NEW YORK STATE
COMMISSION ON SENTENCING REFORM

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Transcript of Meeting

Wednesday,
July 18, 2007
9:00 a.m.

Governor's Office
633 Third Avenue
38th Floor
New York, New York
IN ATTENDANCE:

Commissioners:

George Alexander
Chairman, New York State Board of Parole

Anthony Bergamo, Esq.

Joseph Lentol
New York State Assemblyman

Hon. Juanita Bing Newton
Judge, Criminal Court of the City of New York

Denise E. O'Donnell
Division of Criminal Justice Services

Eric Schneiderman
NYS Senator

Tina Marie Stanford
Chair, Crime Victims Board

Cyrus Vance, Esq.
Also Present:

Anthony Annucci, Esq.
Department of Correctional Services
Gina L. Bianchi, Esq.
Executive Director

Arleigh Green
Court Reporter
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COMMISSIONER O'DONNELL: We are fortunate that we have found someone that we thought could reflect the views, overall, of the victim community, which we know is represented by various different communities who have many, many different issues and concerns. But, Susan is a national leader and internationally-recognized spokesperson for victims of crime.

She formerly served as Executive Director of the National Center for Victims of Crime. She is now a Professor at the Department of Criminal Justice and Sociology at Pace University.

And, we're delighted the Susan has agreed to join us. She did a four-hour workshop yesterday for Probation, and they sort of wore out her voice. So, she has some laryngitis, but despite that, and despite difficult weather out there, Susan is here to join us today, and I really appreciate it.

Susan?

POLICY VIEWS ON SENTENCING REFORM

FROM A VICTIM ADVOCATE

MS. HERMAN: Thank you, Denise. It's really an honor and a pleasure to be here today. I'm not sure how pleasurable it's going to be for you to
listen to this froggy voice. But, please bear with me.

I know that I have a very limited amount of time this morning -- can you hear me?

COMMISSIONER O’DONNELL: Um hmm.

MS. HERMAN: And, what I'd like to do is begin by trying to explain how my views on sentencing are informed by my experience as a victim advocate, and my beliefs about what victims need, and how I have come to conceptualize justice for victims of crime.

I believe that in the aftermath of crime, what victims need are really, essentially, three things, regardless of the type of crime, regardless of the prison. To one extent or another, all victims need safety, they need to recover from the trauma of the crime, and they need to regain control over their lives.

And, I believe that doing all we can to address these needs is part of Government's obligation to provide justice to victims. So, that's where I'm coming from. Responding to those needs is what it means to provide justice to victims.

In order to respond appropriately to victims, it's important to understand the impact of crime on those victims. I'm sure those of you in the
The room are very aware of the fact that crime victims are at greater risk of many mental health problems, drug and alcohol addictions, teenage pregnancies, and many other social ills than the general public. I know you know those statistics.

What I'd like to stress with you today, though, is something else. And that is that there is a particular characteristic of crime that influences peoples' reactions to the trauma of that crime that's somewhat different from the other hardships that befall people.

If you imagine someone experiencing the death of a loved one from illness, versus experiencing the death of a loved one from murder; if you imagine someone's child drowning, accidentally, in a neighbor's swimming pool, versus someone's child being intentionally suffocated; if you imagine property loss from a flood, versus property loss from arson, you start to understand what I'm talking about. It's the element of human cruelty that makes the reaction to this trauma different. I'm not at all saying that the trauma is greater. Please understand that. I'm saying that it's different. And, that there are characteristics of that trauma, and that reaction, that are particularly relevant and observable in crime.
victims.

As a result of this kind of human cruelty and experiencing human cruelty in this way, crime victims, besides all those other things that I said at the beginning -- crime victims tend to be particularly sensitive to the reaction of neighbors, family, and Government officials, because Government officials represent society at large.

Your reactions either exacerbate this trauma, or help victims to overcome it. Poor treatment by Government officials -- and let's get it right there -- poor treatment tends to exacerbate alienation and distrust of others. Compassion, understanding, fair treatment helps victims overcome that trauma. It's that simple. This is what we hear from victims.

I believe -- just so again you know where I'm coming from here -- I believe that the criminal justice system is offender-oriented and is likely to remain so. I believe that there should be a separate path to justice, called parallel justice, for victims of crime, one that does not depend on the arrest and adjudication of offenders to provide justice for victims.

I also believe, though, that the traditional
criminal justice system should be as victim-oriented as possible, and that it can address many of victims' needs.

Giving victims opportunities for meaningful participation in the criminal justice system is part of providing justice for victims. And, I believe that it is in society's interest to maximize those opportunities.

Let me try and explain why I think victims' participation in the criminal justice system is important. First, on the most basic level, it is our civic duty. It is something that we say to victims they owe society to testify. We need them to be witnesses to aid in fact-finding. A lot of resources over the past few decades have been devoted to encouraging victims to participate in the system, to enable prosecutions to proceed.

That participation can also be extremely therapeutic for victims. It's part of regaining control over their lives. First of all, they gain information about the crime, and they understand first hand how the system is handling the crime. That information, that experience, is enormously helpful.

Secondly, they provide information themselves, through testimony, or through a victim
impact statement. Telling your story, having somebody listen, can be very important.

The court, representing the State and society at large, can acknowledge the harm that was done, perhaps for the first time for that victim. Perhaps it's the first time that anyone has. It may certainly be the first time anyone in authority has shown the victim that they care, or said explicitly "What happened to you was wrong."

That is not a statement that we typically hear from police officers, prosecutors. It doesn't mean that they don't think it, but they don't often think to say it. This is something that can happen explicitly in a courtroom -- "What happened to you was wrong."

This relationship between victims and the courts has been defined through legislation enacted over the last three decades. Victims' rights tend to fall into three categories: the right to information and notice, the right to participation, and the right to restitution.

I know that at your -- at least I was told that at your last meeting, the Commission had a full presentation on victims' rights in New York State, so I will not limit them here. You got that in your
I would just like to call your attention to language in Article 23, the Fair Treatment Standards, that asks judges to take steps to ensure that victims' rights have been implemented. There is other language that asks agencies to implement victims' rights, quote, "where possible," close quote. And, further language that stipulates that Article 23 creates no cause of action or injunctive relief. I would say that these are mixed messages, to say the least.

So, given that background, when victims' rights are not implemented or enforced, when victims are not invited to participate when they have a legal right to do so, when victims are misled about the purpose of their participation, when restitution is not considered by judges, or restitution is ordered but not collected, we further alienate victims and increase their lack of trust and confidence in our criminal justice system.

So, recommendations. I have four clear recommendations.

First, the right to present a victim impact statement should be implemented and enforced. Prosecutors and judges must be clear to victims about the limited purpose of a victim impact statement. It
is an opportunity for the victim to express, in their own words, the impact of the crime. Victims' views do not control sentencing decisions, and victims should know this.

This phase of a trial also presents an opportunity for the court to acknowledge the harm experienced by the victim. Judges should be encouraged to do so.

Second, victim safety should be a mandatory consideration in sentencing. Conditions of any form of release or probation should document victim safety -- should be factor -- I'm sorry. Conditions of any form of release or probation should factor in victim safety and emotional needs, even if a full order of protection is not indicated.

Orders of protection also should always be considered. And terms -- this is important -- terms of all orders of protection should be immediately -- immediately communicated to the departments of police, correction, probation, or parole, as appropriate.

The third recommendation. Restitution should always be considered and enforced. Restitution is particularly important to victims. A restitution order is recognition by the courts that the offender has a specific obligation to the victim, to repay the
victim for specific losses. From a victim's perspective, a restitution order conveys a powerful message that their experience matters to the court, and their losses are real.

The widespread failure to enforce these orders conveys another message, that talk is cheap, that the State doesn't really mean what it says, that even victims who endure the hardship of the court process get no more than an empty promise.

The most impressive restitution model is Vermont's. In Vermont, rather than probation or another agency trying to collect restitution from the offender and giving it to the victim, there is a revolving fund that has been created. The first $10,000 of any restitution that's been ordered is paid directly from that fund, by the Government, to the victim. The Government then collects restitution from the offender. And, as you might imagine, the incentive to do so is a bit greater.

Finally, enforcement mechanisms should be created for all victims' rights. I understand that the issue of enforcement was raised at your last meeting in the context of reviewing the Fair Treatment Standards, so I'd like to tell you a bit about what other states are doing in this regard.
Several states have created a designated office or agency to receive, investigate, and attempt to resolve crime victims' complaints. South Carolina has an ombudsmen, Colorado a committee. Connecticut has a state victim advocate. The majority of complaints in those states are resolved by giving victims more information or referrals. However, these complaints may go to the investigative stage.

The ability to impose consequences on offending agencies or officials varies between the states. But, in general, it's limited. Ombudsmen-type offices are limited to investigating complaints and issuing reports. Colorado's committee may refer certain violations to the Governor, who can ask the Attorney General to bring injunctive relief.

In Wisconsin, the Victim Rights Board is authorized to issue reprimands to offending officials and seek injunctive relief in the court, or bring civil actions to assess civil forfeiture up to $1,000. Imagine that happening to a judge, or a probation officer, or district attorney.

While it is important for victims to be able to file such complaints with an agency or official, many violations of victims' rights require immediate action, a different path. Therefore, a number of
states give crime victims limited legal standing to enforce their rights.

Arizona, Florida, Indiana, and Texas all give crime victims legal standing to enforce their rights.

In Alabama, Arizona, Florida, Mississippi, and Texas, the prosecutor also has standing to assert rights on the victim's behalf.

Alaska and Connecticut give the state victim advocate the ability to advocate for the crime victim in the criminal case.

A few other states provide other remedies. Crime victims in Maryland have the right to file an application for leave to appeal to the State's Court of Special Appeals a final order denying their basic rights.

A few states, including Louisiana and North Carolina, allow victims to seek a writ of mandamus to enforce their rights. In Utah, victims may bring an action for declaratory relief, a petition for writ of mandamus, or a petition to file an amicus brief in a case affecting their rights.

So, my final recommendation to this Commission is that you create enforcement mechanisms that provide -- my final recommendation to this
Commission is that you create enforcement mechanisms that provide formal complaint mechanisms through which victims receive information or have their complaints resolved. [Thunder] I'm glad to see he agrees.

[Laughter]

COMMISSIONER O'DONNELL: Your point was made, well made.

[Laughter]

MS. HERMAN: Impose consequences on offending officials, the second part of that. And the third part, it should give victims legal standing to enforce their rights.

Thank you. I think we have time for questions. I hope we do.

COMMISSIONER O'DONNELL: Okay, thank you, very much. And, I guess that sort of practical issue always with restitution -- and I come from the federal system, where there is mandatory restitution imposed -- is, you know, how do you impose restitution on indigent defendants and expect that you're going to be able to collect it?

And, I know we have, you know, abilities to collect small amounts of money when people are incarcerated, but it's a very, very small amount of money.
So, how do you sort of balance the indigence issue and especially as it affects reentry and -- and former inmates getting on their feet, and the restitution issue for crime victims?

MS. HERMAN: Just the way you said. You have a small amount of money that's taken while they're prison. You think about taking small amounts of money while they're at their first job when they're out on parole.

Their reentry consists of paying back all of their debts to society, including their debt to the victim. When this is ignored, it's problematic.

There's -- there is actually a wonderful study that's been done, that shows that restitution is actually good for offenders, as well as victims. When offenders pay all or a large part of the restitution they owe victims, there's less recidivism than when they just pay the fine that's been imposed. So, there's something about actually paying that restitution that matters.

COMMISSIONER O'DONNELL: So, even if you don't --

MS. HERMAN: But, I think you should see --

COMMISSIONER O'DONNELL: -- even if you aren't -- aren't able to collect all of the
restitution, the very act of going through it allows
the victim to feel that they're getting addressed, and
it allows the offender to start to repay --

MS. HERMAN: Well, I think it promotes --

COMMISSIONER O'DONNELL: -- the debt to the
victim.

MS. HERMAN: -- reentry, actually. And, I
don't think that restitution should be decreased,
given someone's present earning power. I think you
assign full restitution, and you continue to enforce
it as much as you can for a long, long time -- $10 a
week, $100 a week, whatever it is that's possible.

And, I think that if we actually went beyond
the Vermont model, where they pay out the first
$10,000 and then they collect it, and give this
responsibility to a State Department of Revenue that
knows how to collect money from people, rather than
have this be a responsibility of probation or a
victims' organization, I think you would see a
tremendous amount of success in collecting
restitution.

COMMISSIONER O'DONNELL: Yes, Tony?

COMMISSIONER BERGAMO: Thank you for coming
today.

While I agree with you philosophically, I
don't know the answers. I'm not involved with victims' rights. I'd like to hear from you. You know, if someone's wife is killed, or someone's husband is killed, and they get three bucks a week for life, it's almost like saying you're a jerk.

MS. HERMAN: I'm sorry. I only heard three bucks a week for life. What was the last --

COMMISSIONER BERGAMO: In other words, if -- if you and I were married, and I get killed by some, you know, or your child is killed, --

MS. HERMAN: Right.

COMMISSIONER BERGAMO: -- and restitution is ordered, and if the most you get out of this is -- is this person who is now re-entering, is three to five dollars a week, I don't see the -- if that was done, I would see that as a slap in my face, you know, three dollars a week, or five dollars a week.

MS. HERMAN: If you don't want --

COMMISSIONER O'DONNELL: It's almost insulting --

MS. HERMAN: -- restitution, --

COMMISSIONER O'DONNELL: -- because the amount is --

MS. HERMAN: -- if you -- well, if you don't want it, you can say so at any time.
COMMISSIONER BERGAMO: No, you're missing my point. I'd find it --

MS. HERMAN: I don't think we should not take that three or six dollars and assume that the victim is insulted.

COMMISSIONER BERGAMO: No, I --

MS. HERMAN: Give the victim the opportunity to say "Stop."

COMMISSIONER BERGAMO: Well, Professor, I'm asking you that question. How --

MS. HERMAN: Yes.

COMMISSIONER BERGAMO: -- how -- I don't know the answer to this. I'm asking you. How does the recipient feel? Is there --

MS. HERMAN: I think victims are as --

COMMISSIONER BERGAMO: Do they feel frustrated with the system? Do they feel good about it? Is there --

MS. HERMAN: There -- there is no one way that victims feel, and that's a very important thing, too, to remember, in all of these considerations. There is no one way.

 Victims' views on sentencing, in particular, vary as much as the public's. It's all a lot of stereotyping that victims are retributive, or that
they want to forgive, or that they want restoration. Their views on sentencing are as varied as everybody in this room. More so.

So, rather than assume what they feel, the best approach is to have opportunities for individual victims to tell you precisely how they feel, and then act accordingly. Many victims will -- will refuse victim compensation. They don't feel they need it. They don't want it. They don't apply for it or want it. That doesn't mean we should abolish compensation. Many victims need it.

Some victims will apply for it and then say, "You know, I don't really need this. I forgot I had insurance. They will cover my expenses."

The same thing with restitution. It could be the symbolic act of having a defendant pay restitution that means something, whether they need it or not. It could mean that they need the money. But, they'll tell you.

COMMISSIONER BERGAMO: Thank you.

MS. HERMAN: Give them the opportunity to tell you.

COMMISSIONER BERGAMO: Thank you, very much.

MS. HERMAN: Okay.
COMMISSIONER O'DONNELL: Anybody else?

MR. ANNUCCI: Just a --

COMMISSIONER O'DONNELL: Yes, Tony.

MS. HERMAN: Do you need me back there?

MR. ANNUCCI: No, I think we can hear.

COMMISSIONER O'DONNELL: Can you hear in Albany? Can you hear?

UNIDENTIFIED: It comes in and out, but yes, we can hear.

MS. HERMAN: Okay.

COMMISSIONER O'DONNELL: Well then, it might be better if you were here.

MR. ANNUCCI: Just a general observation about your points where the statutes don't create affirmative consequences while they're simultaneously creating a lot of rights.

I think part of the concern is that we deal with so many cases processing through the system, the concern is to not potentially impede the validities of pleas, or sentences, and potentially create backlogs in the system.

But, I also, from my personal experience, know that there is a tremendous political clout to crime victims in this state. We react, the highest level officials, if there is a victim issue, somebody
writes a letter saying "How did this inmate get my home address?" We jump.

We have numerous laws named after crime victims. There's a tremendous amount of political clout that victims do -- do have in this state.

And, looking at how we've evolved over the last 15 to 20 years, and how much we've added to our Penal Laws and Criminal Procedures, to give them rights to notice, to collect restitution, to -- to have an authority to say if an inmate even wants to have a name change, that they get notice of that. And, we've opposed that in certain cases where the victim wants to be able to know, to look up that inmate by his name, and know he or she is still in Attica, or whatever -- whatever other facility that person may be in. We've -- we've come a tremendously long way in this state.

So, I'm just curious, from your experience, are you getting feedback that -- specific cases where they seem to feel they're not being paid attention to, or the procedures are not being followed? Is that something in your --

MS. HERMAN: It's way beyond the specific cases. It's -- it's the common experience of victims who don't know what their rights are, aren't told or
invited to come, when they have the ability to be present in court, and be excluded from courts; are not asked to participate, when they have a legal right to participate, and have no recourse. And, we've all been --

MR. ANNUCCI: Do you -- do you think that's more from the prosecution end, or from the judge's end, or is it a combination?

MS. HERMAN: I think it's everybody. I think -- I think, as you know, there's a -- a new policy that prosecutors now have to mail victims pamphlets about their rights. That's good. That -- that is still -- that's a first step. They'll know they have these rights.

But, there has to be a tremendous amount of interaction between the prosecutor and the victim, for the victim to know you're supposed to be conferred with before plea bargaining. "Oops, I forgot to call you. Sorry, but we're moving ahead. The arraignment was yesterday. The first witnesses were yesterday, but if you want to come tomorrow, you can."

There's a victim impact statement. Well, yeah, you can submit something in writing or not, you can speak. Is it really fully explained what that victim impact statement is?
When you have a disagreement between the views of the victim and the views of the prosecutor, we've got a lot of victims who weren't asked to give a victim impact statement. And, there are lots and lots of problems.

And, these rights are fabulous, and there are thousands and thousands of victims' rights on the books all over the United States. They are not implemented and they are not enforced. And, everybody in this room knows about rights without remedies. It's a problem.

COMMISSIONER ALEXANDER: Yeah, and I certainly have to agree with Tony that, you know, we've come a long way. We've got many rights of -- victims' rights on the books.

From a parole perspective, you know, we're duty bound to enforce those rights. Victim impact statements, we have board members that are interviewing our victims all the time.

I think the issue, though, becomes whether or not there is enough victim advocacy out there, that's spreading the word, that's actually spreading that information out there, in terms of what they're legally entitled to, and how to access certain agencies and certain systems. And, I think that is
not necessarily the law, but in terms of communicating the laws, and through resources like victim advocacy --

MS. HERMAN: That's certainly part of it, absolutely. If there were more victim advocates explaining victims' rights to victims, there would be more understanding about what those rights are. You still need to have a criminal justice system that implements and enforces those rights.

If we had judges who had checklists in front of them, so that at every stage of a trial, they could ask the prosecutor, "Has the victim been told 'X,' 'Y,' and 'Z'?' At the next stage, "Has the victim been told 'X,' 'Y,' and 'Z'? Has the victim been contacted?"

And, you could hear how many times a Probation Department says, "Well, we couldn't get that interview, couldn't find the victim. We haven't spoken to the victim."

Just understand, and have a checklist in front of you, on the bench, and ask those questions, that would go a long way, and that's something I think you could recommend.

COMMISSIONER O'DONNELL: Joe?

COMMISSIONER LENTOL: I heard you mention
in your presentation about an office of crime victims' advocate in some states.

MS. HERMAN: Yes.

COMMISSIONER LENTOL: And, in those states that have a crime victims' advocate, is it a better situation, in terms of letting victims know exactly what their rights are, as opposed to just not having anybody in an official position to communicate those rights?

MS. HERMAN: I wouldn't say -- I don't know about that part of it. What I do know is that in those states, you have something interesting, which is that you have someone who has the ability to intervene in the criminal case on behalf of the victim.

So, in Connecticut, for instance, the State Victim Advocate can come in as a third party in the middle of a criminal trial, and say "What's going on? The victim is supposed to be able to -- was supposed to be conferred with before such-and-such, or was supposed to be allowed to attend this. Why have they been excluded from the courtroom?" That's the only time we've had another third party representing the victim intervening, right there, as opposed to seeking mandamus.

COMMISSIONER LENTOL: And, with respect to
restitution, I'm a little bit confused about the concept as to whether or not it applies only to property crimes, where something has been taken from the victim?

Or, are we talking about restitution to make one whole, where nothing has been taken, but the victim has been injured or murdered?

MS. HERMAN: If the victim has been injured, has -- has suffered health problems, lost days of work because of court appearances or medical problems, speaking with the Probation Officer, or speaking with the police, or lost wages, medical expenses, you know, there is -- there are lots of things that happen to victims of violent crime. Restitution is supposed to -- by law is supposed to be considered in every case where there's a victim.

COMMISSIONER O'DONNELL: One last --

COMMISSIONER LENTOL: So --

COMMISSIONER O'DONNELL: -- question -- oh, I'm sorry.

COMMISSIONER LENTOL: Objection.

COMMISSIONER O'DONNELL: One last question.

COMMISSIONER NEWTON: No, he has his hand up already.

[Laughter]
COMMISSIONER O'DONNELL: Okay.

MR. VANCE: I'll defer to the judge.

COMMISSIONER NEWTON: No, I'm --

COMMISSIONER O'DONNELL: That's always safe for us lawyers, actually.

[Laughter]

COMMISSIONER NEWTON: No, I'll be -- he had his hand up longer. So, that's -- your turn.

MR. VANCE: Gracious, thank you, Judge.

COMMISSIONER O'DONNELL: Okay, then, two more questions.

COMMISSIONER NEWTON: A smart move.

MS. HERMAN: A wise Chair.

[Laughter]

MR. VANCE: Professor, it may require more than the time left to get the answer, and I'll follow up.

The concept of parallel justice in our work as the Sentencing Reform Commission, are there models around the country where this concept actually becomes part of -- you look -- you talk about it as being somewhat separate from the criminal justice system, but it seems that we're obviously working --

MS. HERMAN: Right.

MR. VANCE: -- within the criminal justice
system.

How do we take those concepts and embrace -- consider them in our work?

MS. HERMAN: I think there are two parts to that question. Let me just spend a little bit of time explaining it a little bit more, and then tell you where you can see some of it in action.

The concept of parallel justice flows from the idea that every crime produces both a victim and an offender and that we, as a society, need to provide justice to both the offender and the victim. The process of doing that is very different. In recognizing that convictions alone do not necessarily represent justice for all of what justice means to victims, it takes you on another path.

And, you say, well, if you don't rely on the arrest, or the adjudication, or the conviction of an offender to provide justice to victims, first of all, then you can serve all the victims where there's never been an offender identified, but you still have a victim who deserves justice. And, you start thinking about two separate paths to justice -- one for offenders, one for victims. They interact with each other. The agencies -- criminal justice agencies all have a role to play in the parallel justice for
victims. But, they have another role to play in that path to justice for offenders.

So, one example. You would see, for instance, different behavior if they embrace parallel justice all along, every single agency. Police officers, when they arrive at the scene of a crime, instead of just trying to gather evidence and determine whether there was a crime that was committed, they would also see that they have an obligation to do everything they can to prevent repeat victimization.

So, they would see the safety of that victim as another part of their mission. That's embracing parallel justice. Two separate paths, right? But, it's somewhat redefining or adding to their role.

The same would hold true of everybody in the criminal justice system that interacts with victims. They would see promoting victim safety, helping them recover from the trauma of crime, and helping them regain control over their lives as part of their mission, as well.

So, judges would ask affirmatively, explicitly -- "Have -- did you get notice of this? Have you informed the victims of 'X,' 'Y,' and 'Z'?" Judges will say to victims, affirmatively, "What
happened to you is wrong." That's acknowledgment by
the State that's very, very important.

Does that answer --

COMMISSIONER O'DONNELL: I'm going to try
to turn to the Judge's question. She was --

COMMISSIONER NEWTON: Well, I mean, it's
sort of -- I think it's -- it's a little bit a second
part to Commissioner Vance's question.

One -- one of the things that I think that
we -- that I have not heard is, you know, people say
well it's a -- it's a defendant-centered system, and
that's because constitutionally it's been designed
that way.

So, you know, we start off by saying the
judge should be a neutral magistrate. You say
victims. I just say presumption of innocence. But,
we didn't make that up. This has been our --

MS. HERMAN: I'm -- I'm acknowledging that
this is a --

COMMISSIONER NEWTON: And so, I guess the
question --

MS. HERMAN: -- defendant-centered system.

COMMISSIONER NEWTON: -- I had, to what
extent have some of these suggestions been tested on a
constitutional basis that tells us that the modelers,
Government, the hand -- the awesome hand of Government says you are charged with a crime, and this is the process. To what extent has there been conflict between growing victims' rights or some of these issues and -- and the sort of traditional mandatory constitutional imperative?

And, I also want to say I'd like to hear more about this parallel justice as a -- as a separate discipline, not so linked to the criminal justice system with its mandatory, long-standing, constitutional imperatives.

MS. HERMAN: Well, as to your first question, there's a lot of litigation, actually, where victims' rights have been challenged by defendants. And, I can -- I can get you some of those cases, if you'd like to see it.

For the most part, victims' rights have not been held to conflict with defendants' rights. In states where victims' rights are embedded in the state constitution, they're upheld at an even greater extent. The victims' right is -- is viewed as critical and important.

The only place in all the litigation that I've seen around the country where there is usually a conflict that a judge has to weigh the two rights has
to do with the defendant's right to a speedy trial.

Some states have also given victims -- many states have given victims the right to a speedy trial, as well. So, you've got the defendant and the victim, they both have the right to a speedy trial.

And, in those cases, where there have been conflicts, it's the defendant's rights that trump the victim's rights. And most victim advocates will tell you they understand that.

That's why I started out by saying I -- I understand that the criminal justice system is defendant-centered, and it's likely going to remain so. I'm not arguing to turn it into a victim-centered system. I'm arguing that it could be and should be much more victim-oriented, and that there is a separate set of responses partly conducted by criminal justice officials, partly conducted by many other actors, that should be seen as our obligation and part of providing justice to victims.

COMMISSIONER O'DONNELL: Susan, thank you.

I am --

MS. HERMAN: You're welcome.

COMMISSIONER O'DONNELL: -- you know, we -- we are going to be working in subcommittees after this. Part of our sentencing policy committee will be
working on victims' issues, and we'd like to be able
to call on you to discuss --

MS. HERMAN: Of course.

COMMISSIONER O'DONNELL: -- that concept of parallel justice and some of the concrete proposals that you advanced in greater detail.

MS. HERMAN: Absolutely.

COMMISSIONER O'DONNELL: So, thank you, very much, for being here.

MS. HERMAN: You're welcome. I think it's --

COMMISSIONER BERGAMO: Thank you, very much.

[Applause]

MS. HERMAN: -- a little bit ironic to have me talking about giving victims a voice with this voice, but -- but please hear the words.

COMMISSIONER NEWTON: You did an excellent job.

MS. HERMAN: Thank you.

COMMISSIONER NEWTON: Thank you.

COMMISSIONER O'DONNELL: Next, yes, I think Judge Fisher will be here. He did call, and he's having transportation problems. So, if you wouldn't mind --
JUDGE BRUNETTI: Sure.

COMMISSIONER O'DONNELL: Okay?

JUDGE BRUNETTI: Now, do I have to go next to this mike, or are the other mikes working?

COMMISSIONER NEWTON: Just the -- this is just for the video. It doesn't amplify.

JUDGE BRUNETTI: Oh, okay.

COMMISSIONER NEWTON: And, that's for the camera. So, they want you over there.

JUDGE BRUNETTI: Oh, they want me over there. Okay.

(Pause)

JUDGE BRUNETTI: If that's where I'm supposed to be?

COMMISSIONER O'DONNELL: Judge, at either place. If you -- if we can hear you from sitting --

JUDGE BRUNETTI: Let's see. Will they pick me up in Albany?

COMMISSIONER O'DONNELL: They will.

JUDGE BRUNETTI: Good. Because I --

COMMISSIONER O'DONNELL: Now, obviously critical to any look at sentencing is to focus on the role of the judges in sentencing, the issues that judges confront.

You know, the person who imposes a sentence
is a judge, and sentencing and the amount of
discretion judges have in sentencing, are intertwined
and critical to our look, as a Commission, on where we
think that sentencing should be reformed in New York
State.

And, one of the real experts in our state is
our next speaker, Judge John Brunetti, who has, if --
if you read his very modest bio here, occupied pretty
much every kind of role you can imagine in the
criminal justice system. He now is a Court of Claims
and Acting Supreme Court Judge in the Criminal Term.

He was a First Deputy D.A. in Onondaga
County. And, Assistant U.S. Attorney in the Northern
District of New York. And, worked for a State Senator
on the Judiciary and Codes Committee.

He teaches in law school, does lecture on
sentencing issues in New York, is a serious student of
sentencing issues in New York.

And, we are very honored that you have
agreed to speak with us today, Judge, and welcome to
the Sentencing Commission.

POLICY VIEWS ON SENTENCING REFORM
FROM THE JUDICIARY

(PART I)

JUDGE BRUNETTI: Thank you.
As I reviewed the materials that John provided me, four things became evident. The first was how broad the task and topics are that you're going to be studying. The next is, is that I'm only going to be talking about one of them, which is disparity/consistency.

The third is, is it occurs to me that every time you hear from somebody, you probably think that your task is becoming more daunting than when you agreed to join this committee, and you're shaking your heads.

And, the fourth is, is that a critical review of the Girese, Schechtman, and Brunetti memoranda only demonstrate, once again, that brilliant minds think alike.

[Laughter]

JUDGE BRUNETTI: So, I sent out the memo ahead of time, to make the most of our time together. And I know you're thinking there, after 20 pages, single-spaced, with 65 footnotes, what more could I possibly have to say? And, I have in my notes here that except for Juanita, you do not know what you're in for in terms of that.

[Laughter]

JUDGE BRUNETTI: So, let me start with what
I'm going to end with, which is that there is a
difference between approaching something as reducing
disparity, versus increasing consistency. They are
not necessarily the exact opposites of the same
points.

So, I started -- I said we would start with
the discussion topics that are on Page 5 and 6 of the
memo, and I talked about Judge A, with one day on the
bench, and Judge B, with twelve years on the bench.
What does Judge B have over Judge A?

Judge B has no training -- this is twelve
years as a judge -- has no training in deviant
behavior or sentencing, what works and what doesn't.
As I put in my memo, I suggested that Bob Maccarone
speak this year, because I met him on the Probation
Task Force.

What do we do? We apply a sense of justice,
based upon the case and background of the offender.
So, where do we get this from? Our growing up, as
lawyers and people.

Whatever we do, whatever the perception is,
it's subjective. It's the sense of the just
sentences. The judge thinks it's just, or the D.A.
does, but the defense lawyer doesn't, or the defendant
doesn't, but the victim does. And so, it's largely
subjective.

What are we supposed to do, or what do we
do? We look at the law. And, what does the law tell
us? We have to consider the purposes of punishment,
and then whatever case law there is. And, I'm not
going to list those items, because you all know what
they are by now. There's six items in the Penal Law
as to the purposes of imposing a penal sanction.

Now, as far as the case law goes, there is
admittedly an old case, and one could argue that it is
at the root of disparity. And, it's a Court of
Appeals case which is worth reading. And, it's
Farrar. It's in the memo.

The determination of an appropriate sentence
requires the exercise of discretion after due
consideration given to, among other things, the crime
charged, the particular circumstances of the
individual before the court, and the purposes of the
penal sanction, which again, I'm not going to repeat.
The law and strong public policy of this State -- now,
this is in 1981 -- mandate that the court, detach from
the outside pressures often brought to bear on the
prosecution and defense, is the one to make that
determination. Quite simply, the court must perform
the delicate balancing necessary to accommodate the
public and private interests represented in the criminal process.

So, this is the delicate balancing that, for the most part, has been entrusted to the courts. There has been some restriction in that over the years, obviously, since 1995.

However, this execution of the delicate balancing is perceived, in some instances, as creating disparity. But, this delicate balancing will not go away, and the task and the responsibility of doing it is not going to go away. It may be reassigned to either the courts, or the legislature, or some type of a grid system, but it does not go away.

This brings me to my -- the second discussion topic, which is what I call "apparent disparity." And, I say it's apparent because it's impossible to conclude, unless you get a court order to review PSRs, which you could not, I don't think -- well, maybe you could. But, unless you see the PSRs in two cases, you can't determine that the sentences are disparate because you don't know the particular circumstances of the offender that were provided to the court.

But, whatever the disparity is, real or apparent, there are at least three potential causes.
And, the first two involve the Executive Branch.

And, the first is the individual result that's caused by plea bargaining. That's offense-level result, which is solely an Executive Branch function. Or, in the case of a jury providing a verdict on a lesser offense, the jury. But, it's primarily an Executive Branch function.

The next is what may be an Executive Branch function, is the reduction of the charge on condition that there be an agreed-upon sentence for a particular offense. Again, it's an Executive Branch function.

And the third, of course, is the judicial function. It's an exercise of discretion by human beings who take into account each of those five or six factors on sentencing, but the individual person, in that case, in that court, places greater emphasis on one of those six, perhaps, than the same judge would in the same case. What's the emphasis going to be?

I'll use a different example than the one in the memo, about the Boy Scout with the violent felony. What about somebody who's 19 and does a commercial burglary, and has no priors? How is that person treated in one county from the next, in the same county by the same judges, in the same county by individual assistant district attorneys? And, the
larger the D.A.'s office, you probably would see that there might be differences, which is an indication to you as to what you may or may not seek to achieve in controlling whatever the cause may be.

So, I said earlier that there's a difference between approaching something in eliminating or reducing disparity versus increasing consistency. And, the difference is, is that increasing consistency is, in and of itself, an independent, laudable goal for the Commission, and you don't need to find out whether there's disparity, real or apparent, if consistency is a specific, laudable, independent goal.

I'm going to sound like George Carlin for a minute, when he talks about words, but disparity is a negative. It's a consequence of a particular system, and it variably prompts the problem solver to focus on that, and it causes them to literally think inside the box. Whereas, consistency is an independent, laudable goal that provides the creative thinker the opportunity and, in fact, points them to a wide variety of alternatives without any kind of limitation.

Remember, though, you're never going to achieve complete consistency because of individual A.D.A.s, but even if there is a D.A.'s policy, are
they going to follow it? An elected District Attorney has a policy -- all cases are treated the same. And then, even if that occurs, you're still going to have the human being judges, and that's we -- we still are, despite what some may claim. We are still human beings, and you're going to have that factor.

Now, I'm going to mention this because I strive for consistency, and I do it sometimes by luck of having the same type of case at the same time. Sometimes, it's from my institutional memory -- what I did in a particular case. But sometimes, I order the results of my sentences only from the Clerk's Office over a period of years, and I can give them a subdivision of the Penal Law, and that will be generated for me. Now, that will not provide PSR information or anything else like that, but it will provide me something.

In my view, judicial concern for consistency starts with the judge, herself or himself. There are little -- if they're very concerned with that, then they're a little less concerned about what's happening down the hall, and then they're a little less concerned about what's happening in other counties.

So, if you want to increase consistency, particularly in the more serious offenses, one of the
possibilities is this grid system that I suggested.
And, it has to be free from constitutional defects.

One of -- one additional advantage to this,
that's it the seven advantages in the memo, is an
eighth one, which is I saw over the weekend that some
states are moving toward some kind of a jury -- a
second-stage jury proceeding on aggravating factors,
which would be very cumbersome. And, by having the
grid element-oriented under the Penal Law, you would
dispense with the need for that.

So, I'm going to be leaving you, literally,
with three things that are in this little article
summary, and they're not in this particular order.

The first is five articles that dealt with
whether or not the promulgation of a guideline system
-- whatever it is, assuming it's legal -- increased
the number of trials and decreased the incentive of
the defendant to plead guilty. And amazingly, three
out of the five showed that trials went down. But
that's obviously something you're going to be
studying.

The second is -- this is, like, named after
a TV show that went off the air -- Sentencing Reform:
When Everyone Behaves Badly. Is that a great title,
or what?
JUDGE BRUNETTI: It's by a Federal Judge. And, what could be more intriguing than that title? And, I have the answer.

It's a Columbia Law Review article that says that its findings provide information for policy makers -- you -- about two pressing issues in sentencing reform:

First, the choice of how much discretion to retain for judges within a guideline system; and

Second, the decision of whether and how to regulate mode of conviction disparity in guidelines sentences.

So, both of those topics, I'm sure, will be part of your debate. I'll be leaving them with you.

And, if anybody has any questions, I'll be glad to answer them. And otherwise, I'm looking forward to the rest of the speakers.

COMMISSIONER O'DONNELL: Well, Judge, thank you, so much. And, thank you for taking the time to really give us very thoughtful views on sentencing policy. So, we hope we can also call on you to help work with us on the sentencing policy issues, and help us do our best to get it right.

Any questions that we have at this point?
MR. ANNUCCI: Yes.

COMMISSIONER O’DONNELL: Yes, Tony.

MR. ANNUCCI: Just from your perspective as a judge on the bench, and getting down to the nitty-gritty, especially in those instances where you as a judge might feel that the potential sentence should be lower than what the District Attorney is willing to offer in a plea bargain. And, we all know plea bargaining is the linchpin for how our system operates. If we have to significantly expand to jury trials in whatever system we go to, it's going to be enormously expensive and cumbersome.

So, with that in mind, what -- I'd just be interested in hearing from you what is the one thing you most often go back to and say, "Gee, if only I had this authority?" For example, if I had the authority, as a judge, to say I can take a plea one count down and decide what the sentence is without the D.A.'s consent, what is -- what is that one thing, from your perspective, that you would say if I just had that one extra area to have more discretion?

JUDGE BRUNETTI: Well, I think that's influenced by what's next on the grid. Now, as you're talking, I'm conceptualizing something like -- like the Boy Scout burglary case --
MR. ANNUCCI: Right.

JUDGE BRUNETTI: -- that's in the -- in the notes.

MR. ANNUCCI: Right.

JUDGE BRUNETTI: He's got to get three and a half years, and he's got no prior record, and I can't do anything about it.

Now sometimes, we'll have cases where there's a multi-count indictment. The D.A.'s Office offers a one-step reduction. But the proposed sentence is actually higher than the minimum for the higher one. So sometimes, they'll plead to the entire indictment, and we'll give them a lower sentence.

But, other than -- other than allowing a judge to depart one grade level in a grid, based upon acceptance and a responsibility, for example, you could plug that into the sentencing grid without saying that a judge may accept a plea of guilty to a one-step reduction without the D.A.'s consent. You could do that, too, but that would be another way to address it.

COMMISSIONER O'DONNELL: Judge, we've heard from a couple of -- about a couple of states that really have more elaborate information systems available to judges about not only their own
sentencing practices, but other sentencing practices with the state, or within the county, or locality.

And, when we were reading your article, John Amodeo said it looks like Judge Brunetti tries to do that himself, which is -- you know, and -- and there may be other judges there -- it takes an enormous amount of work -- that -- that are trying to do it themselves, to get the information at their disposal of what they've done in similar cases.

Do you think that's a direction that we should consider moving in, in New York? Do you think it's feasible, doable, and would benefit the sentencing results?

JUDGE BRUNETTI: I think that it is a -- an independently good thing to consider. But, it should be coordinated with something else that Bob Maccarone and I discussed on the Probation Task Force, which is -- is the availability of social service/juvenile family court/adult/records. And, I'm not going to call them probation records. But, record sharing throughout the criminal justice system.

And, one of the things that was the benefit of having a statewide Probation Office was something like that. So, it could be an independent goal, or it could be coordinated with a more vast information
COMMISSIONER O'DONNELL: And, the other thing that we have heard come up, primarily in a kind of reentry kind of context, but also something that certain Probation has taken the lead on is -- is the development of risk/needs assessments for individuals, and hopefully the ideal that those kinds of assessments would be done in a pre-sentence report.

And I guess the question that comes out of that is, is that a tool that could be used by judges more effectively in sentencing?

And also, I guess the second part is, if it's a static risk instrument based really on the history of performance of similarly-situated individuals in the past, is that, you know, kind of a negative in sentencing, and pre-determining someone's sentence based on risk data that's available, or is it a helpful tool?

JUDGE BRUNETTI: I think your question demonstrates accurately that judges are not provided with the vast literature on deviant behavior and rehabilitation that is available. And, I joked in my memo that the last deviant behavior course that I took was in 1975, at S.M.U., getting my LL.M.

We -- it would help us to know, for example,
which we know intuitively or we've heard through studies, that as a person gets older, there's less and less of a chance they're going to commit a crime.

And, that's just one of the items that should be, you know, expressed to judges. We should know about it. And definitely, more information of that nature should be provided.

COMMISSIONER O'DONNELL: Could be -- could be valuable.

JUDGE BRUNETTI: Definitely.

COMMISSIONER O'DONNELL: I guess the other part of that, something that I found interesting, is -- is the vast amount of research that shows that you can make low-risk offenders worse by intervention later on, by -- by supervision, or by sentencing.

JUDGE BRUNETTI: Isn't that something?

COMMISSIONER O'DONNELL: And so, you know, I think that's a -- that's an interesting area, you know, that whether there is information out there that we could all use to guide us, both in saving money in the system, and possibly improving the outcome of sentences for low-risk offenders, if we know who they are and can predict who they are.

JUDGE BRUNETTI: You know, it's not a question of catching up, though, with the technology
and science. I mean, science, for whatever it was, existed 30 or 40 years ago about deviant behavior and things like that. So, you know, it's something that we really should -- should have been doing and should be doing.

COMMISSIONER O'DONNELL: Yes, Eric?

MR. SCHNEIDERMAN: Just following up on the idea of having more information available to judges so they can make comparisons.

Can you say something about the availability to judges of information about alternative programs, whether they could be part of a sentence in whole or in part? Is there any systematic way that people keep track of it, or is it more anecdotal?

JUDGE BRUNETTI: Well, the answer -- no, it -- look, it's influenced by funding mechanisms that are created by the State Government in certain cases. And, the example would be -- literally, the ATIP Program, which is -- was predicated, and many of you know this, on the theory that by sending this person on the violation of probation -- they have a violation of probation now -- by sending them to intensive supervision, you're going to save money at the prison system -- the state prison system level. So, that's institutionalized. So, we're provided with that.
We also get it, in certain ways, through defense advocate systems, like the Center for Community Alternatives. They submit a report. You become aware of these things.

I can't tell you where I've drawn whatever I know, if it's from being on the Probation Task Force, or I was on the Criminal Justice Advisory Board, and we met every month, and so I might have been exposed to it a little bit more.

But, it is partially institutionally conveyed to us, but I would not say in its entirety, in all the possible ways.

MR. SCHNEIDERMAN: Thank you.

COMMISSIONER O'DONNELL: Thank you.

JUDGE BRUNETTI: Okay.

COMMISSIONER O'DONNELL: Thank you, very much, Judge.

JUDGE BRUNETTI: All right. I'll leave you -- I'll leave these with John.

[Applause]

COMMISSIONER O'DONNELL: We are going to have plug ahead, because we have so much on our agenda, although not all our speakers are able to be here, because of the weather right now. And, Justice Fisher is on his way. He's headed out twice, already,
to get here. So, we have invited him to join us later, if he can get here.

But, I would like to move into the policy views on sentencing reform for the defense. And, I don't think William Gibney is here, but Jonathan is here -- Jonathan Gradess, and Gabriel Sayegh.

And, if we could start, and welcome, thank you for joining us. Hello. And oh, you are here. We're really fortunate. If you could -- yeah, if you don't mind? I think that will be very helpful.

Just by way of background, we have a very tight time frame for our Commission to issue its preliminary report. That doesn't really afford us time to do public hearings at this stage.

So, we thought that the way we could address some of those issues is to try to reach out to various constituency groups who have strong opinions about sentencing, who are impacted by sentencing, and to invite you to come and speak to the Commission in a limited time frame -- I apologize for that -- but, at least in a time frame that allows us to hear the important and deeply-felt views that we know are out there in the community.

So, we have three very esteemed representatives from the criminal defense bar with us
Meeting

July 18, 2007

today. I don't know in what order you're going to speak. Are you starting, Jonathan?

Jonathan Gradess, who I think everyone probably knows. Jonathan is the Executive Director of the New York State Defenders Association, which assists and, in many ways, represents over 5,000 public defense attorneys here in New York. And Jonathan, I think, probably understands the concerns of the public criminal defense bar better than anybody in the state.

And we're very pleased that you're joining us today, Jonathan. Thank you.

POLICY VIEWS ON SENTENCING REFORM

FROM THE DEFENSE

MR. GRADESS: That's very kind of you.

Thank you.

I wanted to share with you at the outset that I was a little nervous about coming here. I'm aware of people who have talked to you, and you've had experts. I knew that Tony would be here looking at me, and others.

And then, at about 4:00 o'clock this morning, because I live in Albany and have to travel, I woke up and thought to myself, "By God, this is not about policy. This is about people."
And, at the instant that that came to me, a stream of witnesses sort of filled my head, clients that I have known for 38 years, people that I have advocated for in a variety of jobs and positions, and have been uniquely unsuccessful on their behalf, for reasons that I will share with you.

But I want you, if you will, as I speak, to picture all of those people behind me, because they're all depending on you to do something to transform sentencing in this state. And, I want you, as I thought this morning, to share with me the thought that this is not about policy, and it's not just for New York. It's not even for the Governor. It's for people -- human beings in a system that is not now designed for them in any way, shape, or form.

So, with that opening, let me tell you what I want to do. I will not stall beyond 20 minutes, even though Bill is not here. But, I was going to start, Bill was going to go second, and Gabriel would go third.

I want to talk a little bit about history, because I think it is important to you. Some of you have been around for the entire period, and some of you not, but I think it's significant to start with the Temporary State Commission on the Revision of the
Penal Law and the Criminal Code, which took place between 1961 and 1970, a period a little bit longer than you have to work on similar revisions.

[Laughter]

MR. GRADESS: And that Temporary State Commission resulted in two real products: what I still continue to call the "New Penal Law," 40 years after its passage on September 1st, 1967; and the Criminal Procedure Law, which came into effect in 1971.

And, I urge you, as a Commission and as individuals, to go back and take a look at the architecture that was created at that instant by the linkage of both our Penal Law and CPL, because that architecture was purposeful, planned, and worked on. And, at the instant that both came into law, 1971, it was the case that any offense below murder or kidnaping was entitled to non-incarcerative sentencing.

That was an instant in time when the opportunity exists -- existed to take into account the personal characteristics of clients, to advocate for them, to have alternatives as they were necessary, to seek probation or probation with specific conditions, to have unconditional discharges or conditional
discharges, to do what was necessary to make people whole, to protect the community, to service victims and offenders.

It was an environment that provided a rich opportunity to decide individual cases. It was purposeful sanctioning, based on -- or it had the opportunity to be purposeful sanctioning based on what was appropriate in the individual case.

And all of a sudden, two years later, 24 months out, after nine years of study, a decade of work, and a very short period of time of practice, what happened was the Rockefeller drug law and the second felony offender law passed. The experiment died. It was aborted. It did not exist after September 1st, 1973.

And I can recall, to this day, being in the South Bronx, in Barry Schecht's training class at the Legal Aid Society, when after, you know, working as a paralegal in New York, and in three years of law school, and working as an advocate in fashioning sentences and taking advantage of this, they laid on our desk this thick Rockefeller second felony offender law, and altered the landscape immediately.

From that instant on, we had mandatory sentencing as the way we thought in this state. And
that is what you must, I believe, reverse.

We've had other experiences with this, and they're not particularly more savory than the first one. I say "savory" in the sense that when you look at the history of the Rockefeller drug law -- not that Rockefeller drug law that we're always trying to fix, but the one before it passed -- you read the story about Governor Rockefeller traveling to Japan, and coming back, and getting into an argument with Dominick DiCarlo. DiCarlo wanted the second felony offender law. Rockefeller wanted this. And, it was a political compromise, they got married, and that's what happened. It wasn't particularly well thought out.

But it happened, and it changed the way we could have done sentences. And, that has continued to occur in election years ever since. It has -- it was the effect in 1976, when we created, in an election year, designated felonies. It's what happened in those four hot days in 1978, when we passed the violent felony offender law. It's what happened on the same four days -- and maybe Tony who is in this room, for all I know -- when we did the juvenile offender law.

How did that one happen? Well, that was
really interesting. Hugh Carey was about to get on an airplane, and he had some reporters with him. And, he took the occasion to talk about a recent 15-year-old's homicide in New York City -- Willie Bosket, still incarcerated in our system. And he said, "You know, we're going to do a juvenile offender law." And, the next thing we knew, September the 1st, 1978, in that election, that tight election that was tight because Carey was anti-death penalty and his opponent was pro-crime, and for all those reasons, we ended up with a juvenile offender law, and a violent felony offender law. And, the definitions were as skewed then as they are now, because they made us describe things in terms that were expedient, but not particularly intelligent.

That has been what we've been doing since 1973. And, in doing it since 1973, in each of these election years, and I include in that the '90s -- I included in '78 for that law, but also '80, for the mandatory gun law, for which as far as I know and anyone here can correct me, I don't think we have any support in the empirical data for the value of a mandatory sentencing law in gun cases. And, it's certainly what we did last year, in getting a mandatory minimum for gun cases. It is a reflection of our continued failure to look at the data and to
make decisions based on it.

But, in 1995 and in 1998, we continued to do it. So, we're here on the verge of -- on the tail end of a kind of a mistaken orgy in creating mandatory sentencing, which has turned the system on its head in so many ways. And, I want to run through them, and I want to not be too long, but I want to give you my feeling about what it does to us.

It creates for us, in the minds of everyone, the presumption of incarceration associated with the concept of sentencing. I believe we have way too many people in prison. And, one of the reasons that is so is because we have no policy for separating out those who should be in from those who should be out.

We did, at one point in time, have a procedural apparatus to do that, but we bashed that procedural apparatus on the rocks of the Rockefeller drug law and the second felony offender law. What was that apparatus?

You know, we interviewed Peter Preiser a few years back. And he -- you know, he was one of the architects of the Temporary State Commission. He's still around in Albany. And, he has some thoughts on this subject, and he might be worth talking to.

He said that sentencing had become a rival
of the IRS Code in its complexity. And, he said that in 1982.

[Laughter]

MR. GRADESS: So, we can all get a sense of where we have come since then. That is the problem for us.

We had a procedural mechanism in the 1970s to deal with this. And, it was, as Preiser would also tell you, pre-sentence memoranda from the prosecution, pre-sentence memoranda from the defense, sentencing conferences, sentencing hearings, the decision about in and out based on what could now be very rich and robust data -- risk assessment data, data that you've been hearing about at the Commission, data that is now available, frankly, to confirm many of the things that some of us have been saying for many years.

That data is now available, but we don't drive sentencing with our data. We don't even make our data available for people to drive sentencing. We need to think about doing that, in particular.

But, the presumption of incarceration works this way: Think of that phrase -- and I'm sure you've heard it here -- alternative to incarceration -- ATIs. Think about what it really means. What it means is we are so used to thinking about incarceration being the
sentence of choice that anything that is non-incarcerative we call an alternative to incarceration.

We have prosecutors in this state who have grown up trying cases -- or, not trying cases, but engaging in sentencing bargaining, who have no problem saying, "Listen, I will -- we'll reduce it, but he's got to do a little time." Right?

All of these things that are wise alternative sanctions are viewed under the presumption of incarceration as a break. And, there's tremendous rule confusion, role confusion.

The person now controlling the courtroom is an Assistant District Attorney. The defense lawyer has been denuded of his or her role in advocating for an appropriate sanction. And, the judge, with all due respect to those of you who are judges in the room, have become very close to being rubber-stampers because mandatory sentencing removes from judges, and prosecutors, and defense lawyers the ability to make reasoned and deliberative determinations about the appropriate sanctions, to use the data to show us who should be in and who should be out, to articulate individual circumstances that should take people below any range of incarceration, that could construct
realistic alternatives that would make people whole.

And, I'll repeat that, because those witnesses behind me, all of those examples that I thought of this morning, were efforts to make people whole, from which I was prevented from being able to do, unable to help someone who needed drug treatment because of the nature of their charge, unable to help people needing mental health treatment in the community because of their charge, unable to help people because of their criminal record, unable to articulate a basis outside of the mandatory range why we should not be filling these DOCS facilities. We need to change that, and we need to change it as an aspect of your work product.

Now -- and the numbers -- I'm sure you've heard, but the numbers in 2004, when you add them up, it's really between 75 and 80 percent of the people going into prison are going in on mandatory time, some combination of either B felonies and A felonies that are mandatory, or pleas that are driven by how our District Attorneys decide that someone will be in.

Yet, at the same time, even though this process, one might argue, is clean, it has made sentencing confused, hard to understand, somewhat unpredictable, if not completely unpredictable.
Class B drug sales, which Bill will talk about, you know, run the gamut in this state from DTAP in the City, to 5 to 15 in the country, with no rationale for the distinction. I mentioned before last year's loaded gun legislation.

If you go back and look at the 1909 Penal Law, you'll see that we used to have, you know, all kinds of offenses which were taken care of by the Commission -- the grading of offenses -- killing a cow on a railroad track -- you got rid of all that stuff. But, we now have the experience of some poor Senator going back to Southampton and having a -- you know, a CB radio stolen from a EMS van, and there's a new larceny provision. We have made the same kind of cobbled-together mess that we had way back when.

So, I urge you to look at that, and I urge you to look, as you do, at the data, which should be really far more transparent in this state, and available to defense prosecution and the judiciary. But, the grading of offenses, in large measure, has lost its regularity, in that the probability of going to prison, given a felony drug offense in New York State is higher than the probability of going to prison for a VFO offense.

You can sell a dose of drugs as a Class B
felony, and it's the equivalent of stealing over a million bucks, right? And so, it's not an accident that victims are dissatisfied, that the defendants are not held accountable in any meaningful way. I also think, and I've seen my friend Joe, who's seat I stole, that prosecutors are deprived of the opportunity for the meaningful delivery of mercy, and the meaningful delivery of targeted sanctions. And, we need to change that.

And, I had hoped to hear the presentations by the judges, but I have to share with you also the thought that judges, in 1967 to '71, did not need specialty courts, because they were called upon to do the kind of work that we've now created separate courts. We've had to carve out exceptions because of mandatory sentencing, to give these judges the power to do what they should have been empowered to do all long. And, you need to think about that, as you go forward.

We don't need a specialty court for every human problem. We need a judge, and an advocate, and a representative of the people to marshal the evidence and decide who should be in and who should be out.

And, we need a new approach to putting people back together. And, I think I've heard it in a
remark as I was coming in here -- we know that we're pumping low-risk offenders into prison who shouldn't be there. We know that we're putting high-risk offenders in there, and we're not servicing them. And, we have no way to fix that unless we change the paradigm.

Now, I want to talk a little bit about prison and parole. They're terribly misused. I want you to think, as you think about parsing out the imprisonment, I want you to think about it as a last resort. I want you to think about it as a finite commodity. I want you to think about the application of the principle of the least restrictive alternative which used to flourish in the discussions of sentencing way back when. And, I want you to think about the nature of incarceration.

These are -- and you'll forgive me if this is insulting to anyone in the industry -- but these institutions are alien institutions. They are punitive. They take the life blood of human beings out of them. They expose people to shame and humiliation unnecessarily. There is a deliberate infliction of abnormal experience.

And then, there is a public expectation that when people come out of prison, they will be normal.
And while I admire what the Governor and this Commission, I think, has done and will do on reentry, I want to share with you that reentry has to move to the front end as well as the back end. We need to think about the integration of human beings in the context of making them whole.

I could talk, as I said to Mike on the way down here, for two more hours, but I'm going to get to the end of my presentation. I'll be happy to answer questions.

COMMISSIONER O'DONNELL: And, I appreciate that, and we will have other opportunities to talk with you, as we move forward. So, I'm sorry --

MR. GRADESS: Terrific. Moving forward --

COMMISSIONER O'DONNELL: -- yeah.

MR. GRADESS: -- is such a good segue.

I suggested, on the train down, that the product that you come up with ought to be a movement forward toward restorative justice. We need to get away from the idea of allowing people to be harmed by the sentencing decisions we make.

Forty percent of those people are coming back. And, that has been a -- to prison. It's a consistent piece of data for the last quarter century. So, there is something about what we're doing that is
intrinsically wrong.

Now, the data drives some of this, but the ability to -- to structure decision making is important, so let me tick off ten things that you need to do, and I want to leave you with a bill that was written --

COMMISSIONER NEWTON: Only ten?

[Laughter]

MR. GRADESS: Well, I've only got time for ten left. And, Judge Bing Newton will be able to tell you what they are, because they're something I probably said to her 22 years ago when we wrote the bill that I'm going to share with you.

Mandatory sentencing should be eliminated in all cases, and judicial discretion should be returned to sentencing judges.

Prosecutorial discretion in charging should not have the effect of controlling the sentencing decision; and today, it does.

Prison sentences should be uniformly shortened. That's something I would like to spend an afternoon with you on, but they should be uniformly shorter, and a non-incarcerative sentence should be available. I've been advised not to say for every offense, because it would interfere with my
credibility with you. So, I shall say at least go back to where we were from the Temporary State Commission was -- of everything less than kidnaping and murder.

But then, any of you interested could maybe talk to me, and maybe even talk to Tony, about people serving sentences for murder that shouldn't be there. I think we could talk about the recidivism, the low recidivism rate in murder.

Maybe the dialogue could once and for all become real about human beings, but I'm going to take the advice of the people that advised me not to lose my credibility with you, and suggest that prison sentences should be uniformly shorter, and a non-incarcerative sentence should be available for almost every offense, except for ones that would offend you about my credibility.

The principle of the least restrictive alternative should be the governing basis for sentencing, and the procedural system surrounding sentencing should be designed to guide, regularize, and make that rationally reviewable.

You will now say what is that? I'm going to share with you a bill that we wrote for the Black and Puerto Rican Caucus back in 1985, that did just that.
I sent it to John a little while ago. I'm giving you some extras.

We need to work on that kind of an idea, so that sentencing can become rational, equitable, predictable, and fair, and we create a common law of decision making with reference to it.

Here is the key: Incarceration should be seen and used as a last resort. There should be no presumption of incarceration. And rather, there should be an overarching principle that requires us to view prisons as a finite resource. They cost us too much, they steal money from the communities that generate crime. And, we do something -- well, let me -- let me save one thought for the end.

I think there should be a continuum of non-incarcerative, treatment-oriented, graduating -- graduated sanctions providing for increasingly onerous restrictions on liberty that should replace the in/out decision that characterizes sentencing today.

The obligation should be on the State -- and this is for you, Joe -- to establish that an incarcervative sentence, when it is being sought, is necessary to protect the public, and that no lesser sentence simultaneously respecting a client's liberty will do that.
The record of a proceeding should conclusively demonstrate that that least restrictive alternative consistent with the public safety is being imposed, and that the less drastic alternatives had been considered and rejected.

UNIDENTIFIED: You're suggesting that we should be thinking about the expansion of the criminal court and the time.

MR. GRADESS: I share with you this thought. If the speed with which we currently fashion sentences for individuals either has to be sharply reduced, as our information is increased, if we think that system penetration of an individual into a prison, or into the system at all -- non-incarcerative or incarcerative -- is important, then the deliberation about the nature of the sanction to be imposed is equally important. And, if it's not, we should be not having these cases in the first place, or suspending them, or doing something else.

There should be far greater availability and transparency regarding sentencing data, recidivism, and risk. I have pages of stuff I'd love to share with you.

Dispositional outcomes should be driven by that known information.
The law changed, you know, last year to include a new purpose for our Penal Law -- reentry and reintegration, and nothing about what we currently do is designed to accomplish that purpose. This would be.

That greater flow of information would allow us to think collegially about what should happen, what dispositional outcomes should be, and would reduce this presumptive incarcerative point of view. We could use all those procedural devices that were established in 1971 and then put on the shelf.

And lastly, I want to say this to you, as I hand out, if I might, John, or maybe I would ask, would you just pass this out for me?

This is a bill that we wrote to accomplish some of this, and John has all of it. I've given you some excerpt pages from it. It obviously needs work and it's somewhat outdated, but it responded to the question that I think will emerge, which is how the hell do we do what he said? That was the question in 1985. This is an answer that's as good today as it was then. It's at least a good start.

The last thing I want to say to you is this: Do not fool yourself into the belief that you can release the prisoners without releasing the guards.
We have an industry surrounding sentencing. And we have thousands and thousands of guards who you just can't fire.

You need to do something along the lines of what Gerry Miller did in Massachusetts. He was able to close all the juvenile facilities. He just didn't fire the staff. This would certainly take some of the heat off the Commission.

We need to be thinking about the re-training of guards. These institutions are not just bad for prisoners. They are bad — and, I've talked to the union about this — they are bad for guards. It is a terrible work environment. It is an awful thing going to an isolated job in a rural community, even if you live there, to be doing nothing but being alert all day to the fear that you might lose your life, or to being unable to be a companion to a person that you might care about when you became a correctional officer. There are high rates of suicide, domestic violence, and alcoholism. These are not pleasant places. The unions ought to be trying to close them with us. That's what the dialogue is.

But, you need to think about the practical reality that before you create a system of non-incarcerative sanctions, you have to take the
guards with you. And, it would be my great hope that you'd come up with a system that would remove both the prisoners and the guards -- the appropriate prisoners and many of the guards -- all at the same time.

I leave you with that. And still, I'd obviously be happy to answer questions and talk to you again.

COMMISSIONER O’DONNELL: Thank you.

MR. GRADESS: Thanks for having me.

COMMISSIONER O’DONNELL: Thank you, Jonathan. And, I think we'll keep questions to the end.

And, I will turn to William Gibney, who is our next speaker. William is the Acting Director of the Legal Aid Society Criminal Practice Special Litigation Unit, where he has handled a number of class action lawsuits on behalf of inmates, including inmates with mental illness.

He has been a long advocate of drug reform legislation, and has worked in the area of indigent criminal defense for many, many years.

We welcome you, and thank you for joining us this morning.

MR. GIBNEY: Thank you.

As I look around the room, I see many
familiar faces, and some of you may recognize the somewhat younger, less gray, perhaps a little thinner version of me as a person who attended many of the sessions at Governor Cuomo's Sentencing Commission.

It's a little strange to be back here over 20 years later, trying to do the same things. But, it is my sincere hope that we -- that we can get it right this time, because it represents --

COMMISSIONER O'DONNELL: Yeah, I'm sorry. I don't know if it's the speaker or if we can move it -- okay.

MR. GIBNEY: It represents a historic opportunity to change inequities in the system.

Your mission is challenging. It will take a lot of effort and discussion to find a way around the zero sum mindset that is so much a part of our daily criminal practice. The temptation from one side to use its leverage to enact its own agenda will be strong. We saw this with the last Sentencing Commission, and the result was a fractured committee with little persuasive force.

Through an open process that produces fair recommendations, you have the power to correct huge inequities in the system. If implemented, sentencing reform can make all of our communities, including the
downstate neighborhoods that produce 50 percent of the commitments to State Prisons, and those upstate towns that might face a prison closing, safer and more productive places to live.

I'll begin by talking about the use of incarceration in the United States. We are addicted to it as a society. We incarcerate more people, both in sheer numbers and per capita, than any other country on earth. For every 100,000 residents, we have 737 prisoners. Other industrialized Western democracies have in the order of England at 148, Canada at 107, and France at 85. It's just a magnitude of, like, seven times the other developed nations.

These extreme numbers are the result of over three decades -- is there a problem?

[Adjusting microphones.]

MR. GIBNEY: Is that better?

These extreme numbers are the result of over three decades of steady increases in the inmate population, driven primarily by the war on drugs.

While New York's prison population has dropped recently, New York bears the dubious distinction as a leader among the state in incarcerating drug offenders. It has one of the top
ten highest rates of drug offender admissions relative to population.

Despite the enactment of two drug law reform laws, the percentage of new admissions of drug offenders into state prison have actually risen -- risen in both of the last two years.

When viewed in light of the hugely disproportionate representation of minorities in prison, the need for reform is especially urgent. African/Americans and Hispanics make up 77 percent of the New York State prison population, and they make up about a third of our general state population.

Aggressive police practices contribute to this disproportionate numbers. One that -- one that has come to light in big way recently is the New York City Police Department's use of the stop-and-frisk practice, which stopped over a half a million people in New York City last year without probable cause.

I would like to make my first recommendation about continuing drug law reform. I won't go into great detail here. Gabriel is going to mention it in much more detail. But, there are a couple of concepts that really need to be enacted.

Judicial discretion, mentioned by Jonathan, but also increased availability of community-based
One of the problems from our point of view is that -- is the issue of control. At this point, the District Attorneys control virtually every one of the alternative to prison options through their use of -- through their control of both the initial sentence charge and the ability to plead down. The judge has very little authority to order an alternative, and defense counsel is virtually powerless in that regard. We've got to return that discretion to the judges.

States like Connecticut have recently enacted a program that allows even repeat drug offenders to be placed into drug treatment programs.

For those going to prison, the State of Washington -- some of you are familiar with that -- has a system of the State's drug offender sentencing alternative, which allows people convicted of non-violent felony offenses to get a reduced sentence and, in the case of prison, half the sentence -- half of the usual sentence rates, and then intense supervision in the community. For those people who are going -- who are deemed necessary to go to prison, that's an option that you should consider.

One glaring anomaly regarding drug law
reform needs to be addressed. Right now, A-I felony offenders can receive a sentence as low as 8 years, but there are still many old law B felony offenders in state prison who have sentences -- and B felonies are -- can be street drug sales, small quantities. There are many B felony offenders who are serving sentences up to 25 years. We have to continue the expansion of retroactivity of the drug laws that we have taken two small steps toward now.

I know that the Committee is -- an issue before the Committee is whether or not we should move to a completely determinate sentencing system. We have mixed feelings.

We have seen recently abuse of the parole system, to the point where many people have said that it just doesn’t matter what you do in prison. It involves -- it's largely for the people convicted of things that are termed violent felony offenses. It doesn't matter what you do in prison. You're going to be hit by the Parole Board three or four times before your first realistic chance of release. And so many have said that the Executive Branch, by changing parole policies, actually just re-did sentencing law in New York State, without any authorization from the legislature.
A move toward determinate sentencing does have the advantage of uniformity. Our concern about determinate sentencing is that it can be -- can be -- doesn't have to be -- but can be overly harsh, rigid, and therefore resulting in lengthy sentences. The first two steps, in 1995 and 1998, worked toward determinate sentencing in New York, increased not only the sentences, the sentence time that's being served, but also the potential exposure when almost as an afterthought, post-release supervision was tacked on.

So, we ask that any move toward determinate sentencing be accompanied by careful evaluation of the seriousness of the offense, and the study of the actual sentence practices. Assure that the punishments are proportional to the dangerousness of the offense. A 12 1/2- to 25-year indeterminate sentence cannot be translated into a 25-year determinate sentence. It really requires a much more refined evaluation of the numbers.

We are concerned that one of the proposals that was recently submitted -- called a modest proposal for reform, that you might remember, a couple of weeks ago -- that proposal would increase low-level, non-violent felony offenses for people going to state prison by 50 percent, by raising the
frequently imposed minimum sentence of one year up to
one and a half years. So, it -- it -- if you're
moving in this direction, it's vital that you get the
numbers right and you evaluate where you want lower
sentences, that you really are lowering the actual
prison time.

If you do move toward determinate sentences,
I ask that you include a provision for merit time for
all offenders. One of the problems with determinate
sentences is that it offers very little incentive for
good prison adjustment. Under the current law, merit
time is available for most non-violent felony
offenders, but for violent felony offenders.

Everyone is -- almost everyone -- as you've
heard, almost everyone is getting out of prison.
There is no reason not to prepare someone for release.
So, to the extent that you can build into a merit time
type program incentive to programs, incentive to be
good in prison, it just makes sense for everyone. We
don't want to prepare the non-violent folks and not
the violent felony offenders. The programs might be
different, but the preparation and the incentives
should be the same.

There's a good program in DOCS right now,
called the earned eligibility program, which basically
forms a contract between the prisoner and the correctional authority, when the prisoner comes into prison, which says "If you do this program, we're going to presume that you will be released early."

That's a good program. You should think about that, in terms of building in your -- your release -- your release planning and -- but expansion of this program throughout the DOCS system means expansion of -- of DOCS' capacity to provide programs.

Under the current system we see abuse because the Parole Board then -- after the prisoner comes in, does all of the program that's required, is good, earns the eligibility certificate, and then gets denied parole. So, if you're building that into a determinate sentencing system, we think that makes a lot of sense.

Pre-sentence report. Jonathan mentioned the change in the law last year regarding the -- one of the fundamental purposes of incarceration in New York, as being the promotion of successful and productive reentry and reintegration. I think this should start with the pre-sentence report.

The State of Oregon recently passed a statute that requires alternative program evaluation. Are there community-based programs that will meet the
need? Are there prison-based programs that will meet the need?

These should be part -- the reentry planning begins at the point that the person is going into prison, at -- at the -- at the pre-sentence report.

We -- so, we should require that pre-sentence reports do that type of planning. Right now, we see them as almost profunctive reports that are not much use, other than to provide details about the crime to the -- to the correctional authorities.

The judge then could implement specific portions of the pre-sentence report, would know the options in the community. Then, he might be able to order specific programming.

We think you should eliminate the distinction between violent and non-violent felonies. This has meant a -- a huge difference for the -- for the prisoners serving these sentences, but it means, objectively -- right now, the way the system is structured, it means very little, because you can be convicted of a violent felony and not have done anything violent during the course of the crime. And, in fact, some of the crimes that are listed as violent felonies don't involve violence at all.

So, we have these great differences,
distinctions, legal distinctions being made on categories that are very poorly drawn. So, it -- it might make sense, if you're -- as you're re-doing the sentencing system, to -- to punish violence more severely, but -- but punish the actual act of -- act of violence, and not on these false legal categories that right now are different.

I do have some words about the misdemeanor practice. Many of our misdemeanors are -- are listed as A misdemeanors, punishable by up to a year in prison. An A misdemeanor -- a potential punishment by up to a year in prison guarantees you the right to a jury trial. We -- New York City does not have the ability to provide jury trials to everyone who is being -- just -- it's an impossible reality.

So, what we see the practice evolving in New York City is for prosecutors, often at the last minute, often after months are served in jail, to drop the charge from an A misdemeanor to a B misdemeanor -- which is only punishable by 90 days in prison -- and is not -- it does not entitle the person to a jury trial.

We think the system should be a little more honest. If you -- if you really intend to provide jury trials to the people with the most serious of the
misdemeanors -- and the law does require that -- then
you should re-think and drop a lot of these things
that are now considered A misdemeanors to "B"s. List
the "A"s as the most serious of the misdemeanors, or
the repeat -- you can do a repeat offender statute.
That's often the justification for the potential
higher range -- but what if they do it again? You can
build that into a system for repeat offenses.

Sentencing discretion. Greater flexibility
for both the parties and the sentencing judge are
required. There has been some discussion about
changing plea bargaining rules. We wholeheartedly
endorse that.

I mean, there are ways to get around that,
by re-filing the charges, and people do this with
great frequency, but you shouldn't have to do that.
If all the parties in a criminal action agree that a
sentence should be two or three steps down from the
initial charge, after all the evidence is discovered,
why shouldn't they be free to -- to agree to that
sentence?

Penal Law 70.25.2-a requires judges to
impose consecutive sentences any time someone is
already on parole for another charge. A good example
is a drug addict. You may -- the best alternative for
that person may not be a lengthy stint in prison, but a decent rehabilitation program. This does -- the mandatory consecutive law ties the judge's hands. It's required. They can't give a short period of prison, because they have to give these sentences one on top of the other. It interferes with the ability to get into decent community-based programs.

We should consider replicating the federal system in its ability to have a presumptive sentence, but also the ability to do a downward departure in the appropriate case. This would give sentencing judges greater discretion to fashion an appropriate sentence for an individual case.

I know it's easy and the attempt has been done from Albany to form boxes. to say everything in this category should -- should come in at this sentencing range, but life is just more complex than that, and there are some cases that this shouldn't be in that box. And, judges are the best person -- the people who are in a position to determine that.

We should consider expanding youthful -- YO -- youthful offender eligibility. Right now, the cutoff age is 19. Increasing scientific evidence shows that youthful thinking -- we don't really emerge as adults until we're some time in our twenties.
So, you should consider expanding YO eligibility where a judge can say, "Yes, youth is a factor in this crime. I'm going to give you a slightly reduced sentence," to the age of 21.

Finally, I brought my own slide show, the Legal Aid version of a slide. You remember this --

[Laughter]

MR. GIBNEY: Remember -- remember that slide from a couple of weeks ago? This is a slide that shows the three communities that have 50 percent of the commitments to state prison. They are Washington Heights, and the South Bronx, and Bed-Stuy. Fifty percent of the commitments to state prison come from three neighborhoods in New York City.

You're also looking, I know, at the problem of prison closings upstate, because they already need to do them, based on what the current law is. But certainly, if you do any -- any reductions in mandatory sentences, it's going to have to be considered.

By a twist of fate, the community of Washington Heights has been linked with Dannemora and Elmira, right? They are -- they are two sides of this same coin. I think there's a potential solution there.
If we were to invest resources into bringing job training, bringing prevention programs, bringing drug treatment into the communities that most need them, think about economic development in those communities to produce jobs in those communities, we know where the problem is most severe? We know where the problem is most severe. We should put our resources into those communities.

But also, link that program to the communities upstate that might face a prison closing. We should provide support for those communities. We should -- we should do job re-training. We should be trying to do economic development in those communities, because some of them are going to face similar economic problems that are faced in the communities downstate.

This one is a little outside the box. I know we're all in a criminal justice box. We are trying to look for the right box to place this idea into, and it's not a budget box, and it's not a -- it's not a criminal justice field box. But, if you support the idea, I think your endorsement would help -- help this become a reality.
Thank you.

COMMISSIONER O’DONNELL: Thank you, very much.

[Applause]

COMMISSIONER O’DONNELL: And last, certainly -- but certainly not least, we have Gabe -- Gabriel Sayegh, who is the Acting Director -- or, I'm sorry, not the Acting Director -- who is the Director of the State Organizing and Policy Project of the Drug Policy Alliance, which works not only here in New York State, but on a national level, for reform of drug laws, and is an eloquent spokesperson on the topic.

And, we welcome you, and thank you for joining us today.

MR. SAYEGH: Thank you. Thank you.

My name is Gabriel Sayegh. I work at the Drug Policy Alliance.

I've always said, just as a bit of background about us, is that we're the largest organization of people who believe the war on drugs is doing more harm than good. We're a national organization. We have about 26,000 dues-paying members, 100,000 people that receive our e-mails, news alerts. We work in places like California, New Mexico, New Jersey, here in New York, Alabama,
Maryland, Connecticut. We've also worked in places like Texas, Louisiana, Wisconsin, Oregon, Washington. So, we've got some experience across the country in looking at drug policies and drug laws, and the intersection between public health and criminal justice.

I want to touch on something that Jonathan started out with, which is that part of what this Commission is doing, in terms of making policy recommendations, that it's not just about policy, but it's about people.

Part of the work that we do here in New York, as it relates to the Rockefeller drug laws, is to work very closely with a wide range of groups and people who have been directly impacted by the laws as they currently stand. And, I just want to bring that up as a reminder, because it's, for us -- and, I'm going to focus very explicitly on the question of drugs and the Rockefeller drug laws, of course, but a little bit bigger on the question of drugs at large. There's really key people at the center of that.

There's two people that are here, that I want to point out today, and maybe if Cheri and Ricky could also stand up. This is Cheri and Ricky O'Donoghue, who work with us very closely on
Rockefeller drug law reform work. But their son, Ashley O'Donoghue, and some of you may know this story, is currently incarcerated on a B felony first-time non-violent charge, and serving 7 to 21 years in a prison upstate.

Ashley is 24 years old now, and he's in his fourth year of incarceration. Ashley was arrested with -- in a -- part of a sting operation and there were -- you know, two kids got pot at a college. They were -- and, some of you may know this story, so excuse me if it's redundant. Those two college students were caught selling cocaine, small amounts of cocaine on their college. The prosecutor said, "Hey, if you work with us to set up who you're getting this from, you know, we'll -- we'll let you off." They said "We want a high amount. We want over two ounces, because that will trigger an A-I felony."

The students said, "We've never asked for that amount before." They asked Ashley for it. Ashley said "I've never provided that amount before," but they pressured, you know, and he went ahead and brought it up and walked right into a sting operation.

Those two college students are -- got their records sealed, where it's not even -- you know, put into prison, not -- no jail time. They were suspended
from college, but they have now completed college.
And meanwhile, Ashley is serving his prison term.

There's some key factors in here that are important to keep in mind, because it's not, unfortunately, a unlikely scenario. It's not an abnormal case. That's a case that we've seen time and time again over the years -- the last 35 years of the existence of the Rockefeller drug laws, where we have -- the reason that there's 91 percent of the people that are locked up under these laws -- people like Ashley O'Donoghue -- is not because black folks and Latinos in the State of New York use drugs at any higher rate than white people do. Every study that's been done both here in New York and across the country show that drug use or illegal drug activity -- whether that's dealing or what have you -- is roughly proportionate to the population in society of racial categories.

So, what we have is the vast majority, by numbers of drugs users or people who sell drugs and so forth, are white people. But, in our prisons today, the vast majority of people that are serving time are black and brown people.

And, I know that you all have heard a lot about this from other speakers. I'm not going to
pepper you with a lot of numbers, because you've heard a lot of those things before. But, I am going to try to touch on -- on a couple of things here.

And, just to give you a background, in terms of the work within New York here on the Rockefeller drug laws, we're part of a coalition called "Real Reform New York." It's comprised of over a hundred organizations from across the state, and we really have come together around four key things. And, I would even add a fifth. It's not on our official platform, but it's something that we talk about with great frequency.

We say what do we want, as a coalition? We say, well, we want the return of judicial discretion. That's one of the key things.

The second is sentencing -- significant sentencing reform. The sentencing reform, or the reforms that were passed in 2004 and 2005 -- and I'll touch briefly on those in a moment -- were certainly not sufficient, and they -- it was like taking one step forward when you have really thirty more to go.

The third thing is ensuring that there is access and a wholesale expansion of community-based treatment programs in the State of New York, and that those programs are accessible to community members in
And then, the fourth is retroactivity, allowing for the people that are currently incarcerated under the Rockefeller drug laws to apply for some relief based on the new sentencing mechanisms that are put into play.

And then, the fifth one, that's not on our official platform, but that we talk about quite a bit, is this idea of reentry. What do we do with all of these people that are incarcerated that are coming home? I know that, as a Commission, you all pay careful attention to this question. It's also one for us.

We say, "You know what? You have all these people that are incarcerated, many of whom -- the majority of whom are on non-violent first-time offenses. They're all going to be coming home. What resources are available to them, to their families, and to their communities, to ensure that when they come back, they don't get caught up and actually get sent back in, as many people do?"

The Rockefeller drug law was passed in 1973, as Jonathan pointed out. Not a lot of deliberation. There's a really key thing I want to point out here, in terms of the work of this committee, and the
Commission, and where -- what is the status of New York in relationship to drug policy across the country.

The Rockefeller drug laws constitute, essentially, the first type of laws of that sort -- mandatory minimums for drug offenses -- in the country, in 1973.

In the early '80s, Reagan -- and I don't remember the exact quote, and so I'm going to paraphrase slightly here -- but I believe it was in 1983, when he was in the midst of his drug -- you know, the height of the drug war and really kicking this thing off. And Nancy Reagan, I remember her saying just saying no stuff, which is good to some degree, although not entirely. Reagan said need to actually model what we're going to do federally on what's going on in New York, with their Rockefeller drug laws.

In 1986, when you had the death of Len Bias, a basketball star, Congress, literally overnight, passed 26 new mandatory minimum laws, with almost no deliberation, much in the same way that the Patriot Act was passed in 2001. The connections, we like to make those. You all may not. But nonetheless, those 26 mandatory minimum sentencing laws now shape -- and
I know that Professor Berman will be here, and he'll probably talk a lot about those today. They were passed with very little deliberation, in a moment when people -- when the drug war was very much front and center in newspapers, and in conversations in communities across the United States.

We point all that out to say that New York is actually -- well, what happens here can set a precedent across the country. And unfortunately, right now, we're at the top end of a number of things, and none of them are very good.

We have the vast majority of people that are incarcerated under our drug laws are people of color. Those racial disparities are unfit for any democratic nation, certainly unfit for New York.

The treatment accessibility across the state is abysmal. The funding that's gone into treatment over the last 30 years has not kept pace with inflation.

And, when you talk to people that are within the treatment community, and we talk -- and we ask them, you know, if we were to move, let's say tomorrow, into a treatment instead of incarceration -- to go back to Jonathan's thing, and so assuming incarceration may be the norm -- but treatment instead
of incarceration practice, where we're just diverting people, what would happen? And they say, "Our system would crumble."

The infrastructure is simply not capable, at this time, of bringing on an influx of people to effectively provide them the services that they need, without an equal influx of funding, in order to be able to do so.

But, we're not actually in -- there are some very key things that we have, that I'll talk about in just a moment, that I think provide us a sort of way out, like what are the -- what can we actually do that's effective as possible, that's not too pie-in-the-sky, but also doesn't keep us within this kind of framework that's kept us tinkering around the edges but not dealing with the core of the matter?

There's a couple of key things that I want to point to, that you all may have heard before, you know, and Jonathan and Bill both touched on them, that I think are just important to -- to touch base with here.

This issue of the reforms that took place in 2004 and 2005. The reason that we say that they're insufficient in large part has to deal with the fact that they dealt with the smallest number of people
that are incarcerated under the Rockefeller drug laws, the A-I and A-II felonies, right?

Last year, the -- I think -- or maybe it was in 2005, there were approximately 30,000 people that were arrested on drug charges in the State of New York, and 75 percent of those were for B felonies. Two percent were A-I, three percent were A-IIIs, roughly. The reforms that happened in 2005 only dealt with those A-I and A-II felonies. It said nothing about the B felonies, of which Ashley O'Donoghue is currently serving.

So, if I go out now and get arrested for selling four ounces of -- or two ounces of narcotics and get an A-I felony, I could actually get less time than Ashley did, and he's serving a B felony.

We've been trying to deal with that with a couple of pieces of legislation in 2006 and this year, in 2007, neither of which passed. They got through the Assembly, but not the Senate. That -- that piece of legislation is good. I mean, if you want to look it up, it was Assembly Bill 6663. It's a fairly comprehensive piece of legislation, and I see a number of people in the room that worked on it fairly diligently. It's -- there's a lot of worthwhile pieces in that bill.
There's a problem with the bill, though.

The framework for thinking about Rockefeller drug law reform in the State of New York has been contained almost entirely within a political arena that has been shaped by this -- I think Bill said it -- addiction to the prison, this idea that whatever is going to go on with drug use and drug abuse, our initial -- our first, and final, response is going to be the prison, and everything else is going to be an alternative to that.

Most of the reforms that have been proposed and considered with any real meaning have happened within that context. If you look at -- there is a repeal bill that does exist for the Rockefeller drug laws, that Assemblyman Aubry introduces every year, that sits in his committee -- or in your committee, Assemblyman, that never gets any play whatsoever. It's just seen as not politically expedient, and not possible. Why is that?

If we know that the laws don't work, if we know they they're ineffective, they don't actually reduce drug use and abuse in this state, they promote racial disparities, they're not in -- they're not providing any sort of legitimate, real, and meaningful investment in communities that have been devastated by
not only drug abuse, as every community is, but also the policing practices and sentencing practices that we've devised as a society to address those problems, why is a repeal so not politically expedient?

And, part of the reason for that -- and there's a number of reasons -- and I'm sure many of you may have your own -- but one that I would point out is that there has been no political platform to create that framework. I think that's part of the charge that the Commission has, or I hope that it's part of the charge the Commission has, is not just to tinker around the edges or work within that same political arena that holds that incarcerating people for things like drugs, and drug abuse, and so forth, is the right thing to do, and we just need to figure out a way to do it more humanely; but actually to think in an outside-the-box, to use that tired term in some ways, to think what does an actual outside framework look like? And, by providing that framework, it may provide a touchstone to make policy recommendations and changes that don't have us just tinkering here on the side.

And, I'm not -- I'm going to try to keep -- I'm going to be fairly short because I know, Ms. O'Donnell, you all have a lot to do today. There
is two things I want to point out here that are 
important to think about, in terms of recommendations. 
And, one is that the questions around drugs 
are, in our society for the past 35 years, have only 
been dealt with within a criminal justice paradigm. 
And, if you'll permit me to ask a question very 
quickly, I just want to know for both the 
Commissioners and the audience, how many people in the 
audience either have been a cigarette smoker or know 
someone who has been a cigarette smoker at some time? 
A lot of people. 

How many people who have either tried to 
stop, or know someone who has tried to stop, and was 
able to do so the first time? You guys are fantastic. 

So, we have a lot of people in the room that 
raised their hands, but almost nobody was able to stop 
smoking on their first time. 

Now, thank goodness for me, as a -- I smoked 
for 14 years. I started when I was 12, not the best 
thing to do. But, thank goodness for me, I was not -- 
I tried to quit numerous times. I was never arrested 
and incarcerated for it. 

And, I know this isn't a place where we're 
going to deliberate the merits or -- and I know that 
there's a Philosophy Committee, and maybe they'll do
it there, around drug decriminalization or legalization, and I don't want to propose those issues here. But, I've raised this to think there is -- there is an important element of thinking here that we need to get -- that is outside of that criminal justice framework, that actually resides within a public health framework, and that many people in the room -- most people who when I ask that question, whether we're talking about cigarettes or we're talking about alcohol -- have personal experiences with. Whether that's alcohol, we had an uncle who was an alcoholic, or a family member who was a drug addict, or we ourselves tried to stop smoking, these are experiences that most of us in this society have had contact with at one point or another.

So, we've still been stuck within this framework of dealing with those questions and problems within the criminal justice paradigm, and that's where -- that -- it's gotten us to where we are today. Where, across the United States, we incarcerate almost half a million people for drug charges across the country. We consume almost all the cocaine in the world. We incarcerate half a million people.

And, there is a statistic I want to point out here, by way of contrast. The European Union has
a hundred million more people than we do. They have a little -- around 400 million, or maybe a little more, in terms of the entire Union. For all charges, combined, they incarcerate less than 500,000 people. We incarcerate more than they do for everything just for drugs in this country.

I'm not sure if there is anybody who could make a legitimate argument, with the possible exception of the drug czar whose job it is to do so, that the U.S. drug war is working. And, this Committee is obviously not going to, you know, be able to solve those problems today.

I do hope that it comes up in the Philosophy Committee and other committees, to think through what that means for New York. But, there is something I want to point out, which is a state that's trying to think through these issues, that has some relationship to the State of New York, in the sense of population size, the amount that it's spending on incarceration, and so forth, and that's the State of California.

I know it's a little bit of negative, like California is California, in sort of its own universe, in many respects. But, with regard to criminal justice, California and New York do share some similarities that I think are worth pointing out.
In the year 2000, the State of California passed what is -- what was commonly known as Proposition 36. I’m going to pass out some fact sheets and a report on Prop 36 for all of you to look at. Maybe I can do that now. Can you all hear me if I walk around?

But, one of the significant things about Prop --

COMMISSIONER O’DONNELL: You are going to have to kind of move forward --

MR. SAYEGH: Yeah, I'm bringing --

COMMISSIONER O’DONNELL: -- to bring it to conclusion,

MR. SAYEGH: -- this to a close,

Commissioner, I do promise you.

COMMISSIONER O’DONNELL: Okay.

MR. SAYEGH: One of the things that was significant about Proposition 36 is that it actually prohibits the incarceration of people for first- or second-time non-violent drug offenses. The initiative called for an investment of $120 million for the first five years that the initiative was in play, and it diverted people out of the -- out of prison and into community-based treatment programs.

And, here's a couple of interesting things
that happened, right? Over the course of five years after that $600 million investment on the front end, $120 million a year, the State saved a billion dollars.

Over 150,000 people were diverted out of prison, into community-based treatment programs. Their success in completion of those treatment programs -- and it wasn't only abstinence-based treatment programs and there was a wide variety of treatment programs where part of the initiative was they didn't find the right treatment program for that person. People were completing at rates that were equal to or better than what was going on in drug courts, or what was going on with outside regular people walking into a treatment program or getting treatment.

Proposition 36, there is something really important within that context, that the Commission should pay careful attention to. Because, when we're talking about doing Rockefeller drug law reform, and we get down -- and we're not talking about the low-level sales and things. We're just talking about people that are using, possession. That's the part where we say, now, we want you to use some discretion on sale. But, when we get to this point about people
using? We want to step out of that discussion around
discretion almost all together, and say why is it that
the -- why is it that we decided that the courts and
prosecutors are the right people to decide what's
going -- what's going to happen to somebody who's
addicted to heroin, if that's what they've been
arrested for? We wouldn't do -- I mean, if I have
cancer, I'm not going to go talk to a lawyer -- no
offense to lawyers in the room.

[Laughter]

MR. SAYEGH: So, why do we -- why do we do
that with drug use? I mean, it's a just a question I
want to throw out.

I'm going to close with one thing here, and
I will pass out these other reports to you all. New
York is in a particularly unique position in the sense
that we have a very Jekyll-and-Hyde process by which
we develop drug policies in this state. By that I
mean that on the criminal justice side, which
dominates, it's abysmal, right? That's the monster.
We've done our drug policies through the criminal
justice paradigm. It's an utter failure. It's not
working.

If you talk to families like the
O'Donoghues, you know, you -- we can produce those
stories for you. We can do a whole day of nothing but
those stories, time and time again. It's not working.

But yet, on the public health side, New York
is actually one of the leaders in the country. At our
Public Health offices, both in the State and the City,
we have our reduction offices. Those offices are
responsible, in part, for running programs like the
syringe exchange programs here in New York City, along
with other areas of the state where they have syringe
exchange. Why is that important?

Well, in the '80s and '90s, when the HIV and
AIDS crisis was exploding here, IV drug use was
responsible for a great number of those cases. People
were sharing dirty needles. The State said we need to
reduce those transmission rates significantly, as a
public health crisis -- as a public health measure.
They started the public health syringe exchange
programs, giving clean needles to people who were IV
drug users. They saw that the transmission of HIV and
AIDS dropped among IV drug users from 63 percent in
1990 to 13 percent in 2000.

The State essentially acknowledged, within
the Public Health Department, it said people who use
-- and I am going to close -- people who use drugs are
going to be our allies in trying to address this
public health crisis. We're going -- and, we're going to use this syringe exchange program to try to enable them to have contact with treatment and so forth.

If this Commission has the time, I would -- I would strongly encourage you to reach out and talk with the Public Health Commissioner both here in the City and also in the State, so that when you're thinking through recommendations on sentencing policy as it relates to drugs, you're not doing that within a vacuum, outside of a public health framework, and actually trying to involve the public health agencies that are currently employing practices that may be useful to this Commission.

Thank you.

COMMISSIONER O'DONNELL: Thank you, very much. We appreciate that.

[Applause]

COMMISSIONER O'DONNELL: We'll be reaching out to you. We don't have any time for questions today, but I'm sure we'll have them, and we'll continue our dialogue. But thank you, so much, for being with us today.

Before moving on to the prosecution side, Judge -- Justice Fisher, I understand, is here.

JUSTICE FISHER: Yes.
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COMMISSIONER O’DONNELL: Thank you, very much.

The Judge made several attempts to weather the storm, to join us today, and Judge, if you could just come up here, we would be honored to hear from you.

Justice Fisher is one of the pre-eminent experts on criminal law and sentencing issues here in New York State. One of the most impressive parts of his bio is that he has been nominated five times by the New York Commission on Judicial Nomination as a candidate for the New York Court of Appeals. I certainly hope that he will reach the Court of Appeals one of these days. But, the reason being that Justice Fisher has such a distinguished background and career on the bench.

He serves on a number of commissions here in New York State, including the New York Committee on Criminal Jury Instructions, which he co-chairs.

He has served in so many capacities also in the judiciary throughout his career, currently on the Appellate Division 2nd Department, and previously serving as the Administrative Judge in the Queens Supreme Court.

And Judge Fisher, we’re just delighted that
you could be with us today, and thank you for making the effort.

POLICY VIEWS ON SENTENCING REFORM

FROM THE JUDICIARY

(PART II)

JUSTICE FISHER: Well, thank you so much for inviting me. And, I apologize for being late. I do have a good excuse. I come from Queens, and it's raining.

[Laughter]

JUSTICE FISHER: I have read the Governor's Executive Order, and I know what an enormous task you face, and it's a difficult one, an important one, and I don't think you have a whole lot of time within which to do it.

So, let me try to contribute by briefly discussing, from a judicial perspective, two areas of sentencing. I'm not sure if this has been gone over by previous speakers, or you've considered this.

But, they are uniformity in sentencing and the need for deterrence.

Now, any discussion of uniformity in sentence will certainly bring up the viability of sentencing guidelines. Now, as you may know -- I'm sure you do -- judges generally oppose sentencing
guidelines. Judges are public officials. Public officials generally oppose anything that is likely to limit their power, authority, or discretion. I'm not here to oppose sentencing guidelines, or to endorse them as a concept. But, I just want to offer some observations as to their usefulness in New York practice, in terms of enhancing uniformity in sentencing.

Guidelines are certainly thought to enhance uniformity, and there is a certain lack of uniformity in New York sentencing. The question is whether guidelines are the answer.

Now, you have to begin with the proposition that whenever judges have discretion, there will be a disparity in the way the discretion is exercised. No two judges exercise discretion in precisely the same way, and the review of the exercise of discretion is relatively minimal.

The Appellate Division and the Court of Appeals will generally look to see whether discretion has been abused or whether it has been, in the language of the Appellate Division, "improvidently exercised." It is rare for an Appellate court to interfere with a sentence imposed at the trial level.

Does that mean that guidelines are the
answer? Well, guidelines, of course, have problems of
their own. I'm sure you'll hear about it perhaps
later today. You know that there are constitutional
questions when guidelines are to be mandatory, as
opposed to advisory. There are constitutional issues
when a judge is permitted, under guidelines, to
increase a sentence above the ordinary by reference to
facts not found by a jury.

Guidelines are very complicated. As I
understand them, the federal guidelines involve many
hundreds of factors. The probation department has to
score defendants, and that would increase the burden
that they already carry throughout the state, and
there are many loopholes in the guidelines by which
judges can depart upward, or downward, or actually
describe them almost entirely.

Well, let me set those problems aside and
just talk about the usefulness of guidelines, whether
guidelines would be helpful in New York practice.
And, the example I would give is, as I understand it,
and I'm not a federal practitioner -- but, as I
understand it, when a defendant is convicted, and is
scored under the guidelines, among the factors --
important factors considered is whether the defendant
has taken responsibility for the crime. And that, in
turn, is reflected, for example, by whether the
defendant has entered a guilty plea. And, if so, how
soon along the process was that guilty plea entered.

Now, in New York -- and you have the
figures, but I would guess that between 80 and 90
percent of all criminal cases in New York are resolved
by guilty pleas, and the question of the usefulness of
guidelines turns, in part, upon the difference in plea
bargaining in a jurisdiction like a federal
jurisdiction, and plea bargaining in State Courts.

Now, in federal court, as I understand it,
plea bargaining mostly is charge bargaining. That is,
the prosecutor and the defense will negotiate, as to
what plea or what charge the plea will be entered to.
It may be a lesser plea. It may be one of several
pleas to cover the rest. And, there may be a promise
by the prosecutor to make a sentence recommendation,
and they rely on guidelines, and so on. The practice
is very different in New York.

In New York, plea bargaining is principally
sentence bargaining, so that when a plea is
negotiated, defendants are not so much concerned with
what charge they'll be pleading to. They're more
concerned with what the sentence will be that they
will receive. And so, as opposed to, in the federal
courts where negotiation generally goes on between prosecutors and defense lawyers, in the State process, plea bargaining occurs among the prosecutor, the defense lawyer, and the judge.

Because, in virtually every case of a plea, the judge will make some sort of plea promise -- a conditional promise, a conditional commitment -- to the defendant before the plea is entered, as to what the sentence will be. Well what, then, determines what a court will promise as a sentence in the course of plea bargaining?

Well, I think that question is answered by another question that you sometimes hear around the criminal courthouse. And, that is, what is this case worth? And, what does that mean -- what is this case worth?

It's a free market term that really relates to the volume of criminal cases pending in the particular jurisdiction, and the trial capacity in that jurisdiction. Because no jurisdiction, no court is capable of trying all the criminal cases brought in that jurisdiction. So, the idea in a particular jurisdiction is to induce defendants to plead guilty, so that backlogs are not created and the system in the jurisdiction does not collapse of its own weight.
So, what a case is worth means, given the defendant's record, and the charge lodged against the defendant, what sentence is likely to induce a sufficient number of similarly situated defendants to forego their right to trial and plead guilty so as to allow the system to continue without collapsing because of the volume? That's what a case is worth. Okay?

What a case is worth is very different in, say, Manhattan or Brooklyn, where the volume is great, than it might be in some jurisdiction upstate, where the volume is less heavy and there is less pressure to induce defendants to plead guilty. That means that the plea offers in urban jurisdictions are likely to be less. The case is worth less than the offer made upstate.

Now, if you say, well, that's a disparity, that trespasses upon considerations of uniformity, and we really ought to address that by something like guidelines, something has to give. If you establish guidelines, then either the offers will go up in Manhattan and Brooklyn, which means that fewer pleas will be entered, more trials will have to be conducted, backlogs will be created, and the system will be in danger of collapse, or offers will come
down where volume is less, judges -- more pleas will be entered, judges will have less to do, and people in the community will think that defendants are getting away with a slap on the wrist.

So, guidelines, in the context of guilty pleas, really has no relevance in a jurisdiction like New York, where plea bargaining involves sentence bargaining, as opposed to charge bargaining.

Well, what about the ten percent or so of cases that are actually tried, resolved through trial, not through guilty pleas? What is the value of guidelines for post-verdict sentences?

Well, the purpose of guidelines, of course, is to try to make uniform the sentences imposed on similarly-situated defendants. But, I'll tell you, from my experience, defendants are rarely similarly situated. They may have committed a crime, the same crime -- robbery in the first degree. They may have similar records. But, there's always something different about defendants, about their conduct, and so on.

And so, in the course of a trial, when a case goes to trial, the judge is there. The judge hears the testimony. The judge gains an intimate knowledge of the case, of the defendant's
participation in the case, of the defendant's role in the crime, whether the defendant acted cruelly, or -- or not, what the defendant's character is, what the defendant's feeling of remorse may be. The judge will pick up these factors that are intangible, sometimes, and not fully reflected in the guidelines. So, I think there are better ways to reduce disparity and enhance uniformity in sentencing and -- for post-verdict cases.

And, the way I would suggest is to narrow the ranges of authorized sentences -- narrow the ranges of authorized sentences. And, I'll tell you why, and I'll give you an example.

Suppose a defendant with no prior record decides to commit an armed robbery, either with a gun or with a knife. Never been in trouble before. No contacts with the criminal justice system. He is or she is apprehended. Charge, robbery in the first degree.

Robbery in the first degree is a Class B violent felony offense. If the defendant is convicted of that crime, what is the sentencing that's authorized for it?

Well, as I understand the law today -- and laws on sentencing seem to change regularly -- you
have to keep up with them. But, as I understand it, if that happened today, the defendant would face a minimum determinate term of 5 years, and a maximum determinate term of 25 years. That's a 20-year disparity, a 20-year range.

Now, I'm only a judge. How am I supposed to be able to find the precisely correct sentence within that very large range? And, if I were confident, and say, "Well, I can do it, I am confident that this is the correct sentence," I guarantee that next door there will be a judge who will be equally confident, in a similar case, but with a very different sentence.

So, why -- why do we have this ranges of sentencing this large? Isn't the exercise of discretion within a range of, say, five years good enough for a judge for similarly-situated defendants, even 10 years, perhaps?

But, I have to give you a caution, and that is if we are going to narrow the range of authorized sentences, we really would have to carefully re-examine the classification that we give to offenses. And, that brings me to deterrence.

As you know, I'm sure, felonies fall into generally six classifications -- A-I, A-II, B, C, D, and E. Most felonies are within B, C, D, or E.
all felonies -- and there are -- I guess there are hundreds -- are crammed into one of those pigeonholes, and those crimes -- those felonies in that classification have the same authorized sentences, with the exception of violent felonies. You've heard earlier, of course, that sometimes some felonies are designated as violent felonies, and violent felonies generally require sentences more severe than non-violent felonies, even within the same grade, and defendants who have been convicted in the past of violent felonies face greater sentences when convicted again.

Now, to me, it seems perfectly reasonable to punish most severely violent felonies, because it's important to deter violence. We want to deter all criminal conduct, but I think all of us would agree that what we want to deter most are acts of violence that cause physical injury to crime victims, or make physical injury to the victim inevitable or likely.

And, I think it's also reasonable that we want to separate violent criminals -- that is, criminals who have demonstrated a willingness to commit violence against their victim -- to separate those people from society for as long as is reasonably possible.
In contrast, of course, it burdens us all economically, and in human terms, and otherwise, to impose lengthy periods of incarceration on non-violent offenders, like those who commit certain drug offenses, and who would clearly benefit from treatment or alternative to incarceration.

Now, I think it surprises most people when they learn -- and it was just said from this podium moments ago, I think -- that there are crimes that are characterized and punished as violent felonies that involve no violence at all.

If I'm a burglar and I decide that you have in your house very valuable jewelry and money and I want to get it, and I put your house under surveillance, watching when you leave and when you come back, when your family leaves and when they come back. Why? Because the last thing in the world I want when I go in is to confront somebody in there. I'm not bringing a weapon. I don't plan on doing violence. I've never done violence. I'm just a burglar. Okay?

So, I go in, I'm successful. No one is home. I haven't heard anybody. I come out with jewelry. I'm arrested because, foolishly, I left a fingerprint or something like that.
Okay. Now, you feel violated if somebody breaks into your home. That's true, and I'm not suggesting it shouldn't be seriously punished. But, in my case, I am now charged with burglary in the second degree, with is a Class C violent felony crime. I have not committed any act of violence. And, if we're looking principally to deter violent conduct, injury to victims, we ought to be a little more careful about what call "violent felony."

Let me give you another example, from the old days when I actually sat as a trial judge. I guess this was in the '90s. I had two fellows come before me, charged with robbery in the first degree. They had entered a cab, pulled a knife, showed it to the cabbie, demanded the cabbie's money. The cabbie turned it over. They took the money, jumped out of the cab, and ran. Okay? They left the cabbie shaken, but unhurt.

These defendants were on trial before me, and were convicted of robbery in the first degree. That's a Class B violent felony offense, the maximum sentence for which is 25 years. At that time, it was indeterminate sentencing, with the maximum of 25 years.

In the next courtroom, a gentleman was on
Meeting July 18, 2007

trial, charged with attempted murder in the second
degree, also a Class B violent felony offense, and
assault in the first degree which, at that time, was a
"C" violent felony offense.

The allegation? He had doused a former
lover with gasoline, and set the lover aflame. The
lover survived, terribly disfigured, and in terrible
and long-lasting pain. As I said, the defendant was
charged with attempted murder and assault in the first
degree.

He testified. He told the jury, "Yes, I did
exactly what they said I did. But, I want to tell you
I'm not guilty of attempted murder because the last
thing on my mind was to cause this person's death.
What I wanted to cause was suffering. I wanted to
cause pain. I wanted to disfigure. That was my
purpose."

Okay, the jury listened to it and believed
it. So, the jury found the defendant not guilty of
attempted murder, and guilty of assault in the first
degree. Assault in the first degree at the time was a
Class C violent felony. Maximum sentence, 15 years.

The two guys in front of me, who had robbed
the cabbie, leaving the cabbie shaken but unhurt,
faced a maximum of 25 years. The person convicted of
assault in the first degree for terribly disfiguring, 15 years.

Now, that's nuts. Pardon my French.

Since then, assault in the first degree has been re-classified. It's now a Class B violent felony offense. So, that person would now face the same sentence as the two individuals who were tried before me.

I still think that that's wrong. It cannot be that the legislature said that the appropriate range of sentence for acts such as those I've just described should be the same. I can't see it.

You have to classify crimes and thereby produce authorized sentences so as best to deter the conduct that you want most to deter. And, the conduct you want most to deter is violent conduct, conduct that causes injury to crime victims.

And, let me just say a word about guns. For years and years, there have been efforts in the City and State to stem the flow of illegal guns. And thus far, not very successful.

Legislation was adopted providing for a mandatory one-year sentence -- and that's unduly harsh -- for the possession without a license of a loaded and operable weapon. This would bring in, for
example, the bodega owner who got a gun because he'd been robbed five times, and was caught carrying it from his house to the store. Or, the individual who had possessed a gun in his pocket because he'd been threatened and his family had been threatened.

I'm not saying that that's not right. I'm not saying that we ought not to deter illegal gun possession. We certainly should. And certainly we should make it a serious crime to brandish a weapon, for example, in the course of a robbery.

But, what I think, since I focus on injury to the vic, injury to the victim occurs not when the gun is possessed, but when the trigger is pulled. For my money, I would add a crime. I would call it the unjustified discharge of a weapon. I would make that sentence -- that crime punishable by 15 years, consecutive to whatever the defendant got in connection with the incident in which the gun was fired.

Because, I would want to send a message with respect to guns, just like I want to send a message don't injure your victim. I want to send the message: You may have a gun, you may possess a gun, you may even brandish it. But, whatever you do, if you have any concern for your future, your own future, don't
pull that trigger. Don't pull that trigger.

We should want most to deter violent behavior that injures victims. I think, therefore, that we should be careful in sentencing to treat those who cause injury in the course of a crime differently and much more severely than those who do not. And that, in turn, would require a new look at how we classify crimes and how we punish them. The classification of a violent felony should be reserved for violent felonies.

And so, in sum, I would respectfully recommend the rejection of suggestions of sentencing guidelines, in favor of an appropriate narrowing of the range of authorized sentences. And, a simultaneous review, and with great care, of the classifications of felonies, perhaps creating many more than merely six felony classifications, so as to make authorized sentences proportional to the need to punish most severely the criminal conduct society most wants to deter.

And, I thank you all for listening.

COMMISSIONER O'DONNELL: Thank you, Judge.

[Applause]

COMMISSIONER O'DONNELL: Any questions, quickly?
COMMISSIONER NEWTON: I have a question.

COMMISSIONER O'DONNELL: Yes.

COMMISSIONER NEWTON: Because I think I sort of disagree. I dissent.

JUSTICE FISHER: Okay.

[Laughter]

COMMISSIONER NEWTON: Let me just ask you this question, Judge Fisher: We've been hearing, at least from some of the practitioners, the desire to give judges more discretion, as opposed to less discretion, and you would seem to fall in the category of less discretion, by virtue of narrowing for the purposes of uniformity.

And, I guess my question is why is uniformity in the judiciary such a big to-do, when we don't require uniformity for anybody who pre-dates us, precedes us in the practice? We don't require that police have uniformity in who they decide to charge or target. We don't require that the prosecutor have some kind of uniformity in who they want to go to the grand jury, or the cases they decline. We leave that to them as executive privilege.

So, why then do we now want to put on the judiciary function this notion of uniformity by virtue of narrowing sentences to limit discretion? I'm just...
curious. What do we get out of this?

JUSTICE FISHER: Well, I think we get predictability and fairness. I just don't think that it's seemly for similarly-situated defendants to have many years of their lives determined by which judge they happen to draw in the courts.

I mean, you know it, and I know it. There are judges who, you know, have the reputation of going to the maximum immediately, and there are judges who have very different reputations. And, it just doesn't seem right to me. And, I'm not defending the lack of uniformity in police practice, or prosecutorial practice.

But, once you get into the court that's standing between the defendant and the prosecutor, that's adjudicating the issue, you want to really have some uniformity and some predictability. And that's why, for example, that I think the federal guidelines were adopted.

COMMISSIONER NEWTON: Although, with the federal guidelines, and I'm not an expert, it seems to me that the one thing they can do is depart, and that's -- that's a very good thing, and it's almost -- it's based on developing issues and facts, they have the right to engage in departure.
JUSTICE FISHER: Well, they can, but they have to point --

COMMISSIONER NEWTON: Like, to something, right, --

JUSTICE FISHER: -- to specific things, --

COMMISSIONER NEWTON: -- yes, I understand that.

JUSTICE FISHER: -- and some judges who want to exercise discretion feel that they shouldn't have to articulate specific factors. And, in the guidelines, they have to not simply articulate the factors generally, but factors generally held to be appropriate factors, and both sides can appeal, I understand, the guidelines, correct?

COMMISSIONER O'DONNELL: Correct. And, they are reversed. I mean, there really is meaningful appellate review.

Well, Judge, I want to thank you. And, I hope we can call on you as we continue in our work --

JUSTICE FISHER: Any time, and I wish you --

COMMISSIONER O'DONNELL: -- on some of these issues.

JUSTICE FISHER: -- I wish you well.

COMMISSIONER O'DONNELL: Okay. Thank you,
We are going to take a ten-minute break, and then we're going to move to the prosecution side of the issue.

(Off the record.)

COMMISSIONER O'DONNELL: The Sentencing Commission will be coming back to order.

And, I -- I have often thought, having worked as a prosecutor and as a criminal defense attorney, that your perspective on many of these issues,

UNIDENTIFIED: [Albany] I believe that the mike is not on.

COMMISSIONER O'DONNELL: -- including sentencing issues, has a lot to do with where you sit, and what your responsibility is in your particular office, and that you approach these -- oh, okay, the mike is muted? So, we'll have to -- okay.

UNIDENTIFIED: They can't hear you.

COMMISSIONER O'DONNELL: Okay, in Albany?

Okay.

And -- and that affects your perception on these issues. We know many of these issues are difficult, controversial, and that people have different perspectives.
And we've heard, essentially, the defense perspective. And now, we're going to hear the prosecution perspective.

And, I will say that while not all defense attorneys share one perspective, that's true of prosecutors, as well. So, we understand there are many different views on these issues.

But, Mike Bongiorno, our first speaker, is currently the President of the District Attorney's Association. Mike has had a very long and distinguished career. He currently is the prosecutor in Rockland County, where he has served since May, 1995.

As with many of our speakers, and experienced prosecutors and attorneys here in New York State --

UNIDENTIFIED: [Albany] You seem to be muted on your end. We can't hear you.

COMMISSIONER O'DONNELL: Okay.

MS. BIANCHI: They're coming to fix it.

COMMISSIONER O'DONNELL: They're coming to fix it.

UNIDENTIFIED: But they can't hear you up there.

[Laughter]
UNIDENTIFIED: They may be here by Tuesday, next week.

COMMISSIONER O’DONNELL: Help is on the way.

UNIDENTIFIED: Maybe I can just sign for five minutes?

COMMISSIONER O’DONNELL: Do we know where the major microphone is, though, to -- that we could try to --

UNIDENTIFIED: Is that the one at the podium?

COMMISSIONER O’DONNELL: -- fix it ourselves? Maybe up at the speakers' podium?

MS. BIANCHI: Does that do it? Did that work?

UNIDENTIFIED: [Albany] Thank you, yes. It works now.

COMMISSIONER O’DONNELL: Perfect. Okay. That's why you're the Executive Director, Gina, of the Sentencing Commission.

[Laughter]

COMMISSIONER O’DONNELL: Okay.

Mike is a graduate of the New York County District Attorney's Association, and we're delighted to have you here to speak to us today.
POLICY VIEWS ON SENTENCING REFORM

FROM THE PROSECUTION

MR. BONGIORNO: Thank you.

It's a pleasure to be here, to address the Commission on the issue of sentencing reform. I'd like to put it in a historical perspective, because as has been often said, those who do not remember history will be condemned to repeat it.

And, if you look back historically, in this country and in this state, there was a huge crime wave that really began in the late 1960s and extended into the 1990s, when we finally started to see some reductions. And, this crime wave, this tremendous increase in crime, and particularly in New York, was the result of the mainstreaming of narcotics throughout American society. I think there's no doubt that that was the key factor in bringing about increases in not just narcotics crimes, of course, but all crimes, including violent crimes.

To put this in the perspective of Rockland County, where I'm from, I spoke to the District Attorney from Rockland County, Mort Silberman, who was the District Attorney from 1960 to 1966, and I asked him how many drug cases he had. And he goes they didn't have one drug case, felony or misdemeanor, in
the six years he was District Attorney.

Narcotics now accounts for about 35 percent of my felony caseload in Rockland County. We probably indict between 200 and 250 drug felons a year, just to put it in perspective.

I believe that the laws that were passed in response to that crime wave, which in particular were the mandatory minimum sentencing laws, the predicate felony laws, and the persistent felony laws, played a vital role in providing us with the framework which has led to the tremendous and historic reduction in crime we have since about 1993, and not just in New York City and New York State, but also in Rockland County, as well.

I think those laws reflect a commonsense approach that the legislature took to a tremendous increase in crime which was destroying New York City, New York State, and many communities throughout the state. And, we were able to use those laws as tools which have now brought about, in a sense, a sense of complacency because crime has become so reduced.

Let me talk about Rockland's experience for just a bit here. Rockland County, in 1980, we'd say, which would be right in the middle of this crime wave, had 3,500-plus burglaries. That's people breaking
into homes or businesses to steal, but it can be to commit other crimes, as well. And, in Rockland County, it's burglary that is the major felony most likely to impact the average citizen. The average citizen of Rockland is not going to get mugged on the subway, because we don't have subways. But, someone can break into their home, their apartment, or their business.

The last three years in Rockland County, we have had 3,000 approximate fewer burglaries in that year. We're down to 500 and change, as opposed to 3,500. That reflects the same types of reductions we've seen in other parts of New York State, on particular types of crime. And we have focused in particular in Rockland, since I became District Attorney, on going after burglars, and career burglars and, if appropriate, seeking life sentences against them as persistent violent felons.

Why are they persistent violent felons? Because if you break into a residence where people sleep at night, a dwelling, it is a violent felony. You heard Judge Fisher mention, well, if there's no violence involved. The reason that's a violent felony is because the legislature understood that when people are home, and someone breaks in, even if it's to
steal, it has the potential for violence, including injuries and even the killing of the people in the home.

Or, if someone is burglarizing a home, and someone comes home, they have to confront the burglar which, obviously, can threaten them. That's why those are violent crimes.

And, we have put that particular law, where burglars of residences, burglary in the second degree and above, are considered violent felons -- we have used that law to sentence burglars to state prison. We have used the predicate felony laws against the burglars. And, we have used the persistent violent felony offender laws against these career burglars who have committed 100, 200 burglaries a year, and if they're incarcerated for ten years, you're saving yourself 1,000 to 2,000 burglaries over the course of that 10-year period. And that's why, in Rockland County, we have record low numbers of burglaries being committed.

You're talking about 541 burglaries in 2006, in a community of close to 300,000 people. I challenge anyone to look at any other community in the country with 300,000 people, and find fewer burglaries.
But, that has been played out not just in Rockland County, but throughout New York State, in terms of the historic reduction in crime.

Now look back historically to the 1960s. Tremendous increase in crime. The New York Times wrote a series of articles in 1972 about judges, and about the disparities in sentencing, and the fact that judges had full discretion to sentence people, and there were no mandatory minimums, for the most part, under New York law. And, what they found was a series of very disparate treatment of people, because you have one judge sentencing someone to 10 years in one courtroom, and across the hall, in a similar case, someone is getting probation.

I remember when I arrived in Manhattan in 1981 -- once again, in the middle of that crime wave -- we would sometimes get old files for people, look at their records. Now, they're back. They were back in the system.

And, I remember seeing what was called the "zip to three" sentence. Does anyone remember that? I don't know if you people go back that far.

Basically, I remember seeing in a file where a guy had committed eight or nine knife-point robberies, and the judge gave him zip to three, which
was a zero to three year sentence, which means the
moment he was sentenced, he was eligible for parole.
And, I said to myself this is -- this is ludicrous.
This is what has created the situation that we're in
today.

In response to that -- in response to that
disparate treatment and the judicial discretion, which
always needs to be disparate treatment, because you
have different people with different ideas, the
legislature passed mandatory minimum sentencing, the
predicate felony law, and the persistent violent
felony offender law. And, in particular, when it
comes to dealing with repeat offenders and violent
felons, those laws played a vital role in the
reduction of crime in New York that we see today.

Now, when I look at crime, I look at it from
the victim's perspective. I look at it as how would I
feel if it was my house broken into? How would I feel
if it was my son that was killed? How would I feel if
someone put a gun to my head when I was a clerk in a
bodega and stole money from me?

And, I have seen the pain on the faces of
these victims repeatedly. And, it -- it's shocking to
me sometimes that we in the -- in the Government
bureaucracy sometimes detach ourselves from the pain
suffered by the family members of the victims of crime -- the people who no longer can work because they've been assaulted at their work place during a robbery and now they're home, fearful of leaving their home. We've had that recently in Rockland County. The faces of the children who have lost their mother, who was killed in her own bedroom, as we had in Rockland County.

And, it's so important to have mandatory laws, because if we do not have mandatory sentencing laws, at both the violent first-time offender level, at the predicate level, and at the persistent level, you will have judges doing what they did in the 1960s which was, because of this tremendous influx of cases that the system was unprepared for, decided the best thing to do was to just move the cases along, but basically giving the cases away. That's what will happen.

And, you will have another Commission, twenty or thirty years from now, sitting here having people talk about the disparate treatment now because the judges treat people so differently, in similar or the same circumstances. That's what you will see. We'll go right back to where we were in the 1960s.

So, I'm a firm believer in mandatory
minimums, in particular for violent felons, and in particular for predicate felons. You must bear in mind most of the crimes that are committed are committed by a small percentage of the people who do them over and over again. And, that’s where you really have to focus your resources if you want to reduce your crime rate, is by taking the repeat offenders and institutionalizing them, isolating them from society so they can no longer harm the law-abiding citizens. That’s the approach I believe should be taken.

I mentioned Manhattan in 1981. When I arrived in Manhattan in 1981, things were so bad that there were judges leaving the bench because they thought the system was going to collapse. There was so much crime that we did not have time to bother indicting stolen car cases, or chain-snatch cases, or cases of that level, the D and E level felonies.

There were so many homicides by the end of the ’80s to the ’90s, that when I was on homicide call, it was a 24-hour call period where you were summoned down to go to the police departments, to work with the police on the homicide cases. A 24-hour homicide call turned into a 40-hour homicide call.

I remember one particular night being up for
40 straight hours, four murders I had to handle in one night, most of them were in Washington Heights. I couldn't get out of Washington Heights.

And the reason there were so many homicides at that time was because of the close connection between drugs and violence. Washington Heights had become the retail center for cocaine trade on the East Coast. And, there was a huge amount of violence associated with that trade, drug gangs gunning each other down, drug dealers robbing each other, people robbing drug dealers, that led to a lot of these homicides.

And, there had been a lot of people who have always tried to detach. They always talk about, "Well, you know, non-violent drug offenders." There is no such thing. The drug trade is replete with violence. It breeds violence. It breeds the crime that we see.

And, even people who themselves do not, quote, engage in violence, by simply selling drugs, in my personal view, engage in an act of violence against the people to whom they sell the drugs. I hear people talk about low-level drug dealers. "Oh, you know, this is a low-level drug dealer. He just sells a few crack vials now and then." No one is a low-level drug
dealer if they're selling drugs to someone who is a child. No one is a low-level drug dealer if they're
selling drugs to people that cause people to overdose and die, which is a huge problem that we've seen in
this state and in this country.

And, no one is a low-level drug dealer when, for greed and profit, they go out and sell as many
drugs as possible, and then flaunt it, encouraging other people to engage in the same trade. The same
trade that leads to violence and crime on a regular basis.

Just look back to the 1960s. In Rockland County, we've had two homicides only in the last 12
months. Both were drug related. In one, a drug deal gone bad, where the drug deal turned into a robbery,
in which a young boy was shot in the eye and killed. And another one, a dispute between a drug dealer and
the drug purchaser, over how much money was owed, and that led to the stabbing of the drug dealer and his
demise.

That's it. If you took drugs out of the equation for the last year, we would have had no
homicides in Rockland County, a community of 300,000 people, situated half an hour from New York City.

Now that reflects, in part, the success
story we've had in law enforcement and reducing crime, and the critical role that the sentencing laws have played in that regard.

In the bad years -- I'm going to call them the "bad years" -- I'll cite 1966 to 1972. There was a tremendous increase in crime in New York State and New York City, an 85 percent increase in violent crime in those years, but the prison population decreased by 30 percent, from 18,000 to 12,500. There's a correlation.

The people that are in prison are there because they earned the right to be there. They are the worst of the worst, the most dangerous of the dangerous, and if you let them out, they will go back and commit crimes. Do you want to go back to 18,000 people in state prison, such as 1966?

I challenge anyone today to go up, release -- I think there's about 65,000 people in state prison right now. Release 40,000 of them. And, you can pick the 40,000 you want to release. And, tell me the crime rate is going to go down. There's no way. Commonsense tells you that it's going to go up, and way up.

We talk about the drug law reform act. I can tell you how it's impacting me. Many people who
have benefitted from the drug law reform act, people who were discharged from parole early, or people who have had their sentences shortened by merit release and other provisions of the law for drug sentences? They're right back selling drugs again in the streets of Rockland County, and we're re-indicting them, and re-prosecuting them on a regular basis. I see it on their rap sheets. It comes up, statutory discharge from parole. And, they're right back selling drugs. Many of these people are not addicted to their wares. They're not in need of treatment. They didn't get treatment. They have simply had their sentences or their parole shortened. They went right back to selling drugs, the same trade that they had before.

Why? They have been encouraged now to return to the trade. They were given original sentences. Their sentences were shortened. From their perspective -- and you have to look at it from -- don't look at it from your perspective of the law-abiding citizen. Look at it from the perspective of the drug dealer. They gave me a break. They don't have the will to deal with me. There are people who are out there telling other people that dealing drugs isn't a big deal. They go out and do it again.
Now, not all of them return to selling drugs. I've had at least one guy who decided to come back and rob a bank. But still, with the drug law reform, before you do anything, look back at the results of that reform and see if those people that benefitted, who were discharged from parole early, or released from prison early because of merit release, are coming back into the system. And, you will see that there are many of them, and I can give you a list of them.

So, as you can see, I'm an advocate of mandatory sentencing. I think that you -- you know, you do have to look at the numbers. I think it's important that you look at what ranges that should exist and should not exist, in terms of the sentencing. I know that Judge Fisher mentioned before that robbery in the first degree was a large range, from a five-year minimum for a first-time offender, up to 25 years. You know, I believe that giving the judges the discretion within that range is appropriate, because I think that in many instances locking them into a five-year minimum, or them giving a little more in their discretion, serves the purposes in most of those robberies, but not all.

We recently had a robbery in Rockland
County. All the offenders were first offenders, pretty much. They broke into a Monsey Glatt supermarket -- that's a Kosher supermarket -- late at night. They robbed the place. They -- one of them used to work there, so they knew where the money was. And, they pistol-whipped the manager of the store. And, those individuals are receiving a wide range of sentences, some were as high as 13 to 15 years for the first-time robbery. They severely injured the manager, and he's the individual I mentioned before, who now is afraid to work and afraid to leave his home. So, I have no problem with, in that instance, with somebody getting 13, or 14, or 15 years for that kind of violent robbery.

But, you do have to look at the numbers on any of these sentences. The judge was right. Assault in the first degree was under-valued for years, as a C felony. Now that it's a B felony, it's in an appropriate range of sentences for people who would douse their friends or their paramours with gasoline and set them on fire in an attempt just to maim them, or injure them, or cause them pain. I certainly have no problem with that.

But, do not neglect the intimate nexus, when you look at these reforms, between drugs, narcotics,
and violent crime. Because, if you do, we're going to
go back to the bad old days.

That's not to say that I and other
prosecutors don't believe in drug treatment. We have
been at the forefront of drug treatment. Joe Hynes in
Brooklyn, in particular, with his DTAP program. We
were on the drug treatment bandwagon before the courts
ever got there. We had a Drug Court in Rockland
County before OCA and New York State started to
implement Drug Courts across the state. So, we have
done these things already.

The key thing is putting the right people in
the Drug Courts, and the drug treatment programs. If
you put the wrong people in there, you're going to
have a lack of success. You're going to have failed
programs. And, you're going to have an irate public
when someone fails out of one of these programs and
goes out and does something horrendous. So, you have
to be very careful who you put in these programs.

I do think, from an administrative
viewpoint, that the sentencing laws have become a
hodgepodge and very complicated. In order to
determine appropriate sentences, you have to look at
provisions, look at charts. We have computer programs
now in the D.A.'s Association, where you plug in the
variables. It's because over time we've changed
different laws at different times, and it's become --
there's a lack of uniformity in where to find the
laws, and how they should be applied.

And, I think there is a need to go back,
perhaps, and to bring that together in a simplified
form, so that everyone could understand it better.
Even today, we have judges, and prosecutors, and
defense attorneys that have 10, 15, 25 years'
experience, and in a particular case they go, "What?
Is it a mandatory sentence for, you know, assault in
the second degree? Does it have to be two years? Or,
can it be less?" And, the people just have a hard
time figuring these things out sometimes, especially
when you're dealing with juveniles.

So, I'm running out of time, so let me just
conclude by saying I do not view New York's sentencing
laws as being inappropriate or unnecessarily harsh. I
think they -- they fit, for the most part, a proper
balance of what we need to do to protect ourselves. I
think incarceration has played a vital role in the
historic crime reduction we've seen in New York State.
I think there's a need to simplify our laws, and unify
them, and to make them more understandable for
everyone.
And, I think the goal of this Commission should be to protect the law-abiding members of the public from those who would violate that trust and go out and victimize, repeatedly, those law-abiding people. That should be the focus.

I do not view drug dealers as victims. They are victimizers. And, I'll turn it over to my colleagues.

Thank you.

COMMISSIONER O'DONNELL: Thank you, very much, Mike.

[Applause]

COMMISSIONER O'DONNELL: All right. Our next speaker, Bridget Brennan, is widely recognized as an expert on narcotics laws investigations. Also a graduate of the Manhattan District Attorney's Office, Bridget is the Special Narcotics Prosecutor in New York City, where she's served since 1998.

Her office prosecutes approximately 3,000 felony narcotics cases a year, and has jurisdiction over narcotics crimes committed throughout the five counties of New York City.

Bridget has been responsible for many new and innovative prosecution models in the Special Narcotics Prosecutor's Office, including an emphasis
on prosecuting violent drug gangs, and as well as 
money-laundering offenses related to narcotics 
trafficking.

Bridget, thank you for joining us today.

MS. BRENNAN: Thank you, very much.

I've prepared a PowerPoint, so I'm going to 
aske that the lights be dimmed, and you're going to 
have to pull the cap off that.

(Pause)

MS. BRENNAN: There we go. Thank you, very 
much. Everybody, please try to stay awake. I know 
it's been a long morning. I want to thank you very 
much for the opportunity to speak to you today.

I have been head of the Office of the 
Special Narcotics Prosecutor for about seven years, 
and in each of those years, there has been a proposal 
to change the drug laws, but in all of those years, I 
think I have been asked to testify before a formal 
State Commission -- this is the second time. So, I 
have been frustrated myself at my own inability to 
publically bring forward the information that I feel I 
have to offer and my office has to offer on this 
issue.

I'm going to give you a little bit of an 
overview of my office and why I think we have good,
credible, important information for you, a perspective on where we are today on what the impact of the most recent drug law reform acts have had on us and our practice, and give you some suggestions for policy revisions.

I was appointed by the five City District Attorneys to serve in 1998. I was appointed as a Manhattan Assistant District Attorney in 1983. I have been serving as a prosecutor in this City for almost 25 years now. And I, like Mike Bongiorno, served as a Homicide Assistant in Manhattan during the absolute worst times of the crack epidemic.

I, too, was a Homicide Prosecutor during the days when we used to get four homicide calls a night. And, I have to tell you what a remarkable difference it is today. I hear from Homicide Assistants today that a week will go by in Manhattan, and they do not get a homicide call. I would never have believed that we could have that kind of success in Manhattan.

When I went over to Narcotics, I went over to the Office of Special Narcotics to serve in a bureau that handled very high-level narcotics offenses in 1992, and that was after my days as a Homicide Assistant. And, I was extremely frustrated when I was a Homicide Assistant because I felt that I was on the
When I looked at my homicide cases, they were all about drugs. It was people high on crack shooting each other, people shooting each other over crack spots, it was drug-related robberies, it was all about drugs, and I can't tell you how happy I was to go over and be on the front end of the problem. And, I'm extremely proud of the work that we've done in Special Narcotics.

We were established by state law in 1972, during the height of the heroin epidemic. We're staffed by Assistants from all five District Attorney's Offices. We do the high-level -- a lot of very high-level felony cases in New York State because of New York City's unique position in the narcotics world.

It's a center for many things and, unfortunately, it's a center for narcotics trafficking, as well. We import -- or many large amounts of heroin and cocaine are imported into New York City, and distributed throughout New York State, throughout the East Coast, and throughout the Midwest.

My office, along with Joe Hynes' office, pioneered incarceration to drug treatment about twenty years ago. We started to recognize that the threat of
incarceration could be turned into something positive. That people who knew that they were otherwise going to state prison could then use that -- or we could use that as leverage to help them turn their lives around.

And, we have been very successful in that effort. We have diverted literally thousands of people who were facing incarceration, and facing state prison sentences. We have diverted thousands of them to treatment instead of to prison.

Last year, we prosecuted 3,000 felony crimes. We sent 1,000 defendants -- a little over 1,000 defendants to state prison last year. And keep in mind, we handle very high-level offenses in my office.

This is the scope of our prosecution, to give you some sense of the kind of prosecutions that we handle. Very large narcotics prosecutions, online sales of drugs. And, I have to tell you, I think the most important kind of case is at the very bottom of that pyramid.

Here in New York City, we do international importation cases. And, by the way, we have no kingpin statute here in New York City or in New York State, and so my international prosecutions end up as A-I prosecutions. We do transportation cases.
But the things that affect the people in this City more than anything else are the cases on that bottom level, the cases involving street sales on your blocks, in your neighborhoods, where your kids have to stumble past drug dealers on their way to school.

Now, the participants in a street-level sale, you have to understand how the narcotics world works to understand why it’s important to us to have effective narcotics statutes, and narcotics statutes with some sort of deterrent value, you know, that have a state prison sentence attached to them.

It’s -- it’s run like a business. There’s steerers, low-level workers, lookouts, managers, money collectors.

And, this is what -- this is a surveillance tape from one of our very recent investigations. This is a case that just came down in December of this year, not too far away, on 114th Street. Senator Schneiderman, not in your District, but just next door, in Senator Perkins’ District, 114th Street, between 7th and 8th, half a block away from a junior high school, during the middle of the day.

This is crack cocaine. Sales, after sales, after sales.
This is a 220.39. This is a B felony narcotics sale offense. It's that sale, what we call a hand-to-hand.

We investigated this block and the activity on this block because there were four different stoops where these sales were going on. We conducted a three-month long investigation, based on the complaints we were getting from the neighborhood. And certainly you can understand, if your kids are walking past this on the way to school, why people would not want this going on in their neighborhood.

These are low-level, non-violent drug sellers. Currently, the first-level offender is facing a sentence of between one and nine years in state prison. The judge has discretion within that sentencing range, but the amount of time they will spend in prison is much less. It's -- depending on programs, it could be three months, maybe six months, if they get sentenced to the top count.

The people we put in prison, the ones we send to prison are the predicate felony offenders. Those are our focus. It's people who have already had one bite of the apple.

The people buying the drugs, this person right here, that's a misdemeanor offense. That is
your low-level user. That is not a person we send to prison.

We have heard about people going to prison for low-level possessory offenses. Let me tell you that the lowest level possessory offense for which state prison is mandatory -- the B possessory offense -- is about a quarter-ounce of cocaine or heroin, which translates into about 400 vials of crack -- 400 of those rocks. Now, you tell me that is a low-level user.

Now, of course, the people in that neighborhood were extremely upset about what was going on, and delighted when we worked with the Manhattan -- the Manhattan North Narcotics Division to bring down that street organization. And, my Assistants went to the community meetings, and they explained the sentences that people received as a result of this investigation. And, there were quite a number of people we sent to treatment. There were some addicts. There were people who weren't in a program for treatment because they were not addicts, or they had long violent histories or, for one reason or another, they were inappropriate for treatment.

But, the community wanted to know why they were not getting more time. That was the community's
response, because they don’t want to see these people.

This is a letter I got just a couple of weeks ago. It was received July 2nd.

"Much of Harlem has been overrun with drug dealers for many years. We’ve seen arrests of drug dealers and users taking place regularly, but we are frustrated to see the same individuals back on the streets in a short time. We also see these very same drug dealers move from street corner to street corner, to avoid the police. Numerous areas also suffer from many serious crimes, including break-ins, strong arm robberies, et cetera."

And, I can tell you, in this community where we ran this investigation, we have now had complaints from people at 113th Street, on 112th Street, because the drug dealers have merely been displaced over there, and they want the same attention to their neighborhood, and they deserve to have that same attention.

"Many people are afraid to come out of their houses, because of drug activity going on day and night. It's dangerous for children to play in front of our houses. We are concerned about the example being set for children who have been drawn into this criminal lifestyle. All these negative impacts are
directly related to the drug activities taking place on a daily basis in our community."

This is a letter I received two weeks ago.

Now, let me turn to the 2004 drug law revisions. There were two. There was the DLRA in 2004 and 2005.

And I was surprised to continue to hear references to the Rockefeller drug laws, because Rockefeller's only real contribution to the drug laws was the life sentences for narcotics offenders, and those have now been eliminated. So frankly, the Rockefeller drug laws are dead. And, I think it's misleading to continue to invoke that name.

In any event, the 2004 drug law reform eliminated life sentences. And frankly, the A-I sentences were due for reform. Some of the penalties were out of whack. You know, there were good things that came out of that, but it was done in such a way that it benefitted people who deserved no benefits.

It decreased sentences for all narcotics offenders. And, to give you some sense of what that's done to our practice, I told you that some of the individuals who were arrested on 114th Street in that surveillance video I just showed you were offered treatment. There were first-time offenders who were
offered treatment and declined because they were otherwise facing such a minimal sentence.

You know, for people who are truly addicts, deciding to give up drugs, it's a big deal, and it's very difficult. And, it may be easier to do three months in prison, or six months in prison, than to take a plea where you're promising to get in a treatment program and stay straight for a year or 18 months, and if you violate, you're going to prison. Well, they choose to do prison time instead.

And, in that 114th Street case, we had at least three people who declined prison treatment because it was easier to just do the sentence and get it over with, and we see it time and time again, and we particularly see it with our first offenders, because our first offenders typically do not go to prison.

In any event, the 2004 drug law revision increased the amounts of narcotics necessary to prosecute top narcotics offenders. And, I distributed our analysis of the impacts of the Reform Act. You should really look at that. If you're looking at possessory amounts, look at the conversions for the amounts into number of vials or glassines.

You have to understand that a half a pound
of coke is not like a half a pound of sugar. It's like a half a pound of anthrax, that the potency in one grain -- and the grain is a jeweler's measure. It's a very minuscule amount. But, the potency of one grain of cocaine is tremendous. And so, those amounts are substantial amounts.

It decreased actual prison time, expanded judicial discretion in treatment options, and provided re-sentencing for those currently in prison.

The intended results -- and these are quotes from legislators and from Governor Pataki -- was to benefit non-violent offenders, first-time offenders. There was certainly a perception that there were hundreds serving undeservedly long terms.

Here's our experience. These were our cases. And, by and large, almost all of our defendants who applied for re-sentencing were re-sentenced, from the major Colombian kingpins all the way down.

Certainly, there was one person among all those who applied for re-sentencing who fit the profile. There was one. That was somebody who was arrested in the Port Authority, transporting drugs upstate. And, it was slightly over four ounces. And, he certainly fit the profile and, you know, it was a
great thing that he was re-sentenced.

But, along with him, we had major, major traffickers, you know, major importers of cocaine into the City. We had people who were running murderous drug operations. And, in fact, we had one individual who was -- who had run a major narcotics operation in the '80s, and continued to launder money from prison. All that was brought before the judge. And, he was granted re-sentencing.

And, I think it gives you some insight into unfettered judicial discretion. There were no real limits placed on the use of judicial discretion in the re-sentencing law. And so, judges could exercise their discretion as they saw fit. And they did. And we saw very few people, you know, who were denied re-sentencing. I think there was a handful, but very few.

The 2005 revision extended re-sentencing to A-II offenders, because A-II offenders, too, had life sentences. But, most A-II offenders had been plead-downs from A-Is, and so, you know, the kind of person who was applying for A-II re-sentencing possessed 70 pounds of cocaine and a loaded .45-caliber weapon, 715 pounds of cocaine, 25 pounds of crystal meth. I mean, these are the people who
were accessing the benefits of the re-sentencing law.

Now, who are the B level offenders? Because I think that's where we are -- where the focus is. Of the ones we sent to prison, 89 percent last year had felony convictions, prior felony convictions. We sent twice as many first-time offenders to treatment as to state prison.

The effects of the DLRA, you can see since it increased the possessory amounts that are required, our B level prosecutions have increased substantially, and our A felony possessions have declined. That's what you would expect.

This is an example of one of our recent investigations. And this points out the close nexus between violence and street-level selling. This is the kind of thing we see all the time when we run these operations. We see guns, photographs of guns, people proudly displaying their guns and money.

We see nightly sales records. These are businesses. People are receiving salaries. The doorways where narcotics are being sold are rotated regularly, and there are records being kept. These are very tightly run organizations.

This is your B felony offender. Each one of those sales is a B felony offense. Under State Law,
we are not permitted to aggregate those sales. Each one is a B level felony offense.

We also should look at where New York stands with -- I know, the time. I'm almost done.

COMMISSIONER O'DONNELL: Okay.

MS. BRENNAN: There are other states that have run sentencing commissions. This one is from Minnesota, where they compared New York -- here they're comparing Minnesota to other states, but it gives you some example of where New York falls.

New York is considered, in other states, to be the most lenient. There was a Connecticut General Assembly report. This was from 1999, before we revised our statutes. That says New York's penalties on drugs are the most lenient.

And, if you compare the statutes -- and I can provide you with this information -- New York is on the first column, New Jersey on the second column, Connecticut on the last column. This is for the B level offense.

On marijuana, New York is off the charts in terms of leniency. And marijuana is a huge problem for us. We have tons of violence, violent organizations involved in the selling of marijuana, and no real way to attack that problem.
So, here are my recommendations:

Enhanced penalties for repeat marijuana sellers, and particularly marijuana sales on school grounds and in parks.

Because there's no real teeth in the marijuana laws and a lot of money to be made selling marijuana, you have a lot of robberies involved in marijuana sellers, homicides, et cetera.

Enhanced penalties for gun possessions.

There are many in controlled substance and marijuana crimes.

Give us some kind of kingpin statute.

And certainly, no further sentence reductions are needed for drug crimes.

And, retain the mandatory prison sentence for repeat offenders.

Thank you, very much. I know I went over.

Thank you.

COMMISSIONER O'DONNELL: Thank you, very much, for those exhibits.

[Applause]

MS. BRENNAN: But, I want you to know, Rob gave me ten minutes of his time.

[Laughter]

COMMISSIONER O'DONNELL: Okay. Do you have
copies of your handout, by any chance?

MS. BRENNAN: I don't have copies --

COMMISSIONER O'DONNELL: Or can you get them to us?

MS. BRENNAN: -- of my handouts. I can provide it.

COMMISSIONER O'DONNELL: If you could get it to --

MS. BRENNAN: I did provide copies --

COMMISSIONER O'DONNELL: -- Commission --

MS. BRENNAN: of some of the --

COMMISSIONER O'DONNELL: -- we'd -- we'd appreciate it.

MS. BRENNAN: -- other information. Thank you.

COMMISSIONER O'DONNELL: Our next speaker, the Honorable Rob Johnson, is really a legend in his own time.

He is the longest serving District Attorney in Bronx history. He's been serving as the D.A. in Bronx County since 1989. He is the first African/American elected District Attorney in the history of New York State.

What is equally impressive is that under Bob -- or Rob's watch, violent crime has been reduced in
Bronx County by 72 percent, and homicides by 77 percent.

Rob is forward thinking, in terms of a multi-level approach to dealing with crime, which includes treatment, a strong community outreach effort, and a strong prosecution arm.

So, we're very pleased to have you here, D.A. Johnson, and thank you for agreeing to speak to the Sentencing Commission.

MR. JOHNSON: Thank you, very much, Commissioner. Good afternoon, everyone. Thank you for inviting me.

I don't envy your task. I know how difficult a job it is that you have in front of you. And hopefully the things that all of say here today will be of some benefit to you.

I think, while I want to comment some on some of what my colleagues said -- the drug laws, and mandatory sentences, and those things. But, the first thing that I want to do is give you a perspective, a sense of who we are, and who we speak for. And, I think that's very, very important.

One of the things that was left out in that introduction of me is also that I began my career as a defense attorney, and after proceeding to be an
Assistant D.A., I became a judge. So, I think that I have a unique perspective of the criminal justice system.

Secondly, I would like to say for all of us District Attorneys -- and you'll note that I use the term "District Attorneys" and not "prosecutors." And, I do that for a reason.

All of us do more than just prosecute. And, I dare say, if you go to any District Attorney's office, in any county, any of the 62 counties in New York State right now, you will see assistants screening cases brought in by the police department, to make a determination of whether or not there is sufficient evidence to even go forward with the case. And, while that may be a small percentage of what we do, it is a very, very important role that we fill and a reason why I feel we should not be called prosecutors, because we do analyze and make judgments.

We do represent the people of the State. And we do understand that the people of this state include not only the victims, not only those who are fearful of crime, but it includes the people who come before us charged with crimes. We understand that.

I want to also dispel some misconceptions that people have about who we are and how we approach
crime. It's something that I feel that we, in my office, try to dispel the very first day our Assistant D.A.s come in the office.

And that is that in order to be a good Assistant District Attorney what you have to do is send as many people to jail or prison as you can, for as long as you can. We tell them right from the first moment that that is not our mission. That is not how you fulfill the role that we've been given.

I think that you've seen, in issues like the death penalty, how we can speak with different minds, with different voices, how we can be reasonable in our approach, how some of us have opposed the death penalty -- some of my colleagues joined the debate to oppose the death penalty. I personally did not speak out at that time, but when the law gave me the discretion, I let my community know that I believe we could do the job that you just heard -- the reduction in crime -- without utilizing the death penalty. So, District Attorneys are not always about providing the most severe penalty possible.

Reality is that we use incarceration for the violent defendants, for the person who is a threat to our community. And we use rehabilitation for the person who we believe can turn their life around and
become a productive member of our community, and not a
threat the others.

And, in addition to that, many of us are
using preventive measures. Spending time -- as you
heard reference to my community affairs department --
we spend a great deal of time teaching young kids,
from 5th grade to high school, about careers in the
law, about the negatives of drugs, about the negatives
of violence. This is some of who we are.

Yes, we believe that mandatory sentencing is
appropriate in some cases. And mandatory sentencing,
when it -- when it's said, sounds like a draconian
thing, but it's a range. It's not saying you must
sentence this first offender to 20 years. It's saying
you may sentence him to 5 to 25. That's a range.
And, that's a judgment made by both houses of the
legislature as to who is deserving of that and who is
a particular threat.

In fact, one of our greatest problems
because of the successes we've had with violent crime,
is misdemeanor crime. Nowadays, when you go to
community meetings, you hear complaints about
graffiti, you hear complaints about marijuana sellers,
and those kinds of things we have no control over, I
mean, zero, because it's totally in the hands of the
And the judiciary, unfortunately, sometimes when they see somebody coming in over, and over, and over again, still will give them time served, or still will give them a fine. And that, to me, is sending a message to people that we really are not serious about what we're doing.

So I think, at some point, even that has to be changed to where there's a minimum for whatever the number -- you pick the number -- three, five, ten? But right now, in New York State, if you commit 20 misdemeanors and have two prior felonies, if your current case is a misdemeanor, there is no mandatory sentence. You can walk right out of the court at the discretion of the judge. I think that really does not tell people we are serious.

With respect to the drug laws, the voices that have been heard on this debate throughout the recent years, that led to the changes that Special Prosecutor Brennan just alluded to, the voices have been largely those of a small group of people.

You've heard the phrase "silent majority." On this issue, like so many issues, the people who are satisfied with what's being done are not being vocal. It's the people who are either defendants or relatives
of defendants who are driving the debate.

And, in some ways, the debate is driven with
misconceptions and misrepresentations. You know,
people talk about the disparity between crack cocaine
and powder cocaine, and how unfair that is. It may be
true, but that's federal law, not New York State law.
But, that helps to flame the emotions and the concerns
of people when they look at the New York State law.

They talk about mules, the people who are
innocently -- I remember a Stevie Wonder record,
"Living For the City," when he comes up to the city,
and somebody says "run this package across the street
for me real quick." And, it turns out to be a whole
bunch of drugs, and he goes to jail. Now, who trusts
somebody that they don't know with that kind of valued
property that meets the A-I and A-II levels? That's
an issue that I think is a red herring in this.

And, in addition to that, when we look at
the statutes prior to the reforms, there were, like,
60,000 or 70,000 people, as D.A. Bongiorno said, in
state prison. There were 618 of them who were in for
A-I felonies, and that includes the ones who were
selling. And I'm certain that of the ones who were
there for possession with intent, not every single one
of them was -- was an unwitting mule who was
transporting the property. So, it was a very, very
small portion of the prison population.

With respect to drugs, sometimes when you
hear the debates, you think that we're talking about
users. Users, people who possess for their own use,
are misdemeanor defendants -- not only in marijuana,
as Special Prosecutor Brennan indicated, but also with
cocaine, powdered and crack, and with heroin.
Misdemeanor offenses.

The people who are being convicted as felons
are being charged with sale and possession with intent
to sell.

And, another issue that I think comes out is
the issue of race. People say, "Well, look at all the
African/Americans and Latinos that are being drawn up
in these drug sale convictions." Well, that's true.
And, there are African/Americans and Latinos selling.

So, those are the voices you're hearing.
But the voices you're not hearing are the voices of
the people in the communities who are, day-in and
day-out, complaining to the police department, and to
their local District Attorney, about what are you
doing about these people on my corner?

Yes, I have been in community meetings where
people are saying "I have to come home at night and I
have to step past the dealers as they're in my lot."
You saw it on the videotape.

Yes, I have been in meetings where people say "I'm afraid to send my child around the corner to school because of the dealers on the way to school."

In my county, we have 12 precincts. In New York City, there are 80-some. I'm not sure of the number of precincts. But, they all have precinct community councils.

And, on a monthly basis, there are working people in every neighborhood -- neighborhoods like Morris Park, which is largely Italian, neighborhoods like Riverdale, which has a great Jewish population, and neighborhoods like Williamsbridge Road and White Plains Road that has largely a southern and Caribbean population.

In that precinct, the 47th Precinct, they complain, day-in and day-out, about the people near day care centers on White Plains Road. Who are those people? They're marijuana sellers. We have no control, because when the legislature changed the law with respect to marijuana, they lumped in the sellers with the users, and made sale a misdemeanor also. So, the District Attorney has no control.

There are people like the Latinos and
African/Americans in the 46th Precinct, people who walked up to me at a luncheon, and say "Do you know what's going on in my block?" And that was the beginning, the genesis of a major investigation that fortunately culminated with the people from the block having a block party and a barbeque, saying "We got our block back." Those are the voices that you're not hearing on a daily basis.

These crimes, also has been already said, are -- are part of a culture that the violence cannot be minimized. The amount of violence that is around drug sales cannot be minimized.

I won't belabor it, because D.A. Bongiorno spoke about it. But, I will point you to today's New York Daily News, where two men were shot in a bodega in the Bronx, and a 63-year woman was grazed by a bullet, and the cops -- the police are investigating whether that incident was drug related. This is the kind of activity that can take down innocent people, as well as the people who are the violent drug dealers.

Finally, I want to talk a little bit about this issue of the B felonies and whether it should be completely in the discretion of the judges and not in the discretion of the District Attorneys. And people
always feel that this is a power play on the part of
the District Attorneys. But, I'm going to tell you
why it's not a power play.

It's not a power play because the judges are
responding to powers that we don't have to respond to.
The judges are responding, with all due respect, to
the Office of Court Administration, and Standards and
Goals. How quickly are we getting the cases out of
the system?

And, I know that as a former judge, and I
know that as a District Attorney who has spoken to
Administrative Judges. And, every time that has been
raised with me, I ask "What about the fair result in
the case?"

I don't care how old a case gets. If the
case is too old, then you have to fight for the
resources. You have to fight for additional judges
and additional courtrooms. You shouldn't be telling
me that I should give an unjust result because of the
age of the case.

It's appropriate for District Attorneys to
have that discretion because we have the track record.
You hear about the B felony sellers now who have the
minimum of one year and previous to the reforms, a
minimum of one to three years. And how many in the
Bronx, in the ten years from '93 to -- to 2003, 800 a year into treatment. In the last three years, the average was 900 people, over 1,000, over 1,100 in 2006 who were being put into treatment.

Those people, whether they be first offenders or second felony offenders, are only getting there into treatment with the consent of the District Attorney. And, I've sat in meetings in the D.A.'s Association, where my upstate colleagues are saying "We want to do more of it, too, but they haven't given us the resources you have. Give us the resources. Don't take away our discretion."

It's appropriate for the D.A. to have the discretion because we have a greater link to the community than the judges. The nature of being a judge is to remove yourself from the community.

You know, we had a homeowner who, with the crime of prostitution, was having people proposition her daughter in front of her house, and people defecating and urinating on the street in front of her house. And of course, it's a misdemeanor, and we had control over it. And, we tried to explain this to the judges. And, we asked to have this person just let the judges know what the condition was. And, one of the judges was gracious enough to say "Yes, she can
come in and just generally speak to us." Some of the judges walked out, because they didn't want to hear what the condition was.

But, we have to make that record. We have to be the voice of that woman. And, I understand that judges don't want to be in community meetings. Some of them come, on occasion, but not on a regular basis, that we staff every precinct council, every homeowners' association, and hear what the needs of the community are. So, that's the difference between judges and District Attorneys.

In fact, in my county, the judges, a number of whom who are Acting Supreme Court Judges, and actually even the Supreme Court Judges, don't have to live in my county. So, I have more judges in my county who live in other counties than live in the Bronx.

They don't know our problems. And, I'm not too sure that they're always as concerned about our problems as we are.

And, in fact, when compared to the District Attorney, the judges are almost anonymous. I dare even our Senator to name all the Supreme Court Judges. I couldn't do it, off the top of my head, the people who are making judgments about the people in my
But, the District Attorney does not work in anonymity. The District Attorney stands for re-election every four years. The judge stands for re-election every fourteen years. There's an accountability there for the District Attorney that is not there. If we're not doing what our communities ask us to do, whether it be tough on this case or lenient on that case, we have to be responsible for everyone in the community. If we're not doing that, we're going to know about it, and we're going to answer for it. And my two colleagues here in the room have races this year. I'm going to be a little more fortunate, I believe, this year. So, in short, we have not abandoned the notion of fairness.

But, what we're asking you to do is understand that there are voices not being heard in this debate. And please, please think about their voice, and think about the issue of public safety above all.

Thank you, very much.

COMMISSIONER O'DONNELL: Thank you, very much.

[Applause]

COMMISSIONER O'DONNELL: I want to thank
you for joining us. And, we will reach out to you
with our various subcommittees and ask you for
additional information, but appreciate you taking the
time, and the information that you've shared with us
today.

We are, at this point, going to break. We
are going to go into executive session here in the
Commission. So, I am going to ask our visitors to
leave.

We will -- we do have a speaker scheduled at
3:00 o'clock, if it's possible for you to come back.
He was having problems flying here -- Doug Berman.

(Off the record.)

COMMISSIONER O'DONNELL: Professor Douglas
Berman is here, who is a Professor of Law at Ohio
State University, a recognized national expert on
sentencing issues, co-author of a casebook entitled
Sentencing Law and Policy: Cases, Statutes, and
Guidelines.

You may frequently see Professor Berman
quoted by a number of periodicals, including the New
York Times and Washington Post, the Wall Street
Journal, on sentencing issues.

He will speak to us about future trends in
sentencing, the Federal Sentencing Guideline System,
which we haven't really focused on at any great length,

And, he weathered a great deal of peril today, coming here from Ohio. So, we're really fortunate that he made it, and persevered.

Professor Berman?

NATIONAL PERSPECTIVES ON SENTENCING REFORM

MR. BERMAN: Well, thank you, and thanks to the members of the Commission, and everybody here, for inviting me to present some perspectives.

And, I know you all have been through an extraordinarily rigorous schedule, not just today, but over the last five weeks. And, in many respects I feel fortunate, but maybe also disadvantaged to come at the end of this. Because, obviously, you've looked at a lot of the particulars and struggled through the challenges of figuring out exactly what you all can do, given your mandate, given the limitations you have on time and energy, and the enormous project that's ahead of you.

My instinct is to spend this time talking about the forest, on the assumption that you guys have spent a lot of time already with the trees, not only because, by inclination, I'm an ivory tower type that can see the forest a little bit better, and because I
think, interestingly, one of the reasons that a lot of sentencing reform efforts have been less successful than they might have been is because of a failure, I think, to keep the sort of forest and trees perspective in mind at all times. Because, that's what I've sort of observed, both looking over the history of modern sentencing reforms and, in particular, watching some very ambitious reforms, particularly in the federal system, go off the rails in different kinds of ways.

That, it leads me to encourage you, at this stage of the process which is still relatively early, but because it's so expedited, you really need to take stock of so much and then move forward, to encourage you to think of modern sentencing in what I call four dimensions, and I'll talk through what those four dimensions are, provide maybe a particularly federal focus on how I see those four dimensions playing out together. But, I really hope to provide more of a national perspective.

And, I should give you a couple of warnings at the outset. Though I still fancy myself a New York lawyer, since I am a member of the New York Bar, and did all my real practicing here in Manhattan, I actually never had a chance to do criminal law
practice in New York.

And so, I'm relatively unfamiliar with the State sentencing system. In some sense, that's a good sign of New York building on a solid foundation, because academics make their money by criticizing things that have gone wrong. And, the fact that I have not spent a lot of time thinking about New York's system is a sign that it's not that broke.

And, that doesn't mean there aren't things that are worthy of fixing, and obviously, the Governor sees it as very valuable to take stock at this stage. But, my first instinct when seeing the Executive Order and seeing what you all were doing was, wow, how exciting that New York is trying to do better, given that they're not in a state of absolute crisis, as are so many other states.

And, you may have heard from others that things are not nearly as rosy as they seem to me. But, compared to what I see operating in the federal system, what's going in California, what's going on in a number of other states, where sentencing reform is not developing out of a sort of model of good government, but out of a matter of just pure desperation, it's very encouraging that you guys aren't under the gun of either a federal order or
having to release inmates because of a severe overpopulation problem, or having to cut budgets in a variety of ways.

So that, I think, enables you to be that much more ambitious in what you do, but that very ambition could be problematic if not only you don’t have the time to fulfill the ambition, given what you need to get done, but also you’re not attentive to what might be sort of described as the sober pessimism that I think necessarily should inform any effort at thoughtful sentencing reform.

Because again, what I’m here to sort of highlight is not only are you doing better than a lot of other states that haven’t given thought to these issues, but even those jurisdictions that have given a lot of thought to these issues are struggling with the four dimensional dynamics that modern sentencing necessarily bring up.

And, let me sort of start unpacking that idea. And, I very much want to sort of try to cover too much ground, in too little time, and then leave it open for questions, and thoughts, and reactions.

And, in particular, as I mentioned to the folks who invited me here, a lot of knowledge is a dangerous thing. I know a lot about a lot of
different aspects of the national scene. And so, I'm eager to be available to answer questions and to be a resource for you more generally, not just today, but, you know, in any follow-up that you all are doing.

And so, rather than lecture at you for a long period of time, I just want to sort of spotlight these general themes and then hear from you and engage more in a conversation than a lecture.

Here is the first dimension I'd throw out there, and especially as a lawyer, it's not surprising I start with this. And, that's the legal dimension. You know, the basics of the law which, of course, is at some level what I presume this Commission is focused on, first and foremost. How might New York Law be changed to improve the operation of the sentencing part of the state criminal justice system?

And, there is a broad historical national story here. In the most simplified terms, it was that there was a universal commitment to the rehabilitative model of sentencing through, really, the mid-1960s, and I'm even superficially covering a lot of history here.

The key idea was there wasn't much sentencing law, because the instinct that prevailed at sentencing was that it wasn't a task for lawyers, per
It was a task for social workers. It was an -- often talked about as a medical model of sentencing, the instinct being the goal of sentencing was to reform the offender, not to punish the crime. And, I think it was both accurate and, at the same time, sort of insightfully dangerous to view sentencing systems before the modern reform era as lawless.

There was not the expectation that legal norms, and legal standards, and legal procedures would transpire at sentencing. The thought was you'd have a set of, really, social entities -- whether it was the probation officer, or social services groups, and the like -- assess an offender and recommend to a judge what would best rehabilitate the defendant, in order to get the defendant back on a proper path.

And, the instinct, again, was this medical model, this idea that crime was a by-product of either a social disease or an offender's own dysfunction. And, once we have decided that person had violated legal norms, had committed a crime, then the job of the legal system was, essentially, to get law out of the way and to provide whatever resources or mechanisms to rehabilitate the offender. And this was, at least in theory, the model of sentencing that really dominated the national landscape through the
There's lots of particularized stories here about how that theory was not as well accepted down the line as it seemed to be, but the important legal part of the story was that's what all the formal legal structures were built around. We had a system of sentencing that was designed to give judges broad discretion to decide, at sentencing, what sort of outcome would best serve the rehabilitative interests of, presumably, the defendant, and also society.

One might say -- in fact, the academic in me is inclined to say -- well, why did we have judges doing that? And, I think that's, in itself, an example of the sort of disconnect that people started to sort of figure out with this rehabilitative model of sentencing, is if it wasn't something that was supposed to be informed by law at all, why was it still run through legal systems?

And really, the criticism came the other way, which was, gee, judges don't seem to be particularly good at this. Judges aren't trained as social workers. Judges don't have the information they need, either about the offender or about what works to effectively engineer rehabilitative systems.

And, the same criticisms applied to parole
boards, as well. Obviously, the whole parole board structure was developed even more formally to be about figuring out when a defendant had been rehabilitated, to allow their release from incarceration.

Probation, reentry, all of the back end mechanisms, likewise, formally committed to rehabilitation, but struggling in a variety of ways with both the means to achieve rehabilitation and ways to assess whether rehabilitation had been served.

And, that led to what I tend to describe as the modern, structured sentencing reform movement, the idea that it was important to bring law into sentencing.

And, it's often said, and I think it's inaccurate to say, that this was driven by concerns about disparity. That, especially at the federal level, is the sort of mantra. Well, gee, everybody recognized and realized that giving federal judges broad discretion meant that in one courtroom, a judge would give probation to every low-level thief; whereas, at the other end of the courthouse, another judge would always max that same defendant out. That disparity is the problem. That's why we need to reform the system.

But, I think it's more accurate, and I've
written this in some of my own pieces, to recognize
that the movement toward structured sentencing wasn't
just about creating more uniform outcomes, but it was
more generally about appreciating that law needed to
play a more fundamental role in the responses to
criminal wrongdoing beyond just deciding whether or
not a person is a criminal or not, that it was
important to bring law to sentencing. That's how I
often describe it.

The same as a leading book -- you know, on
sentencing -- you know, usefully coming from a New
York lawyer, or New York judge, Judge Marvin Frankel,
law without order -- and he talked about the
lawlessness in sentencing. And, I think his insight
was the profoundest.

It wasn't just that rehabilitation wasn't
working. It wasn't just that different judges, based
on their background, and their history, and their own
perceptions of defendants, were taking different
approaches and ascribing different sentences to
different defendants, even if they have committed the
same crime. It was that there were no legal
standards. The law had, in some sense, to its
discredit, washed its hands of the criminal justice
system after a defendant had been adjudicated as
guilty of a crime. And, that that was an
inappropriate way to structure the deprivations of
liberty and the other penal consequences that were
thought to be inherent in any punishment and
sentencing system. And so, you get what are described
as structured sentencing reforms.

One of the things that maybe you have
already confronted, and one of the things that I’ve
spend a lot of time, if not obsessed over, at least
worried about, is we -- even though we’ve been
bringing law to sentencing for the last three decades,
really -- maybe even longer than that, depending on
how you want to mark time -- we haven’t come up with a
good nomenclature.

We hear talk about determinate sentencing
versus indeterminate sentencing. People have
different visions of what the heck that means.

People talk about discretionary versus
mandatory. People talk about advisory now, in the
federal system, versus mandatory.

There’s a lot of terms that go around. I
like the term "structured sentencing" to describe the
idea of just bringing some form, some structure to the
way in which sentencing is going to take place. And,
the value of that term is it’s amorphous enough and
anomalous enough, or open-ended enough, that it can
describe a variety of different kinds of structures.

It can describe an institutional structure.

So, one aspect of, I think, the best structured
sentencing reform systems is one that includes a
structure to the rule making of both sentencing law
and then, ultimately, sentencing policy, in the form
-- and maybe I'm speaking to the converted, although
not quite -- here in the form of a sentencing
commission.

And one of the things that you're going to
find interesting, especially as I continue to return
back to the federal story here, is I think, in design,
the federal system has set up the best conceptual
approach to structured sentencing.

Interestingly, and maybe you've heard
something about this from other speakers, the American
Law Institute is developing its own model sentencing
provisions, trying to update the model penal code
sentencing provisions, in light of all of the last
three or four decades of changes in philosophy and
attitudes about punishment and sentencing. And
fundamentally, I think, they're adopting what is the
theoretical federal model.

So, despite all the criticism of the federal
sentencing system, of which there is justifiably a
lot, it's not a problem with its approach
structurally, conceptually, to reforming the federal
sentencing scheme. I actually think the Sentencing
Reform Act of 1984, the Act that Congress passed to
set up the federal sentencing guidelines, the Federal
Sentencing Commission, the entire new approach to
colorant sentencing, was, in design, as close to -- I
won't say perfect -- but visionary as anything I could
ever expect to come from our Federal Government, and
something that I think could still serve as a model to
this Commission, could serve as a model to many other
states, as a matter of basic design.

Because I think, in terms of creating a
structure, the Sentencing Reform Act put into place a
set of legal rules that have crossed this sort of
first dimension of how the law impacts sentencing, was
very, very sound and wise, conceptually. What do I
mean by that?

I mean they created sentencing commissions.
I think having a permanent sentencing commission --
this is what the ALI is saying, this is what just
about every academic who looks at this field
ultimately concludes -- having a body with the unique,
and distinctive, and committed responsibility to
monitor, assess, advise all of the other sentencing players, helps the system operate effectively long term.

Commissions can do lots of different things. They can have different mandates, have different goals, have different agendas, have different personnel, have all sorts of different arrangements. And so, in some sense, it's a cop-out to say, well, you to have a commission. That's almost sort of like saying you ought to have some smart people working on these issues, which is really all a commission is about.

But, I very much believe, I think just about everybody else who works a lot in this industry believes, that a commission, though not necessarily essential, and definitely not sufficient to put a jurisdiction on a sound path towards reform, is certainly a valuable, integral part of the structure. And I'm talking about structure in sentencing reform. The structure for going forward to -- to developing a sound sentencing system.

And so, that's why, again, the model penal code, in its reform provisions, has a sentencing commission at the center of its model. That's why, in California, where the system is dysfunctional in
dimensions that are just mind-boggling, the people really trying to get something done have figured out that the smartest thing to do in the first instance is just to create a permanent sentencing commission who can be the shepherd for ongoing development.

That's why I continue to want to believe the federal sentencing system can continue heading on a better path, because it has a permanent commission in place that is well staffed, that is, though not perfect, generally well regarded as commissions go.

You all will be particularly jealous to know about well staffed they are. I believe they have a hundred staff members.

And so, not that I'm -- you didn't hear it from me, when Governor Spitzer asks, you know, "Who said we needed a hundred people working for you guys?"

But, what commissions can do, what commissions should do, how big commissions can get, I think is something that there are models out there of many dimensions. And, one of the things that you all may do -- and I saw it as one of the list of questions -- major issues for consideration, you know, whether to have a permanent commission. I think it's easier for people who are well informed on this issue, that the answer to that should be yes, it's valuable to
have a permanent commission. What that commission looks like, what that commission's ongoing responsibilities are, are subject to lots of debate, and we can talk about that.

But first and foremost, I'd say legally the easiest answer is to create structure in the form of a body whose job it is to keep an eye on these issues, because they're going to keep moving, they're going to keep changing. The fourth dimension that I'll get to -- I'm still on the first one -- the fourth dimension that I'll get to is how dynamic this field is.

And, no matter how effectively you put a model in place, things are going to change in a way that only a permanent body endeavoring to stay abreast of this and to help all other bodies involved is going to be in a position to work with it effectively.

And so, among the nice things that you all can do if you're sick and tired of this, you know, already, is you don't have to recommend that you're members of that permanent committee, right?

[Laughter]

MR. BERMAN: You can force somebody else to go through the hard work, and it is hard work, at every level. But, that's an important point that I think I wanted to get out at the beginning.
The next part, though, about creating structure, is the challenge of going from a sound institutional structure -- and by that, I mean having a commission involved that's helping to produce these rules, that's working with all three branches to implement sensible sentencing reforms -- to go from that to a specific substantive legal structure that makes sense.

Because, just as I think clear as it is to have an institutional structure that includes a commission, that includes a body committed to studying these issues and staying on top of these issues, and monitoring these issues for a jurisdiction, it's extraordinarily difficult to commit to and stay consistent with any substantive legal structure, even though I think it's important to have one.

The important thing to appreciate about the failing of the rehabilitative model that led to all of the reform wasn't that a rehabilitative model doesn't make sense. Lots of debate can be put forward, and I would bet that a heck of a lot of people have come and suggested to you, and you've done reading saying that there ought to be a greater commitment to rehabilitation in the operation of our sentencing system.
And, one of the things I think is a shame is that, to my knowledge, no jurisdiction has ever really invested fully and completely, and without reservation, in a true rehabilitative model. But, that's not surprising because a true rehabilitative model is extraordinarily costly and subject to not only debate, but attack, as an incomplete vision of what a state ought to be doing in response to criminal offenses.

And so, the reason the rehabilitative model broke down, even though it was signed onto by almost every jurisdiction in the nation, wasn't because it isn't arguably a sound system. It's because there was nobody who was truly committed to making it work. It created a vacuum, a vacuum that got filled in by whoever was either required to or saw it as advantageous to fill in the gaps. And, what do I mean by that?

Well, first, judges had, as they had to make initial rehabilitative choices, a variety of competing pressures that influenced the ways in which they made choices at sentencing. Some of those are political stories. Some of those were legal stories. Some of those were social stories. Lots of different dimensions there.
The same went for politicians, at the legislative level, at the executive level. The same went particularly for prison officials, those who supposedly were in charge of rehabilitating and monitoring rehabilitation. You know, one of the consistent themes was the extent which there weren't the resources, there weren't the training and the mechanisms in place to do rehabilitation fully.

And even more importantly -- and again, this is the issue that gets to my next dimension -- the politics is one that necessarily is going to, for lack of a less pejorative word -- bastardize any legal choice that's made in this arena. And so, that gets me to dimension number two.

Some would say I should have started with dimension -- with politics, because in lots of ways sentencing is necessarily a political story, and justifiably a political story. It's something that affects everybody's life, directly or indirectly, and it's something that politicians necessarily should be very concerned with for the overall well being of a jurisdiction, keeping the public safe, controlling crime and punishment, justifiably something that politicians are concerned about.

But, what gets lost is an awareness for the
way in which politics influences not only how the
formal rules get made, right? Obviously, the
legislature is subject to political influences, the
executive is subject to political influences, but that
politics necessarily is going to influence every
choice that's made in the development of the
particular substantive rules and the way in which
those get implemented. And this is, in particular,
where the federal authority gets off the rails, after
the creation, driven, I think, by generally pretty
healthy politics.

What were the healthy politics at the
federal level? Concern about disparity, concern about
discrimination, concern about defendants' rights, to
some extent, that a lot of defendants were being
locked up for very long periods of time, under no
better theory than, well, they look like they're not
rehabilitated. And also, concerns about rising crime
rates and the inefficacy of the sort of half-hearted
rehabilitative efforts that were going on in the
federal system.

We got a combination of the left and the
right at the federal level, to change sentencing
defederally, and so the politics coalesced around what I
continue to believe was an extraordinarily impressive
massive sentencing reform -- the Sentencing Reform Act -- appreciating, among other things, that the seemingly benign commitment to rehabilitation wasn't so benign. It wasn't so benign to defendants who were being treated differently, and sometimes more harshly than they should. It wasn't so benign to society if folks were being recycled through the system and going on to commit more crimes, increased crime rates, and so on, and so forth.

And so, politics can produce great outcomes, but politics also will necessarily continue to shift. And, of course, the most dramatic part of the story is the politics that actually New York was ahead of the curve on, with its Rockefeller laws. But, at the federal level, the war on drugs and the sort of mania about the need to get tough on drug offenders hit its crescendo in the mid-'80s, around the time of the crack epidemic.

And so, when the ink was still drying on the Sentencing Reform Act -- and, just to give you a little background, the Sentencing Reform Act was passed in 1984, almost a decade. If you guys get something done in a year, you're ten times faster than the Feds. The Feds took a decade to think through exactly how to structure sentencing reform, with
Senator Kennedy really a leading voice, starting in the early '70s, talking about the need to do something about federal sentencing law and policy. In '84 is when the Sentencing Reform Act gets passed, signed by President Reagan.

That creates the commission instantly. The commission is given three years -- again, another example of how everything is moving faster in our Internet society today. Back in the '80s, the commission was given three years to develop federal sentencing guidelines.

But, before that was even developed, before the commission could release its initial set of guidelines in 1987, the crack epidemic hit. Amazing how one person can affect one's life. Len Bias famously gets drafted by the Boston Celtics, a prominent basketball player, went to my home state's university, the University of Maryland. Celtics very excited to have the next generation of great player. He dies supposedly from a crack overdose, celebrating having been drafted by the Boston Celtics. History shows it actually was powder cocaine that was involved in this experience.

But, it's sort of the right place, wrong time -- or wrong place, right time. Tip O'Neill, then
the Speaker of the House, understandably disappointed that his star player is not going to continue the Celtics positive development going forward, jumps on "we've got to do something about these crack epidemics taking over our inner cities, destroying our nation's youth, we've got to get tough on crime."

And, in many respects, it was sort of the next wave of what you can trace back even to President Nixon, the sort of politics of getting tough on crime, the war on crime, the heated political debates, which had nothing to do with law, had nothing to do with what works, had nothing to do with good data, but had everything to do with who gets the sound bites to show that they are tough in the way that the public wants and hopes its political officials will be tough, in light of their own public safety.

And so, we get the first wave of that through the passage of mandatory minimum laws in 1986, the famous crack cocaine/powder cocaine disparity, the 100-to-1 ratio that remains 20 years later, a depressing focal point of a lot of federal debate, because of its disproportionate affect on minority defendants. That gets instituted in 1986.

That necessarily echoes through the work of the Sentencing Commission.
trying to be as insulated from politics as they reasonably can, has to then incorporate what Congress has done through these mandatory minimum sentences into the sentencing structure that they are creating.

Around the same time, or at least sort of echoing through the same time, we get the '88 election cycle. The famous Willie Horton ads. Another layer of the politicalization of crime and punishment. Another shock effect through the federal sentencing system, because again, the commission, doing its job well, which is being reflective of what Congress had passed, and being attentive to, gee, we're here to try to create a consistent and uniform sentencing policy.

Congress now says that these drug offenders should get "X" sentence. Well, if this is a slightly worse drug offender, this is drug offender plus one, I guess that defendant needs to get sentence "X" plus one. In many ways, a very sound body, stuck in a difficult political time, starts themselves ratcheting up the overall sentencing severity of the federal sentencing system.

The one-way ratchet of politics continues, and continues quite dramatically at the federal level, and that necessarily trickles down to the states in a variety of ways.
We get, and I assume you all, you know, have heard about all this. During the Clinton years, the Truth in Sentencing laws that tied federal monies to a requirement that states require offenders to serve a certain percentage of their sentence time. As we all know, a politicians' vision of truth is always nuanced. So, even true Truth in Sentencing only means you have to serve 85 percent of your time, rather than 100 percent. But, I guess 85 percent of truth is actually a pretty good standard for most politicians.

COMMISSIONER O'DONNELL: That's pretty high.

MR. BERNAN: So, we shouldn't criticize that much.

[Laughter]

MR. BERNAN: But, that reality notwithstanding, that in turn, you know, echoed its way through not only a variety of federal reforms, but the extent to which states, as they were reforming their own systems, necessarily had the federal model there, often -- and, I'll be happy to echo this -- often as a watch out, be careful not to do things as poorly as the Feds did, right?

And, to me, again, I mean to emphasize -- and this is as I work my way through the two
dimensions that I've gone so far -- legally, I think the Feds did things relatively well, in terms of creating a structure, a commitment to guidelines, whether you call them mandatory or advisory. I actually think they had in mind being advisory, in a sense, even when they were mandatory. Now, they're advisory again, and I'll talk a little bit about that Supreme Court story in a minute.

But, what the Feds did very, very poorly was manage the politics. And that, itself, is a story of structure breaking down. Not only breaking down in terms of, hey, we're going to create a comprehensive guideline system that's going to figure out and balance all these different pieces of the system, but then Congress comes in and throws this shock of mandatory minimum sentences for certain kinds of drug offenders, and everything else has to adjust.

But also structure breaking down in the sense that Congress shouldn't be doing this at all. You created a commission whose job it is to do this stuff. Congress should try to stay out of the way at least until they get their first blueprint out there. And this is something that I think is uniquely challenging, not just for an Executive Commission, as you all are, but for any structure, is to encourage
the politicians to stay out of things, because they think they're supposed to be involved in things. And, they think that's how they get involved.

And that's actually one of the funny things that I tend to think an awful lot about, is what would have happened if the U.S. Sentencing Commission, instead of being placed in Washington, D.C., had been placed in -- and I'll just pick a place out the air -- Columbus, Ohio, or even New York City, or Omaha, Nebraska, or even San Francisco. Part of the story here -- part of the structure, part of what I encourage you all to think about as I work my way through these dimensions, is appreciating the way in which these things interact.

And so, creating a sound structure of a sentencing commission, but putting it in the same city where all the politics goes crazy -- meaning inside the Beltway in Washington -- necessarily meant that the commission wasn't going to be nearly as insulated from the day-to-day politics of sentencing reform as they likely ought to be. It necessarily meant, especially for a system designed to be nationwide, that they were going to be uniquely attentive to what the politicians down the street were saying to them, or just uniquely aware. You know, they're reading the
Washington Post, they're hearing the tough on crime sentiments, they're -- whether they mean to be or not -- not insulted from the day-to-day debate there, and not hearing the folks out in California, or the folks on the border states, or the folks in other regions.

And whether that's a suggestion that you all come to Manhattan for your meetings, instead of staying in Albany, or, you know, find your way out to Syracuse, or find your way out into the Hamptons -- I guess that would be the best place, right?

[Laughter]

MR. BERMAN: To -- to have your meetings. But, that there may be a value in not just creating a commission and a structure, but de-centralizing that structure. That it's not just about creating entities that can do this work well, but appreciating that where and how the entities are constructed itself will influence the way in which the structure works its way through these various dimensions.

And, I want to highlight, and I want to emphasize in a lot of different ways, you can't ignore the political, and you can't -- don't fool yourselves into believing -- and this is really what the first wave of reform showed -- that you can get insulated from politics completely, and that the goal should be,
all right -- and again, this is what the academics --
this is actually what I feel is the failure of my
industry, to some extent -- well, if we just sit up
here in this ivory tower and think, and think, and
think enough, and just spend all our time saying,
well, the politicians don't know what they're talking
about, and so they ought to listen to us instead of
each other, that you'll come up with sort of the
Platonic form of an ideal way to do things, and that
can then be just handed over to the politicians to
embrace and adopt, and then the world will be a better
place.

Politics gets a bad name, but it shouldn't
get a bad name if it's done well. If it means being
attentive to public concerns, being drawn into the
healthy debates over competing priorities among
different policy options, whether it can be an
understanding that -- and this is where I think the
rehabilitative model sort of never competed with the
politics -- the reality that, as much as we may want
to rehabilitate offenders, when we have limited social
services, a limited budget for things like mental
health, for things like job training, for things like
all of the educational opportunities that we know
correlate with various criminogenic factors, people
who have committed crimes are necessarily going to be fairly late on the list of persons for whom we want to get the first cut of those opportunities.

And so, whether we call it politics, whether we call it policy, think of it in good terms or in bad terms, it's inevitable that the legal and the political are going to have to interact. And the lesson across these dimensions is to figure out, okay, what legal structures make a lot of sense? What are sensible? What are our legal values here? And then, what are our political values? How can we insulate ourselves from the harmful -- I don't want to call them political values -- distorting political influences?

Michael Tonry talks about "drive-by legislation," which I think is a great term for this idea of we get that one headline crime of the week, and then everybody wants to go to the legislature and has their bill to fix that one problem. And, you know, that's distorting in so many ways. But, it's how the world works, right?

And that's -- what's funny about this is it's the way other areas of the law work, as well, right? It's not clear to me that other arenas are that much healthier at avoiding the influence of
anecdote and extreme reactions to not so simple problems.

But, appreciating that it's inevitable that the politicians are going to get involved, and maybe figuring out a way to channel that energy, right? And so, here's one of many for examples, just to highlight ways in which working across these dimensions can be very effective, and that a commission can achieve.

Some states, I think to their great credit, created as part of their sentencing commission a requirement that any legislative bill calling for increases in prison sentences, or any kind of bump-up in the severity of sentences would have to be submitted to the sentencing commission or some sort of body for an impact assessment, which would involve reporting out how that particular bill would affect incarceration rates, would ripple its way through the rest of the criminal justice system, and, in particular that sets a price tag on what that would necessarily involve, realistically, sensibly, justifiably.

And that has been, at least from what I've heard nationwide, the most effective way to channel the political instincts and influences, and yet allow sensible reform to dominate rhetoric.
The politicians could still introduce the bill which says "I'm going to triple sentences on sex offenders," but before that goes for a vote, it has to necessarily go to a commission, or a committee, or whatever structure. Sometimes, it's built into the structure of the legislative committees to produce a report along these lines. And, that report takes a little while, which itself is valuable. You get the value of time to sort of de-emphasize that one headline case of the short guy who got the short sentence, or the sex offender who got probation this way or that way.

But then also, the price tag comes back. And, the price tag is, okay, Representative So-and-So, Senator So-and-So, for this little pet legislation that you want to call Jessica's Law, or Jennifer's Law, or Michelle's Law -- it's usually a female name, and not bad to notice that, although not always. Adam Walsh Act was the recent federal sex offender activity. It's going to cost "X" number of dollars, and this is what it's going to do, and how it's going to ripple through the system.

And that is important not only to de-emphasize that this is only about getting tough, but that it has some consequences, but it makes it
easier for other politicians to say, well, gee, before we spend $18 million on this little pet thing that you want for your one person in your jurisdiction, your community that had this problem, what about the $10 million I’ve been trying to push forward for this education program, or for this other good social services? It makes the terms of the debate healthier.

And then, it also allows that one politician to still have his campaign rhetoric. I proposed the bill. Right? The reality is, and this is, itself, depressing and yet useful, you don't necessarily have to pass the bill. You just have to propose the bill. I tried to get tough on sex offenders, but those -- usually it's those bastards in Washington. Now, it could be, you know, the ones in Albany. They -- they, you know, they said they didn't want to pay the money for it. Well, that's why you've got to re-elect me, so I can go back and propose that again.

And so, appreciating the ways in which the politics is always going to be there, but that as you create sound structures, you can channel that politics effectively and avoid the harmful, pernicious effect of the politics, but still get the benefits of it, right?

It can be very beneficial to get a
conversation started. All right, maybe we do need to spend $20 million on rehabilitation for sex offenders, because we do have evidence that suggests these are repeat offenders, over, and over, and over again. And then, the answer isn't to simply hope that they'll go away. The answer is to develop some resources for reentry, for other social services, but that doesn't mean that residency restrictions, or some other kind of new age, new wave, hot idea that doesn't really have any sensible empirical backing is -- is the way to go right away.

So, I've done legal. I've done political. Now, I want to do the one that you guys may be too aware of, without realizing how aware of it. And, that's the practical. And, by "practical," I mean so many things.

First and foremost, all sentencing, like all politics, is local. You guys could develop the most brilliant rules ever. You could have a hundred other brilliant people say, my God, this New York Commission, they've got it going on. They've figured it all out. They've produced the true Platonic form of reform.

But, unless and until the line actors who are actually going to implement the system are on
board, it doesn't matter. And that's itself another funny, amazing aspect of the federal system in operation.

The federal system was very harsh, very rigid, so what happened as it got implemented? It got flexible in a subterranean way, and there's a lot of little stories here.

One of those little stories is plea bargaining. A lot of people thought, gee, there will be less plea bargains as a result of federal sentencing reform, because people will sort of not have to try to bargain away the risk.

The instinct was -- and this again shows you how misguided academics are -- well, gee, when nobody knows exactly what's going to happen because of the rehabilitative model, everybody is going to bargain to try to get some certainty. And so, that's why we had 80 percent of the cases plea bargaining before.

Now that the rules are out there, everybody can see the rules, everybody can understand the way the game is played, and there will be some consistency here. Defendants will go to trial, and they'll know how that goes, and there won't be as much plea bargaining. There won't be as much horse trading on factors, because there will be a consistent set of
rules that can be applied consistently, and the
influence of prosecutors won't be as great, the degree
to which plea bargaining affects the operation of the
system will be diminished.

Nice theory. Wrong in practice. And, very
wrong. Plea bargaining rates have skyrocketed. We're
up to about 95 to 96 percent in the federal system,
which is really remarkable, when you appreciate that
almost by definition almost every federal crime has
already been plea bargaining away. What do I mean by
that?

A choice has been made by the Federal
Prosecutor to bring this as a federal case, rather
than as a state case. Right? So, that's even another
way in which all sentencing is local.

Every federal crime -- and I always sort of
get tired of saying this -- is, itself, a local crime.
And yet, the fact that it's gone into the federal
system itself is a by-product of a set of local
choices, right?

And, I don't have to remind you all -- or
maybe you were a part of the favorite local son, Rudy
Giuliani, when he was U.S. Attorney, who had his
famous federal day. Right? That was the day in which
he decided, as U.S. Attorney, "I'm just going to go
and take a bunch of street crimes and make them federal one day a week. Why am I going to do that? Well, partially, because it's low-hanging fruit, and it will make me look good. Partially because I think this is the way to help my local community. And partially because federal criminal law is written so broadly, that the Feds can do almost anything they want, no matter what they think they're trying to achieve."

And so, we get a federal system where all of these crimes could be prosecuted at the state level. Most of them are. And yet, the federal prosecutors come in and they pick off some of these cases. You would think those were the cases that would be most likely to go to trial because there would be some high budget issue going on. But, in fact, 98 percent -- 96 or 98 percent of those cases get negotiated out.

Because, at the end of the day, nobody wants to go to trial. That's costly. That's expensive. There is still uncertainty built into the system, even when the sentencing rules are clear.

And, this is what's even more profound, the legal rules are nothing more, when all is said and done, than just the shadow in which the real system is going to operate. And, it's the dirty little secret
the prosecutors won't always tell you, but all of them will admit to it if you get them drunk enough, is -- and, that's the way the system should work. The rules shouldn't be written for what should happen. The rules should be written for what I can go tell the defendant will happen if they don't play ball with us. Because, that's the way the criminal system not only operates practically, but should operate. Defendants should have very good reasons to admit to their guilt when they're guilty, and to tell us about all the other people who are guilty with them. That's the way in which the system operates healthy.

That's why we like mandatory minimums, not because we think one size fits all justice. But, we want to be able to threaten one size fits all justice, so that the defendants will play ball with us, so that we can then continue to be what we like to think we are, say the prosecutors, the good guys here, and fight the bad guys.

Because, the bad guys don't play fair, which I think is probably accurate. That's why they're bad guys. And so, it's extra important that we have rules that we can describe to the bad guys, to force them to play by our rules, rather than continue to use their rules. And so, that's why plea bargaining is
inevitable. That’s why plea bargaining, in particular, will always be localized.

And so, the particularly interesting part of this story at the federal level, that very few people spend a lot of time thinking about, but it’s just sort of fascinating as a microcosm into this universe, is along the border districts. Most of the southern border districts, but it actually happens a little bit in Canada, but mostly across the Texas, Arizona, New Mexico, Southern California districts.

There were so many immigration cases, and especially because without really a conscious decision, but a kind of implicit decision to invest more federal resources in immigration offenses, there was a much larger percentage of illegal aliens being brought into the federal criminal justice system. All of the prosecutors and, to some extent, the defense attorneys in that system, couldn’t afford to play even by the plea bargaining rules.

Doing formal plea bargaining was taking too long. Getting an official indictment from a grand jury, working that through a traditional plea agreement, and getting that system done when you were processing, literally, hundreds and hundreds of cases almost every week of people crossing the border, and
wanting to throw them back out, was taking so long that, across the border districts, the U.S. Attorney's Offices created, sub rosa, this thing called "fast track."

What was "fast track"? Fast track was this well understood local convention, not authorized by the Department of Justice, not authorized by the Sentencing Commission, not authorized by Congress, but decided by local prosecutors and local defense attorneys, that if a defendant caught for illegal immigration was willing to waive indictment, waive all the traditional procedures, and plead instantly guilty to illegal entry, their sentence, essentially, would be cut in half.

What's the big deal? They're getting deported anyway, was the thought of all the prosecutors. We can save everybody's time. We get them kicked out. What's the point of wasting all our federal resources keeping these folks locked up twice as long before they get deported anyway? Let's just fast track these people through the system. That's going to be more effective.

Interesting question, debatable question. A fascinating example of how local pressures are going to produce a kind of law and a kind of local politics
that no matter how good the general rules are, are
going to necessarily impact how each community is
going to deal with the unique crime and punishment
problems within that community.

And, what's fascinating and, in some sense,
I think ultimately healthy, is you get enough of that
and, if a good structure is in place, that will be
formalized in more effective law. So, what ultimately
happened was the U.S. Attorney's Offices started
creating their own guidance. They created their own
manuals for how to do fast tracking. Rather than
being this individual prosecutor and this individual
defense attorney negotiating a super fast system, they
created their own internal DOJ policies for dealing
with fast track.

And then, Congress got involved and said,
well, wait a minute. You guys are making up your own
rules. We're supposed to have these national rules.

Because the Department of Justice has a
unique ear of Congress people, they ultimately
legitimized these fast track programs. So now, it's a
formal bit of the law, and the U.S. Sentencing
Commission actually wrote guidelines for these fast
track programs.

And though a lot of people complained, and I
think understandably complained, that there's a
different kind of justice depending on whether you're
in a quote/unquote, fast track district or non-fast
track district, and the truth is, if you're an illegal
immigrant and make the mistake of migrating your way
to a non-fast track district, you will get a much
longer sentence, even if you're willing to plead
guilty very quickly.

But again, the idea is all of this is going
to be localized. All of this is going to be
negotiated. All of this is going to be the product of
compromise. And, all of it's going to be the
by-product of limited resources, time, money, energy,
competing priorities.

And, that gets me to the last piece of the
legal story, and then I'm going to get to the
futuristic story, and then finally wrap up.

This is where the whole Blakely, Booker,
Apprendi, 6th Amendment revolution comes in. And,
what's that all about?

What that's about, at its simplest level --
and you guys haven't had to deal with it head on yet,
but you need to be certainly aware of this -- is we're
supposed to have an adversarial system of criminal
justice. There is an inevitable disconnect between
the inevitability of compromises, and plea bargains, and fact-finding, and everything that goes on in sentencing, when everything is localized, everything is negotiated, everything is the product of compromise.

And, you might call it the "Law and Order" vision of our criminal justice system, which is a jury of one's peers sits in a room and hears all this evidence that actually takes two years to develop, and not just a 40-minute episode to develop, and then a jury decides what really happened, and then a judge, based on the jury's decision, makes some judgement at sentencing.

The only people who sort of still believe in that are Supreme Court Justices, because they're the only ones who are removed enough from the system -- academics are, to some extent, too -- to believe that we could actually still have an adversarial criminal justice system, given the extraordinary pressures -- economics, time, money, energy, competing priorities -- that the system necessarily is functioning with. And so, what the Supreme Court has said in a series of decisions that has necessarily produced a lot of controversy is you just can't be that functional. You can't work your way around the very formal adversarial
models that the founders put into the 6th Amendment in
the form of a right to a jury trial and the right to
due process.

And, the reason this is so controversial,
the reason the Justices continue to fight over this,
the reason that I can say with ultimate confidence
I'll always be in a job trying to figure out what the
Justices are saying, is because the formal and the
functional are always going to butt heads in this
region. The formal notion of full adversarial
processes, with a complete indictment that gives you
sufficient notice of all the things the State thinks
you did wrong, and then the opportunity to have a full
and fair hearing with complete process where a jury
will hear all the evidence and then come to
resolutions on a variety of issues, that then will
inform the judge in his or her own effort to
adjudicate a fair sentence under the law, and policy,
and procedures that are in place there sounds great.
That's what Justice Scalia wants. That's what Justice
Thomas wants. That's what Justice Stevens wants,
Souter, Ginsburg, the Blakely five. But, it's just
never going to happen.

That doesn't mean it shouldn't be an
aspiration. And I, in fact, have become a fan of what
the Supreme Court is trying to do, because it's the only voice that says as we're all operating a functional system, let's not lose sight of some of our traditional premises. Let's not lose sight of the value of giving defendants some chance to dispute the facts of which they're accused of, if there is a legitimate dispute to be had.

But, I think it's important to not lose sight of how unrealistic the Supreme Court's vision here is. And, among the reasons I know that is because not only have they hemmed and hawi when the rubber has hit the road about whether these jury trial rights, and these indictment rights, and these due process rights are going to apply across the board, but it's not just an issue at initial sentencing.

I believe in New York it's been these sort of recidivist enhancements that have come up through habeas. That's, you know, a particularly peculiar and interesting way to look at some of these questions.

But, I'm actually lead counsel on a surpetition looking at supervised release revocation, right? So one of the issues I know, the back end sentencing issues. If you take Blakely and Booker principles at face value, and really believe the Supreme Court Justices are committed to what they're
saying, this isn't just an issue that happens at initial trial and sets the framework for initial sentencing. Well, what if a certain person is out there on probation or parole, and a parole officer says, "Well, I think you've violated the terms of your parole, time to go back"? Or, the terms of your probation.

Well, if you read Blakely carefully, it says any fact that's going to increase your punishment. And so, I actually have a case where -- and it's a remarkable case, and I think if you take Blakely seriously, the Supreme Court ought to take this issue up -- defendant, federal defendant serving five years of supervised release, after having already served three years in prison, the State of Virginia said, "Oh, we saw you stealing some money out of an ATM." They indict her on that. They realize that she's still serving a term of supervised release.

And they say, "Oh, we'll just give this over to the Feds." The probation officer walks into the sentencing judge who had sentenced this woman ten years earlier, and said, "Oh, we have this footage on a surveillance camera that said she stole some money from an ATM. Revoke her supervised release, and send her back to prison for three years."
And the defendant, my client, says, "No, that wasn't me." So, what does the judge do? Not have a full trial here? Well, no, she has a supervised release revocation hearing. She takes evidence, she hears witnesses, and she says, "Fortunately, this isn't sentencing for a crime. This is just whether I'm going to revoke your supervised release. So, I don't need to be convinced beyond a reasonable doubt whether that was you in this surveillance photo. I just have to be convinced by a preponderance. And, I know you're a liar, because you lied to me before when I sentenced you the first time, so I think that really is you, and so I'm revoking your supervised release and sending you back to prison for three years."

And, we say, well, wait a minute. Blakely says any fact that increases your punishment has to be proved to a jury beyond a reasonable doubt. Isn't this one of those facts? And, I fear, they didn't hear it from me, that we're going to have cert denied, not because we don't have a good argument, but because we have too good an argument.

This is going to be one of those settings in which the court is going to go, "Oh, my God. We said those Blakely rights were so important, but maybe we
can force California now, and a lot of other states, to cope with these rights at initial sentencing. But, did we also really mean that this applies to revocation of parole, and probation, and supervised release, and all of these back end functions?"

Does it also mean -- and I don't know if you guys have these problems -- that when somebody has a fine imposed, or restitution, or forfeiture, all those facts have to be proved to a jury, and noticed in an indictment, et cetera, et cetera?

The reason what little hair I had left was lost when Blakely came out was because I realized not just how profoundly consequential this would be to the federal sentencing system and all of those sentencing systems that depended on judicial fact-finding for initial sentencing determinations, but in fact depended on what might be sort of called administrative justice, rather than adversarial justice, in the operation of a sentencing system.

And, that's because -- and this is, again, I'll sort of compliment the founders and give you a thought to think of -- something to think about -- adversarial justice is inefficient. From a framer's perspective, I think that was good, because an inefficient government is a less oppressive
government. An inefficient government can't put
2.2 million people behind bars, which is our current
incarceration rates. An inefficient government can't
monitor 7 million people on probation. An inefficient
government can't afford to lock people up through
civil commitment and other mechanisms that we now use
to lock a heck of a lot of people up. I think that
was very much the framers' vision.

Adversarial justice is costly and
inefficient. The problem is we've, in a lot of ways,
decided we need to be more efficient in the operation
of our criminal justice system. And, I am pretty
darned confident Governor Spitzer won't be pleased if
you were to come back and say, "Well, Berman helped us
see the light, just like the founders suggested, we
should be less efficient in operating the system, and
that will make things go better."

No, that will mean the State will have less
ability to do what it wants to do. Again, depending
on your faith in the State, your faith in the
government's exercise of its power in the criminal
justice system, that could be a very good thing to
safeguard individuals, but it could be a very bad
thing, in terms of getting good things done. Right?

And, that's especially one of the points
that I don't know if you've heard about, drug courts
or, you know, a variety of diversionary programs, or a
variety of mechanisms to use what I think, again, can
fairly be described in general terms as very
administrative models of adjudicating criminal justice
issues, that's going to necessarily be in some kind of
tension with what the Supreme Court is doing through
this modern sentencing jurisprudence.

But I'm -- as I look to the future, and
that's where I want to get to my last dimension, I'm
relatively confident that the practical will always
ultimately prevail, right?

And so, let's just finish up the third
dimension of the practical. Whatever the legal is,
whatever the political is, you could be confident the
practical will always prevail. So, another dimension
that, as a sentencing commission, you need to be
attentive to, as you're putting law together, as
you're making recommendations about politics, is to be
attentive to the inevitability of the practical.

And, that's another variation of the
political story. I mean, maybe this is all just a
kind of version of realism. But, it means make sure
the judges who actually have to put in sentences, or
the prosecutors who actually have to bring
indictments, or the defense attorneys who actually have to argue points or bring up ideas, are bought into the system, right? So, that's really where the federal system went off the rails across a couple of dimensions.

The commission didn't do a great job of buying the politicians into the system at the front end. So that instead of having Congress constantly pass suggestions to the commission, they passed mandatory minimum statutes.

Conversely, the commission also didn't effectively buy the judges into the system. So, the judges were told what they could and couldn't do, rather than being encouraged to write opinions that criticized the guidelines.

And, one of the fascinating things that I only learned recently was that, initially, the commission, itself, recommended the guidelines be advisory in the federal system before they became mandatory. And, I think if that had happened, it would have profoundly impacted the development of the federal sentencing system, because judges would have embraced the guidelines. Hey, this is really helping me. This is a good idea. I like this. Here's what needs to be changed a little bit, and here's what
doesn’t.

Instead, the guideline system got mandated on the judges. They reacted adversely, half of them ruled the system unconstitutional. When the Supreme Court finally said the system was constitutional, they were already so embattled against the commission, and there was such antipathy between the commission and the judges that, practically speaking, the system was already dysfunctional across that dimension, as well, and that’s why we got plea bargains and all sorts of complaints about how the system works.

Okay. The last dimension. This is a dimension that really is the fourth dimension, and that’s the passage of time or the future, right? So, this gets back to the first story of -- and I don’t want to be depressing to be the final thought on a long day, after five consecutive weeks of doing this. But, there’s no way you guys can do anything close to this by October 1 or, you know, whenever your full report is done. All you can do is get started.

And, I don’t know if that makes you feel better or worse, but these things change so quickly, there’s so much there, this is so complicated, I often in a very self-serving way tell my students at the end of the semester when I teach my sentencing course, if
they’re more confused at the end of the semester than they were at the beginning, then I’ve done my job well. Because, this stuff isn’t easy.

And, as time passes, and as you learn more, you just come to appreciate, like I suggest, all of these different dimensions, and how that when you get one piece of this puzzle figured out -- and again, I'm trying to suggest to you that the parts that I have figured out -- having a permanent commission who is in charge of doing this, and focusing on these issues, and being attentive to these issues -- once you get that one piece figured out, then you all of a sudden realize, oh, wait, yeah, but if that commission is too close to the political centers, that commission's priorities will get distorted in a variety of ways that may be unhealthy.

Oh, and if that commission isn't working directly with the individuals having to implement these rules on the ground, the commission is necessarily going to do things that sound great in general, but then get implemented in very disparate ways, in different regions, based on different community norms, and things like that.

And so, even when you get something that you feel confident about, the more you understand about
how the system operates, the more you watch the system 
unfold, the more challenging you see this is, and the 
more you recognize the need to constantly monitor, 
constantly attend to, constantly adjust the way the 
system operates.

And, that's only going to get worse, or 
harder, or more difficult, or challenging because the 
technology of crime, you might say the sort of 
technology of our knowledge about crime and responses 
to crime, and the technology to combat crime is moving 
ever faster, right? And so, you know, think about one 
of the reasons we get this drive-by legislation is 
because we get new crimes. Whether it's -- now we're 
worried about meth instead of crack, or we're worried 
about extasy instead of heroin. New weaponry of 
various sorts, right? Different kinds of threats to 
the community. The computer, right? That's the new 
weaponry, I guess. Identity fraud, right? Back 
dating, I guess is the corporate level of this. Child 
porn downloading. You name it.

The technology is not going to slow down. 
The threats to public safety are going to be evolving 
in ways. And that, itself, has been a part of what's 
gone on at the federal level. It's Congress says, 
"Oh, gosh, here's a new problem," whether it's
corporate crime, or this, or that. I guess the answer is pass a new statute.

And that’s itself one of the really fascinating stories here, is the U.S. Sentencing Commission was in the middle of a 8-year project to revise how it dealt with fraud and theft crimes. And, at the -- literally six months after they passed all of these new guidelines to completely revamp the way it dealt with fraud and theft in a sophisticated way, and to its credit, it did field testing of its proposal, I mean it's just a brilliant project, then Enron collapsed.

And, six months later, Sarbanes-Oxley gets passed, and the commission has to go back and sort of re-write all the rules. Not because they didn't write them brilliantly the first time, but because all of that hard work -- I guess no good deed goes unpunished -- was necessarily recast, in light of the economic changes of the day.

And, I don't need to lecture folks in this City particularly about how crime priorities changed from the war on drugs, to the war on terrorism, to all sorts of other wars going forward. It's inevitable that whatever choices make perfect sense now, they're going to look differently a year from now, five years
from now, ten years from now, fifteen years from now.

New knowledge, right? So, new information about what works, what doesn't work. New knowledge about what our society's commitments are, too, on a variety of different kinds of fronts, right?

So, whether we're talking about different kinds of identity theft, or different kinds of economic harms, or whether we're -- you know, now, the big debate in another part of the criminal justice realm is should virtual child porn count? You know, what about the people who can get the computers to simulate all sorts of awful pornography, but no real people are involved? Is that a crime, in and of itself? What if a person is thinking about doing that? What if a person is describing that? Et cetera, et cetera.

The criminals, good and bad, are always going to come up with all sorts of new visions of what they want to do, and society's responses to those concerns are necessarily going to evolve.

The last piece of this -- and this is the piece that I think I have not done nearly the studying on, but I mentioned when thinking about coming here I wanted to leave you all thinking about -- is what seemed like brave new world technologies, but that I
think are the inevitable future of modern correction systems, right?

So, one is already front and center. I don't know if you all have talked about this at all, but California passed an initiative that called for GPS tracking of all sex offenders. I think it's inevitable in that we already have electronic monitoring, home confinement, a variety of techniques to people confined, especially to the extent that that ends up being cheaper and easier to monitor through computers than keeping people locked up in cells. And, there's almost nothing that's more expensive than keeping people locked up 24/7 through traditional incarceration. I think GPS is going to become more and more a part of the operation of the system.

Lately, we're hearing about microchip implants, which I think is just GPS in a even more intriguing and scary form.

There is talk about brain monitoring, brain impacts, chemical castration has been around for a while, other kinds of chemical approaches to keeping offenders from being violent, or predators of various sorts. These things are inevitable for a couple of reasons.

One is, the technology is going to keep
advancing. We're just going to learn more about how the world works. And, you know, one of the surprising things than only an academic like me could cast in these terms, is imprisonment was a newfangled technology that made America great at one point, right? So, this is the long historical vision.

Why was the death penalty and banishment the common forms of punishment during the era of the framers? It's because it's the only ones we had really sort of figured out at that time.

Then, along comes a fairly progressive vision. Hey, we shouldn't just kill everybody or send them to Australia. We can lock them up. And, won't that be good? Because when we lock them up, what are we going to do? We're going to give them the Bible. We're going to have them reflect on their harms.

One of the amazing experiences that I had, it was at a conference of the National Association of Sentencing Commissions. I don't know if you all have plans to go there, in Oklahoma City, but you ought to think about attending if you can get the budget for it, because there you'll meet all your colleagues and can commiserate with how they're lucky, they get to do this all the time, and you guys only get to do this for a year. But last year's meeting was in
Philadelphia. And, we got to tour the Eastern State Penitentiary, which was one of the first famous penitentiaries, which was very much designed to be this progressive vision of let's not just kill them or throw them out of the country. Let's give them a chance to be locked up in a cell and to reflect on their misdeeds and to go better.

And, one of the many fascinating insights was that, according to the tour guide, the Eastern State Penitentiary had indoor toilet facilities before the White House did. Now, imagine that these days, right?

[Laughter]

MR. BERMAN: You know, Governor, I know you're working on some new technology in the Governor's mansion. We think we ought to put this in prisons first because, you know, of course, they deserve the new technology first. Unfathomable, right? And, I loved that moment, just as an awareness of, you know, in at time that seems so cold and distant, they were treating prisoners better than they were treating the President. I won't make a political statement about wanting to do that now, perhaps.

But, I will say that technology changes the equations all the time. And, it's inevitable that
we're on the cusp of a variety of technological advances that could change this. And again, you know, think about ways that it's not as scary, right?

Trigger locks on guns as a technological way. Imagine a system in which you could create a database -- and we're working on this -- a DNA database, as fingerprinting databases, for all criminal offenders. If you can create a mechanism, through technology, that anybody with a criminal record would have their fingerprint encoded in a way that would disallow them from being able to fire certain kinds of firearms. Rather than locking up people for 10 years for being a felon in possession, we would just make sure those persons couldn't actually use the weapons, through a technological means.

A variety of techniques to keep drunk drivers from getting back on the road and driving. There's all sorts of ways.

This doesn't mean that you all should become a brave new world commission. But it is something that I encourage you to be thinking ahead about, not only because I think there's a lot more potential there than most people realize, but also because if you don't do it, the companies will.
There is an economic reason why GPS is becoming successful. It's because there are companies out there marketing their services, saying "We can, cheaper than keeping all your sex offenders locked up, make them little dots on this system. And, for half the price, you can monitor twice as well. And, trust us, this report, that we had this very expert scientific community do" -- which, of course, is their own paid researchers -- "has shown that this is twice as effective as keeping these folks locked up in civil commitment, in this form, or that form."

And, I don't need to tell you all how appealing that's going to sound when marketed that way. And so, I think, as I look ahead and think about the future, it's not just that new technology has extraordinary potential to recast the way we look at a lot of these issues, but that there are going to be people with a very significant economic incentive to present those issues, both to the politicians and to the people working practically, right?

So, this gets back to these dimension levels. This gets back to the inevitability of whatever legal rules you guys put forward, the politics and the practicalities are going to influence things. And, if it turns out that you come up with a
brilliant way to deal with any of these problems, but then the local community is struggling to make their budget, and some -- I don't know what's sort of the technological equivalent of a snake oil salesman -- comes along and says, "Look, we can get you the same end at half the price," that's going to be very hard to resist.

And that's what I see time and time again, at a different level, the way these things sort of pop up from the grassroots. Oftentimes, again, those are very valuable things to think about.

The entire drug court movement, which has been so popular, and I know your own Chief Justice has spoken, justifiably proudly, about, grew out of a Miami court system that said there has to be a better way.

But, it's important that people are soberly realistic about those innovations and are prepared, especially if there is a commission like this in place, to help the people on the ground see which ones really are worth trying and which ones may sound better than they truly prove to be.

I think I've saved a little time for questions.

COMMISSIONER O'DONNELL: You did. Thank
MR. BERMAN: Thank you.

COMMISSIONER O’DONNELL: This has been great, very thoughtful. I know we do have a lot of very tired people who have to catch trains and planes. But, I do want to -- are there any questions that you would like to discuss at this point?

I would really appreciate it if we could reach out to you --

MR. BERMAN: Absolutely.

COMMISSIONER O’DONNELL: -- as we do our work, and bounce ideas off you and get your thoughts.

MR. BERMAN: It would be my pleasure to do so. I’m already excited and looking forward to seeing whatever you produce October 1st, because I’m sure it will be --

[Laughter]

COMMISSIONER O’DONNELL: It might be we need more time.

MR. BERMAN: Right. Nothing wrong with that.

Let me just say, as sort of a last appropriately flattering point, that my sense is you guys are taking the appropriate first approach of trying to bring in a lot of bright people to tell you
a lot of things. And, I'm sure that's more overwhelming than it is inspiring at this stage.

Because I was just, even looking over who you had on the agenda today, let alone who you've had before, and they're all top notch people who I have, you know, heard great things about. And, the problem is we all have too much to say, and have too much experience seeing all of this stuff have incredible potential and then not always live up to that potential.

And so, my guess is not only do you have -- that's why I didn't bring any reading, because I figure you have plenty to read already on your train rides back, and that you should feel comfortable coming to me, you know, just in whatever ways that I can help. Because, my goal is to not only continue to look favorably on the New Yorkers who I still consider myself a part of, but that I think, as I mentioned at the outset, New York is well positioned to not have to simply just overreact to sort of current problems, but rather sort of take this moment to build the sort of next era of reform and provide, then, an effective blueprint for other states that I know are sometimes directly, sometimes indirectly, struggling with the same issues.
COMMISSIONER O’DONNELL: Thank you, very much.

MR. BERMAN: Thank you.

COMMISSIONER O’DONNELL: We really appreciate it.

[Applause]

COMMISSIONER O’DONNELL: Thank you, everyone. If you don’t have your subcommittee assignment, Gina will be calling you this week, to let you know when and where. And, thank you.

[Time noted: 4:05 p.m.]

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CERTIFICATE

I, June Accornero, do hereby certify that I typed the preceding transcript of the proceedings of the New York State Commission on Sentencing Reform, held on Wednesday, July 18, 2007, at Governor's Office, 633 Third Avenue, New York, New York, and that this is an accurate transcript of what happened at that time and place, to the best of my ability.

June Accornero