Guidelines was that a judge might invoke “a longer term than would ordinarily be appropriate simply because there were no available alternatives that served the purposes he sought to achieve with a long sentence.”⁷³ Congress, though, was not focused just on the length of prison terms; it expressed concern about the overuse of prison as the typical *type* of sentence.⁷⁴ The Senate Committee Report

68. *Id.*

69. 28 U.S.C. § 994(j).

70. 18 U.S.C. § 3551 note.

71. 28 U.S.C. § 994(g).

72. *See* S. REP. NO. 98-225, at 50, 59, 67, 172–76 (1983) (criticizing the previous lack of guidance on nonprison sentences and emphasizing probation as a type of sentence to be considered when evaluating defendants and striving to meet the purposes of sentencing while insuring the most appropriate use of penal and correctional facilities).

73. *Id.* at 50.

74. H.R. REP. NO. 98-1017, at 37 (1984) (“[D]efficiency of current [f]ederal practice is the misuse of the nation's limited and expensive prison facilities. Federal prisons, like their State counterparts, are currently overcrowded. Too often prison is used for people who could just as effectively be punished through nonincarcerative sentences. Prison should be used in those cases where incapacitation or deterrence demand it, or where the

observed that the law was not then “particularly flexible in providing the sentencing judge with a range of options,” such that “a term of imprisonment may be imposed in some cases in which it would not be imposed if better alternatives were available.”⁷⁵ The Senate Report reflected further that the

only type of sentence for which current law provides a full range of options is the term of imprisonment. This probably results in too much reliance on terms of imprisonment when other types of sentences would serve the purpose of sentencing equally well without the degree of restriction on liberty that results from imprisonment.⁷⁶

To rectify this gap, the Senate Committee expected that the new system should “assure the availability of a full range of sentencing options from which to select the most appropriate sentence in a particular case.”⁷⁷

All of this language strongly undermines the theory that Congress intended prison to be anything akin to a presumptive sentence. Still, the legislative committee reports differ as to whether an alternative sentence should be the default. Addressing the question about whether there ought to be any presumption on the type of sentence issued, for instance, the Senate Report concluded that “the best course is to provide no presumption either for or against probation as opposed to imprisonment, but to allow the Sentencing Commission and, under [the Commission’s] guidelines, the courts, the full exercise of informed discretion in tailoring sentences to the circumstances of individual cases.”⁷⁸ In contrast, the House Report stated that its committee “believes that it is best, whenever possible, to use effective alternatives to imprisonment” such that judges at the initial stage of sentencing should “consider and reject all nonprison alternatives before imposing a sentence of incarceration.”⁷⁹ The Reform Act itself is neutral on the issue, merely permitting a sentence of imprisonment, probation, or fine,⁸⁰ and instructing judges in all cases to consider all kinds of sentences available.⁸¹

seriousness of the crime is such that nonprison sentences would cause public disrespect for the law; yet the overcrowded condition of our institutions makes prison less available in those cases where it is needed.” (footnotes omitted).

75. S. REP. NO. 98-225, at 50.

76. *Id.* at 59.

77. *Id.* at 39.

78. *Id.* at 91.

79. H.R. REP. NO. 98-1017, at 37, 41. *But see id.* at 253 (dissenting statement) (complaining that the bill fails to sufficiently promote punishment as a primary goal).

80. 18 U.S.C. § 3551(b) (2012).

81. *Id.* § 3553(a)(3).

The aversion to rehabilitation at the time does not frustrate the conclusion that Congress accepted that nonincarcerative sentences should be given in many, arguably most, cases. The Senate Committee advocated that imprisonment was not the “only form of sentence that may effectively carry deterrent or punitive weight. It may very often be that release on probation under conditions designed to fit the particular situation will adequately satisfy any appropriate deterrent or punitive purpose.”⁸²

Notwithstanding all of this evidence of Congress’s rejection of an incarceration-focused policy, as the next Subpart will explore, the Sentencing Commission fully embraced, and wrote the Guidelines to dictate, a prison-by-default position.

C. *The Sentencing Commission as Policy Driver*

The Sentencing Commission early on definitively established imprisonment as the presumptive sentence across the board. To be clear, the Guidelines do allow for a nonprison sentence.⁸³ Yet, they also operate in various ways to substantially discourage such a result. The availability of a Guidelines-based alternative to prison is extremely limited, and when it might in the relatively few cases be allowed, the Commission has provided little guidance to judges in answering what might be the first relevant question in sentencing: the in/out decision. This Subpart will address these contentions and attempt to explain how the Commission appears to substantiate its position to privilege prison terms. Then consideration of other potential sources for the substantial ratchet up of prison sentences following the Guidelines’ implementation will follow, along with a discussion of the available statistical evidence that may confirm or refute those alternative sources. It is noted that the empirical support provided herein varies by year based on the purpose of the reference and, importantly, the availability of relevant data.

1. *Guidelines Policies Preferring Imprisonment.* Under the Guidelines, prison sentences dominate. Indeed, alternatives, including straight probation, are never a default in the sense that prison is an option in every case, even for minor misdemeanors perpetrated by first time offenders.⁸⁴ The Commission determined

82. S. REP. NO. 98-225, at 92.

83. 18 U.S.C. § 3551(b); U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(1)(4)(d) (2013).

84. See Nora V. Demleitner, *Replacing Incarceration: The Need for Dramatic Change*, 22 FED. SENT’G REP. 1, 1 (2009) (noting that imprisonment “rhetorically dominates, since all other sanctions are merely ‘alternatives’”). Compare U.S. SENTENCING GUIDELINES MANUAL § 2X5.2 (setting forth a “base offense level” of six for defendants convicted of Class A misdemeanors for

that the availability of a nonprison sentence would be governed by zones, which are superimposed on a single grid.⁸⁵ This grid is the nucleus of the Guidelines system. Basically, the grid provides for ranges of time, in months, of (purportedly) appropriate prison sentences. Indeed, this table is clearly labeled such that the ranges control the length of imprisonment. The grid contains a horizontal axis that corresponds to the defendant's final criminal history score (using an ordinal scale from I–VI). The vertical axis relates to the defendant's final offense level (1–43). Thus, there are 258 cells in the grid. The grid is further subdivided into four zones using an alphabetical hierarchy, from Zone A to D, using an ordinal scale. The Guidelines differentiate between zones for purposes of sentencing options, as in *types* of sentence allowed.

Zone A expressly permits probation or a fine-only sentence and all of its ranges include, but are not limited to, the number zero to represent the option of requiring no prison time.⁸⁶ Zone B allows for a probation sentence as long as there is also a community confinement restriction, such as home detention, halfway house, or drug rehabilitation facility.⁸⁷ Probation or fine-only sentences are technically impermissible for defendants falling into Zones C and D.⁸⁸ One might surmise there to be no thumb on the scale favoring a prison term considering two zones permit alternatives to prison while an equal two zones do not. Together, though, Zones C and D comprise the bulk of the cells. Today, 81% of the cells fall into Zones C and D.⁸⁹ Actual sentencing data, perhaps coincidentally, almost replicate this number. For fiscal years 2006–2012, 83% of defendants were delegated to Zones C and D.⁹⁰ Thus, during such timeframe, pursuant to the Guidelines, approximately only one out of six defendants were technically even eligible for a nonprison sentence. This skew exists despite the fact that Congress statutorily authorizes judges to impose probation for numerous offenses, i.e., any offense with a

the court to use in determining an appropriate sentence), *with id.* ch. 5, pt. A (setting forth zero to six months of incarceration as an appropriate sentence of a first-time offender with a “base offense level” of six). The Guidelines apply to Class A misdemeanors, which can include less serious offenses such as gambling and trespass, but do not apply to Class B or Class C Misdemeanors. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.9.

85. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A.

86. *Id.*; *id.* §§ 5B1.1(a)(1) & cmt. n.1(A), 5C1.1(b) cmt. n.2.

87. *Id.* § 5B1.1(a)(2) & cmt. n.1(B).

88. *Id.* §§ 5B1.1 cmt. n.2, 5C1.1(d), (f).

89. *Id.* ch. 5, pt. A.

90. Data compiled from U.S. SENTENCING COMM'N, 2006–2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.16 (2007–2013).

statutory maximum below twenty-five years unless precluded by statute for the offense.⁹¹

Another avenue leading toward a presumption of prison is the fact that the Commission based the initial Guidelines and the recommended sentencing ranges on a distorted vision of past sentencing practices. More specifically, the Commission chose to analyze in depth those past sentences in which a term of imprisonment was given and only those that went to trial,⁹² though acknowledging that, at the time, 85% of cases were pleas which often attracted reduced sentences.⁹³ The Commission candidly explained that it designed the Guidelines to recommend sentences within a narrow range, using as anchors the average time served under prior law in which sentences of imprisonment were imposed and the defendants were first offenders.⁹⁴ The sentencing table from the very beginning thus excluded from its recommended “norms” approximately 50% of all cases—that is, the numerous cases in which judges had believed it appropriate to impose probation or some other nonprison sentence.⁹⁵ The anchors used likewise did not properly represent average defendants in that first offenders who had previously received prison sentences prior to the promulgation of the Guidelines, in light of the high rate of probation sentences overall, likely represented more serious offenders.⁹⁶ Further, contrary to the Commission’s assertion that the initial Sentencing Guidelines were largely reliant upon the averages of past sentencing practices,⁹⁷ they clearly

91. 18 U.S.C. §§ 3561(a), 3559(a) (2012).

92. U.S. SENTENCING COMM’N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 23 (1987).

93. *Id.* at 48.

94. *Id.* at 22–23.

95. Compare *supra* notes 92–94 and accompanying text (explaining that the Commission only used sentences where a term of imprisonment resulted when developing the sentencing table), with BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL CRIMINAL CASES, 1980–87, at 7 app. tbl. (1989), available at <http://www.bjs.gov/content/pub/pdf/fcc8087.pdf> (showing that half of the federal defendants sentenced in 1985 were given nonprison sentences).

96. See U.S. DEP’T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1985 (1990), available at <http://www.bjs.gov/content/pub/pdf/cfjs85.pdf> (explaining that, in 1985, first offenders were much less likely to receive a sentence of incarceration than those with a criminal history and showing that those convicted of violent offenses were much more likely to receive a sentence of incarceration than those convicted of less serious offenses).

97. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. n.5 (2013) (“[The Commission] relied upon pre-guidelines sentencing practice as revealed by its own statistical analyses.”). See generally U.S. SENTENCING COMM’N, *supra* note 92, at 17–19, 23 (discussing how the Commission utilized “[s]tandard multivariate statistics... to draw inferences about the sentences received”).

did not replicate these averages.⁹⁸ Thus, it has been suggested that the Commission had not created Sentencing Guidelines addressing a spectrum of alternatives, but a narrower version representing merely *prison* guidelines.⁹⁹

In addition, further reflecting a prison bias, the Commission has unfortunately chosen not to provide substantive guidance on the in/out decision.¹⁰⁰ This continues to be surprising considering Congress expressly directed it to do so in the Reform Act legislation¹⁰¹ in order to assist judges who are statutorily required to ascertain if a probation sentence is statutorily permissible.¹⁰² Congress clearly contemplated that the “sentencing guidelines will recommend to the sentencing judge an appropriate *kind* and range of sentence for a given category of offense committed by a given category of offender.”¹⁰³ The Senate Report accompanying the legislation also forthrightly indicates that this was considered an important mission for the agency:

The guidelines are required to provide guidance for the judge in determining whether to sentence a convicted defendant to probation, to pay a fine, or to a term of imprisonment. This guidance may prove to be *one of the most important parts* of the guidelines process, since current law provides no guidance or mechanism for guidance to judges on this crucial decision, leading to considerable unwarranted disparity which there is no mechanism to correct.¹⁰⁴

The House Report is in agreement, likewise referring to the in/out decision as “the most fundamental decision of sentencing” and expressing that the Guidelines should advise judges on this specific determination.¹⁰⁵

98. See Carissa Byrne Hessick, *Prioritizing Policy Before Practice After Booker*, 18 FED. SENT’G REP. 167, 167 (2006) (“[T]he Commission’s adherence to past practice was far from uniform.”).

99. Herbert J. Hoelter, *Sentencing Alternatives—Back to the Future*, 22 FED. SENT’G REP. 53, 53 (2009).

100. See Thomas W. Hillier, II, *Linking Judicial Sentences to Congressional Purposes*, 8 FED. SENT’G REP. 24, 24–25 (1995) (explaining the need and advocating for an “in/out” guideline); Charlie E. Varnon, *Restoring Probation, Parsimony and Purposes to the Sentencing Reform Act*, 5 FED. SENT’G REP. 217, 217–18 (1993) (criticizing the lack of Guidelines that specifically recommend a fine or probation).

101. 28 U.S.C. § 994(a)(1)(A) (2012) (instructing the Commission to promulgate a guideline that would permit a sentencing judge to determine whether to impose a sentence of probation, a fine, or a term of imprisonment).

102. 18 U.S.C. § 3561(a).

103. S. REP. NO. 98-225, at 51 (1983) (emphasis added).

104. *Id.* at 163–64 (emphasis added).

105. H.R. REP. NO. 98-1017, at 102 (1984) (noting, too, that some state commissions unfortunately focus instead on guiding the length of prison sentences rather than the kind of sentence).

As has been recognized, “[d]espite these clear directives, no chapter, or even section of the Guidelines points the sentencing court to factors that should be considered in answering the threshold question of whether to imprison.”¹⁰⁶ Considering that Congress is stridently interested in fostering nationwide uniformity in sentencing practices, this lapse is curious in that the in/out decision is a critical threshold question, the resolution of which can certainly cause disparity in sentencing practices.¹⁰⁷

The Guidelines also, contrary to congressional mandate,¹⁰⁸ fail to provide factors for judges to contemplate in considering the length of any nonprison sentence. There exists a grid for prison sentences, but no corresponding grids for alternative sentences. Thus, instead of the initial question the Guidelines should assist with—What type of sentence is appropriate?—the Guidelines merely ask—How long of a prison term is appropriate?¹⁰⁹ The Senate Committee had acknowledged that refined Guidelines with ranges for alternative sentences would likely be difficult but suggested the two-year implementation timeframe would be sufficient for the agency to complete the assigned task.¹¹⁰ In its report, the Senate Committee also noted that congressional staffers had tried to be helpful in this regard by listing a variety of offender characteristics, from which the Commission was instructed to review and, then, choose those factors that should be relevant to the court’s decision on what type of sentence to impose.¹¹¹

The Legislature, in fact, reiterated these goals two years later. A House Report supporting an amendment to the Commission’s responsibility in 1986 indicated the Legislature’s expectation that the Commission would be “directed to issue sentencing guidelines that address the type of punishment to impose (probation, a fine, imprisonment); the appropriate amount of a fine, and the appropriate length of a term of probation or of imprisonment.”¹¹² Despite such congressional expectations, the Commission chose to focus almost exclusively

106. Ellen C. Brotman, *Make Probation a Real Option at Sentencing*, 23 FED. SENT’G REP. 257, 257 (2011).

107. *Id.* at 257–58; Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 884 (1990).

108. See 28 U.S.C. § 994(a)(1)(B) (2012) (directing the Commission to issue a guideline courts can use to determine the “appropriate length of a term of probation”); S. REP. NO. 98-225, at 165.

109. Adelman, *supra* note 1, at 310–11.

110. S. REP. NO. 98-225, at 169.

111. *Id.* at 171.

112. H.R. REP. NO. 99-614, at 3 (1986).

on promoting prison sentences.¹¹³ In light of the various proclamations by Congress preferring alternative sentences provided above, one may wonder about the Commission's strong stance otherwise.

Certain philosophical rationales may explain the agency's bias against alternatives.¹¹⁴ One is that the Commission initially referred to straight probationary sentences as not sufficiently punitive, indeed, declaring them "very lenient."¹¹⁵ A commentator has observed that the Commission's "limitations on judge[s'] choices in the types of sentences to be imposed [were] part of a larger shift away from probationary and alternative sentences, again due to the increasingly widespread belief that a punitive and severe punishment could only be satisfied through imprisonment."¹¹⁶ Indeed, in its statistical measures of adherence to the Guidelines, the Commission today counts a probationary sentence as a noncompliant, 100% downward variance if the Guidelines minimum in the case was greater than zero months.¹¹⁷ Critics contend, as well, that the Commission wanted

113. Michael E. Smith, *Designing and Implementing Noncustodial Penal Sanctions: What Purposes Will Real Alternatives Serve?*, 4 FED. SENT'G REP. 27, 27 (1991) ("[G]rid-based guideline systems are initially hostile to all penal measures except incarceration—the penal measure which, largely by default, has become our archetype, our all-purpose sanction, the standard of exchange in the punishment market.”).

114. See Paul L. Seave, *Rehabilitation, Non-Recidivism, and Probation: The Sentencing Commission's Unwanted Stepchildren*, 5 FED. SENT'G REP. 223, 223 (1993) (describing the Commission's "crime control" philosophy and disbelief in the effectiveness of probation as theoretical justifications for the focus on imprisonment in the Guidelines).

115. U.S. SENTENCING COMM'N, *supra* note 92, at 17.

116. Hoelter, *supra* note 99, at 54; see also Varnon, *supra* note 100, at 217 (observing that the Commission thought only imprisonment could deter or punish). The Commission has admitted its belief that "the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm." U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(1)(4)(d) (2013). But the Commission offered no evidence to support this presumption, and available evidence is to the contrary. See Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1707–08 (1992) (noting that the Guidelines Manual did not provide support for the assertion that probation practice was ineffective); see, e.g., VALERIE WRIGHT, SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 4, 6–7, 9 (2010), available at <http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf> (analyzing the weak deterrent effects of increasing the severity of sentences); David Weisburd, Elin Waring & Ellen Chayet, *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 CRIMINOLOGY 587, 589, 597–98, 601 (1995) (finding no difference in deterrence of white-collar offenders, presumably the most rational offenders, between imprisonment and probation).

117. U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING pt. A, at 101 (2012), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/Part_A.pdf#page=5.

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to abolish probation as it generally adopted a pro-prosecution bias catering to the “law-and-order” members of Congress.¹¹⁸

It is as if the Commission believes there is a significant divide in terms of punishment between prison and alternatives. Congress, to the contrary, considered that a term of imprisonment was *not* “necessarily a more stringent sentence than a term of probation with restrictive conditions and a heavy fine.”¹¹⁹ The Senate Report indicates that larger fines, probation with conditions, and other alternatives to all or part of a prison term, such as community service or intermittent confinement, should be used more often.¹²⁰ The committee’s expectation was that it would be the sentencing judge’s responsibility to determine whether the purposes of sentencing would best be served by probation or imprisonment,¹²¹ except that the Legislature directed that imprisonment itself was not appropriate to achieve the purpose of rehabilitation.¹²²

The Commission’s stance in subverting the role of nonprison sentences as a sufficient punishment is also in conflict with congressional will, which viewed probation as a “form of sentence with conditions.”¹²³ Again, in the Senate Report accompanying the Reform Act, the committee indicated there should be no

artificial line between imprisonment and probation, forcing the sentencing guidelines system and the judges to formulate sentencing policy that assumes that a term of imprisonment, no matter how brief, is necessarily a more stringent sentence than a term of probation with restrictive conditions and a heavy fine. Such an assumption would be a roadblock to the development of sensible comprehensive sentencing policy.¹²⁴

To this end, the legislative committee affirmatively encouraged the “fashioning of conditions of probation in order to make probation a useful alternative to a term of imprisonment.”¹²⁵

Another explanation for the Commission’s stance returns us to preferences on sentencing philosophies. As indicated earlier, a

118. Adelman, *supra* note 1, at 302; Michael Tonry, *The Success of Judge Frankel’s Sentencing Commission*, 64 U. COLO. L. REV. 713, 717 (1993).

119. S. REP. NO. 98-225, at 55 (1983).

120. *See id.* at 50, 59 (speculating that imprisonment may be imposed in some cases because of a lack of alternatives and stating that Congress provided for those alternatives).

121. *Id.* at 92, 119; *see also* 18 U.S.C. §§ 3551(b), 3561–3564 (2012).

122. 18 U.S.C. § 3582(a).

123. S. REP. NO. 98-225, at 59.

124. *Id.* at 55.

125. *Id.* at 59.

philosophical change of heart was a foundational push for sentencing reform as a general matter. But in the legislation itself, Congress did not direct that sentencing policy should prospectively ignore rehabilitation. Instead, the legislation outlined four main sentencing philosophies—deterrence, retribution, incapacitation, and rehabilitation—yet did not choose to elevate any one of them.¹²⁶ In its report, the Senate Committee seems to discount rehabilitation but only in the context of a prison setting, which helps explain the concurrent abolition of the parole system.¹²⁷ Otherwise, the report states expressly that in the legislative debates regarding reform, the suggestion to eliminate rehabilitation was proffered and then explicitly rejected.¹²⁸ The Sentencing Commission, however, adopted deterrence and retribution as its main philosophies, after conceding that its initial commissioners could not agree on which of those two prevailed.¹²⁹ Notice, though, this stance ignores rehabilitation. And the Guidelines so promulgated, with a default position of prison and a failure to adequately guide decisions on nonprison sentences, illustrate such partiality. In support thereof, the Commission can correctly point to a congressional edict that “the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant.”¹³⁰ Critics, though, claim that the Commission has incorrectly interpreted such provision to apply too broadly:

Congress did not say that imposing a sentence for rehabilitative purposes is inappropriate; to the contrary, it said a sentence to a *term of imprisonment* is inappropriate for the purpose of fostering rehabilitation in cases where deterrence, punishment, and incapacitation do not otherwise require incarceration. The Commission’s belief that Congress placed a low priority on rehabilitation was not supported by the statute or its legislative history. In cases where the three purposes of sentencing other than rehabilitation did not require prison, Congress intended probation to be the default sentence.¹³¹

Actually, another provision of the Reform Act instructs that judges consider each defendant’s need for educational and treatment services when imposing a sentence, particularly when

126. 18 U.S.C. § 3553(a)(2).

127. See S. REP. NO. 98-225, at 38.

128. *Id.* at 76.

129. U.S. SENTENCING COMM’N, *supra* note 92, at 17.

130. 28 U.S.C. § 994(k).

131. Brotman, *supra* note 106, at 258 (footnote omitted). However, the Senate Report declined to suggest any presumption of a sentence of prison or probation. S. REP. NO. 98-225, at 91.

determining whether to require any special conditions of probation.¹³² The Senate Report accompanying the Reform Act makes clear that rehabilitative purpose should be weighed “in determining whether a sanction other than a term of imprisonment is appropriate in a particular case.”¹³³ In support of rehabilitation being a relevant and driving factor for nonprison sentences, Congress evidently was open to the consideration of personal circumstances, such as education, vocational skills, employment, and family and community ties, when determining if an alternative sentence is appropriate.¹³⁴

It is of interest how the Commission responded to Congress’s admonition that prison resources be reserved for serious and violent criminals who pose the greatest threat to society.¹³⁵ The Commission took a position that seems to redact the characteristic of violence and adopted an expansive definition of which crimes were serious.¹³⁶ Again, the Commission here noted its antagonistic perspective on probation. It asserted that courts had previously been sentencing to probation “an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission’s view are ‘serious.’”¹³⁷ Thus, the Commission wrote Guidelines mandating prison for many offenses that were then generally receiving probationary sentences.¹³⁸ This position is in conflict with a report from a committee of the House of Representatives at the time of sentencing reform that stated one of the purposes of the legislation was to “encourage the development of effective alternatives to prison for nonviolent criminals, and to provide more severe nonprison forms of punishment for white-collar and corporate crime.”¹³⁹

132. 18 U.S.C. § 3553(a)(2)(D); U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING 13 (2004), available at http://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/15_Year_Study/15_year_study_full.pdf.

133. S. REP. NO. 98-225, at 76–77.

134. 28 U.S.C. § 994(d)–(e).

135. 18 U.S.C. § 3551 note.

136. See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(1)(4)(d) (2013) (stating that the Commission considers certain crimes “serious” that previously frequently resulted in sentences of probation).

137. *Id.*

138. *Id.*; see Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL’Y REV. 93, 108 (1999) (indicating such decision had no evident basis in empirical research); see also U.S. SENTENCING COMM’N, *supra* note 132, at 44 (explaining a substantial reason for the decreased use of probation following Guidelines implementation was due in large part to the Guidelines’ presumption of prison sentences instead of the historical tendency toward probation for economic crimes).

139. H.R. REP. NO. 98-1017, at 31 (1984).

The Commission itself officially acknowledged, and several of the original commissioners were clearly aware, the Guidelines would significantly reduce probationary sentences.¹⁴⁰ One of the commissioners wrote that the Guidelines ensured that the “certainty of confinement will be dramatically increased under the guidelines” and that his initial statistical projection was that straight probation sentences would at least be halved.¹⁴¹ Another initial commissioner noted the Guidelines drafted would require prison except for very minor cases.¹⁴² One of them also trumpeted that “the significant reduction in the incidence of straight probation terms may be the most important innovation attributable directly to [C]ommission policy.”¹⁴³

The failure of guidance on nonincarcerative sentences may explain why the Commission itself concedes that “it is impossible to discern from available data the exact reasons sentencing courts have in mind when deciding whether to impose alternative sentences.”¹⁴⁴ The pro-prison bias continues despite staff reports in the meantime warning that the Guidelines’ requirement of prison in nearly every case is unnecessary and counterproductive.¹⁴⁵ Other research concurs.¹⁴⁶

140. U.S. SENTENCING COMM’N, *supra* note 92, at 53; Michael K. Block & William M. Rhodes, *Forecasting the Impact of the Federal Sentencing Guidelines*, 7 BEHAV. SCI. & L. 51, 52 (1989); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 24 n.121 (1988).

141. Block & Rhodes, *supra* note 140, at 60 tbl.1, 61.

142. Notice, Sentencing Guidelines for United States Courts, 52 Fed. Reg. 18,046, 18,122 (May 13, 1987) (dissenting view of Comm’r Paul H. Robinson) (“Offenders under current practice receive sanctions other than imprisonment (e.g., fines, conditions of probation) in approximately 50% of the cases, yet the guidelines provide for imprisonment in all but the most minor cases.” (footnote omitted)).

143. Block & Rhodes, *supra* note 140, at 65–66.

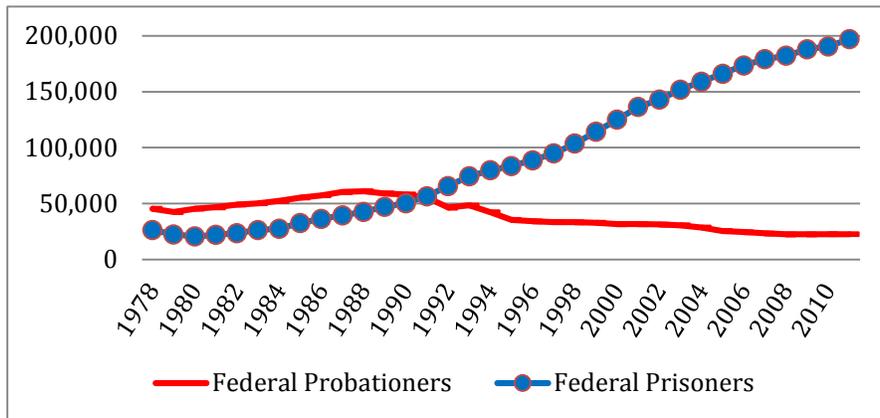
144. U.S. SENTENCING COMM’N, ALTERNATIVE SENTENCING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 20 (2009), available at http://www.ussc.gov/Research_and_Statistics/Research_Projects/Alternatives/20090206_Alternatives.pdf.

145. See *id.* (“[A]lternatives to incarceration can provide a substitute for costly incarceration. . . [and can] also provide those offenders opportunities by diverting them from prison (or reducing time spent in prison) and into programs providing the life skills and treatment necessary to become law-abiding and productive members of society.”); U.S. SENTENCING COMM’N, SENTENCING OPTIONS UNDER THE GUIDELINES 18–19 (1996), available at http://www.ussc.gov/Research/Working_Group_Reports/Simplification/SENT_OPT.PDF (“Many federal offenders who do not currently qualify for alternatives have relatively low risks of recidivism compared to offenders in state systems and to federal offenders on supervised release. . . [A]lternatives divert offenders from the criminogenic effects of imprisonment which include contact with more serious offenders, disruption of legal employment, and weakening of family ties.”).

146. See Laura Baber, *Results-Based Framework for Post-Conviction Supervision Recidivism Analysis*, FED. PROBATION, Dec. 2010, at 5, 7–8 & fig.5 (studying roughly 40,000 federal offenders, finding 85% of those on probation and 76% of those on supervised release after a prison term remained arrest-free within the first three years of

The Commission's policies regarding prison as the default punishment are significant contributors—though clearly not the sole basis—in accounting for certain additional statistical measures. The first is the important change in the profile of federally sentenced defendants in terms of the numerical ranks of federal prisoners and probationers as provided in Figure 5. The graph demonstrates significant shifts in two of the main subpopulations in the federal correctional system.

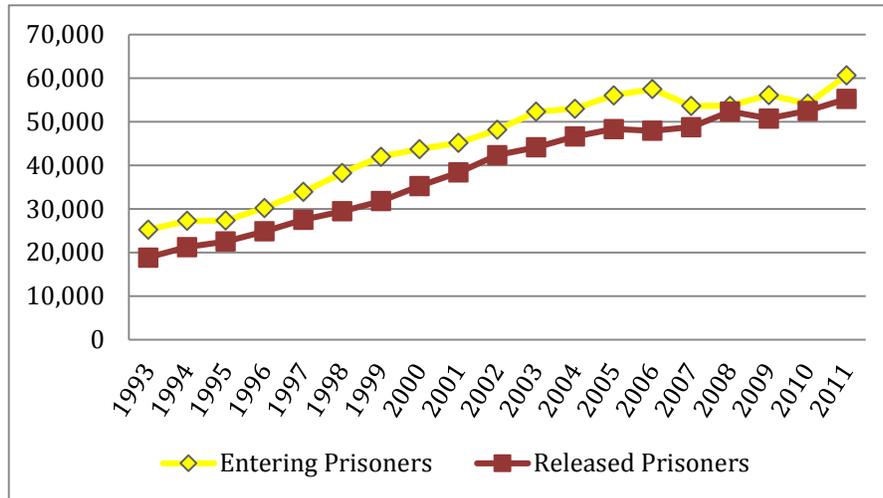
Figure 5: Populations of Federal Sentenced Prisoners and Probationers¹⁴⁷



Of course, prison capacity might not be at issue if the Federal Bureau of Prisons released as many or more prisoners than were entering. But that has not occurred. As Figure 6 illustrates, every year over the last two decades the number of entering federal prisoners has exceeded the number released.

their term); Miles D. Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 FED. SENT'G REP. 22, 23 (1994) (“[T]he alienation, deteriorated family relations, and reduced employment prospects resulting from the extremely long removal from family and regular employment may well increase recidivism.”); Lynne M. Vieraitis, Tomislav V. Kovandzic & Thomas B. Marvell, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974–2002*, 6 CRIMINOLOGY & PUB. POL’Y 589, 591–93 (2007) (finding that “imprisonment causes harm to prisoners” by isolating them from families and friends, making it difficult to successfully reenter society, and “reinforc[ing] criminal identities” through contacts with other criminals).

147. Data compiled from BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, ADULTS ON PROBATION IN THE UNITED STATES, 1977–2012 (2013), <http://www.bjs.gov/content/data/corpop11.csv>; BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SENTENCED PRISONERS UNDER THE JURISDICTION OF STATE OR FEDERAL CORRECTIONAL AUTHORITIES, DECEMBER 31, 1978–2012, http://www.bjs.gov/nps/resources/documents/QT_sentjur_tot.xlsx (counting prisoners sentenced for more than a year).

Figure 6: Entering and Released Federal Prisoners¹⁴⁸

Curiously, the Commission, then and now, seems intent on maintaining its prison-by-default policies, despite prison capacity issues.¹⁴⁹ To its merit, the Commission admits this reality; however, it remains unapologetic. Instead, agency officials in 2004 rationalized that “Congress has proven willing to appropriate the funds needed to expand the capacity of the federal prisons to the levels needed to accommodate expanded federal prosecution and increased sentence severity.”¹⁵⁰ Then in 2012, in response to a legislative hearing expressly enquiring about the rising costs of federal imprisonment, the Chair of the Commission appeared to assume little blame on the agency’s behalf. She principally explained overcrowding by pointing to the effect of mandatory minimum statutes and obliquely referring to

148. Data derived from E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NUMBER OF ADMISSIONS OF SENTENCED PRISONERS TO STATE OR FEDERAL PRISONS, 1978–2012 (2013), http://www.bjs.gov/nps/resources/documents/QT_nps%20admiss_tot.xlsx (counting prisoners sentenced for more than a year) and E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NUMBER OF RELEASES OF SENTENCED PRISONERS FROM STATE OR FEDERAL PRISONS, 1978–2012 (2013), http://www.bjs.gov/nps/resources/documents/QT_nps%20release_tot.xlsx (counting prisoners sentenced for more than a year).

149. See U.S. SENTENCING COMM’N, NOTICE OF FINAL PRIORITIES 2, 4 (2013), available at http://www.ussc.gov/Legal/Federal_Register_Notices/20130820_FR_Final_Priorities.pdf (focusing on costs of incarceration, rather than rates of incarceration). Compare U.S. SENTENCING GUIDELINES MANUAL §§ 5B1.1, 5C1.1 (1993) (setting forth the 1993 version of the Guidelines regarding the imposition of probation and imprisonment terms), with U.S. SENTENCING GUIDELINES MANUAL §§ 5B1.1, 5C1.1 (2013) (setting forth the 2013 version of the Guidelines regarding the imposition of probation and imprisonment).

150. U.S. SENTENCING COMM’N, *supra* note 132, at 77.

the size and composition of the federal criminal docket.¹⁵¹ While she in an official capacity asked Congress to consider enacting specific statutes that would offer some sentencing relief, no additional changes to the Guidelines have yet to be offered to address prison overcrowding.¹⁵²

2. *Alternative Sources of Prison Promotion.* The thesis herein is not that the prison-by-default ideology is the *sole* responsibility of the Commission. Instead, the contention is that the expansive policies initiated by the agency render the Commission a likely primary party in explaining the significant upward spiral of prison sentences. Based on the multiple policies just discussed that substantively promote imprisonment in sentencing and the fact the Guidelines were, until *Booker*, mandatory, the fact that nonprison sentences became the minority just after the Guidelines' implementation cannot be coincidental. The initial commissioners had intended and predicted such result.¹⁵³ And over time the Commission has done little to address the imbalance. To the extent that the Commission consistently seems greatly concerned with disparities in sentencing, the commonality of prison as the *type* of sentence utilized certainly promotes the agency's interest in nationwide uniformity.¹⁵⁴ Still, it is appropriate to consider the potential impact of other sources in accounting for the substantially high likelihood today of sentences requiring incarceration.

It is certainly true that Congress itself has promoted imprisonment for various categories of offenders, such as career criminals, violent offenders, and high-level drug traffickers, and, over time, has created a host of mandatory minimum sentences

151. Letter from Patti B. Saris, Chair, U.S. Sentencing Comm'n, to Patrick J. Leahy, Chairman, Senate Judiciary Comm., and Charles Grassley, Ranking Member, Senate Judiciary Comm. 1–3 (Aug. 7, 2012), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/20120807_StC_Prison_Costs.pdf.

152. *Id.* at 2–3; *see also* *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 1–2, 7 (2013) [hereinafter *Reevaluating the Effectiveness*] (statement of Patti B. Saris, Chair, United States Sentencing Commission), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/20130918_SJC_Mandatory_Minimums.pdf (referring to prison capacity issues but only suggesting Congress provide relief for certain mandatory minimums).

153. *See supra* notes 140–143 and accompanying text.

154. *See* U.S. SENTENCING COMM'N, *supra* note 117, at 7–9 (discussing the Commission's desire for uniformity of sentences and factors contributing to unwanted sentence disparity).

for specific offenses.¹⁵⁵ Yet these congressional mandates, by definition, affect only subsets of the federal defendant population, and they have not necessarily grown in size or as a percentage of the federal sentenced population in the last couple of decades. The role of mandatory minimums will be addressed first. A recent report from the Sentencing Commission announces that the percentage of federal cases involving a “mandatory minimum penalty has remained relatively constant during the last [twenty] years,” accounting for 27% of cases in fiscal years 1991 and 2010.¹⁵⁶ In reality, the role of mandatory minimums in the rate of imprisonment is further reduced since the percentage of federal defendants who were actually subject to the applicable mandatory minimums fell from 21% in 1991 to 14% in the years 2010–2012.¹⁵⁷ The most common reasons that mandatory minimums are avoided is that the Guidelines provide relief when the defendant is given a substantial assistance departure or when the statutory safety valve departure is applied to low-level drug offenders.¹⁵⁸

In contrast to ad hoc congressional directives that have led to prison sentences for relatively small groups of individuals, the Commission policies outlined herein, on the other hand, reach far broader, with some of the agency’s prison-by-default policies applying across offenses and offenders.¹⁵⁹ For example, the guideline that limits nonprison punishments to Zones A and B in effect are applicable to five out of six defendants.¹⁶⁰

Fans of the escalating rate of incarcerative sentences may claim that such a statistic is merely a manifestation of the federal population of criminal defendants over time representing more heinous offenders. It is true that the rate of filing charges for misdemeanors by federal prosecutors has fallen from 17% to 12% between fiscal years 1998 and 2011,

155. 28 U.S.C. § 994(i)–(j) (2012); *see also* U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM app. A, tbl.A-1 (2011), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm (listing the current federal mandatory minimum statutes).

156. U.S. SENTENCING COMM’N, *supra* note 155, at 67.

157. *Id.* The statistics for 2011–2012 were computed using the Commission’s relevant datafiles.

158. U.S. SENTENCING COMM’N, *supra* note 155, at 31–36, 158–71 (describing how mandatory minimum sentences are avoided and who receives this relief most often).

159. U.S. SENTENCING GUIDELINES MANUAL § 5C1.1 (2013).

160. *See supra* notes 86–90 and accompanying text (describing how approximately 83% of defendants fall into Zones C and D causing them to not be applicable for probation or fine-only sentences).

respectively.¹⁶¹ Nonetheless, this is a relatively modest differential that cannot count significantly toward explaining the dramatic increase in imprisonment. Importantly, other evidence is to the contrary, suggesting strongly that the federal population of defendants has not experienced increases in severity level overall. Data from fiscal years 1998–2012 show that the mean final offense level (a measurement of overall offense/offender severity) has remained fairly constant, hovering around eighteen points, with no definitive trend in any single direction (ranging from 17.25 to 18.85 on a scale of 1–43).¹⁶² In two recent fiscal years, the mean offense levels were on the lower side, being 17.25 in fiscal 2011 and 17.68 in fiscal 2012. While the data provide some conflicting information, there is no single, clear trend that federal defendants have significantly worse criminal histories. The mean criminal history score has remained constant during that same time as well as at II (on a scale of I–VI),¹⁶³ though the percentage of defendants in Criminal History I (the lowest) has dropped from 56% in 1996 to 45% in 2012.¹⁶⁴ The percentage of defendants in the top three criminal history categories (IV–VI) did increase from 21% in 1998 to 26% during the fiscal years 2004–2010, though it has edged back down to less than 23% in 2011 and 2012.¹⁶⁵

If sentence length is also an indication of the severity of the offense and of the offender, then average sentence length over time also fails to support an ideology of an increasingly more serious population of federal defendants. Figure 7 plots the mean length of sentences over time with two lines, the lower of the two counting probation sentences as zero months and the higher excluding probation sentences and focusing on sentences with imprisonment.

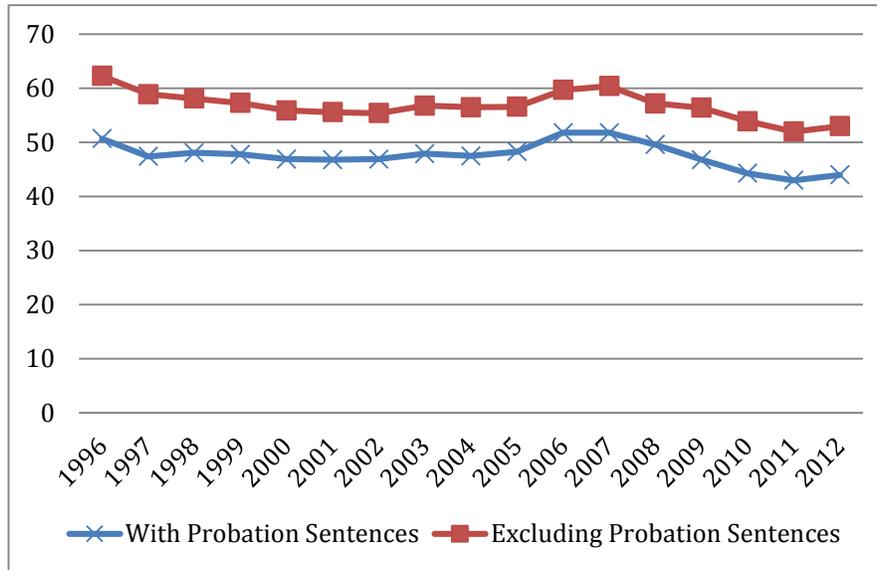
161. Data compiled from *Defendants Charged in Criminal Cases*, BUREAU JUST. STAT., http://www.bjs.gov/fjsrc/var.cfm?ttype=trends&agency=AOUSC&db_type=CrimCtCases&saf=IN (last visited Apr. 16, 2014) (using the “Felony flag (filing offense)” variable).

162. Data compiled from *Offenders Sentenced*, BUREAU JUST. STAT., http://www.bjs.gov/fjsrc/var.cfm?ttype=trends&agency=USSC&db_type=SntcEvnt&saf=OUT (last visited Apr. 16, 2014) (using variable “Final offense level”); U.S. SENTENCING COMM’N, 2012 DATAFILE.

163. Data compiled from *Offenders Sentenced*, BUREAU JUST. STAT., http://www.bjs.gov/fjsrc/var.cfm?ttype=trends&agency=USSC&db_type=SntcEvnt&saf=OUT (last visited Apr. 16, 2014) (using variable “Criminal history category”); U.S. SENTENCING COMM’N, 2012 DATAFILE.

164. 2012 SOURCEBOOK, *supra* note 23, tbl.21; U.S. SENTENCING COMM’N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 36 tbl.21 (1997).

165. Data compiled from *Offenders Sentenced*, BUREAU JUST. STAT., http://www.bjs.gov/fjsrc/var.cfm?ttype=trends&agency=USSC&db_type=SntcEvnt&saf=OUT (last visited Apr. 16, 2014) (using variable “Criminal history category”); U.S. SENTENCING COMM’N, 2012 DATAFILE; U.S. SENTENCING COMM’N, 2011 DATAFILE.

Figure 7: Mean Length of Sentence¹⁶⁶

The lines indicate no single trend over the entire time period, but they do reflect that mean sentences are lower in recent years than in the 1990s, dropping from fifty-one months to forty-four months from 1996 and 2012, respectively, when including probation sentences, and from sixty-two months to fifty-three months for the fiscal years 1996 and 2012, respectively, when excluding probation. These numbers suggest an overall reduction, though modest, in severity of the population, despite Figure 1's (percentage of prison versus probation sentences) consistent trend otherwise.

The statistical measures of average sentences actually issued do not merely reflect the perspective of judges' collective

166. U.S. SENTENCING COMM'N, 2012 ANNUAL REPORT 42 (2013) [hereinafter 2012 ANNUAL REPORT]; U.S. SENTENCING COMM'N, 2011 ANNUAL REPORT 34 (2012) [hereinafter 2011 ANNUAL REPORT]; U.S. SENTENCING COMM'N, 2010 ANNUAL REPORT 32 (2011); U.S. SENTENCING COMM'N, 2009 ANNUAL REPORT 36 (2010); U.S. SENTENCING COMM'N, 2008 ANNUAL REPORT 34 (2009); U.S. SENTENCING COMM'N, 2007 ANNUAL REPORT 28 (2008); U.S. SENTENCING COMM'N, 2006 ANNUAL REPORT 34 (2007); U.S. SENTENCING COMM'N, 2005 ANNUAL REPORT 38, 45 (2006); U.S. SENTENCING COMM'N, 2004 ANNUAL REPORT 48, 55 (2005); U.S. SENTENCING COMM'N, 2003 ANNUAL REPORT 36 (2004); U.S. SENTENCING COMM'N, 2002 ANNUAL REPORT 41 (2003); U.S. SENTENCING COMM'N, 2001 ANNUAL REPORT 43 (2002); U.S. SENTENCING COMM'N, 2000 ANNUAL REPORT 41 (2001); U.S. SENTENCING COMM'N, 1999 ANNUAL REPORT 41 (2000); U.S. SENTENCING COMM'N, 1998 ANNUAL REPORT 37 (1999); U.S. SENTENCING COMM'N, 1997 ANNUAL REPORT 36 (1998); U.S. SENTENCING COMM'N, 1996 ANNUAL REPORT 34 (1997). The Commission's Annual Reports, which are referenced throughout this Article, can be found at http://www.ussc.gov/Publications/Annual_Reports_and_Statistical_Sourcebooks/index.cfm. The 1995–2011 Annual Reports can be found under the "Archives" link.

sense of the culpability of the federal population of defendants. While such sentence averages are consistently below the mean Guidelines minimum recommended sentences, the two lines are relatively parallel, according to Commission reports, meaning that the Guidelines' collective ranking of the sentenced population has remained relatively consistent with the judiciary over the same time period.¹⁶⁷

Other statistics likewise tend to refute the explanation that the increased rate of imprisonment might result from population changes, such as with more serious and violent offenders being sentenced now rather than in the past. The security level classifications of the Bureau of Prisons might be relevant. From 1998–2010, the percentage of inmates classified to minimum and low security statuses combined represent a curvilinear line, thus not representing any clear trend.¹⁶⁸ Between 55% and 64% of federal prisoners (with a mode of 57% in four separate years) were assigned to these two lowest security levels. These numbers suggest a majority federal prison population of low-level offenders, though no definitive conclusion is possible considering these measures include nonsentenced immigration detainees, District of Columbia inmates, and pretrial defendants.¹⁶⁹

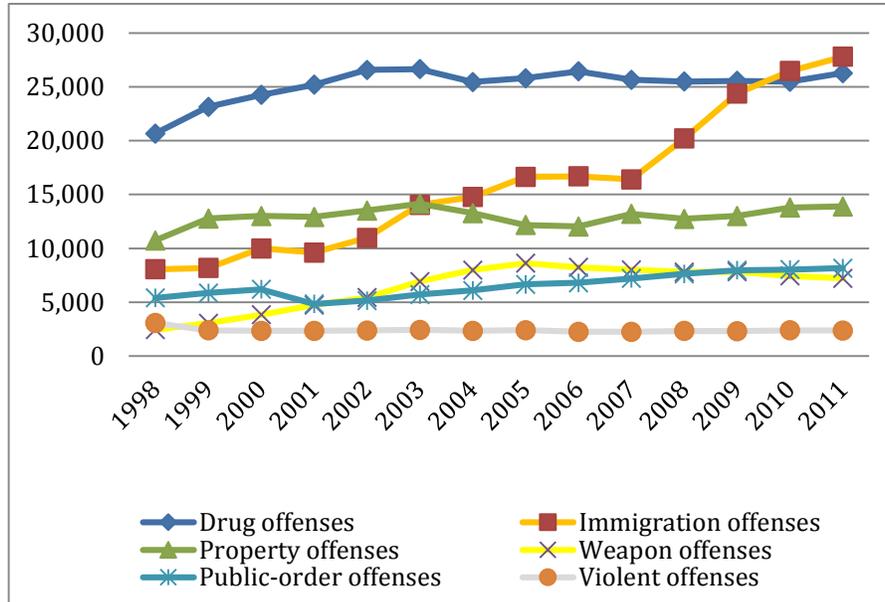
In terms of the potential for more serious and violent offenses exhibiting any effect, Figure 8 shows the historical trends for federally sentenced defendants by crime type.

167. U.S. SENTENCING COMM'N, *supra* note 117, at 60.

168. FED. BUREAU OF PRISONS, STATE OF THE BUREAU 2010, at 3; FED. BUREAU OF PRISONS, STATE OF THE BUREAU 2009, at 57; FED. BUREAU OF PRISONS, STATE OF THE BUREAU 2008, at 61; FED. BUREAU OF PRISONS, STATE OF THE BUREAU 2007, at 52; FED. BUREAU OF PRISONS, STATE OF THE BUREAU 2006, at 51; FED. BUREAU OF PRISONS, STATE OF THE BUREAU 2005, at 51; FED. BUREAU OF PRISONS, STATE OF THE BUREAU 2004, at 59; FED. BUREAU OF PRISONS, STATE OF THE BUREAU 2003, at 57; FED. BUREAU OF PRISONS, STATE OF THE BUREAU 2002, at 57; FED. BUREAU OF PRISONS, STATE OF THE BUREAU 2001, at 53; FED. BUREAU OF PRISONS, STATE OF THE BUREAU 2000, at 53; FED. BUREAU OF PRISONS, STATE OF THE BUREAU 1999, at 53; FED. BUREAU OF PRISONS, STATE OF THE BUREAU 1998, at 50. The *State of the Bureau* reports can be found at <http://www.bop.gov/resources/publications.jsp>.

169. See, e.g., FED. BUREAU OF PRISONS, STATE OF THE BUREAU 1998, at 15–16, 23, 49–50.

Figure 8: Federal Defendants Sentenced by Type of Crime¹⁷⁰



As for the potential that the federal defendant population is becoming increasingly more violent, the data fail to support such a trend. In reality, the number of federal defendants convicted of violent offenses has remained a small portion of the sentenced population, representing 6% in fiscal 1998 and dropping by half to 3% in fiscal 2011.¹⁷¹ On the other hand, the percent of weapons violations increased from 5% to almost 9%, respectively.¹⁷² These potential categories representing crimes of violence seem to offset each other. But the increase in firearms offenses does not itself necessarily indicate weapons are more likely used in violent attacks. A separate national study published by the Bureau of Justice Statistics shows that the number and rate of violent crimes being committed with a firearm has decreased overall from 1993–2011.¹⁷³ Taken altogether, the population of federal defendants does not appear to represent a more violent group over time.

170. Data compiled from *Offenders Sentenced*, BUREAU JUST. STAT., http://www.bjs.gov/fjsrc/var.cfm?type=trends&agency=USSC&db_type=SntcEvnt&saf=0 UT (last visited Apr. 16, 2014) (using variable “Offense type”). The Figure excludes missing data and cases of unknown type.

171. *Id.*

172. *Id.*

173. MICHAEL PLANTY & JENNIFER L. TRUMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, FIREARM VIOLENCE, 1993–2011, at 1 (2013), available at <http://www.bjs.gov/content/pub/pdf/fv9311.pdf> (finding firearm-related homicides declined 39% and nonfatal firearm crimes declined 70% from 1993 to 2011).

Drug offenders comprised one-third of federally sentenced defendants last year, including those who were not given prison terms,¹⁷⁴ yet there is evidence that they have become less serious offenders. A Commission document recognized in 2004, for example, that the “available data suggest a general trend toward less serious offenses and a greater incidence of mitigating factors in cases sentenced in the late 1990s.”¹⁷⁵ The document noted that cases involving cocaine tended to be for lesser amounts, defendants were more likely to accept responsibility, and defendants were more likely to only play a minor role in trafficking.¹⁷⁶ Since 2004, there is no obvious evidence to support a return to more serious drug offending. Indeed, the rates of cocaine and methamphetamine use have decreased since 2006 by 50% and 33%, respectively.¹⁷⁷ Further, the federal government’s perspective on drug offending has changed dramatically such that drug addiction is now envisioned, according to the National Drug Control Strategy 2013, as a disease of the brain, and the executive branch supports alternatives to incarceration as a general matter.¹⁷⁸ In sum, drug offenders are no longer considered the odious criminals they once were.

As shown in Figure 8, the single most significant difference in crime type in federal sentencing is the substantial increase in the number and percentage of immigration offenders. Strikingly, the Commission has at one point contended that the low rate of alternative sentences is primarily the result of the increasing numbers of noncitizen offenders, which the Commission calls the “citizenship effect.”¹⁷⁹ Blaming the descent primarily on the citizenship effect is questionable. It is true that United States citizens are more likely to receive nonincarcerative sentences as most of the noncitizens in the federal system are illegal aliens, meaning that they are deportable and often ineligible for release.¹⁸⁰ However, the citizenship effect is not nearly as responsible for the substantial reliance on prison sentences in recent years as suggested. Here, the citizenship effect can be measured in three different ways.

174. 2012 SOURCEBOOK, *supra* note 23, fig.A.

175. U.S. SENTENCING COMM’N, *supra* note 132, at 54.

176. *Id.*

177. EXEC. OFFICE OF THE PRESIDENT OF THE U.S., NATIONAL DRUG CONTROL STRATEGY iii (2013), *available at* http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/ndcs_2013.pdf.

178. *Id.* at 27.

179. U.S. SENTENCING COMM’N, *supra* note 144, at 4. “The decreasing trend in alternative sentences . . . is attributable to the non-citizen offenders in the federal sentencing population.” *Id.* at 5–6.

180. *Id.* at 4.

Using the clearest definition of the citizenship effect, separate statistical analyses of datafiles for each of fiscal years 2010–2012 show that nonprison sentences overall were issued to 14% to 15% of U.S. citizens, as compared to 3% of noncitizens.¹⁸¹ It appears that, contrary to the report’s assertion, though, the increasing presence of noncitizens itself does not significantly account for the significant upward trend of prison sentences as 85% of citizen defendants failed to avoid terms of incarceration for those years, a rate far higher than before the Guidelines took effect.¹⁸² Similarly, in comparing the category of immigration offenses with all other offenses using the fiscal 2006–2012 data, the results show that 14% of nonimmigration offenders received nonprison sentences, compared to 4% of immigration offenders.¹⁸³ Results are consistent when isolating illegal entry/reentry cases. Those cases are highly likely to receive prison sentences because of the nature of the crime, the illegality of such offenders being in the community, and the fact that they tend to have higher criminal history scores, averaging a criminal history score of III (2.89) while the average is closer to II for all other crimes (2.19).¹⁸⁴ Statistical analyses of the fiscal 2010–2012 datasets show that 14% of the rest were sentenced to alternative punishments, while less than 2% of illegal entry/reentry offenders received nonprison sentences.¹⁸⁵ In sum, measuring the citizenship effect in three different ways still led to the same important result: excluding such potential cases, citizens and nonimmigration offenders generally still received prison sentences in an overwhelming percentage of cases.

Supporters of the escalation in the use of imprisonment may alternatively (or additionally) assert that the practice largely reflects federal prosecutors having become increasingly more selective over time in terms of accepting more severe offenses and dangerous offenders.¹⁸⁶ Again, federal statistics generally fail to

181. These analyses utilized the 2010–2012 Commission datafiles.

182. See *supra* Figure 1.

183. Data derived from *Interactive Sourcebook: Offenders Receiving Sentencing Options in Each Primary Offense Category*, U.S. SENTENCING COMM’N, http://isb.ussc.gov/content/pentahocdf/RenderXCDF?solution=Sourcebook&path=&action=table_xx.xcdf&template=mantle&table_num=Table12 (last visited Apr. 16, 2014) (selecting fiscal 2006–2012 from the “Selection Criteria” menu).

184. U.S. SENTENCING COMM’N, 2012 DATAFILE (analyses on file with the Author).

185. *Id.*

186. See Michael Edmund O’Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1475–76, 1477 tbl.21 (2004) (noting that the only significant reason for prosecutorial declinations to pursue violent crimes is jurisdictional or venue problems, while declinations to pursue fraud and property crimes occur for numerous reasons, including the availability of other disciplinary alternatives).

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support such a contention. Figure 9 contains data on matters prosecuted and those that prosecutors declined to pursue. There are three general resolutions to criminal cases: prosecutors send them to district courts for prosecution, send them to magistrates to pursue (which generally are misdemeanors), or decline them. The last two columns represent the number and percentage of cases declined by federal prosecutors by year.

Figure 9: Matters Prosecuted and Declined¹⁸⁷

Year	Total Matters Concluded by U.S. Attorneys	Matters Prosecuted in U.S. District Court	Matters Terminated by U.S. Magistrate	Matters Declined by Prosecutors	Percent of Matters Declined
1994	94,980	50,802	9,754	34,424	36.2%
1995	102,309	55,703	10,710	35,896	35.1%
1996	98,454	56,938	8,684	32,832	33.3%
1997	99,459	60,383	10,007	29,069	29.2%
1998	106,022	64,993	12,243	28,786	27.2%
1999	114,283	68,734	14,545	31,004	27.1%
2000	117,450	73,090	13,916	30,444	25.9%
2001	118,978	72,648	14,080	32,250	27.1%
2002	124,081	76,314	14,093	33,674	27.1%
2003	128,518	80,106	14,810	33,602	26.2%
2004	148,240	86,485	29,889	31,866	21.5%
2005	143,640	85,818	28,067	29,755	20.7%
2006	141,130	83,148	28,305	29,677	21.0%
2007	144,049	83,791	31,026	29,232	20.3%
2008	182,723	88,063	66,558	28,102	15.4%
2009	193,234	91,890	71,564	29,780	15.4%
2010	193,021	93,493	68,858	30,670	15.9%
2011	193,534	94,484	68,638	30,412	15.7%

Notice that, over time, U.S. Attorneys have become far less likely to decline cases, whereby 36% of cases were declined in 1994 and the percentage steadily decreased to a declination rate of 16% in 2011. The third and fourth columns, on the other hand, indicate that prosecutors are pursuing a steadily increasing

187. Data compiled from *Suspects in Investigations Concluded*, BUREAU JUST. STAT., http://www.bjs.gov/fjsrc/var.cfm?ttype=trends&agency=EOUSA&db_type=CrimMatrs&saf=OUT (last visited Feb. 10, 2014) (using variable "Outcome of the matter"); BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1994–1997, at 16 tbl.1.2 (1994–1997). The 1994–1997 Compendiums can be found at <http://www.bjs.gov/index.cfm?ty=pbse&sid=4>.

number (and considering the rate of declination, the percentage as well) of cases overall. Thus, there appears to be a negative correlation between the total number of matters closed and the number of cases declined.

In other words, Figure 9 indicates that federal prosecutors are accepting far more cases and at a higher percentage, signaling they have been increasingly less selective in their choices. These trends are not explained by crime becoming a greater problem in the country, as crime rates nationwide have decreased significantly for a wide variety of crime types since the 1990s.¹⁸⁸ Other evidence providing reasons why federal prosecutors officially decline cases, from a national report concerning 2009 decisions, reveals that more than half of matters are not pursued because either it was determined that no crime was committed or there were evidentiary problems.¹⁸⁹ This suggests that only a portion of declinations may be related to perceptions that referred matters were not significant enough for prosecution.

In sum, this Part has outlined a variety of policies initiated and maintained by the Sentencing Commission through Sentencing Guidelines that have substantially promoted fundamental changes in federal sentencing. More specifically, the Commission is largely, perhaps primarily, responsible for a trend toward reliance on incarceration in the vast majority of cases. Alternative explanations were considered and none of them appear to bear greater culpability, judging by relevant statistical measures. Nonetheless, regardless of the potential multiple sources for the federal sentencing system's reliance upon incarcerative sentences, the significant influence of the Commission's policies, which on their own terms strongly promote imprisonment, cannot be doubted. Importantly, the Commission's inflexibility in fully embracing alternatives now confronts changed conditions. There is strong evidence that no

188. Data derived from *Uniform Crime Reporting Statistics: State-by-State and National Crime Estimates by Year*, FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, <http://www.bjs.gov/ucrdata/Search/Crime/State/StatebyState.cfm> (using "United States Total" from 1960 to 2012); see also ERIKA HARRELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENT VICTIMIZATION COMMITTED BY STRANGERS, 1993–2010, at 1 & fig.1 (2012), available at <http://www.bjs.gov/content/pub/pdf/vvcs9310.pdf> (providing statistics indicating violent victimization by strangers and known aggressors substantially declined since 1993); JENNIFER HARDISON WALTERS ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HOUSEHOLD BURGLARY, 1994–2011, at 1 & fig.1 (2013), available at <http://www.bjs.gov/content/pub/pdf/hb9411.pdf> (showing that rates of household burglary declined substantially from 1994–2011).

189. MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2009—STATISTICAL TABLES 11 tbl.2.3 (2011), available at <http://www.bjs.gov/content/pub/pdf/fjs09st.pdf>.

longer is Congress, or even the general public, willing to fund prison expansion or accept mass imprisonment. The next Part explains such a conjecture.

III. POTENTIAL FOR AMELIORATIVE POLICY

This Article has set forth arguments to support the contention that the U.S. Sentencing Commission has unfortunately adopted a one-size-fits-all policy in which a prison term is the default sentence for federal defendants. As set forth in Part II, this position bears the burden of likely being in contravention of congressional intent at the time of sentencing reforms. Equally important problems are that it contributes to an overflowing federal prison system,¹⁹⁰ violates the principle of parsimonious punishments as prison is unnecessary in many cases,¹⁹¹ and taxes the health and welfare of defendants, their families, and their communities.¹⁹² Times have changed for political, philosophical, and economic reasons such that there appears to be present a hospitable environment in which interested parties can remedy the situation. Professor Frank Bowman was prescient in predicting that an unlikely coalition of allies could spawn a reformed penology in which the injudicious use of imprisonment is not necessarily constructed as a politically incorrect, soft-on-crime stance:

[A] nascent alliance of liberal social action groups concerned about over-incarceration of the downtrodden, libertarian advocacy groups concerned about the over-criminalization of assertedly private behavior, corporate interest groups concerned about over-criminalization and over-punishment of business activity, political conservatives keen to preserve values of federalism against the perceived over-federalization of essentially local crime, fiscal conservatives worried about the cost of rising prison populations, judges protective of the prerogatives of the bench, the defense bar concerned for its clients, and perhaps even religious activists moved by the biblical imperative that justice be tempered with mercy may never coalesce as a unified movement. But concern is rising in enough different quarters that a shift in the political landscape seems at least possible.¹⁹³

190. See *supra* notes 147–152 and accompanying text.

191. Smith, *supra* note 18, at 111.

192. Am. Bar Ass'n Comm'n on Effective Criminal Sanctions, *Report to the House of Delegates: On Alternatives to Incarceration and Conviction*, 22 FED. SENT'G REP. 62, 67 (2009).

193. Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 264 (2005).

Such a shift has occurred—at least in several states, even some very conservative states.¹⁹⁴ Their successes in sentencing reforms, which have generally reduced their prison populations while not witnessing either an increased crime rate or public backlash, provide a timely model for revolutionizing the federal criminal justice system.¹⁹⁵

A. *Changed Circumstances*

“Times have changed” is arguably an overused mantra, yet nevertheless an expressive phrase that is immanently suitable to describe the state of imprisonment in the United States. Many states have already embraced a variety of changes to their sentencing and correctional policies and, as a result, have experienced declining prison populations.¹⁹⁶ A dominant theme has been to divert cases at the front end from prison to noncustodial alternatives, primarily probation.¹⁹⁷ The federal justice system is lagging behind this revolt.¹⁹⁸ Nonetheless, corroborating information indicates that federal officials, including various members of Congress, may be prepared to accept that the reforms of the 1980s are no longer appropriate in today’s climate.¹⁹⁹ For a variety of reasons, explained below, perhaps the time is ripe to reform the reforms in the federal sentencing system.

The first reason is quite simple. Recent Supreme Court doctrine clearly sets forth a hospitable legal environment in which district courts may explicitly repudiate the Commission’s choice to prefer prison sentences in almost all cases. The *Booker* decision is the catalyst here in which the Supreme Court rendered the Guidelines voluntary.²⁰⁰ Two watershed Supreme Court decisions since *Booker* provide additional authority for a federal district judge to both vary from a Commission policy with which she disagrees and to reengage a rehabilitative philosophy.

194. Letter from Jonathan J. Wroblewski, Dir., Office of Policy & Legislation, to Patti B. Saris, Chair, U.S. Sentencing Comm’n 3–5 (July 11, 2013) [hereinafter Wroblewski Letter], available at <http://www.justice.gov/criminal/foia/docs/2013annual-letter-final-071113.pdf>.

195. *Id.* at 5–7.

196. Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POL’Y 51, 70–72 (2013).

197. *Id.* at 55.

198. See CARSON & GOLINELLI, *supra* note 37, at 2 & tbl.1, 6 (noting that the federal prison population is increasing while the state prison population is declining).

199. See *infra* notes 216–221 and accompanying text (explaining why the current prison climate renders the federal system susceptible to reform).

200. *United States v. Booker*, 543 U.S. 220, 245 (2005).

A policy disagreement is expressly permitted by the Court in the case of *Kimbrough v. United States*, an opinion issued in 2007.²⁰¹ The district judge in *Kimbrough* had rejected the guideline applicable to crack cocaine sentencing as he believed it overly punitive; the judge therefore varied downward significantly from the Guidelines-recommended range.²⁰² The Supreme Court affirmed, confirming that *Booker* meant that the Guidelines were now advisory and a district judge who had a policy disagreement with a guideline could reject that policy or that guideline.²⁰³ The Court also noted that the crack cocaine guideline represented a Commission-created policy because Congress had not ordered it.²⁰⁴ Under this precedent, a district judge may lawfully disregard any Commission-initiated, prison-by-default policy or guideline.²⁰⁵

The more recent relevant decision, styled *Pepper v. United States*, finds the Court reconfirming that a district court per *Booker* and *Kimbrough* has the authority to issue a non-Guidelines sentence if the judge disagrees with the Commission's views, particularly when such views are not represented by Congress's intent in statutes.²⁰⁶ The Court highlighted, as well, Congress's edict that rehabilitation remains one of the valid sentencing goals, such that defendant Pepper's positive responses to correctional programming and supervision were an important consideration in determining a parsimonious sentence.²⁰⁷ In sum, the Supreme Court case law now provides a sufficient legal environment for judges to reject the Commission's pro-prison policies, particularly in light of the policies being contrary to the Legislature's will, and to accept rehabilitation as a proper and congressionally accepted objective in deciding on the *type* and length of punishment appropriate in the case.

The second reason is equally quite simple: economics. The recent recession has taken a toll on government coffers, and there is no doubt that prisons are an extremely costly endeavor.²⁰⁸ During the law-and-order movement of the 1980s

201. *Kimbrough v. United States*, 552 U.S. 85, 101 (2007).

202. *Id.* at 92–93.

203. *Id.* at 108–11.

204. *Id.* at 102–03.

205. *Id.* at 91; see Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665, 667–78 (2006) (describing how after *Booker* a judge can “thumb his nose” at the federal Sentencing Guidelines).

206. *Pepper v. United States*, 131 S. Ct. 1229, 1237, 1248–50 (2011).

207. *Id.* at 1242.

208. ALISON LAWRENCE & DONNA LYONS, NAT'L CONFERENCE OF STATE LEGISLATURES, PRINCIPLES OF EFFECTIVE STATE SENTENCING AND CORRECTIONS POLICY

and 1990s, public officials seemed willing and financially able to keep up with rising inmate populations simply by building new prisons or outsourcing to private prison contractors, generally with the approval of their constituents.²⁰⁹ An interested observer explains the transformation in easy terms:

[T]he increasing rates of admission coupled with a jump in the amount of time served resulting from increasingly restrictive release policies made this approach untenable as a long-term strategy, and by the late 1990s, states were beginning to succumb to prison overcrowding and were unable to continue to access the funds necessary to expand capacity.²¹⁰

Instead, “[p]ropelled by state budget crises and a shift in the politics of punishment, these declines in incarceration are the result of a flurry of reform efforts, including revised criminal codes and sentencing guidelines, expanded prison alternative programs, and improved community supervision policies.”²¹¹ Even the National Conference on State Legislatures now suggests offering a continuum of community supervision options, which would benefit the public by extending corrections resources further.²¹²

Largely as a result of these state reforms, the overall national prison population of sentenced defendants declined for the third consecutive year in 2012.²¹³ Nine states, some of which bend politically conservative, were primarily responsible, each posting a decrease of over 1,000 prisoners in 2012: California, Texas, North Carolina, Colorado, Arkansas, New York, Florida, Virginia, and Maryland.²¹⁴ But while the state prison population collectively declined by almost 30,000 prisoners in 2012 (down 2.1%), the federal prison headed in the opposite direction, increasing by about 1,500 prisoners in 2012.²¹⁵ The remainder of the reasons explains further why the current climate renders the federal system finally susceptible to a similar transformation and how economic concerns are relevant.

11 (2011), available at <http://www.ncsl.org/documents/cj/pew/WGprinciplesreport.pdf>; King, *supra* note 21, at 48.

209. King, *supra* note 21, at 48.

210. *Id.* (“As long as there was public support for ‘tough on crime’ policies and the commensurate tax revenues and bond issuance, states and the Federal Bureau of Prisons were able to keep green-lighting prison construction.”).

211. Phelps, *supra* note 196, at 52.

212. LAWRENCE & LYONS, *supra* note 208, at 11.

213. CARSON & GOLINELLI, *supra* note 37, at 1, 4.

214. *Id.* at 1–2.

215. *Id.* at 1 (including all prisoners in custody).

Third, the politics of punishment at the federal level has just recently been recalibrated. A startling coalition of politicians and policy foundations has just emerged calling for prison reductions, including Republican (and former presidential candidate) Newt Gingrich, religious conservative Pat Nolan of the Prison Fellowship, conservative Texas Public Policy Foundation, religious conservative Family Research Council, and liberal American Civil Liberties Union.²¹⁶ Republican Senator Rand Paul and Democratic Senator Patrick Leahy have cosponsored a bill in the Senate, called the Smarter Sentencing Act of 2013, which would provide an additional safety-valve departure to avoid mandatory minimums for many drug offenders.²¹⁷ While the focus of the legislation is limited, the purpose is broader. The senators have expressed that their larger joint concerns address overincarceration and the unacceptably high costs associated with the federal prison system.²¹⁸ A Washington, D.C. reporter observes that it appears that “agreement cuts across party lines that our decades-long experiment in mass incarceration has been a huge policy failure.”²¹⁹ Interestingly, at a committee hearing on the 2013 safety-valve bill, Rand Paul expressed his support for returning to the judiciary substantial power in sentencing, noting each case should be judged on its own merits in terms of the appropriate punishment.²²⁰

With a variety of politically savvy leaders appearing to be in agreement on reducing prison costs, it is even more evident that some significant policy change to reduce the federal inmate population is imminently necessary. The Government Accountability Office projects that, with the current state of affairs, the Federal Bureau of Prisons will witness another 15% increase in the inmate population by 2020.²²¹

216. Dagan & Teles, *supra* note 12, at 25–30 (“Change is coming to criminal justice because evangelicals and libertarians have discovered that the nation’s prison growth is morally objectionable by their own, conservative standards.”).

217. *Prison Reform: An Unlikely Alliance of Left and Right*, *supra* note 35, at 23.

218. *Reevaluating the Effectiveness*, *supra* note 152, at 1–2 (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary) (“Today we meet to confront the unsustainable growth of our federal prison population. After years of debate, I am encouraged that we have bipartisan agreement that we must act; that we must reevaluate how many people we send to prison and for how long. Fiscal responsibility demands it. Justice demands it.”).

219. Greg Sargent, *Where Are Republicans on Sentencing Reform?*, WASH. POST (Sept. 11, 2013, 2:57 PM), <http://www.washingtonpost.com/blogs/plum-line/wp/2013/09/11/where-are-republicans-on-sentencing-reform/>.

220. *Prison Reform: An Unlikely Alliance of Left and Right*, *supra* note 35, at 24; *see also Reevaluating the Effectiveness*, *supra* note 152, at 1 (statement of Sen. Rand Paul).

221. U.S. GOV’T ACCOUNTABILITY OFFICE, BUREAU OF PRISONS: GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE 12 (2012), *available at* <http://www.gao.gov/assets/650/648123.pdf>.

Fourth, popular sentiment about criminal justice policy has likewise shifted in the last decade. When fear of crime is high, it seems understandable that a public who believes in the deterrence value of imprisonment would support prison sentences, even lengthy ones. Yet, crime is no longer one of the country’s most immediate social problems.²²² One likely explanation is that rates of both violent and property crime, though witnessing an increase in the late 1980s, have since noticeably declined, as shown in Figures 10 and 11, respectively.

Figure 10: National Violent Crime Rates²²³

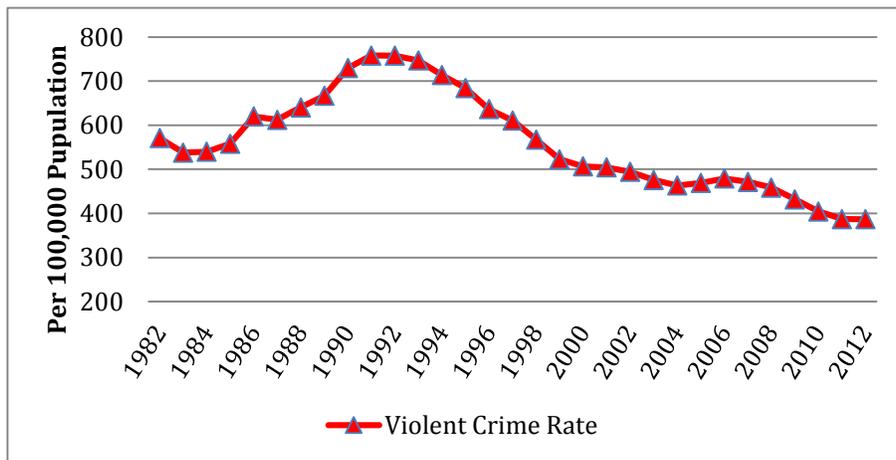
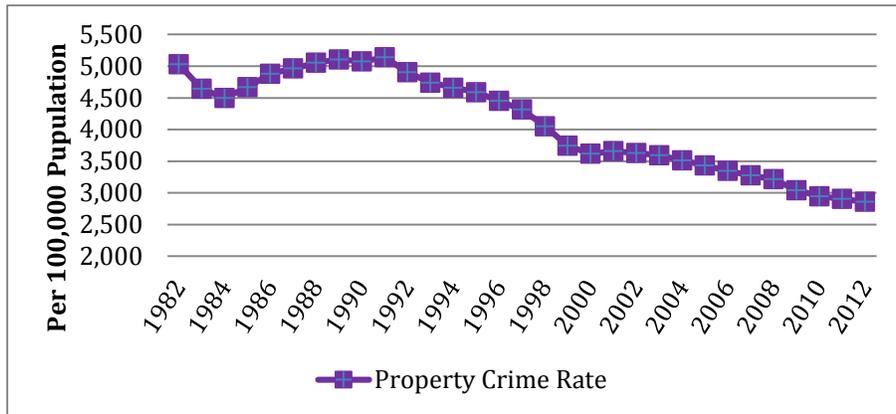


Figure 11: National Property Crime Rates²²⁴



222. Adelman, *supra* note 1, at 295–96.

223. Data derived from *Uniform Crime Reporting Statistics: State-by-State and National Crime Estimates by Year*, *supra* note 188 (choosing “United States-Total,” “Violent crime rates,” and the years 1982–2012).

224. *Id.* (choosing “United States-Total,” “Property crime rates,” and the years 1982–2012).

Lower crime rates naturally “reduce[] public fear and alleviate[] political pressure to adopt ‘tough on crime’ measures.”²²⁵ The public, except perhaps in a few urban cities such as certain Chicago and Detroit neighborhoods, is no longer as preoccupied with fear of gangs and drug-related street violence as it was in the 1980s.²²⁶ In lieu thereof, in terms of fear of violent victimization, the public’s more pressing concerns appear to be threat of terroristic attacks and mass shootings, which uniquely are unlikely to be deterred by the threat of imprisonment.²²⁷ Other issues that are consuming Americans’ attention concern struggling with the recession, such as blows that the housing and job markets have taken.²²⁸ The public, therefore, has embraced a different perspective on criminal punishment: “Americans believe too many people are in prison and the nation spends too much keeping them there.”²²⁹ The American Bar Association’s position is representative: “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.”²³⁰

Fifth, a related cultural shift has occurred with respect to perspectives on the drug war. The federal government has been at the forefront of convicting and imprisoning drug offenders. As depicted in Figure 12, half of the current federal prison population has been convicted of drug-related charges. However, many now view the drug war as a colossal failure, and the public is no longer on board.²³¹ In support thereof, when Congress recently passed a law to substantially decrease penalties for

225. David Cole, *Turning the Corner on Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 27, 35 (2011).

226. *Id.*; Lehrer, *supra* note 7, at 23–24.

227. Cole, *supra* note 225, at 38; Laura Dugan, *To Deter Terrorism, Think Beyond Punishment*, BALTIMORE SUN (May 2, 2013), http://articles.baltimoresun.com/2013-05-02/news/bs-ed-deterring-terrorists-20130502_1_terrorists-punishment-martha-crenshaw (“The historical record shows that terrorists are often willing to die for their cause, making threats of punishment seem inconsequential.”).

228. *CBS News Poll Database*, ROPER CENTER (Jan. 2014), http://www.ropercenter.uconn.edu/psearch/question_view.cfm?qid=1845286&pid=1&ccid=1 (polling respondents with the question “What do you think is the most important problem facing this country today?”).

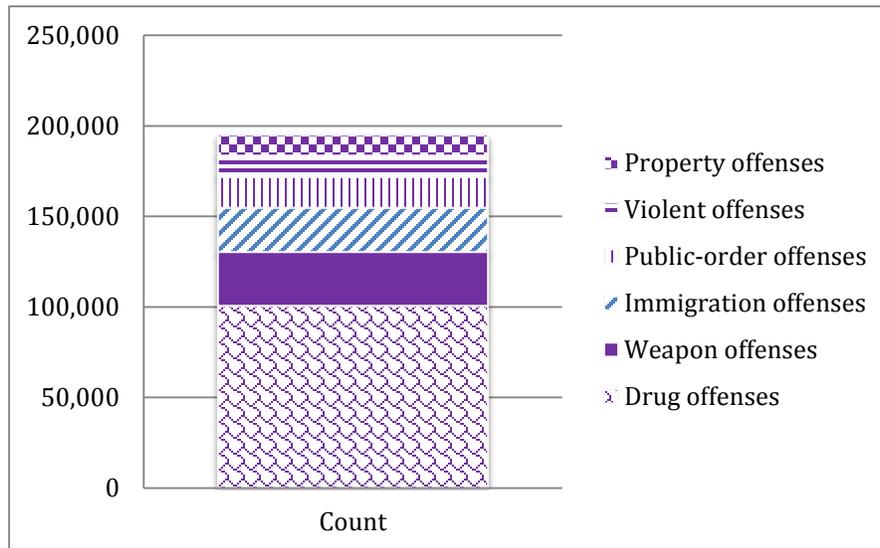
229. Alison Lawrence, *States Are Consolidating and Closing Prisons as Reforms and Budget Cuts Decrease Inmate Populations*, NAT’L CONF. STATE LEGISLATURES (Jan. 2013), <http://www.ncsl.org/research/civil-and-criminal-justice/shrinking-prisons.aspx>.

230. Am. Bar Ass’n Comm’n on Effective Criminal Sanctions, *supra* note 192, at 63.

231. Eduardo Porter, *Numbers Tell of Failure in Drug War*, N.Y. TIMES, July 4, 2012, at B1.

crack cocaine trafficking, there was bipartisan support for it and little public backlash.²³²

Figure 12: Federally Sentenced Prison Population by Crime Type, 2011²³³



In combination, several of the foregoing reasons for changed circumstances suggest potentially an exponential impact on political will to reduce the federal prison population. The federal government's budget crises in recent years, the public's focus on issues other than ordinary crime control, reductions in crime rates, and the variety of political persuasions to jump on the bandwagon to reduce mass sentencing at the federal level all suggest that the time may be overdue for Congress to decline funding new prisons without risking being labeled as soft on crime or suffering other political consequences.²³⁴ Still, several additional developments have transpired to justify the timeliness of re-embracing alternative sentencing.

232. Gary Fields, *House Passes Bill to Ease Crack-Cocaine Sentences*, WALL ST. J., July 29, 2010, at A4; see also Editorial, *Fairer Sentences for Crack*, WASH. POST, July 21, 2010, at A18 (describing the various public interest groups that supported the bill).

233. *Prisoners in Federal Prison at Year-End*, BUREAU JUST. STAT., http://www.bjs.gov/fjsrc/var.cfm?ttype=one_variable&agency=BOP&db_type=Prisoners&af=STK (last visited Apr. 16, 2014) (using year 2011 and variable "Offense type" and displaying "All values"). The graph excludes cases of unknown or miscellaneous type.

234. See generally Lehrer, *supra* note 7 (explaining how support for prison reductions is consistent with a conservative agenda for these reasons).

The sixth reason is that the need to revolutionize federal sentencing policies was recently endorsed by a key player. As Professor Bowman suggested almost a decade ago, serious change to the current sentencing system would require a catalyst of either the Justice Department or Congress being convinced that such change was required.²³⁵ The Department of Justice is evidently now so convinced. In a document publicly released in the summer of 2013, the Department of Justice took what is certainly a trailblazing position in modern times, considering the executive agency's typically tough-on-criminals approach, by declaring that "it is time to rethink the nation's system of mass imprisonment."²³⁶ To be even clearer about the desire for significant change, in another public document this same year, a leading official proclaimed the Department of Justice's intent to reform federal sentencing policy in the near term to reduce reliance on imprisonment.²³⁷ The Department of Justice's concerns address inefficient use of resources, prison overpopulation, and more general issues of fairness.²³⁸ Attorney General Eric Holder noted around the same time in a speech addressing the American Bar Association that the growth in the federal prison population has far outpaced the growth in the national population and expressed his belief that federal prisons were unnecessarily overpopulated.²³⁹ He stated that

the promise of equal justice for all . . . must lead us all to acknowledge that—although incarceration has a significant role to play in our justice system—widespread incarceration at the federal, state, and local levels is both ineffective and unsustainable. It imposes a significant economic burden—totaling \$80 billion in 2010 alone—and it comes with human and moral costs that are impossible to calculate.²⁴⁰

Consistent with the theme of this Article, the Justice Department is now calling for restraint in the inclination to resort to imprisonment in the first instance, while promoting the use of alternative sanctions in the federal system.²⁴¹ Attorney General Holder laments that "[a]s a nation, we are coldly efficient in our

235. Bowman, *supra* note 193, at 259.

236. U.S. DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 1 (2013), available at <http://www.justice.gov/ag/smart-on-crime.pdf>.

237. Wroblewski Letter, *supra* note 194, at 1, 3.

238. *Id.* at 7–8.

239. Eric Holder, Att'y Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013) (transcript available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>).

240. *Id.*

241. *Id.*

incarceration efforts.”²⁴² Further, “with an outsized, unnecessarily large prison population, we need to ensure that incarceration is used to punish, deter, and rehabilitate—not merely to warehouse and forget.”²⁴³

The Department of Justice similarly issued a policy document on behalf of the agency, titled *Smart on Crime*, calling for reform, in which it affirmatively asserted that “[i]ncarceration is not the answer in every criminal case;” instead, “[i]n appropriate instances involving non-violent offenses, prosecutors ought to consider alternatives to incarceration, such as drug courts, specialty courts, or other diversion programs” and that this “requires a top-to-bottom look at our system of incarceration. For many non-violent, low-level offenses, prison may not be the most sensible method of punishment.”²⁴⁴ The Department of Justice’s ex-officio member of the Sentencing Commission likewise reiterated that “imprisonment is a power that should be exercised sparingly and only as necessary.”²⁴⁵ On this issue, the Department of Justice has definitively made a precedent-setting stance in clearly rejecting prison as the default sentence.

Seventh, successes from state reforms can serve as appropriate models. Significantly, the Department of Justice agrees. Returning to Eric Holder’s public statements:

We have studied state systems and been impressed by the policy shifts some have made. . . . In recent years, no fewer than [seventeen] states—supported by the [Justice] Department, and led by governors and legislators of both parties—have directed funding away from prison construction and toward evidence-based programs and services, like treatment and supervision, that are designed to reduce recidivism.²⁴⁶

The Department of Justice’s *Smart on Crime* document concurs that federal law enforcement should adopt the states’ approach,²⁴⁷ particularly considering crime rates generally failed to rise afterward:

242. *Id.*

243. *Id.*

244. U.S. DEP’T OF JUSTICE, *supra* note 236, at 3–4.

245. Wroblewski Letter, *supra* note 194, at 3.

246. Holder, *supra* note 239.

247. U.S. DEP’T OF JUSTICE, *supra* note 236, at 4. “[The Department of Justice’s] findings align with a growing movement at the state level to scrutinize the cost-effectiveness of our corrections system. In recent years, states such as Texas and Arkansas have reduced their prison populations by pioneering approaches that seek alternatives to incarceration for people convicted of low-level, nonviolent drug offenses.” *Id.* at 1.

Many states have lowered their incarceration rates and still experienced a drop in crime. Between 1998 and 2007, states that had the greatest increases in incarceration rates did not necessarily see a corresponding drop in crime rates. In some states, the opposite was true: they reduced their incarceration rates and their crime rates fell.²⁴⁸

Eighth, probationary sentences have continued to be a mainstay in the American system of criminal justice. It is the federal sentencing system that is the outlier. The most common type of sentence in the states today (combining felonies and misdemeanors) is probation, which has been depicted as the states' default sentence.²⁴⁹ As a commentator reflected: "The American criminal justice system has an apparent addiction to the use of probation as a means for adjudicating vast numbers of cases, particularly misdemeanors."²⁵⁰ Figure 1 earlier provided rates of prison versus alternative sentences for federal offenders and indicated the most recent alternative sentence rate was 10% (combining felonies and misdemeanors). The steep decline in the rate of federal nonprison sentences (the vast majority of which were probation) since 1988 is in stark contrast to the situation in states' sentencing patterns. States are far more likely than the federal system to sentence even felons to probation, and, unlike the downward spiral for federal defendants, the rate in the states has remained consistent. From 1990 to 2006 (the latest year for which the combined statistic is available), the rate of probationary punishments for felonies (here, excluding misdemeanors) in the states varied slightly, ranging from 27% to 32%.²⁵¹

248. JUSTICE POLICY INST., *supra* note 6, at 2 (footnote omitted) (citing JUSTICE POLICY INST., FACTSHEET: PERCENT CHANGE IN INCARCERATION AND CRIME RATES, 1998–2007 (2008), available at http://www.justicepolicy.org/images/upload/07-02_FAC_StatebyStateIncarceration_AC-PS.pdf). Importantly, the reference to both incarceration rate and crime rate is not meant to suggest any causal connection between the two. Far too many factors are at play in explaining changes in crime rates. *Id.* (showing that there is little correlation between states' incarceration rates and crime rates). Instead, the implication is that the policies that reduced reliance on imprisonment likely have not faced political backlash as crime rates kept dropping. *Id.* at 1–2.

249. See Horwitz, *supra* note 20, at 753–54, 759–60.

250. *Id.* at 753.

251. These statistics were extracted from the following documents: SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 4 tbl.1.2 (2009), available at <http://www.bjs.gov/content/pub/pdf/fssc06st.pdf> (27%); MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2004, at 3 (2007), available at <http://www.bjs.gov/content/pub/pdf/fssc04.pdf> (28%); MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 2002—STATISTICAL TABLES tbl.1.2 (2005), available at <http://www.bjs.gov/content/pub/pdf/sc0201st.pdf> (31%); MATTHEW R.

Financial considerations play an important role in justifying limiting prison sentences and promoting alternatives. Annual costs of imprisonment per inmate in the federal system range from \$21,000 up to \$34,000, depending on the prison security level, which averages about eight times the annual costs of supervision by probation officers in the community.²⁵² As a result of the high cost of imprisonment, the federal prison system now accounts for over a quarter of the Department of Justice's budget, and if current trends continue, it will only consume a larger portion in the future.²⁵³ As a policy think tank warns, this will have the unfortunate consequence of funneling money to prisons instead of funding federal investigators and prosecutors or supporting state and local governments.²⁵⁴

Ninth, probation is not deemed by many as the lenient and primarily rehabilitative sentence that the Sentencing Commission believes it to be. "No longer does the decision to grant probation mean, as one commentator observed in 1969, 'the difference between almost total freedom in the community and almost total control in the typical maximum security prison.'"²⁵⁵ Further,

[n]o longer is probation synonymous with the "soft" enterprise of rehabilitating offenders. Rather, in tandem with the expanded array of techniques coming into use over time, which by design and effect have considerably more onerous effects, probation today is animated by a far richer gamut of purposes—including the punishment, deterrence and incapacitation of offenders, and the restoration of victims and communities to their pre-crime status.²⁵⁶

DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2000, at 10 (2003), available at <http://www.bjs.gov/content/pub/pdf/fssc00.pdf> (32%); JODI M. BROWN, PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 1996, at 2 tbl.2 (1999), available at <http://www.bjs.gov/content/pub/pdf/fssc96.pdf> (31%); PATRICK A. LANGAN & JODI M. BROWN, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 1994, at 2 tbl.2 (1997), available at <http://www.bjs.gov/content/pub/pdf/fssc94.pdf> (29%); PATRICK A. LANGAN & JOHN M. DAWSON, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 1990, at 2 tbl.2 (1993), available at <http://www.bjs.gov/content/pub/pdf/fssc90.pdf> (29%).

252. LA VIGNE & SAMUELS, *supra* note 17, at 2; *Supervision Costs Significantly Less than Incarceration in Federal System*, THIRD BRANCH NEWS (July 18, 2013), <http://news.uscourts.gov/supervision-costs-significantly-less-incarceration-federal-system>.

253. LA VIGNE & SAMUELS, *supra* note 17, at 2.

254. *Id.*

255. Wayne A. Logan, *The Importance of Purpose in Probation Decision Making*, 7 BUFF. CRIM. L. REV. 171, 194 (2003) (quoting ROBERT O. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE 71 (1969)).

256. *Id.* at 172.

Community supervision can be quite punitive. Studies have shown that intensive probation conditions may be dreaded more than a prison stay considering the requirement of complying with a combination of multiple conditions.²⁵⁷ Some offenders actually choose to serve a prison term in lieu of intensive probation after factoring in the constant pressures of compliance.²⁵⁸ In other cases, a prison sentence is unnecessary to ensure the defendant feels sufficient pain: “For many minor and first-time offenders, no sanction other than conviction itself may be needed to punish and deter: the shame and stigma of conviction will be adequate.”²⁵⁹ These studies support Congress’s assumptions, as represented in the Senate and House Committee Reports accompanying the Reform Act mentioned earlier, that probation and other alternatives to prison could exemplify sufficiently punitive sentences.²⁶⁰

Tenth, experts highlight the damage that mass incarceration inflicts on families and communities.²⁶¹ The Justice Department’s ex-officio member of the Sentencing Commission formally recognized that the mass incarceration policy has taken “a great human and fiscal toll.”²⁶² Attorney General Holder likewise exclaimed: “Today, a vicious cycle of poverty, criminality, and incarceration traps too many Americans and weakens too many communities. And many aspects of our criminal justice system may actually exacerbate these problems, rather than alleviate them.”²⁶³ An expert on sentencing policy agrees:

[W]e are beginning to recognize that our overreliance on locking people up has an especially malign effect on poor urban neighborhoods, where up to [twenty] percent of the adult male population may be behind bars at any given

257. Joan Petersilia & Elizabeth Piper Deschenes, *What Punishes? Inmates Rank the Severity of Prison vs. Intermediate Sanctions*, FED. PROBATION, Mar. 1994, at 3, 6–7; Kimora, *The Emerging Paradigm in Probation and Parole in the United States*, 46 J. OFFENDER REHABILITATION, no. 3/4, 2008, at 1, 3.

258. Kimora, *supra* note 257, at 1, 3.

259. Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1056 (2013).

260. See *supra* notes 72–79 and accompanying text.

261. Ann Jacobs & Sarah From, *Foreword to JUDITH GREENE, KEVIN PRANIS & NATASHA A. FROST, THE PUNITIVENESS REPORT—HARD HIT: THE GROWTH IN THE IMPRISONMENT OF WOMEN, 1977–2004*, at 7, 8 (2006), available at <http://66.29.139.159/institute/hardhit/HardHitReport4.pdf> (“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.”).

262. Wroblewski Letter, *supra* note 194, at 2.

263. Holder, *supra* note 239.

time. Not only do the men come home with diminished prospects that hurt the whole community, but . . . their absence weakens the family and social networks they need when they come home and hurts those left behind. It is no accident that the sons and brothers of men who go to prison are more likely to follow the same path. These trends help cause crime rather than prevent it.²⁶⁴

In advocating for reductions in the rate of incarceration, the American Bar Association likewise decries the extreme, negative impact on children and families of sparing use of community supervision.²⁶⁵

There is another important sense in which “communities” suffer from overincarceration. The Government Accountability Office recently warned that overcrowding in federal prisons imposed substantial negative consequences to the safety and security of inmates as well as staff.²⁶⁶

Finally, policy analysts and social scientists concur that there is important evidence that alternatives may often be preferable to protect communities and promote positive rehabilitative outcomes. Studies show that imprisonment does not protect public safety to the extent expected²⁶⁷ and may actually endanger future communities because of the criminogenic effects of prison.²⁶⁸ Another study found that defendants “sentenced to prison failed more often and more quickly than offenders placed on probation and that incarcerated drug offenders had significantly higher recidivism rates than any

264. Joan Petersilia, *Beyond the Prison Bubble*, FED. PROBATION, June 2011, at 2, 3; see also Adelman, *supra* note 1, at 310 (“[M]ass incarceration divides minority communities as the experience of pervasive imprisonment is confined to those who do not have a college education. Mass incarceration also disrupts inner city neighborhoods and tears apart families living there.” (footnote omitted)).

265. Am. Bar Ass’n Comm’n on Effective Criminal Sanctions, *supra* note 192, at 67.

266. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 221, at 18.

267. Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 115, 119–21 (2009) (reviewing empirical studies and concluding that “incarceration appears to have a null or mildly criminogenic effect on future criminal behavior”).

268. See Francis T. Cullen, Cheryl Lero Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 48S, 59S–60S (2011) (reviewing studies and concluding that “the use of custodial sanctions may have the unanticipated consequence of making society less safe”); Robert DeFina & Lance Hannon, *For Incapacitation, There Is No Time Like the Present: The Lagged Effects of Prisoner Reentry on Property and Violent Crime Rates*, 39 SOC. SCI. RES. 1004, 1013 (2010) (“[A]ny crime-reducing benefits of increased incarceration are completely wiped out by the crime-promoting effects associated with the increasing prevalence of ex-inmates.”); Daniel P. Mears, Joshua C. Cochran & William D. Bales, *Gender Differences in the Effects of Prison on Recidivism*, 40 J. CRIM. JUST. 370, 375 (2012) (finding prison had a modest criminogenic effect).

other offenders.”²⁶⁹ Other experts acknowledge the likely diminishing returns of the increased rate of imprisonment and reductions in crime.²⁷⁰ As for prison capacity issues, experts agree that front-end changes, including diverting sentences from incarceration to probation, represent a best practice to alleviate prison overcrowding.²⁷¹

B. Potential Guidelines Policy Changes

Congress could certainly act by passing legislation to reverse the Commission’s policies favoring prison in all cases. Arguably, though, it does not need to, considering that it already had approved the widespread use, perhaps even a preference for, alternatives to prison, as discussed previously.²⁷² In addition, the fact that the Department of Justice is evidently a proponent of substantially reducing the federal incarceration rate means that the other two criminal justice institutions—being the Commission and the federal judiciary—are the players that now must confront dramatically changed circumstances and alter their perspectives and practices. The Commission is the more obvious of the two with which to begin, considering the argument herein that the downward rate of alternative sentences is due largely to Commission-directed policies.²⁷³

Importantly, the Department of Justice, in its recent call for further reforms, specifically appealed to the Sentencing Commission to effect changes in the Guidelines with the goal of controlling the prison population.²⁷⁴ The executive agency has specifically invited the Commission to learn from the states’ successes and failures to “address the significant challenges facing the federal criminal justice system today.”²⁷⁵

A federal district judge is concerned: “It might seem odd that the Commission was more concerned about judges imposing

269. Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 CRIMINOLOGY 329, 352 (2002).

270. FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 51–52 (2007); Anne Morrison Piehl & Bert Useem, *Prisons*, in CRIME AND PUBLIC POLICY 532, 542 (James Q. Wilson & Joan Petersilia eds., 2011).

271. See e.g., NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 2 (2013); LA VIGNE & SAMUELS, *supra* note 17, at 6.

272. See *supra* Part II.B (detailing the history of the Sentencing Reform Act and Congress’s original intention of promoting alternatives to prison sentences).

273. See *supra* notes 155–165 and accompanying text (explaining how the Sentencing Commission’s policy seems to favor prison over alternative sentences).

274. Wroblewski Letter, *supra* note 194, at 1–3.

275. *Id.* at 1.

insufficiently harsh sentences than it was about mass incarceration.”²⁷⁶ Recommendations for Guidelines policy changes to reverse this perspective are obvious. These include substantially reducing sentencing ranges, perhaps across the board, and providing more research-based departures for offenders who pose less risk than the current Guidelines appreciate.²⁷⁷ And to comport with the theme of this Article, suggestions would be to prioritize complying with prior congressional mandates concerning alternative sentences.

The Commission should jettison its prison-by-default ideology and start anew with the philosophy that giving direction on the full range of *types* of sentences is at least as important as guidance on the length of imprisonment. Writing full guidelines on the continuum of nonprison sentences can take the Guidelines to a much higher level, improve the relevance of the Commission, and provide needed direction to district judges. The Commission has both the general expertise to do so and the current information on various alternatives and their relative successes at the state level, according to a symposium on alternatives the agency hosted in 2008.²⁷⁸ In addition, the prison and fiscal crises call for a well-constructed and research-based in/out guideline. Professor Wayne Logan has recognized that the in/out determination is far more nuanced than a decision on the length of a prison sentence, but one that can be appropriately guided by thoughtful criteria.²⁷⁹ Thus, outlining factors a judge should consider in deciding whether prison is necessary would be helpful.²⁸⁰ Finally, the single prison grid is generally of no use to

276. Adelman, *supra* note 1, at 298.

277. *Reevaluating the Effectiveness*, *supra* note 152, at 2, 7, 10–11 (statement of Patti B. Saris, Chair, United States Sentencing Commission) (recommending that “safety valves” be expanded and applied more broadly to allow for a reduction in the sentence of non-violent offenders).

278. *See generally* U.S. SENTENCING COMM’N, PROCEEDINGS FROM THE SYMPOSIUM ON ALTERNATIVES TO INCARCERATION 209, 212, 216–17, 220–22 (2008) (statements of Susan Katzenelson, Executive Director, North Carolina Sentencing and Policy Advisory Commission; Mark Bergstrom, Executive Director, Pennsylvania Commission on Sentencing; David Guntharp, Director, Arkansas Department of Community Corrections; and Rick Kern, Director, Virginia Criminal Sentencing Commission), *available at* http://www.ussc.gov/Research_and_Statistics/Research_Projects/Alternatives/20080714_Alternatives/11_FINAL_StatesImplementation.pdf (describing the various alternative sentences used and results experienced by North Carolina, Pennsylvania, Arkansas, and Virginia).

279. Logan, *supra* note 255, at 181–83, 194–95.

280. A well-respected jurist, Judge Richard A. Posner, argues that federal judges have failed to converge on sentencing, in large part because the Commission has not formulated and educated judges on a “coherent, evidence-based theory of criminal punishment.” RICHARD A. POSNER, REFLECTIONS ON JUDGING 314 (2013).

alternative sentences, meaning that producing separate tables for them is an appropriate task.

In the end, it appears to be preferable to adopt the states' sentencing philosophy in that the in/out decision ought to favor nonprison sentences. Prison should be considered a scarce resource, such that it is reserved for when there is a reason in the individual case that strongly indicates that a prison sentence is necessary to achieve the goals of sentencing other than rehabilitation. The fact that drug offenders represent about half of sentenced prisoners in recent years²⁸¹ bolsters this proposition considering the nation's experience in which rehabilitative programming generally provides better opportunities for successful outcomes than lengthy prison terms.²⁸²

Despite these basic suggestions being consistent with the mission given the Commission, determining whether the agency will actually do so is merely guesswork at this point. On the positive side, the Commission has in the past studied alternative sentences, showing its willingness and ability to do so. At an early stage, a working group was established specifically for that purpose. Chaired by Norman Carlson, who had been the director of the Federal Bureau of Prisons from 1970 through 1987, the Alternatives to Imprisonment Project produced a lengthy paper that detailed "a package of highly structured sentencing options emphasizing accountability, control, responsibility, counseling, education and other treatment or risk reducing programs" which addressed all four sentencing philosophies, including rehabilitation.²⁸³ While the working group still suggested that some term of imprisonment be imposed in almost all cases, it set forth a continuum of community sanctions that could be used in lieu of a portion of a prison term.²⁸⁴ The report stated that alternatives could save tax dollars, provide efficiency in using prison space, and increase fairness.²⁸⁵ The report even suggested specific exchange rates between the type of alternative and prison time (such as one day of intensive probation supervision being equivalent to

281. See *supra* Figure 12.

282. DOUG MCVAY, VINCENT SCHIRALDI & JASON ZIEDENBERG, JUSTICE POLICY INST., TREATMENT OR INCARCERATION?: NATIONAL AND STATE FINDINGS ON THE EFFICACY AND COST SAVINGS OF DRUG TREATMENT VERSUS IMPRISONMENT 5–6, 9–10 (2004), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/04-01_rep_mdtreatmentorincarceration_ac-dp.pdf.

283. ALTERNATIVES TO IMPRISONMENT PROJECT, U.S. SENTENCING COMM'N, THE FEDERAL OFFENDER: A PROGRAM OF INTERMEDIATE PUNISHMENTS introductory note, 51 (1990), available at <https://www.ncjrs.gov/pdffiles1/Digitization/151251NCJRS.pdf>.

284. *Id.* at 53–65, 73.

285. *Id.* at 5–9.

three days of prison).²⁸⁶ Unfortunately, these recommendations have been generally neglected by the agency as a whole.²⁸⁷

Later, as evidenced in a 1996 report, Commission staff recognized that alternatives were rarely imposed despite the fact there was no evidence that alternative programming was not readily available.²⁸⁸ In that same report, staffers suggested the Commission draft an in/out guideline and prepare grids for alternative sentences.²⁸⁹ These goals have yet to be achieved.

Over a decade thereafter, the Commission tried again. In 2008 the Commission held a two-day national symposium on alternatives to incarceration, gathering together a host of state and federal experts and practitioners, with the intent to “gather information regarding the use of alternatives to incarceration and to provide a forum for idea-sharing concerning implementation of nonincarceration sanctions in the federal system.”²⁹⁰ On a positive front, the Commission in a report post-symposium seemed to embrace the practical advantages of alternatives:

Effective alternative sanctions are important options for federal, state, and local criminal justice systems. For the appropriate offenders, alternatives to incarceration can provide a substitute for costly incarceration. Ideally, alternatives also provide those offenders opportunities by diverting them from prison (or reducing time spent in prison) and into programs providing the life skills and treatment necessary to become law-abiding and productive members of society.²⁹¹

Nonetheless, the symposium produced little change. Perhaps this was due, in part, to the Department of Justice’s representative at the symposium rejecting any need to change the Guidelines with respect to alternative sentencing.²⁹² Obviously, this statement preceded the recent change of heart by the agency’s top brass.²⁹³ In any event, the Commission took two

286. *Id.* at 63.

287. Hoelter, *supra* note 99, at 54. The Commission rejected the various exchange rates, simply incorporating a day-for-day equivalent between imprisonment and home detention or community confinement. U.S. SENTENCING GUIDELINES MANUAL § 5C1.1(e) (2013).

288. U.S. SENTENCING COMM’N, *supra* note 145, at 15.

289. *Id.* at 24–25.

290. U.S. SENTENCING COMM’N, *supra* note 278, at 2.

291. U.S. SENTENCING COMM’N, *supra* note 144, at 20.

292. U.S. SENTENCING COMM’N, *supra* note 278, at 389 (statement of Linda Hoffa, Criminal Division Chief, United States Attorney’s Office, Eastern District of Pennsylvania).

293. *See supra* notes 236–245 and accompanying text.

subsequent actions. First, the Commission issued a report in 2009 on alternative sentences. This report concedes that Congress considered probation to be an actual sentencing option and that community confinement options can be cost effective.²⁹⁴

The second consequence of the 2008 symposium on alternatives was a Guidelines amendment. The Commission passed the amendment, effective in late 2010, that it described as “expanding the availability of alternatives to incarceration”; yet the most significant change it accomplished was to move Zones B and C one cell higher on the criminal history score axis.²⁹⁵ These changes affect only a small proportion of offenders.²⁹⁶ Other than the minor changes made in the amendment, the Commission failed to take the opportunity to provide more guidance on the in/out decision, on what types of alternatives to consider, or the duration thereof. Curiously, after the amendment became effective in 2010, the Commission has appeared, at least from a public perspective, to let it slip from its attention. Recent publications from the Commission do not mention the issue and educational conferences and materials fail to highlight and promote any new information on alternatives.²⁹⁷ Considering sentencing statistics since then, the symposium definitely has not realized an increase in the rate of nonprison sentences, as shown in Figure 1 and by the Commission’s recent data showing the use of probation has decreased another percent, to 9%, through the fourth quarter of fiscal 2013.²⁹⁸ And considering the pro-prison positions maintained in the Guidelines, the fact that the Commission recently has explicitly invited Congress to make statutory changes rendering it more difficult for district judges to impose sentences that are contrary to the Guidelines and for appellate courts to scrutinize more carefully non-Guidelines sentences (largely to limit *Booker* discretion) only cements those positions.²⁹⁹

294. U.S. SENTENCING COMM’N, *supra* note 144, at 1–2, 20.

295. U.S. SENTENCING GUIDELINES MANUAL amend. 738 (2012); *id.* § 5C1.1 cmt. n.6.

296. *Id.* amend. 738.

297. *See generally* U.S. SENTENCING COMM’N, *supra* note 117; U.S. SENTENCING COMM’N, *supra* note 149. The last two annual training seminars, for instance, do not list any session on alternatives. *See 2012 National Seminar Materials*, U.S. SENTENCING COMM’N, available at http://www.ussc.gov/Education_and_Training/Annual_National_Training_Seminar/2012/index.cfm (last visited Apr. 16, 2014); *2011 National Seminar Materials*, U.S. SENTENCING COMM’N, available at http://www.ussc.gov/Education_and_Training/Annual_National_Training_Seminar/2011/index.cfm (last visited Apr. 16, 2014). Nor does the Commission’s Online Learning Center contain any module clearly relevant to alternatives. *See Online Learning Center*, U.S. SENTENCING COMM’N, http://www.ussc.gov/Education_and_Training/Online_Learning_Center/index.cfm (last visited Apr. 16, 2014).

298. U.S. SENTENCING COMM’N, *supra* note 22, at 30 tbl.18.

299. *See* U.S. SENTENCING COMM’N, *supra* note 117, at 9.

On a more positive front, the Commission has signaled that it might finally appreciate that Congress may have lost its appetite for absorbing increasing prison costs and building more prisons to accommodate a growing prison population. In mid-2013, the Commission actually acknowledges, in its list of priorities, the congressional edict that it consider the fact that prisons are operating over capacity.³⁰⁰ Then again, other than such a vague reference, it provides no hint on what direction it may take. It is certainly not impossible, for example, to provide judges with guidance on the in/out decision as state commissions have accomplished such a task and their products could serve as guides.³⁰¹ Nonetheless, whether or not the Commission in the future offers any guidance as just suggested, there is still an important role that the judiciary can play in embracing alternative sentencing.

C. *Judicial Discretion as Policy Driver*

Significantly, federal judges are no longer as beholden to the Sentencing Commission's Guidelines or policies after *Booker*.³⁰² Thus, even if the Commission remains entrenched in its pro-prison favoritism, judges may lawfully, individually as well as collectively, embrace the *Booker*-inspired power to reengage with alternative sentencing practices and with rehabilitation as a primary sentencing philosophy.³⁰³ As criminal law expert Franklin Zimring has observed, judges can make a difference in substantially reducing punishments even when the formal rules do not change:

There is enough free play in the choices available to prosecutors and judges that the formal conditions of a sentencing regime can remain untouched while the punishments delivered by the system can double or drop by half! Much of that latitude is contained in the wide discretion to either send felons to prison or put them on probation—what sentencing analysts call “the in-out decision.”³⁰⁴

300. U.S. SENTENCING COMM'N, *supra* note 149, at 2.

301. See, e.g., ALA. SENTENCING COMM'N, PRESUMPTIVE AND VOLUNTARY SENTENCING STANDARDS MANUAL 32, 40 (2013), available at http://sentencingcommission.alacourt.gov/SentStandards/Presumptive%20Manual_2013.pdf; MD. STATE COMM'N ON CRIMINAL SENTENCING POLICY, MARYLAND SENTENCING GUIDELINES MANUAL 30–34 & tbls.8-1 to -3 (2013), available at <http://www.msccsp.org/Files/Guidelines/guidelinesmanual.pdf>.

302. United States v. Booker, 543 U.S. 220, 245–46 (2005).

303. *Id.*

304. Franklin E. Zimring, *Penal Policy and Penal Legislation in Recent American Experience*, 58 STAN. L. REV. 323, 331 (2005).

Sentencing expert Nora Demleitner earlier predicted a trend toward an increasing rate of probation sentences, speculating after *Booker* rendered the Guidelines advisory that

as judges may be able to use their increased discretion in a post-*Booker* world, the use of nonprison sentences could increase. The danger of unguided discretion in this area coupled with the budget cutbacks in the federal prison system should provide an incentive for the judiciary and Congress to explore greater use of nonprison sentencing options.³⁰⁵

Unfortunately, this prophecy has not come to pass. At the time of her prediction, 17% of federal sentences did not include prison terms, yet the rate has only continued to drop, down to 9% through the fourth quarter of fiscal 2013.³⁰⁶ Still, there is hope for change in the judicial mindset today. Supreme Court Justice Anthony Kennedy delivered a speech at an annual American Bar Association meeting in which he called on the organization to start a rational public discourse on the subject of injustices wrought by the current state of America's prison and correctional systems.³⁰⁷ He declared that it was no excuse even if the current prison system was a product of neglect rather than intent.³⁰⁸ In response, the organization established the ABA Justice Kennedy Commission to study correctional problems and to make recommendations.³⁰⁹ The group concluded that "the need for incarceration of nonviolent offenders may have been exaggerated in the past."³¹⁰ The ABA 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" and that it is generally preferable to be smarter on crime rather than just tougher.³¹¹ Perhaps the most significant endorsement was that incarceration be reserved for offenders who pose the greatest danger to the community and who commit the

305. Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 STAN. L. REV. 339, 340 (2005).

306. U.S. SENTENCING COMM'N, *supra* note 22, at 30 tbl.18; *supra* Figure 1.

307. Justice Anthony M. Kennedy, Assoc. Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting 1-3 (Aug. 9, 2003), *available at* http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Justice_Kennedy_ABA_Speech_Final.pdf.

308. *Id.* at 7.

309. JUSTICE KENNEDY COMM'N, AM. BAR ASS'N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 4 (2004), *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf.

310. *Id.* at 23-24.

311. *Id.* at 22.

most serious offenses and that “[a]lternatives to incarceration should be provided when offenders pose minimal risk to the community and appear likely to benefit from rehabilitation efforts.”³¹² Consistent with the initiative, the American Bar Association now has adopted a sentencing standard advocating that a prison sentence should be mandated by law for a particular offense only in the narrow circumstances where “[t]he legislature can contemplate no mitigating circumstance that would justify a less restrictive sanction.”³¹³

Others envision that the evolution of the makeup of the federal judiciary may bring about positive change in adopting a broader alternative sentencing mindset:

[T]he recent addition of new federal judges with prior successful experiences with the use of rehabilitation-focused sanctions at the state level may be at least a partial explanation for the increased proportion of federal sentences that are below the recommended federal sentencing guideline range. This suggested that many federal judges may be amenable to the expanded utilization of alternative sanctions, particularly if there is mounting evidence that the imposition of these sanctions does not pose a public safety threat, but does provide an opportunity for not only short-term offender control, but also long-term offender change.³¹⁴

A survey of federal judges in 2010 showed that a small minority of respondents agreed that the Guidelines should at least permit a nonprison sentence for a variety of offenses.³¹⁵ At least 10% of survey-takers believed that nonincarcerative punishments may be appropriate for charges relating to firearms, illegal reentry, and assault, while at least 20% approved for offenses involving fraud, larceny, and non-distribution child pornography.³¹⁶ At least one out of ten judges approved of the potential for nonprison sentences for distributing each of the major types of drugs, ranging from 11% for heroin to 22% for marijuana.³¹⁷ Even Federal District Judge William K. Sessions III, former Chair of the Sentencing

312. *Id.* at 9.

313. ABA STANDARDS FOR CRIMINAL JUSTICE: SENTENCING 18-3.11(c) (3d ed. 1994).

314. James M. Byrne & Susan Turner, *Reforming Federal Sentencing Guidelines: A Modest Proposal*, 5 VICTIMS & OFFENDERS 220, 222 (2010). Judge Richard A. Posner would seem to agree as he writes that “[e]xperience, like training, can inculcate values that influence judicial behavior.” RICHARD A. POSNER, HOW JUDGES THINK 95 (2008).

315. U.S. Sentencing Comm’n, *Results of Survey of United States District Judges January 2010 Through March 2010*, 23 FED. SENT’G REP. 296, 306 tbl.11 (2011).

316. *Id.*

317. *Id.*

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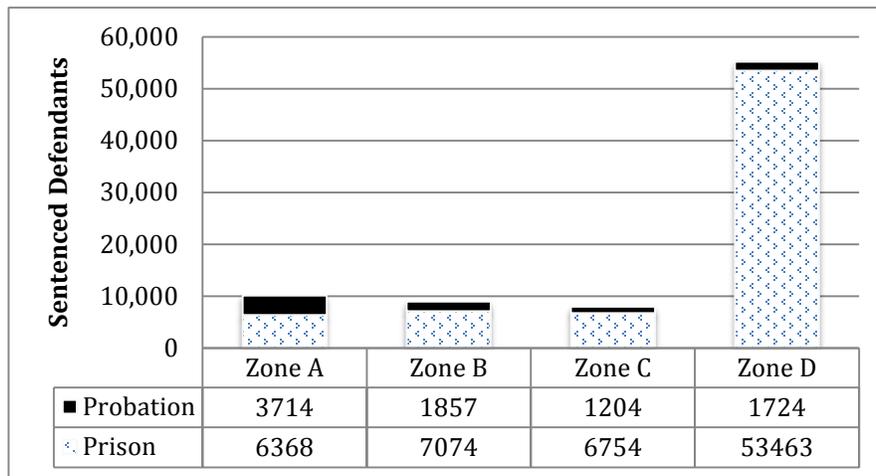
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Commission, recently suggested a substantially revised sentencing grid that would increase opportunities for judges to use alternatives to prison.³¹⁸

Sentencing data also provide some glimpses that there is at least a subset of judges willing to use their *Booker* power to reject the Commission's guidance on the use of prison as compared to alternatives.³¹⁹ Figure 13 utilizes fiscal 2012 data made available by the Commission. It represents the number of nonprison sentences issued relative to the grid zone in which the defendants fell. Recall that the Commission's strict policy precludes a nonprison sentence in Zones C and D, but as the table illustrates, many district judges are issuing nonincarcerative sentences in at least a small percentage of cases in those two zones.³²⁰

Figure 13: Sentence Type by Zone, Fiscal 2012³²¹



The rate of offenders in each of the Zones in fiscal 2012 receiving a nonprison sentence for Zones A, B, C, and D, ratchet downward in the expected fashion, at 37%, 21%, 15%, and 3%, respectively. While the presence of nonprison

318. See William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & POL. 305, 343–45 (2011) (agreeing, too, with Attorney General Holder that smart sentencing practices would embrace alternatives more often).

319. 2012 ANNUAL REPORT, *supra* note 166, at 44–45; 2011 ANNUAL REPORT, *supra* note 166, at 36–37.

320. See Mark Osler, *Seeking Justice Below the Guidelines: Sentencing as an Expression of Natural Law*, 8 GEO. J.L. & PUB. POLY 167, 172 n.30 (2010) (expressing surprise at the rate of variances considering judges intent on using probation are faced with a myriad of ways to manipulate fact findings such that a technical variance is not required).

321. Data derived from statistical analyses using standard statistical software of the Sentencing Commission's fiscal 2012 datafile, available at http://www.ussc.gov/Research_and_Statistics/Datafiles/SPSSopafy12nid.zip (fine-only sentences are included under the term Probation in the table).

sentences in Zones C and D occur for a variety of reasons in individual cases that may comply with Guidelines rules (such as government-sponsored departures the Guidelines formally permit), the percentages represent as well the fact and frequency of judges in individual cases assuming their *Booker*-provided authority to disregard the Guidelines policy precluding probation. Conducting another data run using the same fiscal 2012 datafile, results showed that 55% and 41% of the probation/alternative sentences in Zones C and D, respectively, exemplified discretionary judicial departures.

Nonetheless, despite positive clues for substantial change on actual in/out decision practices, and despite the legal flexibility provided by *Booker* and *Kimbrough* to reject the Commission's policy of prison by default, the rate of nonprison sentences continues to fall.³²² In a country in which probation is the most common sentence overall and in which multiple states are actively pursuing alternative methods to control their prison populations, it is a curiosity as to why the federal judiciary remains the exception. Perhaps it is merely a matter of the gravitational pull of cultural norms. A commentator observes that the "culture of punishment solely through imprisonment has permeated the system for so long that lawmakers, judges, district attorneys, and probation officers think that justice can only be satisfied through a sentence of incarceration."³²³ To be sure, a sentencing outcome does not epitomize an isolated decision made solely by the sentencing judge. Instead, sentencing often is a sort of negotiated product from a courtroom community in which normative practices may be at play. The members of the courtroom community, who often rely on each other to better attain efficient case processing, may have come to agreement on the "normal penalties" and "going rates" for certain types of crimes in their courtroom or district.³²⁴ Normative practices, though, can certainly change and evolve. Our system of law, based as it is on the common law, enjoys a long history of judicial activism and cultural shifts due to internal and external changes in circumstances.³²⁵

322. See *supra* Figure 1.

323. Hoelter, *supra* note 99, at 56.

324. CASSIA SPOHN, HOW DO JUDGES DECIDE?: THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT 124 (2d ed. 2009).

325. See Ian Holloway, *Judicial Activism in an Historical Context: Of the Necessity for Discretion*, 24 MEMPHIS ST. U. L. REV. 297, 320 (1994) (discussing the adaptability of the common law and its origins in a myriad of divergent ideas).

Several district judges are acting as leaders in conveying the message through published opinions, often sternly worded, that the Sentencing Guidelines offer too punitive of sentences and, as a result, judges can and should exercise their legal authority to reject them and their underlying policies as and when necessary. Judges Jack B. Weinstein (E.D.N.Y.),³²⁶ Mark W. Bennett (N.D. Iowa),³²⁷ and Lynn Adelman (E.D. Wis.),³²⁸ among others, are penning thoughtful opinions providing support for viewing the Guidelines and Commission policies with a critical eye and espousing the judiciary's professional expertise in meting out reasonable punishments. As a former federal judge and sentencing scholar recently suggested, the Commission itself should more aggressively track and highlight district-level decisions for the educational benefit of others in the judiciary.³²⁹

It is true that the use of judicial discretion may not have the ability to foster substantial percentage changes in the in/out decision because of the application of mandatory minimum statutes³³⁰ and the general unavailability of alternative sanctions for the growing immigration offense population.³³¹ But, as the Commission itself has noted, there are loopholes through which judges, perhaps with prosecutors complicit, can counteract at least mandatory minimum prison floors.³³² The inability to impact the likelihood of imprisonment for noncitizens also is not dispositive considering the recent upward trend in immigration prosecutions is more a matter of immigration politics

326. See, e.g., *United States v. D.M.*, 942 F. Supp. 2d 327, 343, 352 (E.D.N.Y. 2013) (sentencing child pornography defendant to probation despite the Guidelines prohibiting such an option); *United States v. Bannister*, 786 F. Supp. 2d 617, 649–51 (E.D.N.Y. 2011) (criticizing mass incarceration).

327. See, e.g., *United States v. Newhouse*, 919 F. Supp. 2d 955, 957, 973–74 (N.D. Iowa 2013) (asking rhetorically whether the “grid and bear it scheme” of the career offender recidivist guidelines “raise[s] a specter of aperiodic, irrational, and arbitrary sentencing guideline ranges in some cases,” and answering in the positive); *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1091 (N.D. Iowa 2009) (ruling the child pornography guideline recommendations are not parsimonious).

328. See, e.g., *United States v. McDaniels*, 2011 U.S. Dist. LEXIS 124763, at *1–2, *5–7 (E.D. Wis. Oct. 27, 2011) (sentencing defendant to probation despite his placement in Zone D); *United States v. Reyes*, 2007 WL 1795466, at *3 (E.D. Wis. June 19, 2007) (sentencing defendant to probation despite his being placed in Zone C).

329. Nancy Gertner, *Advice for the US Sentencing Commission from Former USDJ Nancy Gertner*, SENT’G L. & POL’Y BLOG (Sept. 30, 2013, 10:15 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2013/09/advice-for-the-us-sentencing-commission-from-former-usdj-nancy-gertner.html#comments.

330. Robert Batey, *The Costs of Judicial Restraint: Forgone Opportunities to Limit America’s Imprisonment Binge*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 29, 37 (2007).

331. U.S. SENTENCING COMM’N, *supra* note 144, at 4.

332. See generally U.S. SENTENCING COMM’N, *supra* note 155, at 345–46.

independent of criminal justice policy. Further, deportation is an executive decision rather than a judicial one.³³³ Overall, there exists much evidence that a cultural shift amongst the federal judiciary toward embracing alternative sentencing may now be on the horizon.

IV. CONCLUSIONS

The federal sentencing system is facing a host of newly offered criticism for its role in contributing to the country's shameful recent experience with mass incarceration. The federal prison system keeps reaching records for the number of prisoners it houses and the rate at which it incarcerates its own residents. A main contributor to those statistical measures is the plummeting rate at which federal defendants are sentenced to nonprison sentences. In turn, as this Article posits, a major source of that statistic is the U.S. Sentencing Commission, which earlier on adopted, and has continued to maintain, various prison-by-default policies in its Sentencing Guidelines. The federal judiciary, though used to issuing nonprison sentences in about half the cases before the Sentencing Reform Act of 1984, has seemed to unfortunately follow the Commission's guidance with respect thereto, considering that since then sentences include prison in a substantial majority of cases.

Circumstances have changed, though, for political, financial, philosophical, and pragmatic reasons, and presumptive prison sentencing practices are being questioned by important figures interested in criminal justice and fiscal issues. An unlikely confederation of ideologically diverse individuals and groups are on board, as is the Department of Justice. This Article makes the case that a timely change in federal sentencing policy is appropriate that would reverse the presumption that a prison term is virtually always necessary. Both the Sentencing Commission and the federal judiciary should replace these policies and practices with a normative culture that envisions a prison sentence as only appropriate when certain facts and circumstances unique to the individual case indicate that a prison term is the least restrictive alternative. Such a policy would have various benefits, such as reducing incarceration rates, alleviating prison overcrowding, fostering rehabilitative potential, providing just sentencing, protecting the individual and the community better, and, more broadly, aligning the federal system with state and global norms of sentencing.

333. 8 U.S.C. § 1227(a) (2012).