

FEDERAL PUBLIC DEFENDER'S OFFICE SENTENCING RESOURCE MANUAL

Using Studies & Statistics to Redefine the Purposes of Sentencing

September 2008

NOTE TO ATTORNEYS

This manual is an attempt to compile useful resources that federal defense attorneys can consult when drafting sentencing memoranda and making oral arguments for sentences below the advisory guideline range. Many of the assumptions underlying the United States Sentencing Guidelines and government sentencing recommendations have no supportable basis. The following resource list will guide you to studies and statistics that undercut many of the most common assumptions. Web sites, professional journals, and even newspapers are replete with such information. Citing these sources to the Court will provide strength and objectivity to your sentencing arguments.

It is our hope that this resource becomes a living document that expands over time with the input of defense attorneys nationwide. If you come across a source with an especially good argument, particularly one published by the federal government, please submit the cite and excerpt in an email to jennifer_coffin@fd.org, sarah_gannett@fd.org, or molly_roth@fd.org so that it may be included in future editions of this resource.

Former working drafts of this manual were included in the package of materials distributed at the 2006 National Seminar for Federal Defenders and the 2008 National Seminar for Federal Defenders. Check the Training Branch's website www.fd.org for the most current version of this manual.

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STATUTORY AUTHORITY FOR SENTENCING ARGUMENTS

18 U.S.C. § 3553(a): Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . .
- (5) any pertinent policy statement . . .
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

FIREARMS OFFENSES

David McDowall, Colin Loftin and Brian Wiersema, *A Comparative Study of the Preventive Effects of Mandatory Sentencing Laws for Gun Crimes*, 83 J. Crim. L & Criminology 378 (1995)

“Our analysis is based on six city-specific case studies, which monitored the effects of mandatory sentencing on violent crime in Detroit, Jacksonville, Tampa, Miami, Philadelphia and Pittsburgh. The key features of the laws were the same in each area. First, each law required judges to impose a specified sentence on defendants convicted of an offense involving a gun. Second, mitigating devices such as probation, suspended sentences and parole were prohibited.” *Id.* at 378-379.

“Although the results of the case studies are complex, no individual study provides clear support for the proposition that mandatory sentencing reduces firearm violence.” *Id.* 385.

Steven Raphael and Jens Ludwig, “Do Prison Sentence Enhancements Reduce Gun Crime? The Case of Project Exile,” *Evaluating Gun Policy*, Jens Ludwig and Philip J. Cook, eds. Brookings (2003).

Evaluating the impact of Project Exile and mandatory sentencing enhancements on gun-related violence in Richmond, VA.

“[T]he reduction in Richmond’s gun homicide rates surrounding the implementation of Project Exile was not unusual and that almost all of the observed decrease probably would have occurred even in the absence of the program.” *Id.* at 252.

“Our analysis confidently rules out the possibility that Project Exile achieved the dramatic reductions in gun violence that have been claimed in the past. . .” *Id.* at 277.

AGE

United States Sentencing Commission, *Guidelines Manual*, § 5H1.1 (2008).

“Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.”

Measuring Recidivism: the Criminal History Computation of the Federal Sentencing Guidelines, A Component of the Fifteen Year Report on the U.S. Sentencing Commission’s Legislative Mandate (May 2004).

Available at: http://www.ussc.gov/publicat/Recidivism_General.pdf

“Recidivism rates decline relatively consistently as age increases.” *Id.* at 12.

Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 *Stan L. Rev.* 338 (2005).

“As they constitute a large financial burden, older offenders might be a primary target group for nonincarcerative sanctions.” *Id.* at 351.

United States Department of Justice, Office of Juvenile and Delinquency Prevention, *Annual Report* (2005).

Available at: www.ncjrs.gov/pdffiles1/ojdp/212757.pdf

Confirming that adolescents “often use the emotional part of the brain, rather than the frontal lobe, to make decisions” and “[t]he parts of the brain that govern impulse, judgment, and other characteristics may not reach complete maturity until an individual reaches age 21 or 22.” *Id.* at 8.

Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 *Annals N.Y. Acad. Science* 105-09 (June 2004).

Reporting results of longitudinal study for the National Institutes on Health on brain development in adolescents showing that the prefrontal cortex, the “executive” part of the brain important for controlling reason, organization, planning, and impulse control, does not fully mature until the early twenties.

Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate*, *Wash. Post*, Feb. 1, 2005, at A01.

Referring to same longitudinal MRI study by Dr. Jay N. Giedd for the National Institutes of Health as showing “that the region of the brain that inhibits risky behavior is not fully formed until age 25.”

Vera Institute of Justice, *Esperanza Shows Promise at Lowering Recidivism Among Troubled Teens, Saving City Millions*, 21 July 2006.

Available at: www.vera.org

Vera's demonstration project "Esperanza," which provides alternatives to placement for youth in trouble with the law, is helping to save New York City million of dollars and shows promise for reducing recidivism — according to a new report from the New York City Independent Budget Office (IBO). Esperanza and a similar program run by the Department of Probation saved the city more than \$1.2 million in 2005 and could save nearly \$5 million this year, the report notes. The authors project that outcomes could be even better if the early recidivism numbers persist: "The city will have savings from lower operating costs and also from lower recidivism which means lower jail costs, less police time, and better outcomes for city youth."

PHYSICAL CONDITION

United States Sentencing Commission, *Guidelines Manual*, § 5H1.4 (2008).

“An extraordinary physical impairment may be a reason to depart downward; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.”

Debra Niehoff, *Ties that Bind: Family Relationships, Biology, and the Law*, 56 DePaul L. Rev. 847 (2007).

Child abuse and neglect can cause chemical changes in the brain and nervous system, with studies involving abused and neglected children showing that “abused individuals were 1.8 times more likely to be arrested for a juvenile offense, 1.5 times more likely to be arrested as an adult, and 1.35 times for likely to be arrested for a violent crime.” *Id.* at 847.

Studies show that abuse “need not involve actual physical injury to do lasting damage to the developing brain.” *Id.* at 849.

“Victims of abuse, the institutions charged with protecting them and the criminal justice system would be better served if child welfare laws, policies, sentencing guidelines, and treatment approaches were informed by a better understanding of the impact of abuse and neglect on the human brain.” *Id.* at 849.

“Clinical studies confirm that exposure to stress early in life – specifically, to inadequate or abusive parenting – changes in emotional circuitry of the brain and the neuroendocrine mechanisms underlying allostasis [the inherent flexibility that allows functions such as rate and respiration to increase or decrease to counter potentially destabilizing events] in enduring and often compromising ways.” *Id.* at 855, 861.

Thomas M. Burton, *Hidden Trauma: Studies Cite Head Injuries As Factor in Some Social Ills: Brain Researchers Link Mental Woes, Alcoholism To Long-Ago Blows*, Wall Street J., at A1 (Jan. 29, 2008).

“Researchers studying brain injury believe they've found a common thread running through many cases of seemingly unrelated social problems: a long-forgotten blow to the head. New research indicates hidden traumatic brain injuries can cause social or educational failure, such as alcoholism or homelessness.”

“They've found that providing therapy for an underlying brain injury often helps people with a variety of ills ranging from learning disabilities to chronic homelessness and alcoholism. If broadly verified, the findings could have a significant impact in dealing with such intractable difficulties.”

“That severe head injuries can lead to cognitive and behavioral problems is widely accepted. The U.S. Centers for Disease Control and Prevention estimates 5.3 million Americans suffer from mental or physical disability that is due to brain injury.”

“What's new is the contention of some researchers that there are many other cases where a severe past blow to the head, resulting in unconsciousness or confusion, is the unrecognized source of such problems. ‘Unidentified traumatic brain injury is an unrecognized major source of social and vocational failure,’” says Wayne A. Gordon, director of the Brain Injury Research Center at Mount Sinai School of Medicine in New York, where much of the research is being done.

John Paul Wright et al, *Association of Prenatal and Childhood Blood Lead Concentrations with Criminal Arrests in Early Adulthood*, PLoS Medicine, Vol. 5, No. 5, e101 doi:10.1371/journal.pmed.0050101.

Available at:

<http://medicine.plosjournals.org/perlserv/?request=get-document&doi=10.1371/journal.pmed.0050101#toclink4>

Study done by researchers at the University of Cincinnati.

“Prenatal and childhood blood lead concentrations were predictors of adult arrests. . . . Data from several recent prospective studies suggest that blood lead concentrations in the later preschool years may be more predictive of cognitive and behavioral problems.”

“Environmental lead levels as well as crime have dropped over the last 30 y in the US. However, the overall reduction was not uniform; inner-city children, who are predominately African-American, remain particularly vulnerable. Crime and violent crime are concentrated in urban centers in the US where many poor African-Americans reside. One factor in the disproportional representation of African-Americans in crime statistics could well be the historically higher exposures to lead in these communities. Furthermore, recent data from epidemiological studies implicate blood lead concentrations well below the current level of concern adopted by the United States Centers for Disease Control in the development of neurobehavioral deficits.”

“The neurodevelopmental consequences associated with lead exposure in previous studies, such as lower IQ, less tolerance for frustration, deficits in attention, hyperactivity, and weak executive control functions, are potent predictors of delinquent and criminal behaviors. Attention deficit hyperactivity disorder (ADHD) is a common finding among juvenile delinquents, and those with ADHD are more likely to have severe cognitive impairments. ADHD is also a known risk factor for criminal behavior in adulthood. A recent analysis of data from the third National Health and Nutrition Examination Survey

(NHANES-III) found that higher blood lead concentrations were significantly associated with ADHD. Children with blood lead concentrations greater than 2 µg/dl were at a 4.1-fold increased risk of ADHD. Similarly, in experiments with rodents, felines, and nonhuman primates, early lead exposure was associated with increased impulsivity, aggression, antagonistic interactions, reduced social play and abnormal mother–infant interaction. *Childhood lead exposure therefore seems to place individuals at risk for multiple underlying neurobehavioral deficits associated with a higher probability of later criminal behavior.*” (Emphasis added).

“Lead interferes with synapse formation, disrupts dopamine systems, and lowers serotonin levels. Lead exposure has been shown to reduce MAO A (monoamine oxidase A) activity, and low MAO A activity has been associated with violent and criminal behaviors. One consequence of these alterations could be neural dysfunction in areas of the brain involved in arousal, emotion, judgment, and behavioral inhibition such as the prefrontal cortex.”

RACE & SOCIO-ECONOMIC FACTORS

Winnie Hu and Griff Palmer, *To Close Gaps, Schools Focus on Black Boys*, New York Times, April 9, 2007.

Available at: <http://select.nytimes.com/gst/abstract.html?res=F30E17FE3E5B0C7A8CDDAD0894DF404482>

“Ossining, NY, school district programs aimed to get black male students to college is new frontier in nationwide effort to close achievement gap between minority and white students...”

“...second- and third-grade black boys are set apart by special mentoring program that pairs them with black teachers for one-on-one guidance outside class, extra homework help, and cultural activities during school day...”

“Ossining's special programs for black male students began in 2005 and now stretch from kindergarten all the way to college-preparatory program for high schoolers...”

Arianna Huffington, *The War on Drugs' War on Minorities*, L.A. Times, March 24, 2007.

Available at: http://www.latimes.com/news/opinion/commentary/la-oe-huffington_24mar24,1,4064763.story?ctrack=1&cset=true

“According to a 2006 report by the American Civil Liberties Union, African Americans make up an estimated 15% of drug users, but they account for 37% of those arrested on drug charges, 59% of those convicted and 74% of all drug offenders sentenced to prison. Or consider this: The U.S. has 260,000 people in state prisons on nonviolent drug charges; 183,200 (more than 70%) of them are black or Latino.”

“Avoidance of this issue [excessive punishment for non-violent drug offenses] comes at a very stiff price (and not just the more than \$50 billion a year we're spending on the failed drug war). The toll is paid in shattered families, devastated inner cities and wasted lives (with no apologies for using that term).”

“Federal sentencing guidelines dictate that judges impose the same five-year prison sentence for possession of five grams of crack or 500 grams of powder cocaine.”

“...Jeff Sessions (R-Ala.), is now leading the charge in Congress to ease crack sentences. ‘I believe that as a matter of law enforcement and good public policy, crack cocaine sentences are too heavy and can't be justified,’ he said. ‘People don't want us to be soft on crime, but I think we ought to make the law more rational.’”

Brennan Center for Justice at NYU School of Law and The National Institute for Law and Equity, *Prosecutorial Decision-Making and Racial/Ethnic Disparities in the Federal Criminal Justice System: Principles and Guidelines*, 19 Fed. Sent. Rep. 192 (app.) (Feb. 2007).

Available at: http://www.brennancenter.org/dynamic/subpages/download_file_48382.pdf

“If adopted, the guidelines will reduce unwarranted racial disparities in the criminal justice system and provide prosecutors with practical tools to use in their work.”

“The new procedures call on prosecutors to:

- 1) Be conscious of racial disparities when setting prosecution priorities;
- 2) Be proactive with law enforcement agencies to prevent bias and make sure similar defendants receive similar charges;
- 3) Implement race bias training for staff and law enforcement agencies;
- 4) Seek input from and effectively communicate with community-based organizations.”

*Summary by Lynn Lu, Katz Fellow & Counsel, Brennan Center for Justice at NYU School of Law

Erik Eckholm, *Plight Deepens for Black Men*, *Studies Warn*, N.Y. Times, March 20, 2006, at A1.

“Especially in the country’s inner cities, finishing high school is the exception, legal work is scarcer than ever and prison is almost routine, with incarceration rates climbing for blacks even as urban crime rates have declined.”

“If you look at the numbers, the 1990s was a bad decade for young black men, even though it had the best labor market in 30 years.”

“In 2000, 65 percent of black male high school dropouts in their twenties were jobless – that is, unable to find work, not seeking it, or incarcerated. By 2004, that share had grown to 72 percent, compared with 34 percent of white and 19 percent of Hispanic dropouts. Even when high school graduates were included, half of black men in their twenties were jobless in 2004, up from 46 percent in 2000.”

The Sentencing Project, *The Federal Prison Population: A Statistical Analysis*.

Available at: <http://www.sentencingproject.org/pdfs/federalprison.pdf>

“African Americans now serve virtually as much time in prison for a drug offense (57.2 months) as whites do for a violent offense (58.8 months).” *Id.* at 2.

Jens Ludwig, Greg J. Duncan and Paul Hirschfield, *Urban Poverty and Juvenile Crime: Evidence From A Randomized Housing-Mobility Experiment*, *Quarterly Journal of Economics*, Vol. 116:2 (2001).

Analyzing federal and state government data on housing and juvenile crime activity in the Greater Baltimore Metropolitan Area to discover the effects of neighborhood poverty levels on criminal behavior.

“Our central finding is that [a relocation] from a high- to a lower-poverty neighborhood reduces involvement in violent crime.”

“[M]oves to very low-poverty areas may cause an increase in property crime offending, at least in the short term.”

Glenn C. Loury, *Why Are So Many Americans in Prison: Race and the Transformation of Criminal Justice*, *The Boston Review*, July/Aug. 2007, at 7.

Discussing the transformation of highly politicized issues of race in the post-civil rights era into “seemingly race-neutral concerns over crime,” with the result being that punishment for crime has been transformed into a system of racial hierarchy.

Pointing to study by Jeffrey Fagan and others that “discovered a perverse effect of incarceration on crime: higher incarceration in a given neighborhood in one year seemed to predict higher crime rates in that same neighborhood one year later. . . . [D]iscretionary and spatially discriminatory police behavior led to a high and increasing rate of repeat admissions in the designated neighborhoods, even as crime rates fell.” This situation is explained by the fact that the sellers most easily targeted by police, who have quotas to meet, “come predominately from the poorest, most non-white parts of the city.” *Id.* at 8-9.

“[C]onsider the nearly 60 percent of black male high-school dropouts born in the late 1960s who are imprisoned before their 40th year. While locked up, these felons are stigmatized – they are regarded as fit subjects for shaming. Their links to family are disrupted; their opportunities for work are diminished; their voting rights may be permanently revoked. They suffer civic excommunication.” *Id.* at 9.

“Mass incarceration has now become the principle vehicle for the reproduction of racial hierarchy in our society.” *Id.* at 10.

John Paul Wright et al, *Association of Prenatal and Childhood Blood Lead Concentrations with Criminal Arrests in Early Adulthood*, PLoS Medicine, Vol. 5, No. 5, e101 doi:10.1371/journal.pmed.0050101

Available at:

<http://medicine.plosjournals.org/perlserv/?request=get-document&doi=10.1371/journal.pmed.0050101#toclink4>

[Additional excerpts from the discussion section of the article can be found under Physical Condition].

“Prenatal and childhood blood lead concentrations were predictors of adult arrests. . . . Data from several recent prospective studies suggest that blood lead concentrations in the later preschool years may be more predictive of cognitive and behavioral problems.”

“One factor in the disproportional representation of African-Americans in crime statistics could well be the historically higher exposures to lead in these communities.”

“Childhood lead exposure therefore seems to place individuals at risk for multiple underlying neurobehavioral deficits associated with a higher probability of later criminal behavior.”

IMPACT ON CHILDREN AND FAMILIES

United States Sentencing Commission, *Guidelines Manual*, § 5H1.6 (2008).

“Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.”

United States Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* (October 2003).

Available at: www.ussc.gov/depart03/depart03.pdf

“Almost all (90%) of offenders in the family ties departure sample provided caregiving and/or financial support to family members. Nearly two-thirds (61.9%) of these offenders, however, were not the sole provider of such support to dependents.” *Id.* at 51.

Child Welfare League of America, *What Happens to Children?* (2005).

Available at: <http://www.cwla.org/programs/incarcerated/whathappens.htm>

When a parent is incarcerated, (1) children’s lives are disrupted; (2) children often lose contact with their parents; (3) prison visits are difficult (4) most children live in poverty before, during and after their parents incarceration; (5) children experience difficult memories; and (6) children are at an increased risk for poor academic treatment, truancy, dropping out of school, gang involvement, early pregnancy, drug abuse, and delinquency.

Marc Mauer and Meda Chesney-Lind, *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (2005).

“Examines the financially encumbered families who must travel hundreds of miles as a result of the rural prison movement, and the communities deprived of young men who would otherwise be starting families and careers.”

U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Risk Factors for Delinquency: An Overview* (2001).

Aggression, anti-social behavior, substance abuse, linked to poverty, anti-social parents, broken home, separation from parents, physical and emotional abuse, and neglect. *Id.* at 4.

Federal Interagency on Forum on Child and Family Statistics, *America's Children: Key National Indicators of Well-Being* (2005).

“Violence affects the physical, mental, and emotional well-being of young people who experience, witness or feel threatened by it. . . . such violence can adversely affect victims’ mental health and development and increase the likelihood that they themselves will commit acts of serious violence. *Id.* at 44.

The Sentencing Project, *Incarceration and Crime: A Complex Relationship*

Available at: <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>

“The persistent removal of persons from the community to prison and their eventual return as a destabilizing effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality.” *Id.* at 7.

Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 *Stan. L. Rev.* 338 (2005).

“More than half of the women incarcerated in federal prisons have children, and more than eighty percent of them lived with their children prior to incarceration. Because of the sparseness of federal women’s prisons, most of the women are housed far from their families, making it more difficult for them to stay in regular, close contact with their children. Longer prison terms often automatically end parental rights. On the other hand, children of incarcerated parents are more likely to experience a host of negative consequences, including a greater likelihood of going to prison themselves.” *Id.* at 352.

“Since many of the offenders with young children also constitute lower recidivism risks in light of their offense of conviction and their prior criminal records, sentencing judges should at least be allowed to consider the impact of a prison sentence on families and minor children. For that reason, more offenders with heavy family responsibilities, and especially those with minor children, should be eligible for intermediate sanctions.” *Id.* at 352.

Ross D. Parke and K. Alison Clarke-Stewart, *Effects of Parental Incarceration on Young Children*, from U.S. Department of Health & Human Services Conference “From Prison to Home” (2001).

Available at: <http://aspe.hhs.gov/hsp/prison2home02/>

“Over 50% of the children of incarcerated parents had school problems, such as poor grades or instances of aggression.”

“70% of young children with incarcerated mothers had emotional or psychological problems.

Children exhibit internalizing problems, such as anxiety, withdrawal, hypervigilance, depression, shame and guilt.”

“Many of the problems associated with either separation from the parent or co-detention can be avoided by provision of some form of community-based sentencing, instead of prison-based incarceration. These alternatives include house arrest, half-way houses where mother and children reside, and day programs in which mothers attend programs in a correctional institution during the day but are permitted to return home at night. Devine (1997) surveyed 24 community-based programs for mothers and children in 14 states. Community sentencing programs yielded reduced recidivism and increased family preservation — outcomes that have positive implications for children's adjustment. In view of the cost effectiveness achieved by reducing the number of incarcerated women, it is surprising that these types of programs are available to only a small percentage of women violators. Because the vast majority of offenses committed by women are relatively minor and non-violent (e.g., drugs, prostitution), alternatives to regular incarceration merit more consideration.”

Creasia Finney Hairston, PhD, *Prisoners and Families: Parenting Issues During Incarceration*, from U.S. Department of Health & Human Services Conference “From Prison to Home” (2001).

Available at: <http://aspe.hhs.gov/hsp/prison2home02/>

“Most families experience financial losses as a result of parental incarceration and the loss is greatest for those families who try to maintain the convicted individual as a family member.”

SUBSTANCE ABUSE AND MENTAL ILLNESS

Doug McVay, Vincent Schiraldi, & Jason Ziedenberg, *Treatment or Incarceration: National and State Findings on the Efficacy of Cost Savings of Drug Treatment Versus Imprisonment* (March 2004), Justice Policy Institute Policy Report.

Available at: <http://www.justicepolicy.org/article.php?list=type&type=98>

“Though the time behind bars spent is limited, the impact of a felony conviction may last a lifetime, and even a short period of incarceration has been shown to affect people’s earnings, and ability to get a job, to be parents, and to become productive parts of their communities.” *Id.* at 3.

“Treatment is a much less expensive option than incarceration for handling substance abusing offenders.” *Id.* at 5.

“Dollar for dollar, treatment reduces the societal costs of substance abuse more effectively than incarceration does.” *Id.* at 6.

National Treatment Improvement Evaluation Study 1997 Highlights (March 1997) Washington, D.C.: U.S. Department of Health and Human Services, Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration.

Available at: <http://www.health.org/nties97/costs.htm>

Treatment appears to be cost effective, particularly when compared to incarceration, which is often the alternative.

National Institute on Drug Abuse, *Principles of Drug Abuse Treatment for Criminal Justice Populations*, National Institutes of Health (2006).

Available at:

http://www.nida.nih.gov/PDF/PODAT_CJ/PODAT_CJ.pdf

“Untreated substance abusing offenders are more likely to relapse to drug abuse and return to criminal behavior. This can bring about re-arrest and re-incarceration, jeopardizing public health and public safety and taxing criminal justice system resources. Treatment offers the best alternative for interrupting the drug abuse/criminal justice cycle for offenders with drug abuse problems.”

“In 2002, it was estimated that the cost to society of drug abuse was \$180.9 billion (Office of National Drug Control Policy, 2004), a substantial portion of which—\$107.8 billion—is associated with drug-related crime, including criminal justice system costs and costs borne by victims of crime. The cost of treating drug abuse (including research, training, and prevention efforts) was estimated to be \$15.8 billion, a fraction of these overall societal costs.

Drug abuse treatment is cost effective in reducing drug use and bringing about associated healthcare, crime, and incarceration cost savings.”

Jennifer C. Karberg and Doris James, *Substance Dependence, Abuse, and Treatment of Jail Inmates, 2002*, Bureau of Justice Statistics Special Report (2005).

Available at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/sdatji02.pdf>

“In 2002, 68% of jail inmates reported symptoms in the year before their admission to jail that met substance dependence or abuse criteria.”

“Three-quarters of inmates in jail for drug or property offenses met dependence or abuse criteria.”

“Half of all convicted jail inmates were under the influence of drugs or alcohol at the time of offense.”

Rydell, C.P. & S.S. Everingham, *Controlling Cocaine* (1994). Prepared for the Office of National Drug Control Policy and the United States Army.

Each dollar spent on cocaine treatment yield \$7.48 in societal benefits.

Josh Rutledge, *Drug Treatment Urged in Criminal Justice*, The Wash. Times, July 25, 2006, at A6.

A report from the National Institute on Drug Abuse (NIDA) states that failure to treat incarcerated drug abusers can lead to higher crime rates and re-incarceration and “the costs of treatment are not nearly as high as the costs to society when drug abuse is ignored.”

“Ninety-five percent of those who receive no treatment while incarcerated end up relapsing into drugs. And 70 percent of those end up re-incarcerated as a result.”

“NIDA says every dollar spent toward effective treatment programs yields a \$4 to \$7 return in reduced drug-related crime, criminal costs and theft. That return is even greater when health care savings are taken into account.”

INCARCERATION OF NON-VIOLENT DRUG OFFENDERS

Amy Baron-Evans, Sentencing Resource Counsel, *Enforcing the New Sentencing Law: Advanced Federal Criminal Appellate Practice Seminar*, March 2006.

“Rehabilitation was not taken into account in formulating the guidelines.” *Id.* at 10.

“The [Sentencing Commission Fifteen Year] Report criticizes mandatory minimum penalties for creating unwarranted uniformity, unwarranted disparity, and undue severity, and for bypassing collaboration with essential participants and criminological research as sources of sentencing policy development. However, the Report essentially acknowledges that the Commission took a bad idea and made it worse.” *Id.* at 13.

“Congress intended to establish a two-tiered penalty structure with five-year mandatory minimums for “managers of the retail traffic,” and ten-year mandatory minimums for “manufacturers or the heads of organizations.” *Id.* at 13.

Harley G. Lappin, *Good Conduct Time under the Prison Litigation Reform Act*, U.S. Department of Justice Federal Bureau of Prisons, March 31, 2006.

Available at: <http://www.bop.gov>

“...an inmate subject to the PLRA can earn up to the full 54 days credit for GCT...if the inmate has earned or is making satisfactory progress toward earning a GED credential.”

“...an inmate subject to the PLRA is to earn up to 42 days credit for GCT per year... if the inmate has not earned or is not making satisfactory progress toward earning GED credential, unless, the inmate alien is subject to a final order of removal, deportation, or exclusion.”

Margo Schlanger and Givovanna Shay, *Legally-Sanctioned Negligence*, TomPaine.com, March 23, 2007.

Available at: http://www.tompaine.com/articles/2007/03/23/legallysanctioned_negligence.php

“Passed in 1996, the Prison Litigation Reform Act contains a number of provisions that shield abuse and inhumane treatment from judicial—and hence public—scrutiny.”

“The PLRA bars damages for constitutional violations that do not lead to physical injuries—so that even proven violations that relate to freedom of religion, free speech or due process of law go uncompensated. And the

PLRA bars courts from considering meritorious constitutional claims if prisoners have failed to comply with each and every one of the myriad technical requirements of a prison's administrative complaint system before going to court."

John Irwin, Ph.D., *America's One Million Non-Violent Prisoners* (March 1999), Justice Policy Institute Policy Report.

Available at: <http://www.justicepolicy.org/article.php?list=type&type=83>

"The European Union, a political entity of 370 million, has a prison population including violent and nonviolent offenders, of roughly 300,000. This is one-third the number of prisoners which America, a country of 274 million, has chosen to incarcerate for just nonviolent offenses." *Id.* at 5.

"The 1,185,458 nonviolent offenders we currently lock up represents five times the number of people held in India's entire prison system, even though it is a country with roughly four times our population." *Id.* at 5.

The Sentencing Project, *The Federal Prison Population: A Statistical Analysis*.

Available at: <http://www.sentencingproject.org/pdfs/federalprison.pdf>

"Nearly three-fourths (72.1%) of federal prisoners are serving time for a non-violent offense and have no history of violence." *Id.* at 1.

United States Department of Justice, Bureau of Justice Statistics Fact Sheet, *Profile of Nonviolent Offenders Exiting State Prisons*, October 2004.

Available at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/pnoesp.pdf>

Among nonviolent releasees, about 1 in 5 were rearrested for a violent crime within 3 years of discharge. *Id.* at 2.

McVay, Schiraldi and Zeidenberg, Justice Policy Institute, *Treatment or Incarceration? National and State Findings on the Efficacy and Cost Savings of Drug Treatment Versus Imprisonment* (March 2004).

Available at: <http://www.justicepolicy.org/reports/report-a-toi.html>

A prison setting is ill-suited for the most effective approach to persistent drug abuse, which consists of a broad framework of substance abuse counseling with "job skill development, life skills training, [and] mental health assessment and treatment." *Id.* at 18.

John Fuquay, *Expanding prison mean more jobs*, Fayetteville Observer, July 20, 2008.

Available at: <http://www.fayobserver.com/article?id=299734>

Highlights how mass incarceration trends are supported by economic incentives underlying the prison industry.

For some communities, new prisons mean “jobs and money for the local economy” -- “a positive” addition to the community. *Id.* Rather than fear escaped inmates, “[m]ost people are excited about the jobs.” *Id.* In one rural North Carolina county, plans for a landfill were scrapped in favor of a prison. *Id.*

DRUG SENTENCING

United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 2004.

Available at: http://www.ussc.gov/15_year/15year.htm

“73.7 percent of district court judges and 82.7 percent of circuit court judges [rate] drug punishments as greater than appropriate to reflect the seriousness of drug trafficking offenses.” *Id.* at 52.

The Sentencing Project, *The Federal Prison Population: A Statistical Analysis*.

Available at: <http://www.sentencingproject.org/pdfs/federalprison.pdf>

“From 1992-2002, the average time served in prison for a drug offense increased by 31% from 32.7 months to 42.9 months.” *Id.* at 2.

Amy Baron-Evans, Sentencing Resource Counsel, *Enforcing the New Sentencing Law: Advanced Federal Criminal Appellate Practice Seminar*, March 2006.

“Incarceration has little effect on reducing drug crime because drug crime is driven by demand, and low-level dealers and couriers are easily replaced.” *Id.* at 10.

“A majority of judges responding to a 2002 survey urged greater availability of probation with confinement conditions, especially for drug offenders.” *Id.* at 11-12 (citing the *Fifteen Year Report* at 44-45.)

“Of all federal offenders, drug offenders are the least likely to recidivate. Tying punishment to mandatory minimum quantities, enhanced by the guidelines, sweeps in low-level offenders and punishes them as harshly as kingpins. This misdirects law enforcement resources from the kingpins and traffickers Congress had in mind.” *Id.* at 14.

“A typical male drug offender is twice as likely as a female to be sentenced to prison, sentence length is 25-30% longer for men in all types of cases, women get larger downward departures, and are more likely to get an alternative sentencing option. This may be warranted by lesser involvement by women, greater family responsibilities and greater separation from their families caused by the relative scarcity of prisons for women, or it may be unwarranted disparity driven by paternalism or an incorrect assumption that men do not have family responsibilities.” *Id.* at 24.

CRACK-POWDER DISPARITY

United States Sentencing Commission, *Cocaine and Federal Sentencing Policy* (May 2007).

Available at: http://www.ussc.gov/r_congress/cocaine2007.pdf

“Current data and information continue to support the core findings contained in the 2002 Commission Report, among them:

- (1) The current quantity-based penalties overstate the relative harmfulness of crack cocaine compared to powder cocaine.
- (2) The current quantity-based penalties sweep too broadly and apply most often to lower level offenders.
- (3) The current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality.
- (4) The current severity of crack cocaine penalties mostly impacts minorities.” *Id.* at 8-9.

“The majority of federal cocaine offenses do not involve aggravating conduct.” *Id.* at 14.

Given the “urgent and compelling” nature of the problems associated with the 100-to-1 drug quantity ratio, describing the Commission’s decision to “partially address some of the problems” by adjusting downward by two levels crack cocaine quantities above, below, and between the statutory mandatory minimums. *Id.* at 9.

The amendment is “neither a permanent nor a complete solution” to the problems associated with the 100-to-1 drug quantity ratio. *Id.* at 9-10.

United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (2004).

The United States Sentencing Commission evaluation stated that the 100-to-1 crack/powder cocaine quantity ratio disproportionately impacts a “particular offender group,” (again, African-Americans) but serves “no clear sentencing purpose” because the “[t]he harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine.” *Id.* at 132-33.

“The harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine.” *Id.* at 132.

“Powder cocaine is easily converted into crack cocaine through a simple process involving baking soda and a kitchen stove. Conversion usually is done at the lowest levels of the drug distribution system. Large percentages

of the persons subject to five- and ten-year penalties under the current rules do not fit the category of serious or high-level trafficker that Congress described when initially establishing the five- and ten-year penalty levels. Most crack cocaine offenders receiving sentences greater than five years are low-level street dealers. For no other drug are such harsh penalties imposed on such low-level offenders. High penalties for relatively small amounts of crack cocaine appear to be misdirecting federal law enforcement resources away from serious traffickers and kingpins toward street-level retail dealers.” *Id.* at 132.

United States Sentencing Commission, *Cocaine and Federal Sentencing Policy* (May 2002).

Available at: http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf

The 100-to-1 ratio “fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act.” *Id.* at 91.

Concluding that “there is no authoritative legislative history that explains Congress’s rationale for selecting the 100-to-1 drug quantity ratio for powder cocaine and crack cocaine offenses.” *Id.* at 7.

Anne E. Blanchard & Kristen Gartman Rogers, “*Presumptively Unreasonable: Using the Sentencing Commission’s Words to Attack the Advisory Guidelines*,” *The Champion*, March 2005, at 24.

“The Commission’s desire to create an evenly-spaced grid took precedence over sparing defendants whose drug amounts fell between the amounts specified in the mandatory minimum statutes. By admitting this, the commission creates an opportunity for you to challenge the reasonableness of drug trafficking guideline sentences falling between the statutory mandatory minimums.” *Id.* at 27.

James Egan & Molly Roth, *Good Math to Fight the Bad Math: Avoiding Unwarranted Disparity by Applying the Commission’s Lowest Accepted Ratios to All Offense Levels* (March 11, 2008).

Available at: http://www.fd.org/odstb_CrackCocaine.htm

Presenting the case that the lowest crack ratios incorporated in the Nov. 1, 2008 amendments should be applied at all base offense levels. While maintaining that a 1:1 ratio is the only truly equitable fix, urging counsel to use the Commission’s current lowest ratios—25:1 powder to crack and 5,000:1 marijuana to crack—to assert an intermediate fix that is more equitable than the current crack guidelines.

James Egan, *Faulty Math in New Cocaine Base Equivalency Table* (Jan. 18, 2008)

Available at: http://www.fd.org/odstb_CrackCocaine.htm

Addressing the Commission's failure to appropriately update the conversion table to account for the two-level reduction in crack cases after November 1, 2008. Comparing the pre- and post-amendment crack cocaine/marijuana conversion table in USSG § 2D1.1, analyzing the impact of the amendment at each base offense level, and suggesting an algebraic formulae that more justly determine a client's offense level under the amended guidelines.

Pamela A. Maclean, *After Booker, Judges Reduce Crack Cocaine Sentences*, *The National Law Journal*, October 11, 2005.

Available at: <http://www.law.com/jsp/article.jsp?id=1128947761797>

"What has emerged among recent federal court rulings are expression by some of the jurists that a more reasonable ratio would be a 20-to-1 difference between crack and cocaine."

Diana Murphy, Statement to Senate Judiciary Committee, May 22, 2002, *reprinted in* 14 Fed. Sent. Rep. 236-39 (Nov./Dec. 2001- Jan./Feb. 2002).

"[A]ggravating conduct occurs in only a small minority of crack cocaine offenses" and it "does not differ substantially from the prevalence in powder cocaine offenses."

Two-thirds of federal crack-cocaine defendants are street-level dealers.

William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 *Ariz. L. Rev.* 1233, 1249 (Winter 1996).

"The 500 grams of cocaine that can send one powder defendant to prison for five years can be distributed to eighty-nine street dealers who, if they converted it to crack, could make enough crack to trigger the five year mandatory minimum for each defendant."

Ryan King & Marc Mauer, *Sentencing with Discretion: Crack Cocaine Sentencing After Booker* (Jan. 2006).

Available at: <http://www.sentencingproject.org>

Provides a comprehensive analysis of 24 written federal court decisions in 2005 that specifically implicate *Booker* to assess how courts have adjusted sentencing strategies for crack cocaine under this new system.

American Bar Association Justice Kennedy Commission, *Report with Recommendations to the ABA House of Delegates* (August 2004).

Available at: www.sentencing.typepad.com

“[The Anti-Drug Abuse Act of 1986's] differential treatment of crack and powder cocaine has resulted in greatly increased sentences for African-American drug offenders.” *Id.* at 28.

The Act also “makes crack one of only two drugs for which possession is a felony” and it “prescribes crack as the only drug that triggers a mandatory minimum sentence for mere possession.” *Id.* at 28.

“The overwhelming majority of crack defendants are African-American, while the overwhelming majority of powder cocaine defendants are white or Hispanic.” *Id.* at 28.

United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (2004).

This United States Sentencing Commission evaluation states that the 100-to-1 crack/powder cocaine quantity ratio disproportionately impacts a “particular offender group,” (again, African-Americans) but serves “no clear sentencing purpose” because the “[t]he harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine.” *Id.* at 132-33.

“The harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine.” *Id.* at 132.

“Powder cocaine is easily converted into crack cocaine through a simple process involving baking soda and a kitchen stove. Conversion usually is done at the lowest levels of the drug distribution system. Large percentages of the persons subject to five- and ten-year penalties under the current rules do not fit the category of serious or high-level trafficker that Congress described when initially establishing the five- and ten-year penalty levels. Most crack cocaine offenders receiving sentences greater than five years are low-level street dealers. For no other drug are such harsh penalties imposed on such low-level offenders. High penalties for relatively small amounts of crack cocaine appear to be misdirecting federal law enforcement resources away from serious traffickers and kingpins toward street-level retail dealers.” *Id.* at 132.

Amy Baron-Evans, Sentencing Resource Counsel, *Enforcing the New Sentencing Law: Advanced Federal Criminal Appellate Practice Seminar*, March 2006.

“The Commission has recommended reducing the 100:1 powder to crack ratio because ‘the harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine,’ but Congress has not yet acted on that recommendation.’ *Id.* at 14.

“As the May 2002 Commission Report concludes, ‘there is no authoritative legislative history that explains Congress’s rationale for selecting the 100 to 1 drug quantity ratio for powder cocaine and crack cocaine offenses.’ *Id.* at 28.

IMMIGRATION

Ruben G. Rumbaut, Ph.D. & Walter A. Ewing, Ph.D., Immigration Policy Center, *The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates among Native and Foreign-Born Men* (Spring 2007).

Available at: http://www.ailf.org/ipc/special_report/sr_022107.pdf

“[D]ata from the census and other sources show that for every ethnic group, without exception, incarceration rates among young men are lowest for immigrants, even those who are the least educated and the least acculturated. This holds true especially for the Mexicans, Salvadorans, and Guatemalans who make up the bulk of the undocumented population. What is more, these patterns have been observed consistently over the last three decennial censuses, a period that spans the current era of mass immigration and mass imprisonment, and recall similar national-level findings reported by three major government commissions during the first three decades of the 20th century.” *Id.* at 1.

Immigrants have lower incarceration rates than natives: “Among men age 18-39 (who comprise the vast majority of the prison population), the 3.5 percent incarceration rate of the native-born in 2000 was 5 times higher than the 0.7 percent incarceration rate of the foreign-born.” *Id.*

“The foreign-born incarceration rate in 2000 was nearly two-and-a-half times less than the 1.7 percent rate for nativeborn non-Hispanic white men and almost 17 times less than the 11.6 percent rate for native-born black men.” *Id.*

“Foreign-born Mexicans had an incarceration rate of only 0.7 percent in 2000—more than 8 times lower than the 5.9 percent rate of native-born males of Mexican descent.” *Id.*

The paradox of assimilation: “The children and grandchildren of many immigrants—as well as many immigrants themselves the longer they live in the United States—become subject to economic and social forces, such as higher rates of family disintegration and drug and alcohol addiction, that increase the likelihood of criminal behavior among other natives.” *Id.* at 2.

“Given the cumulative weight of this evidence, immigration is arguably one of the reasons that crime rates have dropped in the United States over the past decade and a half.” *Id.* at 14.

Rachel Rosenbloom, *Senseless Deportations*, Wash. Post, March 25, 2007, at B7.

Available at: <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/23/AR2007032301590.html>

“The Child Citizen Protection Act, sponsored by Rep. Jose Serrano (D-N.Y.), would allow immigration judges, when deciding whether to deport parents, to consider the interests of children who are U.S. citizens.”

“Studies by professors at Harvard and the University of California have shown that immigrants commit crimes at lower rates than do native-born Americans. And in many cases, those who do run into trouble with the law -- often in their teens or early 20s -- go on to become productive members of their communities.”

“It is hard to see the rationale behind our inflexible deportation laws given that last year, according to news reports, 12 percent of new Army recruits had criminal records including felonies or serious misdemeanors such as aggravated assault and vehicular homicide.”

Robert J. Sampson, *Open Doors Don't Invite Criminals*, N.Y. Times, March 11, 2006, at A15.

Discussing studies showing that immigrants form stable, non-violent communities

Evidence points to increased immigration as a major factor associated with the lower crime rate of the 1990's (and its recent leveling off).

Living in a neighborhood of concentrated immigration is directly associated with lower violence.

Tim Schepers, *Does the Punishment Fit the Crime? U.S. Alien Deportation and the Requirement of Acceptance in Jama v. I.N.S.*, 28 Hamline L. Rev. 387 (2005).

Arguing that U.S. alien-removal procedure requires nothing less than the assent of a removal country because such a process upholds congressional intent, maintains the moral character of U.S. foreign policy, and recognizes a human beings right to even-handed, safe treatment.

Anne E. Blanchard & Kristen Gartman Rogers, *Presumptively Unreasonable: Using the Sentencing Commission's Words to Attack the Advisory Guidelines*, The Champion, March 2005, at 24.

“The presence of [fast-track] programs in some districts, and their absence from neighboring districts, could lead to disparate sentencing outcomes for offenders convicted of similar conduct.” *Id.* at 27.

“Practitioners in districts that do not have fast-track programs have a powerful argument that a sentence within the advisory guideline range is unreasonable when similarly-situated offenders in fast-track districts routinely receive sentences well below the range.” *Id.* at 28.

“Practitioners whose clients plead guilty and waive procedural rights similar to the rights waived by offenders who benefit from formal fast-track programs can argue that a sentence four levels below the range recommended by the advisory guidelines is a presumptively reasonable sentence.” *Id.* at 28.

Karen C. Turnlin, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 Cal. L. Rev. 1173 (2004).

Arguing that since 9/11, few immigration policies have been created without terrorism policy in mind, which has led to immigration policy existing largely as a means of fighting terrorism.

“Several Department of Justice post-9/11 policies explicitly employ immigration-plus profiling to impose greater scrutiny and selective enforcement of immigration laws on certain groups of immigrants.” *Id.* at 1185.

Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 Stan. L. Rev. 338 (2005).

“Noncitizens should not be automatically precluded from participation in intermediate sentences.

They may be particularly suited for custodial confinement or an enhanced supervision program.” *Id.* at 353.

Bill Ong Hing, *Deporting Our Souls and Defending Our Immigrants*, *Amerasia Journal*, Vol. 31, Issue 3 (2005).

Explores how criminality can lead to the deportation of Asian Americans who have grown up in the U.S. and argues that the nation ought to be looking at alternatives to deportation.

Amy Baron-Evans, Sentencing Resource Counsel, *Enforcing the New Sentencing Law: Advanced Federal Criminal Appellate Practice Seminar*, March 2006.

“Independent of mandatory minimums, the Guidelines account for 25% of the more than . . . tripling of immigration offense sentences.” *Id.* at 11.

“The ranges under §2L1.2 for unlawfully entering or remaining were increased four times, the most significant of which was the 16-level increase for re-entry after an aggravated felony. That 16-level increase, the steepest

increase in the Guidelines Manual, was not required by Congress, not supported by data or research, and was not explained.” *Id.* at 16.

“The real evidence of the undue severity of the immigration guidelines is that for many years, they have been rarely applied. Judges and prosecutors have avoided the harshness of the immigration guidelines through “fast track” charge bargaining and departures. Average sentence length under § 2L1.2 decreased from 36 months in 2000 to 35 months in 2001 to 30 months in 2002 to 28 months in 2003 to 29 months in 2004 to 27 months in 2005. The highest departure rates by district are due to fast track programs, and the guidelines have been unsuccessful in reducing inter-judge disparity in immigration cases.” *Id.* at 16.

“In districts without fast track programs, defendants are receiving sentences double or more the average in cases sentenced under § 2L1.2, because they are among the twenty or so percent who happen to get arrested in a district without a fast track program.” *Id.* at 16.

Linda Drazga Maxfield & Keri Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 Fed. Sent. Rep. 260, 2002 WL 31304861 (Mar. Apr. 2002).

Discussing 1998 empirical study by Commission researchers finding that the government’s use of fast track charge bargains and departures created unwarranted disparity because shorter sentences were unavailable to all similarly situated defendants.

For example, in three fast-track districts, defendants with five prior convictions and two prior deportations received an average sentence of 32 months, far lower than the guideline range applicable to a defendant with only one prior conviction and one prior deportation in a district that does not have a fast-track policy in place.

Kristin F. Butcher & Anne Morrison Piehl, *Cross-City Evidence on the Relationship Between Immigration and Crime*, Journal of Policy Analysis and Management, Vol. 17, No. 3 (1998).

Concluding from statistical analysis that recent immigrants appear to have no effect on crime rates and that youth born abroad are statistically significantly less likely than native-born youth to be criminally active.

Kristin F. Butcher & Anne Morrison Piehl, *Recent Immigrants: Unexpected Implications for Crime and Incarceration*, 51 Indus. & Lab. Rel. Rev. 654 (1998).

Study conducted extensive analysis of “institutionalization” of immigrant groups as compared to “native” groups. Institutionalization primarily indicated incarceration but also included residence at mental hospitals and other long-term care facilities. *Id.* at 656.

As a fraction of the population, the incarceration rates between native and immigrant residents were as follows — 1980: native-born (0.0135), immigrant (0.0069); 1990: native-born (0.0216), immigrant (0.0149) *Id.* at 659.

Concluded that “the rate of institutionalization in the United States in 1980 and 1990 was lower among immigrants than the native born. When controls are included for characteristics that correlate with labor market opportunities and criminal justice enforcement intensity, institutionalization rates are much lower for immigrants than for natives.” *Id.* at 677.

Calculated that “if natives had the same institutionalization probabilities as immigrants, our jails and prisons would have one-third fewer inmates.” *Id.* at 677.

Fox Butterfield, *Study Finds 2.6% Increase In U.S. Prison Population*, New York Times, July 28, 2003.

Noting that it “was not illogical for the prison population to go up even when the crime rate goes down” because some victimless crimes—including drug crimes and immigration offenses—are not counted in the FBI’s annual report on the crime rate.

Suzanne Gamboa, *ICE Considers Tracking Deportation Volunteers; Ankle Devices an Option for the Time Before Travel*, Houston Chronicle, August 1, 2008.

Discussing ICE program allowing people (in five cities only) approximately one month in 2008 to arrange to leave the country if they have ignored deportation orders and have not committed crime. Notes that “about 450,000 people have deportation orders and have not committed crimes, said ICE spokesman Richard Rocha.”

Jon M. Sands and Robert J. McWhirter, *Does the Punishment Fit the Crime? A Defense Perspective on Sentencing in Aggravated Felon Re-Entry Cases*, 8 Fed. Sent. R. 275, 1996 WL 671556 (March/April 1996).

Discussing the development of the immigrant reentry sentencing guidelines provision (USSG § 2L1.2) from its inception through the 1995 amendments. When this provision was originally promulgated, the base offense level was 6. Later amendments brought several changes (most notably the 16-level increase) which lack reason and sound basis.

Regarding the drastic 16-level increase, the authors note that the Commission “did no study to determine if such sentences were necessary—or desirable from any penal theory. Indeed, no research supports such a drastic upheaval.”

Jon M. Sands and Jane L. McClellan, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on "Fast-track" Sentences*, 38 Ariz. St. L. J. 517 (Summer 2006).

Reviewing the increase in percentage of immigration prosecutions nationwide, the development of USSG § 2L1.2, the evolving meaning of the term "aggravated felony," and the history of the Commission's implementation of the 16-level increase to the base offense level for illegal reentry.

Discussing sentencing strategy post-PROTECT Act, including how to argue in favor of sentencing reductions based on unwarranted disparity. The authors offer a brief historical overview of fast-track programs and bibliographic references.

Sandra Guerra Thompson, *Immigration Law and Long-Term Residents: A Missing Chapter In American Criminal Law*, 5 Ohio St. J. Crim. L. 645 (Spring 2008).

Reviewing statistics concerning the rise of persons incarcerated for immigration crimes.

"Apparently, the federal government may indeed be on a campaign to increase the size of the federal system to accommodate the scores of undocumented persons being convicted of immigration crimes. The Bureau of Justice Statistics reports that from 1995 to 2003, the number of people in prisons who were sentenced for immigration offenses grew 394% from 3420 to 16,903. At present, prisoners in the Federal Bureau of Prisons under sentence for immigration offenses comprise 11.2% of the total inmate population or 20,970 of the 187,241 people in federal prisons. As of 2004, immigration crimes 'represent the single largest group of all federal prosecutions, about one third (32%) of the total.' By contrast, drugs comprise 27%, and weapons cases account for only 9%."

Also makes the case for continuing need to increase communication between the criminal defense bar and immigration attorneys.

Raquel Aldana, *Of Katz and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. Davis L. Rev. 1081 (Feb. 2008)

Addressing Fourth Amendment's lack of protection to immigrants, the author examines immigrants' privacy rights, and "concludes by urging courts to reconsider reliance on immigrants' unlawful presence in the U.S. to excuse law enforcement abuses and offers several legal and policy reasons in favor of privacy protection for noncitizens."

Discussing how criminal prosecutions and punishments have increased over time, and how civil immigration enforcement has become more punitive.

Describing benefits undocumented immigrants bring to US society, citing farming industry as one example: "Consider agriculture, for example. The United States' annual farm subsidies, combined with free trade agreements with most Latin American nations and a cheap supply of foreign agricultural workers on U.S. farms, have slowed down farm production in Latin America, displaced farmers from their homes and into the United States, and increased produce importation and profits for U.S. farmers."

The Pew Hispanic Center publishes reports and fact sheets on a number of topics, including immigration, regarding Latino communities. These can be found at <http://pewhispanic.org>. Two fact sheets concerning undocumented immigrants and their contributions to the United States are:

Estimates of the Unauthorized Migrant Population for States based on the March 2005 CPS (April 26, 2006):

Estimates how many unauthorized immigrants there were in each state during this timeperiod; can be used to request fast-track programs or variances in areas which do not have these programs, but have very high immigrant populations.

The Labor Force Status of Short-Term Unauthorized Workers (April 13, 2006) (shows percentage of US workforce comprised by people in this group, and other relevant statistics):

This fact sheet states: "The estimates show that there are a total of 7.2 million unauthorized workers in the U.S. and more than 2.5 million of them, or 35 percent, arrived between 2000 and 2005. Unauthorized workers as a whole make up nearly 5% of the U.S. labor force. Short-term unauthorized migrants account for just under 2%. The short-term unauthorized are concentrated in a few sectors of the economy. More than a million are employed in the construction and hospitality industries. Examining employment data by occupations produces a similar picture. More than half of all short-term unauthorized migrants are employed in two occupational categories: construction and services. The latter category encompasses a broad range of jobs generally involving services to individuals such as waiters, janitors, police officers and dental assistants."

SEX OFFENDERS

Center for Sex Offender Management, Office of Justice Programs, U.S. Department of Justice, *Myths and Facts About Sex Offenders* (Aug. 2000).

Available at: <http://www.csom.org/pubs/pubs.html>

“It is noteworthy that recidivism rates for sex offenders are lower than for the general criminal population.”

Child molesters have a lower rate of reconviction than rapists (for sex offenses, 13% compared to 19% in one study).

“Individual characteristics of the crime” such as gender of the victim and relationship of the offender to the victim “further distinguish recidivism rates.”

“Treatment programs can contribute to community safety because those who attend and cooperate with program conditions are less likely to re-offend than those who reject intervention.” (Characterizing as a “myth” the notion that “treatment for sex offenders is ineffective.”)

Treatment costs less than incarceration (\$5-15,000 compared to \$22,000 for one year).

Center for Sex Offender Management, Office of Justice Programs, U.S. Department of Justice, *Recidivism of Sex Offenders* (May 2001).

Available at: <http://www.csom.org/pubs/pubs.html>

Discusses likelihood of re-offense, contributing factors, and treatments.

Dynamic factors associated with recidivism should influence the structure and supervision of individualized interventions. These factors include the formation of positive relationships with peers, stable employment, avoidance of alcohol and drugs, prevention of depression, reduction of deviant sexual arousal, and increase in appropriate sexual preferences. . . . This model is “currently the only approach that enjoys any evidence of effectiveness in reducing sexual recidivism.” *Id.* at 16.

Bureau of Justice Statistics, Office of Justice Programs, *Recidivism of Sex Offenders Released from Prison in 1994* (Nov. 2003).

Available at: <http://www.ojp.usdoj.gov/bjs/abstract/rsorp94.htm>

“[S]ex offenders had a lower overall rearrest rate” compared to non-sex offenders.

“No clear association was found between how long [sex offenders] were in prison and their recidivism rate.”

The more prior arrests they had, the greater their likelihood of being rearrested for another sex crime after leaving prison.”

National Juvenile Online Victimization Study, *Child Pornography Possessors Arrested in Internet-Related Crimes*.

Available at: <http://www.unh.edu/ccrc/>

Stats on offender characteristics that can help you show that your client is “normal” or “better than normal” (at least for a sex offender), e.g., “Most CP producers had multiple victims and many victimized groups of children or adolescents.”

Hanson, R. Karl & David Thornton, *Static-99: Improving Actuarial Risk Assessments for Sex Offenders*.

Available at: <http://www.psepc-sppcc.gc.ca/res/cor/rep/cprmindex-en.asp>

Compares the predictive accuracy of the three most commonly used sex offender risk assessment measures.

Explains how each measure is used, and gives you the factors so you can present them to the court (e.g., prior sex offenses, prior non-sex offenses, male victims, stranger victims, never married, under 25 years old, etc.).

Amy Baron-Evans and Sara E. Noonan, Sentencing Resource Counsel, *The Adam Walsh Child Protection and Safety Act of 2006 -- Part I* (October 2006).

Available at: http://www.fd.org/odstb_AdamWalsh.htm

Provides brief overview of the Adam Walsh Act and suggests some (though not all) possible legal challenges to the Act.

Amy Baron-Evans and Sara E. Noonan, Sentencing Resource Counsel, *The Adam Walsh Child Protection and Safety Act of 2006 -- Part II* (November 2006).

Available at: http://www.fd.org/odstb_AdamWalsh.htm

Describing the Sex Offender Registration and Notification Act (SORNA) and its complex requirements. The paper also describes how the law might operate, and suggests some challenges it appears to invite.

Amy Baron-Evans and Sara E. Noonan, Sentencing Resource Counsel, *Supplement to The Adam Walsh Child Protection and Safety Act of 2006 -- Part II* (May & September 2007).

Available at: http://www.fd.org/odstb_AdamWalsh.htm

Addressing new developments since the publication of the original Adam Walsh Act - Part II memo, including the Attorney General's interim rule regarding retroactivity, a favorable case applying the Ex Post Facto Clause, and the new sentencing guidelines.

Professor Corey Rayburn Yung's Sex Crimes Blog

[http://sexcrimes.typepad.com/sex_crimes/.](http://sexcrimes.typepad.com/sex_crimes/)

Devoted to the criminal laws regulating and punishing sex offenders, with a special category devoted to Adam Walsh.

Berlin, F.S. et al., *A Five-Year Plus Follow-up Survey of Criminal Recidivism Within a Treated Cohort of 406 Pedophiles, 111 Exhibitionists and 109 Sexual Aggressives: Issues and Outcome*, 12 Am. J. of Forensic Psych. 3 (1991).

Documents the effectiveness of community treatment for sex offenders.

CAREER OFFENDERS

United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 2004.

Available at: http://www.ussc.gov/15_year/15year.htm

The career offender provision is a sentencing rule “that [has] a disproportionate impact on a particular offender group [namely, African-Americans] but that serve[s] no clear sentencing purpose . . . The recidivism rate for career offenders more closely resembles the rates for offenders in the lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules in Chapter Four of the Guidelines Manual. The career offender guideline thus makes the criminal history category a *less* perfect measure of recidivism than it would be without the inclusion of offenders qualifying only because of prior drug offenses.” *Id.* at 134 (emphasis in original).

Anne E. Blanchard & Kristen Gartman Rogers, *Presumptively Unreasonable: Using the Sentencing Commission’s Words to Attack the Advisory Guidelines*, *The Champion*, March 2005, at 24.

“The career offender provision is not necessary to protect the public from future crimes of the defendant when the provision’s application to the defendant rests on his or her prior drug trafficking convictions.” *Id.* at 27.

Amy Baron-Evans, Sentencing Resource Counsel, *Enforcing the New Sentencing Law: Advanced Federal Criminal Appellate Practice Seminar*, March 2006.

“The Career Offender guideline has a racially disparate impact on Blacks that is not warranted by an increased risk of recidivism.” *Id.* at 20.

“The racial disparity is not warranted because the recidivism rate for offenders whose ‘career offenders’ status is based on controlled substance offenses is not more than that for offenders in the criminal history category in which they would have been placed under normal criminal history rules. This means that career offender status is unwarranted in any case in which the predicates are controlled substance offenses, regardless of the defendant’s race.” *Id.* at 20.

“The use of non-moving violations in the criminal history score may also adversely affect minorities.” *Id.* at 20.

CRIMINAL HISTORY

United States Sentencing Commission, *Guidelines Manual*, § 4A1.3 (2005).

“If reliable information indicates that the defendant’s criminal history category is substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.”

Amy Baron-Evans, Sentencing Resource Counsel, *Enforcing the New Sentencing Law: Advanced Federal Criminal Appellate Practice Seminar*, March 2006.

“If the Guidelines exclude consideration that reduce the risk of recidivism, or include factors without predictive value that increase the criminal history score, then the criminal history rules produce sentences that are too severe.”
Id. at 18.

RECIDIVISM

Measuring Recidivism: the Criminal History Computation of the Federal Sentencing Guidelines, A Component of the Fifteen Year Report on the U.S. Sentencing Commission's Legislative Mandate (May 2004).

Available at: http://www.ussc.gov/publicat/Recidivism_General.pdf

Provides specific data supporting USSG Guidelines, including data on age, gender, employment status, and educational attainment

Criminal history points are more predictive of recidivism than an offender's Criminal History Category. *Id.* at 7.

"Women recidivate at a lower rate than men, and the difference is even greater in CHC V and VI." *Id.* at 11.

"Recidivism rates decline relatively consistently as age increases, from 35.5% under age 21 to 9.5% over age 50." *Id.* at 12.

"Stable employment in the year prior to arrest is associated with a lower rate of recidivism.

"However, in CHC V, recidivism rates are higher for those with a college education than those with less than a high school education." *Id.* at 12.

"Recidivism rates decrease with educational level of recidivism." *Id.* at 12.

"Offenders sentenced under the fraud, larceny and drug guidelines are the least likely to recidivate, and drug offenders are the least of all except in CHC I." *Id.* at 13.

"The Offense Level is not a predictor of recidivism." *Id.* at 13.

"Offenders are most likely to recidivate when their sentence is straight prison, as opposed to probation or split sentences." *Id.* at 13.

Conclusion: Rehabilitation programs focused on drug use or education would have a high cost-benefit value (and should be used instead of incarceration where appropriate.)

Recidivism and the "First Offender," A Component of the Fifteen Year Report on the U.S. Sentencing Commission's Legislative Mandate (May 2004).

Available at: http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf

“The guideline mitigating role adjustments to reduce the offense level was infrequently given: only 5.6 percent among all offenders in CHCs II through VI received this adjustment. First time offenders were overall, only slightly more likely to receive this adjustment.” *Id.* at 10.

“All offenders with zero criminal history points have a primary recidivism rate of 11.7 percent.

This zero point offender rate is substantially lower than the recidivism rates for offenders with only one criminal history point. (22.6%), or for offenders with two or more points (36.5%) combined in the CHC II though CHC VI.” *Id.* at 13-14.

“The three first offender groups all come from offenders with zero criminal history points, and are defined as follows: group A contains offenders with no prior arrests; group B contains offenders with prior arrests, but no prior convictions; and group C contains offenders with only prior convictions that are to never count towards criminal history. Among these groups the lowest recidivism rate is for group A with a rate of 6.8 percent. Group B has a recidivism rate of 17.2 percent. Group C has a recidivism rate of 8.8 percent.” *Id.* at 16-17.

“Recidivism risk . . . is lowest for offenders with the least experience in the criminal justice system.

Offenders with zero criminal history points have lower recidivism rates than offenders with one or more criminal history points. Even among offenders with zero criminal history points, offenders who have never been arrested have the lowest recidivism risk of all.” *Id.* at 17.

A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score, A Component of the Fifteen Year Report on the U.S. Sentencing Commission’s Legislative Mandate (January 2005).

Available at: <http://www.ussc.gov/publicat/RecidivismSalientFactorCom.pdf>

The Salient Factor Score method is a better predictor of recidivism than is the Criminal History Category. *Id.* at 12.

Andres F. Rengifo, Vera Institute of Justice, Center on Sentencing and Corrections, *Assessing the Effectiveness of Intermediate Sanctions, Multnomah County, Oregon* (July 2008).

Available at: http://www.vera.org/publication_pdf/csc_multnomah_report.pdf

In an evidence-based study done of offenders on supervision in Multnomah County, Oregon, finding that “the use of jail as an intermediate sanction was correlated with higher rates of recidivism.”

Recommending that courts “increas[e] the use of sanctions other than jail and considering targeting the use of jail to the group for which it is most appropriate, namely those who pose the greatest risk to public safety.”

Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates, Washington Institute for Public Policy, October 2006.

Available at: <http://www.wsipp.wa.gov/pub.asp?docid=06-10-1201>

A comprehensive overview of programs that have demonstrated an ability to reduce recidivism.

VICTIM IMPACT

Restorative Justice

Coben, J. & Penelope Harley, *Intentional Conversations About Restorative Justice, Mediation and the Practice of Law*, 25 Hamline J. of Pub. L. & Pol'y 235 (Spring 2004).

Describing the positive impact of restorative justice approaches that consider victim need and provide offenders with experiences that motivate reform.

Nancy Lucas, *Restitution, Rehabilitation, Prevention, and Transformation: Victim-Offender Mediation for First-Time, Non-Violent Youthful Offenders*, 29 Hofstra L. Rev. 1365 (2001).

Explaining ancient concept of restorative justice as alternative to incarceration, citing numerous studies examining its effectiveness in criminal context.

James Bonta et al., *Restorative Justice: An Evaluation of the Restorative Resolutions Project*, Report No. 1998-05, Solicitor General of Canada (Oct. 1998).

Available at:

http://ww2.ps-sp.gc.ca/publications/corrections/pdf/199810b_e.pdf.

Collecting studies regarding restorative justice and reporting that offenders participating in victim and community reconciliation program rather than being incarcerated were more likely to make restitution to victims and generally had lower recidivism rates.

Interests of the Child

Faller, Kathleen Coulborn, United States Department of Health and Human Services Administration for Children and Families, *Child Sexual Abuse: Intervention and Treatment Issues* (1993).

Available at:

<http://nccanch.acf.hhs.gov/pubs/usermanuals/sexabuse/index.cfm>

Discussing importance of family therapy and wishes of the child

“The court can be helpful in compelling family members, especially offenders, into treatment; in protecting victims and families from offenders; and in effecting alternative living situations for offenders (or victims, if necessary).”

Crime Victims Rights Act

Amy Baron-Evans, Sentencing Resource Counsel, *Defending Against the Crime Victims Rights Act* (2006).

Available at:

http://www.fd.org/pdf_lib/victim%20memo%20to%20defenders.pdf

Discusses the constitutional, procedural, historical, and interpretive issues raised by the Crime Victims Rights Act.

SENTENCING REFORM & PHILOSOPHY

Ryan S. King, *Changing Direction? State Sentencing Reforms 2004-2006*, The Sentencing Project Research and Advocacy for Reform (March 2007).

Available at: <http://sentencingproject.org/Admin/Documents/publications/sentencingreformforweb.pdf>

“Between 2004 and 2006, at least 22 states enacted legislative reforms to their sentencing policies,” focusing on:

1) “diversion of drug offenders from incarceration through expanded treatment options” including drug courts, drug treatment programs, and community-treatment sentencing;

2) “expansion of alternatives to incarceration for non-violent offenders” by granting prosecutors discretion to refer cases to community sentencing, and to charge a state felony as a misdemeanor;

3) “parole and probation reforms designed either to reduce time served in prison or to provide supervision options to reduce the number of revocations to prison; and,”

4) “broader sentencing reform” including changing the weight triggers for certain drug charges and integrating “principles of rehabilitation and reentry at the sentencing phase.”

U.S. Sentencing Commission, *Public Opinion on Sentencing Federal Crimes*, at 86 (Oct. 1995).

Available at: http://www.ussc.gov/nss/jp_exsum.htm

“Fairly strong consensus exists on the seriousness ordering of crimes, with those involving actual or threatened physical harm to victims generally considered to be the most serious and status victimless crimes regarded as least serious.” *Id.* at 11.

“In giving concrete sentences to convicted persons, citizens are not guided solely by the seriousness of the crimes but also by the convicted person’s previous record and the amount of damage or loss suffered by victims.” *Id.* at 12.

“There is some evidence that respondent sentencing preferences can be affected, perhaps strongly, by providing a wider range of punishment choices, information on prison conditions, and the costs of incarceration.” *Id.* at 12.

“The general public does not make important distinctions between trafficking in heroin, powder cocaine and crack cocaine.” *Id.* at 86.

“[The general public] did not typically favor long prison sentences for drug possession.” *Id.* at 85.

United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 2004.

Available at: http://www.ussc.gov/15_year/15year.htm

“Using a sample of 264 federal judges sentencing a different series of hypothetical cases, they found that judges who were on average than judges who emphasized other goals.” *Id.* at 80.

Samuel B. Lutz, *The Eighth Amendment Reconsidered: A Framework for Analyzing the Excessiveness Prohibition*, 80 N.Y.U. L. Rev. 1862 (2005).

Asserting that the Supreme Court must revisit 8th Amendment jurisprudence to create a consistent standard for excessive criminal sanctions.

“Current doctrine has created a situation in which nonviolent offenses like cocaine possession or obtaining \$120.75 by false pretenses can be punished by mandatory life imprisonment, while far more serious crimes of rape, felony-murder, and even non-aggravated murder cannot be punished by death. Thus, despite the fact that life imprisonment and death are the two most-severe punishments authorized by law and are similar in the enormous degree to which they infringe upon an individual’s interests, the level of scrutiny applied to each is dramatically different.” *Id.* at 1876.

Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. Crim L. & Criminology 25 (2005).

Advocating post-*Booker* for sentencing policies that (1) consider all the factors that distinguish individual defendants and offenses; and (2) allows judges to make a decision based on a moral balancing of the crime, the individual factors and circumstances, and the judge’s legal experience.

“The fair method for sentencing is for an impartial judge, who is fully cognizant of an individual defendant’s personal character, family responsibilities, medical and mental condition, criminal record, and the particular circumstances surrounding the crime, to impose a sentence after deep reflection, informed by the judge’s experience in life and in the law.” *Id.* at 78.

Nora V. Demlietner, *Smart Public Policy: Replacing Imprisonment With targeted Nonprison Sentences and Collateral Sanctions*, 58 Stan. L. Rev. 339 (2005).

Arguing that post-*Booker*, federal courts should follow the lead of the states and impose nonprison sanctions on offenders who pose a low-risk to public safety.

Patrick Kelly & Don Stemen, *Probation Reform: Is Zero Tolerance a Viable Option?*, Vera Institute of Justice, Research and Practice Forum (October 2005).

Outlining a probation and community-corrections punishment model that empowers officers to create rewards and sanctions for offenders.

Andrew R. Strauss, *Losing Sight of the Utilitarian Forest for the Retributivist Trees: An Analysis of the Role of Public Opinion in a Utilitarian Model of Punishment*, 23 Cardozo L. Rev. 1549 (2002).

Arguing that the juvenile justice system has become inflexibly retributive as the result of mounting political pressure and public misperception. Asserting that the law must return to utilitarian goals that seek to deter and rehabilitate criminal conduct.

“The juvenile justice system has evolved over the past thirty years from a rehabilitative system to a punitive one, due in large part to a misplaced emphasis on public opinion. This change has been harmful both to society and the juvenile. [D]etermining what works, rather than by appeasing the public, is of premier importance.”

Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 Emory L.J. 377 (2005).

Advocating for an indeterminate sentencing system wherein a commission creates a presumptive minimum and maximum sentence and a system of parole release that allows judges and parole boards to tailor incarceration to the requirements of the offense and the individual characteristics and conduct of the offender.

Steven L. Chanenson, *Guidance from Above and Beyond*, 58 Stan. L. Rev. 175 (2005).

Advocating for the adoption of three sentencing “tools” in the wake of *Booker*; more thorough appellate review of sentences; re-institution of parole release authority; and creation of “extended sentences review” for older offenders serving lengthy prison terms.

Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 Geo. L.J. 1 (2005).

Finding that federal courts draw too sharp a line between civil and criminal offenses when interpreting constitutional protections while federal government agencies increasingly impose severe “civil penalties” on individuals. Arguing that the courts and federal government need to reform criminal and civil sanctioning to ensure constitutional protections, proper deterrence, and basic fairness.

John Braithwaite, *A Future Where Punishment is Marginalized: Realistic or Utopian?* 46 UCLA L. Rev. 1727 (1999).

Arguing for restorative justice to bring together stakeholders (victims, offenders, communities) in search of outcomes that heal the hurt of crime, instead of responding with more hurt.

The Sentencing Project, *Incarceration and Crime: A Complex Relationship* (2005)

Available at: <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>

“Incarceration does not always have a uniformly positive impact on reducing crime and that, therefore, other factors significantly affect crime trends.” *Id.* at 3.

“Nationally, violent crime has declined by 33% and property crime has decreased 23% since 1994.

During the same period incarceration rates rose by 24%.” *Id.* at 3. “Between 1991 and 1998, those states that increased incarceration at rates that were *less* than the national average experienced a *larger* decline in crime rates than those states that increased incarceration at rates higher than the national average.” *Id.*

“Expanding the use of imprisonment inevitably results in diminishing returns in crime control. This is because high-rate and serious or violent offenders will generally be incarcerated even at modest levels of imprisonment, but as prison systems expand, new admissions will increasingly draw in lower-rate offenders.” *Id.* at 6.

“The expenditure of \$1 million to expand mandatory minimum sentencing would result in a national decrease in drug consumption of 13 kilograms, while dedicating those funds to drug treatment would reduce consumption by 100 kilograms.” *Id.* at 8 (citing Caulkins, J.P., Rydell, C.P., Scwabe, W.L., Chiesa, J. (1997). *Mandatory Minimum Drug Sentences: Throwing Away The Key or The Taxpayers’ Money?* Santa Monica, CA: RAND.)

Nancy Lucas, *Restitution, Rehabilitation, Prevention, and Transformation: Victim-Offender Mediation for First-Time Non-Violent Youthful Offenders*, 29 Hofstra L. Rev. 1365 (2001).

“Restorative justice is characterized by the following three principles: First, crime is not, as is often wrongly assumed, primarily an offense against the state. Rather, it is a conflict between individuals resulting in injuries to victims, communities and the offenders themselves; only secondarily is it lawbreaking. Second, the overall aim of the criminal justice process should be to make peace between the parties, repair the harm caused by crime, and not to be obsessively concerned about punishment for punishment’s sake. Finally, the criminal justice process should not be “dominated by the government” to the exclusion of victims, communities, and the offenders themselves.” *Id.* at 1370.

Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 Stan. L. Rev. 338 (2005).

“In contrast to many state and foreign systems that allow for fines, restitution orders, and community service as stand-alone sanctions, the Federal Guidelines permit them; only as part of a probation sentence. The federal criminal justice system only offers limited forms of alternative sanctions. Among the notable omissions are intensive probation with enhanced supervision of offenders and day fines that are based directly on the gravity of the offense and an offender’s economic situation.” *Id.* at 344.

“Nonprison sentences allow, and even require, individuals to be employed, pay fines, and make restitution, pay taxes, and assist their families. Such demands are crucial to allowing them to regain their place in society.” *Id.* at 346.

Amy Baron-Evans, Sentencing Resource Counsel, *Enforcing the New Sentencing Law: Advanced Federal Criminal Appellate Practice Seminar*, March 2006.

“In contrast to mitigating offender characteristics and offense circumstances, the Guidelines fully reflect one aggravating characteristic of the defendant and a seemingly infinite and ever-increasing sea of aggravating offense circumstances. In assessing its work over the first fifteen years, the Sentencing Commission has identified some guidelines that produce sentences that are too severe, but none that are not severe enough. Thus, it is highly probable that the guideline range already takes into account whatever factor the government may argue for a sentence above the guideline range, and it should be extremely difficult for a judge to justify a sentence higher than the guideline range as insufficient to meet the goals of sentencing.” *Id.* at 6.

“As both Justice Breyer and the Commission’s Senior Research Associate note, . . . the Commission and appellate courts treated the departure power more restrictively than originally intended.” *Id.* at 10.

“When punishment is disproportionate to the offense, it squanders resources, creates disrespect for the law, and fails to achieve just punishment.” *Id.* at 10.

Amy Baron-Evans, Sentencing Resource Counsel, *The Continuing Struggle for Just, Effective and Constitutional Sentencing after United States v. Booker* (August 2006)

Available at http://www.fd.org/pdf_lib/EvansStruggle.pdf

Demonstrates through history, empirical evidence, government reports and other resources why the Guidelines do not reflect or incorporate 18 U.S.C. § 3553(a) and therefore should not be followed in general or with respect to specific guidelines

“Defense counsel must help to ensure that judges retain and exercise their sentencing power by providing arguments to support reasoned decisions that will be upheld on appeal (or not appealed at all), that Congress can respect, and that the public can understand. There are powerful arguments to be preserved below and raised in petitions for certiorari that post-Booker sentencing violates the sentencing law under basic principles of statutory construction, the Sixth Amendment right to jury trial, the Fifth Amendment right to proof beyond a reasonable doubt, and the Sixth Amendment right to confront and cross-examine adverse witnesses.” *Id.* at 6.

“[R]egardless of what circuit you are in or what stage of the litigation, it is necessary to demonstrate as a factual matter that the guidelines do not comply with 18 U.S.C. § 3553(a), and that a lower sentence does a far superior job.” *Id.* at 6.

American Bar Association Justice Kennedy Commission, *Report with Recommendations to the ABA House of Delegates* (August 2004).

Available at : sentencing.typepad.com/sentencing_law_and_policy/files/JusticeKennedyCommissionReports-11Aug2004

“Our recommendation is that shorter period of incarceration should be prescribed for offenders whose crimes are not the most serious and do not pose the greatest danger to the community. We believe that the trend throughout the states is to recognize that the seriousness of the crime and the danger to the community are key factors in determining both whether incarceration is an appropriate sanction and how lengthy a sentence of incarceration is warranted.” *Id.* at 25.

“The reality . . . is that well designed alternatives to incarceration that save money, protect the community and reduce recidivism are worth exploring once they have been shown to work.” *Id.* at 29.

“If treatment works, reduces recidivism, and is cost-effective, it is a desirable alternative to incarceration for many low-level offenders.” *Id.* at 32.

“Not all who violate a condition of parole require imprisonment. Imprisonment may be the correct sanction for violators who commit additional criminal acts or who pose a danger to the community, but a graduated system of sanctions may make as much sense in the parole/probation context as in the basic sentencing decision following conviction.” *Id.* at 34.

John J. Gibbons and Nicholas Katzenbach, Commission Co-Chairs, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America’s Prisons*, Vera Institute of Justice (2006).

Available at

http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf

“What happens inside jails and prisons does not stay inside jails and prisons. It comes home with prisoners after they are released and with corrections officers at the end of each day’s shift. When people live and work in facilities that are unsafe, unhealthy, unproductive, or inhumane, they carry the effects home with them. We must create safe and productive conditions of confinement not only because it is the right thing to do, but because it influences the safety, health, and prosperity of us all.” *Id.* at 11.