

NEW YORK STATE
COMMISSION ON SENTENCING REFORM

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.

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Also Present:

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

Arleigh Green
Court Reporter

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Bridget G. Brennan

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Douglas A. Berman

P R O C E E D I N G S

1
2 COMMISSIONER O'DONNELL: We are fortunate
3 that we have found someone that we thought could
4 reflect the views, overall, of the victim community,
5 which we know is represented by various different
6 communities who have many, many different issues and
7 concerns. But, Susan is a national leader and
8 internationally-recognized spokesperson for victims of
9 crime.

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

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

20 Susan?

21 POLICY VIEWS ON SENTENCING REFORM

22 FROM A VICTIM ADVOCATE

23 MS. HERMAN: Thank you, Denise. It's
24 really an honor and a pleasure to be here today. I'm
25 not sure how pleasurable it's going to be for you to

1 listen to this froggy voice. But, please bear with
2 me.

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

5 COMMISSIONER O'DONNELL: Um hmm.

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

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

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

23 In order to respond appropriately to
24 victims, it's important to understand the impact of
25 crime on those victims. I'm sure those of you in the

1 room are very aware of the fact that crime victims are
2 at greater risk of many mental health problems, drug
3 and alcohol addictions, teenage pregnancies, and many
4 other social ills than the general public. I know you
5 know those statistics.

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

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

1 victims.

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

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

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

25 I also believe, though, that the traditional

1 criminal justice system should be as victim-oriented
2 as possible, and that it can address many of victims'
3 needs.

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

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

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

24 Secondly, they provide information
25 themselves, through testimony, or through a victim

1 impact statement. Telling your story, having somebody
2 listen, can be very important.

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

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

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

22 I know that at your -- at least I was told
23 that at your last meeting, the Commission had a full
24 presentation on victims' rights in New York State, so
25 I will not limit them here. You got that in your

1 materials.

2 I would just like to call your attention to
3 language in Article 23, the Fair Treatment Standards,
4 that asks judges to take steps to ensure that victims'
5 rights have been implemented. There is other language
6 that asks agencies to implement victims' rights,
7 quote, "where possible," close quote. And, further
8 language that stipulates that Article 23 creates no
9 cause of action or injunctive relief. I would say
10 that these are mixed messages, to say the least.

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

20 So, recommendations. I have four clear
21 recommendations.

22 First, the right to present a victim impact
23 statement should be implemented and enforced.

24 Prosecutors and judges must be clear to victims about
25 the limited purpose of a victim impact statement. It

1 is an opportunity for the victim to express, in their
2 own words, the impact of the crime. Victims' views do
3 not control sentencing decisions, and victims should
4 know this.

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

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

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

21 The third recommendation. Restitution
22 should always be considered and enforced. Restitution
23 is particularly important to victims. A restitution
24 order is recognition by the courts that the offender
25 has a specific obligation to the victim, to repay the

1 victim for specific losses. From a victim's
2 perspective, a restitution order conveys a powerful
3 message that their experience matters to the court,
4 and their losses are real.

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

10 The most impressive restitution model is
11 Vermont's. In Vermont, rather than probation or
12 another agency trying to collect restitution from the
13 offender and giving it to the victim, there is a
14 revolving fund that has been created. The first
15 \$10,000 of any restitution that's been ordered is paid
16 directly from that fund, by the Government, to the
17 victim. The Government then collects restitution from
18 the offender. And, as you might imagine, the
19 incentive to do so is a bit greater.

20 Finally, enforcement mechanisms should be
21 created for all victims' rights. I understand that
22 the issue of enforcement was raised at your last
23 meeting in the context of reviewing the Fair Treatment
24 Standards, so I'd like to tell you a bit about what
25 other states are doing in this regard.

1 Several states have created a designated
2 office or agency to receive, investigate, and attempt
3 to resolve crime victims' complaints. South Carolina
4 has an ombudsmen, Colorado a committee. Connecticut
5 has a state victim advocate. The majority of
6 complaints in those states are resolved by giving
7 victims more information or referrals. However, these
8 complaints may go to the investigative stage.

9 The ability to impose consequences on
10 offending agencies or officials varies between the
11 states. But, in general, it's limited.

12 Ombudsmen-type offices are limited to investigating
13 complaints and issuing reports. Colorado's committee
14 may refer certain violations to the Governor, who can
15 ask the Attorney General to bring injunctive relief.

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

22 While it is important for victims to be able
23 to file such complaints with an agency or official,
24 many violations of victims' rights require immediate
25 action, a different path. Therefore, a number of

1 states give crime victims limited legal standing to
2 enforce their rights.

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

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

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

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

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

23 So, my final recommendation to this
24 Commission is that you create enforcement mechanisms
25 that provide -- my final recommendation to this

1 Commission is that you create enforcement mechanisms
2 that provide formal complaint mechanisms through which
3 victims receive information or have their complaints
4 resolved. [Thunder] I'm glad to see he agrees.

5 [Laughter]

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

8 [Laughter]

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

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

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

22 And, I know we have, you know, abilities to
23 collect small amounts of money when people are
24 incarcerated, but it's a very, very small amount of
25 money.

1 So, how do you sort of balance the indigence
2 issue and especially as it affects reentry and -- and
3 former inmates getting on their feet, and the
4 restitution issue for crime victims?

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

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

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

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

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

24 COMMISSIONER O'DONNELL: -- even if you
25 aren't -- aren't able to collect all of the

1 restitution, the very act of going through it allows
2 the victim to feel that they're getting addressed, and
3 it allows the offender to start to repay --

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

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

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

13 And, I think that if we actually went beyond
14 the Vermont model, where they pay out the first
15 \$10,000 and then they collect it, and give this
16 responsibility to a State Department of Revenue that
17 knows how to collect money from people, rather than
18 have this be a responsibility of probation or a
19 victims' organization, I think you would see a
20 tremendous amount of success in collecting
21 restitution.

22 COMMISSIONER O'DONNELL: Yes, Tony?

23 COMMISSIONER BERGAMO: Thank you for coming
24 today.

25 While I agree with you philosophically, I

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

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

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

11 MS. HERMAN: Right.

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

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

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

21 MS. HERMAN: -- restitution, --

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

24 MS. HERMAN: -- if you -- well, if you
25 don't want it, you can say so at any time.

1 COMMISSIONER BERGAMO: No, you're missing
2 my point. I'd find it --

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

6 COMMISSIONER BERGAMO: No, I --

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

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

11 MS. HERMAN: Yes.

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

15 MS. HERMAN: I think victims are as --

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

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

23 Victims' views on sentencing, in particular,
24 vary as much as the public's. It's all a lot of
25 stereotyping that victims are retributive, or that

1 they want to forgive, or that they want restoration.
2 Their views on sentencing are as varied as everybody
3 in this room. More so.

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

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

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

20 COMMISSIONER BERGAMO: Thank you.

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

23 COMMISSIONER BERGAMO: Thank you, very
24 much.

25 MS. HERMAN: Okay.

1 COMMISSIONER O'DONNELL: Anybody else?

2 MR. ANNUCCI: Just a --

3 COMMISSIONER O'DONNELL: Yes, Tony.

4 MS. HERMAN: Do you need me back there?

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

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

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

10 MS. HERMAN: Okay.

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

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

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

22 But, I also, from my personal experience,
23 know that there is a tremendous political clout to
24 crime victims in this state. We react, the highest
25 level officials, if there is a victim issue, somebody

1 writes a letter saying "How did this inmate get my
2 home address?" We jump.

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

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

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

23 MS. HERMAN: It's way beyond the specific
24 cases. It's -- it's the common experience of victims
25 who don't know what their rights are, aren't told or

1 invited to come, when they have the ability to be
2 present in court, and be excluded from courts; are not
3 asked to participate, when they have a legal right to
4 participate, and have no recourse. And, we've all
5 been --

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

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

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

22 There's a victim impact statement. Well,
23 yeah, you can submit something in writing or not, you
24 can speak. Is it really fully explained what that
25 victim impact statement is?

1 When you have a disagreement between the
2 views of the victim and the views of the prosecutor,
3 we've got a lot of victims who weren't asked to give a
4 victim impact statement. And, there are lots and lots
5 of problems.

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

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

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

20 I think the issue, though, becomes whether
21 or not there is enough victim advocacy out there,
22 that's spreading the word, that's actually spreading
23 that information out there, in terms of what they're
24 legally entitled to, and how to access certain
25 agencies and certain systems. And, I think that is

1 not necessarily the law, but in terms of communicating
2 the laws, and through resources like victim advocacy
3 --

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

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

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

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

24 COMMISSIONER O'DONNELL: Joe?

25 COMMISSIONER LENTOL: I heard you mention

1 in your presentation about an office of crime victims'
2 advocate in some states.

3 MS. HERMAN: Yes.

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

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

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

25 COMMISSIONER LENTOL: And, with respect to

1 restitution, I'm a little bit confused about the
2 concept as to whether or not it applies only to
3 property crimes, where something has been taken from
4 the victim?

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

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

17 COMMISSIONER O'DONNELL: One last --

18 COMMISSIONER LENTOL: So --

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

21 COMMISSIONER LENTOL: Objection.

22 COMMISSIONER O'DONNELL: One last question.

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

25 [Laughter]

1 COMMISSIONER O'DONNELL: Okay.

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

3 COMMISSIONER NEWTON: No, I'm --

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

6 [Laughter]

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

9 MR. VANCE: Gracious, thank you, Judge.

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

12 COMMISSIONER NEWTON: A smart move.

13 MS. HERMAN: A wise Chair.

14 [Laughter]

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

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

24 MS. HERMAN: Right.

25 MR. VANCE: -- within the criminal justice

1 system.

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

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

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

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

1 victims. But, they have another role to play in that
2 path to justice for offenders.

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

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

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

22 So, judges would ask affirmatively,
23 explicitly -- "Have -- did you get notice of this?
24 Have you informed the victims of 'X,' 'Y,' and 'Z'?"
25 Judges will say to victims, affirmatively, "What

1 happened to you is wrong." That's acknowledgment by
2 the State that's very, very important.

3 Does that answer --

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

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

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

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

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

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

22 MS. HERMAN: -- defendant-centered system.

23 COMMISSIONER NEWTON: -- I had, to what
24 extent have some of these suggestions been tested on a
25 constitutional basis that tells us that the modelers,

1 Government, the hand -- the awesome hand of Government
2 says you are charged with a crime, and this is the
3 process. To what extent has there been conflict
4 between growing victims' rights or some of these
5 issues and -- and the sort of traditional mandatory
6 constitutional imperative?

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

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

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

23 The only place in all the litigation that
24 I've seen around the country where there is usually a
25 conflict that a judge has to weigh the two rights has

1 to do with the defendant's right to a speedy trial.

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

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

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

20 COMMISSIONER O'DONNELL: Susan, thank you.

21 I am --

22 MS. HERMAN: You're welcome.

23 COMMISSIONER O'DONNELL: -- you know, we --
24 we are going to be working in subcommittees after
25 this. Part of our sentencing policy committee will be

1 working on victims' issues, and we'd like to be able
2 to call on you to discuss --

3 MS. HERMAN: Of course.

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

7 MS. HERMAN: Absolutely.

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

10 MS. HERMAN: You're welcome. I think it's
11 --

12 COMMISSIONER BERGAMO: Thank you, very
13 much.

14 [Applause]

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

18 COMMISSIONER NEWTON: You did an excellent
19 job.

20 MS. HERMAN: Thank you.

21 COMMISSIONER NEWTON: Thank you.

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

1 JUDGE BRUNETTI: Sure.

2 COMMISSIONER O'DONNELL: Okay?

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

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

7 JUDGE BRUNETTI: Oh, okay.

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

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

12 (Pause)

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

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

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

19 COMMISSIONER O'DONNELL: They will.

20 JUDGE BRUNETTI: Good. Because I --

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

25 You know, the person who imposes a sentence

1 is a judge, and sentencing and the amount of
2 discretion judges have in sentencing, are intertwined
3 and critical to our look, as a Commission, on where we
4 think that sentencing should be reformed in New York
5 State.

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

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

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

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

22 POLICY VIEWS ON SENTENCING REFORM

23 FROM THE JUDICIARY

24 (PART I)

25 JUDGE BRUNETTI: Thank you.

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

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

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

16 [Laughter]

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

24 [Laughter]

25 JUDGE BRUNETTI: So, let me start with what

1 I'm going to end with, which is that there is a
2 difference between approaching something as reducing
3 disparity, versus increasing consistency. They are
4 not necessarily the exact opposites of the same
5 points.

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

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

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

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

1 subjective.

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

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

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

1 public and private interests represented in the
2 criminal process.

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

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

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

24 But, whatever the disparity is, real or
25 apparent, there are at least three potential causes.

1 And, the first two involve the Executive Branch.

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

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

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

19 I'll use a different example than the one in
20 the memo, about the Boy Scout with the violent felony.
21 What about somebody who's 19 and does a commercial
22 burglary, and has no priors? How is that person
23 treated in one county from the next, in the same
24 county by the same judges, in the same county by
25 individual assistant district attorneys? And, the

1 larger the D.A.'s office, you probably would see that
2 there might be differences, which is an indication to
3 you as to what you may or may not seek to achieve in
4 controlling whatever the cause may be.

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

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

23 Remember, though, you're never going to
24 achieve complete consistency because of individual
25 A.D.A.s, but even if there is a D.A.'s policy, are

1 they going to follow it? An elected District Attorney
2 has a policy -- all cases are treated the same. And
3 then, even if that occurs, you're still going to have
4 the human being judges, and that's we -- we still are,
5 despite what some may claim. We are still human
6 beings, and you're going to have that factor.

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

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

24 So, if you want to increase consistency,
25 particularly in the more serious offenses, one of the

1 possibilities is this grid system that I suggested.

2 And, it has to be free from constitutional defects.

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

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

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

22 The second is -- this is, like, named after
23 a TV show that went off the air -- Sentencing Reform:
24 When Everyone Behaves Badly. Is that a great title,
25 or what?

1 [Laughter]

2 JUDGE BRUNETTI: It's by a Federal Judge.

3 And, what could be more intriguing than that title?

4 And, I have the answer.

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

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

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

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

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

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

25 Any questions that we have at this point?

1 MR. ANNUCCI: Yes.

2 COMMISSIONER O'DONNELL: Yes, Tony.

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

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

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

1 MR. ANNUCCI: Right.

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

4 MR. ANNUCCI: Right.

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

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

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

22 COMMISSIONER O'DONNELL: Judge, we've heard
23 from a couple of -- about a couple of states that
24 really have more elaborate information systems
25 available to judges about not only their own

1 sentencing practices, but other sentencing practices
2 with the state, or within the county, or locality.
3 And, when we were reading your article, John Amodeo
4 said it looks like Judge Brunetti tries to do that
5 himself, which is -- you know, and -- and there may be
6 other judges there -- it takes an enormous amount of
7 work -- that -- that are trying to do it themselves,
8 to get the information at their disposal of what
9 they've done in similar cases.

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

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

22 And, one of the things that was the benefit
23 of having a statewide Probation Office was something
24 like that. So, it could be an independent goal, or it
25 could be coordinated with a more vast information

1 sharing type approach.

2 COMMISSIONER O'DONNELL: And, the other
3 thing that we have heard come up, primarily in a kind
4 of reentry kind of context, but also something that
5 certain Probation has taken the lead on is -- is the
6 development of risk/needs assessments for individuals,
7 and hopefully the ideal that those kinds of
8 assessments would be done in a pre-sentence report.

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

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

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

25 We -- it would help us to know, for example,

1 which we know intuitively or we've heard through
2 studies, that as a person gets older, there's less and
3 less of a chance they're going to commit a crime.
4 And, that's just one of the items that should be, you
5 know, expressed to judges. We should know about it.
6 And definitely, more information of that nature should
7 be provided.

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

10 JUDGE BRUNETTI: Definitely.

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

16 JUDGE BRUNETTI: Isn't that something?

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

24 JUDGE BRUNETTI: You know, it's not a
25 question of catching up, though, with the technology

1 and science. I mean, science, for whatever it was,
2 existed 30 or 40 years ago about deviant behavior and
3 things like that. So, you know, it's something that
4 we really should -- should have been doing and should
5 be doing.

6 COMMISSIONER O'DONNELL: Yes, Eric?

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

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

15 JUDGE BRUNETTI: Well, the answer -- no, it
16 -- look, it's influenced by funding mechanisms that
17 are created by the State Government in certain cases.
18 And, the example would be -- literally, the ATIP
19 Program, which is -- was predicated, and many of you
20 know this, on the theory that by sending this person
21 on the violation of probation -- they have a violation
22 of probation now -- by sending them to intensive
23 supervision, you're going to save money at the prison
24 system -- the state prison system level. So, that's
25 institutionalized. So, we're provided with that.

1 We also get it, in certain ways, through
2 defense advocate systems, like the Center for
3 Community Alternatives. They submit a report. You
4 become aware of these things.

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

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

13 MR. SCHNEIDERMAN: Thank you.

14 COMMISSIONER O'DONNELL: Thank you.

15 JUDGE BRUNETTI: Okay.

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

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

20 [Applause]

21 COMMISSIONER O'DONNELL: We are going to
22 have plug ahead, because we have so much on our
23 agenda, although not all our speakers are able to be
24 here, because of the weather right now. And, Justice
25 Fisher is on his way. He's headed out twice, already,

1 to get here. So, we have invited him to join us
2 later, if he can get here.

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

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

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

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

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

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

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

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

13 POLICY VIEWS ON SENTENCING REFORM

14 FROM THE DEFENSE

15 MR. GRADESS: That's very kind of you.
16 Thank you.

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

22 And then, at about 4:00 o'clock this
23 morning, because I live in Albany and have to travel,
24 I woke up and thought to myself, "By God, this is not
25 about policy. This is about people."

1 And, at the instant that that came to me, a
2 stream of witnesses sort of filled my head, clients
3 that I have known for 38 years, people that I have
4 advocated for in a variety of jobs and positions, and
5 have been uniquely unsuccessful on their behalf, for
6 reasons that I will share with you.

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

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

21 I want to talk a little bit about history,
22 because I think it is important to you. Some of you
23 have been around for the entire period, and some of
24 you not, but I think it's significant to start with
25 the Temporary State Commission on the Revision of the

1 Penal Law and the Criminal Code, which took place
2 between 1961 and 1970, a period a little bit longer
3 than you have to work on similar revisions.

4 [Laughter]

5 MR. GRADESS: And that Temporary State
6 Commission resulted in two real products: what I
7 still continue to call the "New Penal Law," 40 years
8 after its passage on September 1st, 1967; and the
9 Criminal Procedure Law, which came into effect in
10 1971.

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

20 That was an instant in time when the
21 opportunity exists -- existed to take into account the
22 personal characteristics of clients, to advocate for
23 them, to have alternatives as they were necessary, to
24 seek probation or probation with specific conditions,
25 to have unconditional discharges or conditional

1 discharges, to do what was necessary to make people
2 whole, to protect the community, to service victims
3 and offenders.

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

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

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

24 From that instant on, we had mandatory
25 sentencing as the way we thought in this state. And

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

15 That has been what we've been doing since
16 1973. And, in doing it since 1973, in each of these
17 election years, and I include in that the '90s -- I
18 included in '78 for that law, but also '80, for the
19 mandatory gun law, for which as far as I know and
20 anyone here can correct me, I don't think we have any
21 support in the empirical data for the value of a
22 mandatory sentencing law in gun cases. And, it's
23 certainly what we did last year, in getting a
24 mandatory minimum for gun cases. It is a reflection
25 of our continued failure to look at the data and to

1 make decisions based on it.

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

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

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

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

25 He said that sentencing had become a rival

1 of the IRS Code in its complexity. And, he said that
2 in 1982.

3 [Laughter]

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

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

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

21 But, the presumption of incarceration works
22 this way: Think of that phrase -- and I'm sure you've
23 heard it here -- alternative to incarceration -- ATIs.
24 Think about what it really means. What it means is we
25 are so used to thinking about incarceration being the

1 sentence of choice that anything that is
2 non-incarcerative we call an alternative to
3 incarceration.

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

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

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

1 realistic alternatives that would make people whole.

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

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

22 Yet, at the same time, even though this
23 process, one might argue, is clean, it has made
24 sentencing confused, hard to understand, somewhat
25 unpredictable, if not completely unpredictable.

1 Class B drug sales, which Bill will talk
2 about, you know, run the gamut I this state from DTAP
3 in the City, to 5 to 15 in the country, with no
4 rationale for the distinction. I mentioned before
5 last year's loaded gun legislation.

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

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

25 You can sell a dose of drugs as a Class B

1 felony, and it's the equivalent of stealing over a
2 million bucks, right? And so, it's not an accident
3 that victims are dissatisfied, that the defendants are
4 not held accountable in any meaningful way. I also
5 think, and I've seen my friend Joe, who's seat I
6 stole, that prosecutors are deprived of the
7 opportunity for the meaningful delivery of mercy, and
8 the meaningful delivery of targeted sanctions. And,
9 we need to change that.

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

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

24 And, we need a new approach to putting
25 people back together. And, I think I've heard it in a

1 remark as I was coming in here -- we know that we're
2 pumping low-risk offenders into prison who shouldn't
3 be there. We know that we're putting high-risk
4 offenders in there, and we're not servicing them.
5 And, we have no way to fix that unless we change the
6 paradigm.

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

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

24 And then, there is a public expectation that
25 when people come out of prison, they will be normal.

1 And while I admire what the Governor and this
2 Commission, I think, has done and will do on reentry,
3 I want to share with you that reentry has to move to
4 the front end as well as the back end. We need to
5 think about the integration of human beings in the
6 context of making them whole.

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

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

14 MR. GRADESS: Terrific. Moving forward --

15 COMMISSIONER O'DONNELL: -- yeah.

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

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

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

1 intrinsically wrong.

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

7 COMMISSIONER NEWTON: Only ten?

8 [Laughter]

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

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

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

20 Prison sentences should be uniformly
21 shortened. That's something I would like to spend an
22 afternoon with you on, but they should be uniformly
23 shorter, and a non-incarcerative sentence should be
24 available. I've been advised not to say for every
25 offense, because it would interfere with my

1 credibility with you. So, I shall say at least go
2 back to where we were from the Temporary State
3 Commission was -- of everything less than kidnaping
4 and murder.

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

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

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

23 You will now say what is that? I'm going to
24 share with you a bill that we wrote for the Black and
25 Puerto Rican Caucus back in 1985, that did just that.

1 I sent it to John a little while ago. I'm giving you
2 some extras.

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

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

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

20 The obligation should be on the State -- and
21 this is for you, Joe -- to establish that an
22 incarcerative sentence, when it is being sought, is
23 necessary to protect the public, and that no lesser
24 sentence simultaneously respecting a client's liberty
25 will do that.

1 The record of a proceeding should
2 conclusively demonstrate that that least restrictive
3 alternative consistent with the public safety is being
4 imposed, and that the less drastic alternatives had
5 been considered and rejected.

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

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

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

24 Dispositional outcomes should be driven by
25 that known information.

1 The law changed, you know, last year to
2 include a new purpose for our Penal Law -- reentry and
3 reintegration, and nothing about what we currently do
4 is designed to accomplish that purpose. This would
5 be.

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

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

15 This is a bill that we wrote to accomplish
16 some of this, and John has all of it. I've given you
17 some excerpt pages from it. It obviously needs work
18 and it's somewhat outdated, but it responded to the
19 question that I think will emerge, which is how the
20 hell do we do what he said? That was the question in
21 1985. This is an answer that's as good today as it
22 was then. It's at least a good start.

23 The last thing I want to say to you is this:
24 Do not fool yourself into the belief that you can
25 release the prisoners without releasing the guards.

1 We have an industry surrounding sentencing. And we
2 have thousands and thousands of guards who you just
3 can't fire.

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

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

23 But, you need to think about the practical
24 reality that before you create a system of
25 non-incarcerative sanctions, you have to take the

1 familiar faces, and some of you may recognize the
2 somewhat younger, less gray, perhaps a little thinner
3 version of me as a person who attended many of the
4 sessions at Governor Cuomo's Sentencing Commission.

5 It's a little strange to be back here over
6 20 years later, trying to do the same things. But, it
7 is my sincere hope that we -- that we can get it right
8 this time, because it represents --

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

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

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

22 Through an open process that produces fair
23 recommendations, you have the power to correct huge
24 inequities in the system. If implemented, sentencing
25 reform can make all of our communities, including the

1 downstate neighborhoods that produce 50 percent of the
2 commitments to State Prisons, and those upstate towns
3 that might face a prison closing, safer and more
4 productive places to live.

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

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

17 [Adjusting microphones.]

18 MR. GIBNEY: Is that better?

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

22 While New York's prison population has
23 dropped recently, New York bears the dubious
24 distinction as a leader among the state in
25 incarcerating drug offenders. It has one of the top

1 ten highest rates of drug offender admissions relative
2 to population.

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

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

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

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

24 Judicial discretion, mentioned by Jonathan,
25 but also increased availability of community-based

1 treatment options.

2 One of the problems from our point of view
3 is that -- is the issue of control. At this point,
4 the District Attorneys control virtually every one of
5 the alternative to prison options through their use of
6 -- through their control of both the initial sentence
7 charge and the ability to plead down. The judge has
8 very little authority to order an alternative, and
9 defense counsel is virtually power -- powerless in
10 that regard. We've got to return that discretion to
11 the judges.

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

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

25 One glaring anomaly regarding drug law

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

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

14 We have seen recently abuse of the parole
15 system, to the point where many people have said that
16 it just doesn't matter what you do in prison. It
17 involves -- it's largely for the people convicted of
18 things that are termed violent felony offenses. It
19 doesn't matter what you do in prison. You're going to
20 be hit by the Parole Board three or four times before
21 your first realistic chance of release. And so many
22 have said that the Executive Branch, by changing
23 parole policies, actually just re-did sentencing law
24 in New York State, without any authorization from the
25 legislature.

1 A move toward determinate sentencing does
2 have the advantage of uniformity. Our concern about
3 determinate sentencing is that it can be -- can be --
4 doesn't have to be -- but can be overly harsh, rigid,
5 and therefore resulting in lengthy sentences. The
6 first two steps, in 1995 and 1998, worked toward
7 determinate sentencing in New York, increased not only
8 the sentences, the sentence time that's being served,
9 but also the potential exposure when almost as an
10 afterthought, post-release supervision was tacked on.

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

20 We are concerned that one of the proposals
21 that was recently submitted -- called a modest
22 proposal for reform, that you might remember, a couple
23 of weeks ago -- that proposal would increase
24 low-level, non-violent felony offenses for people
25 going to state prison by 50 percent, by raising the

1 frequently imposed minimum sentence of one year up to
2 one and a half years. So, it -- it -- if you're
3 moving in this direction, it's vital that you get the
4 numbers right and you evaluate where you want lower
5 sentences, that you really are lowering the actual
6 prison time.

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

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

24 There's a good program in DOCS right now,
25 called the earned eligibility program, which basically

1 forms a contract between the prisoner and the
2 correctional authority, when the prisoner comes into
3 prison, which says "If you do this program, we're
4 going to presume that you will be released early."
5 That's a good program. You should think about that,
6 in terms of building in your -- your release -- your
7 release planning and -- but expansion of this program
8 throughout the DOCS system means expansion of -- of
9 DOCS' capacity to provide programs.

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

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

23 The State of Oregon recently passed a
24 statute that requires alternative program evaluation.
25 Are there community-based programs that will meet the

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

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

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

23 We think the system should be a little more
24 honest. If you -- if you really intend to provide
25 jury trials to the people with the most serious of the

1 misdemeanors -- and the law does require that -- then
2 you should re-think and drop a lot of these things
3 that are now considered A misdemeanors to "B"s. List
4 the "A"s as the most serious of the misdemeanors, or
5 the repeat -- you can do a repeat offender statute.
6 That's often the justification for the potential
7 higher range -- but what if they do it again? You can
8 build that into a system for repeat offenses.

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

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

22 Penal Law 70.25.2-a requires judges to
23 impose consecutive sentences any time someone is
24 already on parole for another charge. A good example
25 is a drug addict. You may -- the best alternative for

1 that person may not be a lengthy stint in prison, but
2 a decent rehabilitation program. This does -- the
3 mandatory consecutive law ties the judge's hands.
4 It's required. They can't give a short period of
5 prison, because they have to give these sentences one
6 on top of the other. It interferes with the ability
7 to get into decent community-based programs.

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

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

21 We should consider expanding youthful -- YO
22 -- youthful offender eligibility. Right now, the
23 cutoff age is 19. Increasing scientific evidence
24 shows that youthful thinking -- we don't really emerge
25 as adults until we're some time in our twenties.

1 So, you should consider expanding YO
2 eligibility where a judge can say, "Yes, youth is a
3 factor in this crime. I'm going to give you a
4 slightly reduced sentence," to the age of 21.

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

7 [Laughter]

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

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

21 By a twist of fate, the community of
22 Washington Heights has been linked with Dannemora and
23 Elmira, right? They are -- they are two sides of this
24 same coin. I think there's a potential solution
25 there.

1 If we were to invest resources into bring --
2 bring job training, bring -- bring prevention
3 programs, bring drug treatment into the communities
4 that most need them, think about economic development
5 in those communities to produce jobs in those
6 communities, we know where the -- where the crime --
7 remembering hearing the theory that you should devote
8 your resources where you know that the problem is most
9 severe? We know where the problem is most severe. We
10 should put our resources into those communities.

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

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

1 Thank you.

2 COMMISSIONER O'DONNELL: Thank you, very
3 much.

4 [Applause]

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

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

15 MR. SAYEGH: Thank you. Thank you.

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

18 I've always said, just as a bit of
19 background about us, is that we're the largest
20 organization of people who believe the war on drugs is
21 doing more harm than good. We're a national
22 organization. We have about 26,000 dues-paying
23 members, 100,000 people that receive our e-mails, news
24 alerts. We work in places like California, New
25 Mexico, New Jersey, here in New York, Alabama,

1 Maryland, Connecticut. We've also worked in places
2 like Texas, Louisiana, Wisconsin, Oregon, Washington.
3 So, we've got some experience across the country in
4 looking at drug policies and drug laws, and the
5 intersection between public health and criminal
6 justice.

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

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

22 There's two people that are here, that I
23 want to point out today, and maybe if Cheri and Ricky
24 could also stand up. This is Cheri and Ricky
25 O'Donoghue, who work with us very closely on

1 Rockefeller drug law reform work. But their son,
2 Ashley O'Donoghue, and some of you may know this
3 story, is currently incarcerated on a B felony
4 first-time non-violent charge, and serving 7 to 21
5 years in a prison upstate.

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

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

23 Those two college students are -- got their
24 records sealed, where it's not even -- you know, put
25 into prison, not -- no jail time. They were suspended

1 from college, but they have now completed college.

2 And meanwhile, Ashley is serving his prison term.

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

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

24 And, I know that you all have heard a lot
25 about this from other speakers. I'm not going to

1 pepper you with a lot of numbers, because you've heard
2 a lot of those things before. But, I am going to try
3 to touch on -- on a couple of things here.

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

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

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

22 The third thing is ensuring that there is
23 access and a wholesale expansion of community-based
24 treatment programs in the State of New York, and that
25 those programs are accessible to community members in

1 their community.

2 And then, the fourth is retroactivity,
3 allowing for the people that are currently
4 incarcerated under the Rockefeller drug laws to apply
5 for some relief based on the new sentencing mechanisms
6 that are put into play.

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

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

22 The Rockefeller drug law was passed in 1973,
23 as Jonathan pointed out. Not a lot of deliberation.
24 There's a really key thing I want to point out here,
25 in terms of the work of this committee, and the

1 Commission, and where -- what is the status of New
2 York in relationship to drug policy across the
3 country.

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

8 In the early '80s, Reagan -- and I don't
9 remember the exact quote, and so I'm going to
10 paraphrase slightly here -- but I believe it was in
11 1983, when he was in the midst of his drug -- you
12 know, the height of the drug war and really kicking
13 this thing off. And Nancy Reagan, I remember her
14 saying just saying no stuff, which is good to some
15 degree, although not entirely. Reagan said need to
16 actually model what we're going to do federally on
17 what's going on in New York, with their Rockefeller
18 drug laws.

19 In 1986, when you had the death of Len Bias,
20 a basketball star, Congress, literally overnight,
21 passed 26 new mandatory minimum laws, with almost no
22 deliberation, much in the same way that the Patriot
23 Act was passed in 2001. The connections, we like to
24 make those. You all may not. But nonetheless, those
25 26 mandatory minimum sentencing laws now shape -- and

1 I know that Professor Berman will be here, and he'll
2 probably talk a lot about those today. They were
3 passed with very little deliberation, in a moment when
4 people -- when the drug war was very much front and
5 center in newspapers, and in conversations in
6 communities across the United States.

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

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

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

20 And, when you talk to people that are within
21 the treatment community, and we talk -- and we ask
22 them, you know, if we were to move, let's say
23 tomorrow, into a treatment instead of incarceration --
24 to go back to Jonathan's thing, and so assuming
25 incarceration may be the norm -- but treatment instead

1 of incarceration practice, where we're just diverting
2 people, what would happen? And they say, "Our system
3 would crumble."

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

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

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

22 This issue of the reforms that took place in
23 2004 and 2005. The reason that we say that they're
24 insufficient in large part has to deal with the fact
25 that they dealt with the smallest number of people

1 that are incarcerated under the Rockefeller drug laws,
2 the A-I and A-II felonies, right?

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

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

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

1 There's a problem with the bill, though.

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

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

20 If we know that the laws don't work, if we
21 know they they're ineffective, they don't actually
22 reduce drug use and abuse in this state, they promote
23 racial disparities, they're not in -- they're not
24 providing any sort of legitimate, real, and meaningful
25 investment in communities that have been devastated by

1 not only drug abuse, as every community is, but also
2 the policing practices and sentencing practices that
3 we've devised as a society to address those problems,
4 why is a repeal so not politically expedient?

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

23 And, I'm not -- I'm going to try to keep --
24 I'm going to be fairly short because I know,
25 Ms. O'Donnell, you all have a lot to do today. There

1 is two things I want to point out here that are
2 important to think about, in terms of recommendations.

3 And, one is that the questions around drugs
4 are, in our society for the past 35 years, have only
5 been dealt with within a criminal justice paradigm.

6 And, if you'll permit me to ask a question very
7 quickly, I just want to know for both the

8 Commissioners and the audience, how many people in the
9 audience either have been a cigarette smoker or know
10 someone who has been a cigarette smoker at some time?
11 A lot of people.

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

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

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

23 And, I know this isn't a place where we're
24 going to deliberate the merits or -- and I know that
25 there's a Philosophy Committee, and maybe they'll do

1 it there, around drug decriminalization or
2 legalization, and I don't want to propose those issues
3 here. But, I've raised this to think there is --
4 there is an important element of thinking here that we
5 need to get -- that is outside of that criminal
6 justice framework, that actually resides within a
7 public health framework, and that many people in the
8 room -- most people who when I ask that question,
9 whether we're talking about cigarettes or we're
10 talking about alcohol -- have personal experiences
11 with. Whether that's alcohol, we had an uncle who was
12 an alcoholic, or a family member who was a drug
13 addict, or we ourselves tried to stop smoking, these
14 are experiences that most of us in this society have
15 had contact with at one point or another.

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

24 And, there is a statistic I want to point
25 out here, by way of contrast. The European Union has

1 a hundred million more people than we do. They have a
2 little -- around 400 million, or maybe a little more,
3 in terms of the entire Union. For all charges,
4 combined, they incarcerate less than 500,000 people.
5 We incarcerate more than they do for everything just
6 for drugs in this country.

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

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

21 I know it's a little bit of negative, like
22 California is California, in sort of its own universe,
23 in many respects. But, with regard to criminal
24 justice, California and New York do share some
25 similarities that I think are worth pointing out.

1 In the year 2000, the State of California
2 passed what is -- what was commonly known as
3 Proposition 36. I'm going to pass out some fact
4 sheets and a report on Prop 36 for all of you to look
5 at. Maybe I can do that now. Can you all hear me if
6 I walk around?

7 But, one of the significant things about
8 Prop --

9 COMMISSIONER O'DONNELL: You are going to
10 have to kind of move forward --

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

12 COMMISSIONER O'DONNELL: -- to bring it to
13 conclusion,

14 MR. SAYEGH: -- this to a close,
15 Commissioner, I do promise you.

16 COMMISSIONER O'DONNELL: Okay.

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

25 And, here's a couple of interesting things

1 that happened, right? Over the course of five years
2 after that \$600 million investment on the front end,
3 \$120 million a year, the State saved a billion
4 dollars.

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

17 Proposition 36, there is something really
18 important within that context, that the Commission
19 should pay careful attention to. Because, when we're
20 talking about doing Rockefeller drug law reform, and
21 we get down -- and we're not talking about the
22 low-level sales and things. We're just talking about
23 people that are using, possession. That's the part
24 where we say, now, we want you to use some discretion
25 on sale. But, when we get to this point about people

1 using? We want to step out of that discussion around
2 discretion almost all together, and say why is it that
3 the -- why is it that we decided that the courts and
4 prosecutors are the right people to decide what's
5 going -- what's going to happen to somebody who's
6 addicted to heroin, if that's what they've been
7 arrested for? We wouldn't do -- I mean, if I have
8 cancer, I'm not going to go talk to a lawyer -- no
9 offense to lawyers in the room.

10 [Laughter]

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

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

24 If you talk to families like the
25 O'Donoghues, you know, you -- we can produce those

1 stories for you. We can do a whole day of nothing but
2 those stories, time and time again. It's not working.

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

11 Well, in the '80s and '90s, when the HIV and
12 AIDS crisis was exploding here, IV drug use was
13 responsible for a great number of those cases. People
14 were sharing dirty needles. The State said we need to
15 reduce those transmission rates significantly, as a
16 public health crisis -- as a public health measure.
17 They started the public health syringe exchange
18 programs, giving clean needles to people who were IV
19 drug users. They saw that the transmission of HIV and
20 AIDS dropped among IV drug users from 63 percent in
21 1990 to 13 percent in 2000.

22 The State essentially acknowledged, within
23 the Public Health Department, it said people who use
24 -- and I am going to close -- people who use drugs are
25 going to be our allies in trying to address this

1 public health crisis. We're going -- and, we're going
2 to use this syringe exchange program to try to enable
3 them to have contact with treatment and so forth.

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

14 Thank you.

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

17 [Applause]

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

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

25 JUSTICE FISHER: Yes.

1 COMMISSIONER O'DONNELL: Thank you, very
2 much.

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

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

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

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

25 And Judge Fisher, we're just delighted that

1 you could be with us today, and thank you for making
2 the effort.

3 POLICY VIEWS ON SENTENCING REFORM

4 FROM THE JUDICIARY

5 (PART II)

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

10 [Laughter]

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

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

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

22 Now, any discussion of uniformity in
23 sentence will certainly bring up the viability of
24 sentencing guidelines. Now, as you may know -- I'm
25 sure you do -- judges generally oppose sentencing

1 guidelines. Judges are public officials. Public
2 officials generally oppose anything that is likely to
3 limit their power, authority, or discretion. I'm not
4 here to oppose sentencing guidelines, or to endorse
5 them as a concept. But, I just want to offer some
6 observations as to their usefulness in New York
7 practice, in terms of enhancing uniformity in
8 sentencing.

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

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

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

25 Does that mean that guidelines are the

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

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

17 Well, let me set those problems aside and
18 just talk about the usefulness of guidelines, whether
19 guidelines would be helpful in New York practice.
20 And, the example I would give is, as I understand it,
21 and I'm not a federal practitioner -- but, as I
22 understand it, when a defendant is convicted, and is
23 scored under the guidelines, among the factors --
24 important factors considered is whether the defendant
25 has taken responsibility for the crime. And that, in

1 turn, is reflected, for example, by whether the
2 defendant has entered a guilty plea. And, if so, how
3 soon along the process was that guilty plea entered.

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

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

20 In New York, plea bargaining is principally
21 sentence bargaining, so that when a plea is
22 negotiated, defendants are not so much concerned with
23 what charge they'll be pleading to. They're more
24 concerned with what the sentence will be that they
25 will receive. And so, as opposed to, in the federal

1 courts where negotiation generally goes on between
2 prosecutors and defense lawyers, in the State process,
3 plea bargaining occurs among the prosecutor, the
4 defense lawyer, and the judge.

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

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

17 It's a free market term that really relates
18 to the volume of criminal cases pending in the
19 particular jurisdiction, and the trial capacity in
20 that jurisdiction. Because no jurisdiction, no court
21 is capable of trying all the criminal cases brought in
22 that jurisdiction. So, the idea in a particular
23 jurisdiction is to induce defendants to plead guilty,
24 so that backlogs are not created and the system in the
25 jurisdiction does not collapse of its own weight.

1 So, what a case is worth means, given the
2 defendant's record, and the charge lodged against the
3 defendant, what sentence is likely to induce a
4 sufficient number of similarly situated defendants to
5 forego their right to trial and plead guilty so as to
6 allow the system to continue without collapsing
7 because of the volume? That's what a case is worth.
8 Okay?

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

17 Now, if you say, well, that's a disparity,
18 that trespasses upon considerations of uniformity, and
19 we really ought to address that by something like
20 guidelines, something has to give. If you establish
21 guidelines, then either the offers will go up in
22 Manhattan and Brooklyn, which means that fewer pleas
23 will be entered, more trials will have to be
24 conducted, backlogs will be created, and the system
25 will be in danger of collapse, or offers will come

1 down where volume is less, judges -- more pleas will
2 be entered, judges will have less to do, and people in
3 the community will think that defendants are getting
4 away with a slap on the wrist.

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

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

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

22 And so, in the course of a trial, when a
23 case goes to trial, the judge is there. The judge
24 hears the testimony. The judge gains an intimate
25 knowledge of the case, of the defendant's

1 participation in the case, of the defendant's role in
2 the crime, whether the defendant acted cruelly, or --
3 or not, what the defendant's character is, what the
4 defendant's feeling of remorse may be. The judge will
5 pick up these factors that are intangible, sometimes,
6 and not fully reflected in the guidelines. So, I
7 think there are better ways to reduce disparity and
8 enhance uniformity in sentencing and -- for
9 post-verdict cases.

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

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

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

24 Well, as I understand the law today -- and
25 laws on sentencing seem to change regularly -- you

1 have to keep up with them. But, as I understand it,
2 if that happened today, the defendant would face a
3 minimum determinate term of 5 years, and a maximum
4 determinate term of 25 years. That's a 20-year
5 disparity, a 20-year range.

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

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

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

23 As you know, I'm sure, felonies fall into
24 generally six classifications -- A-I, A-II, B, C, D,
25 and E. Most felonies are within B, C, D, or E. And,

1 all felonies -- and there are -- I guess there are
2 hundreds -- are crammed into one of those pigeonholes,
3 and those crimes -- those felonies in that
4 classification have the same authorized sentences,
5 with the exception of violent felonies. You've heard
6 earlier, of course, that sometimes some felonies are
7 designated as violent felonies, and violent felonies
8 generally require sentences more severe than
9 non-violent felonies, even within the same grade, and
10 defendants who have been convicted in the past of
11 violent felonies face greater sentences when convicted
12 again.

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

20 And, I think it's also reasonable that we
21 want to separate violent criminals -- that is,
22 criminals who have demonstrated a willingness to
23 commit violence against their victim -- to separate
24 those people from society for as long as is reasonably
25 possible.

1 In contrast, of course, it burdens us all
2 economically, and in human terms, and otherwise, to
3 impose lengthy periods of incarceration on non-violent
4 offenders, like those who commit certain drug
5 offenses, and who would clearly benefit from treatment
6 or alternative to incarceration.

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

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

22 So, I go in, I'm successful. No one is
23 home. I haven't heard anybody. I come out with
24 jewelry. I'm arrested because, foolishly, I left a
25 fingerprint or something like that.

1 Okay. Now, you feel violated if somebody
2 breaks into your home. That's true, and I'm not
3 suggesting it shouldn't be seriously punished. But,
4 in my case, I am now charged with burglary in the
5 second degree, with is a Class C violent felony crime.
6 I have not committed any act of violence. And, if
7 we're looking principally to deter violent conduct,
8 injury to victims, we ought to be a little more
9 careful about what call "violent felony."

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

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

25 In the next courtroom, a gentleman was on

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

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

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

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

23 The two guys in front of me, who had robbed
24 the cabbie, leaving the cabbie shaken but unhurt,
25 faced a maximum of 25 years. The person convicted of

1 assault in the first degree for terribly disfiguring,
2 15 years.

3 Now, that's nuts. Pardon my French.

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

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

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

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

22 Legislation was adopted providing for a
23 mandatory one-year sentence -- and that's unduly harsh
24 -- for the possession without a license of a loaded
25 and operable weapon. This would bring in, for

1 example, the bodega owner who got a gun because he'd
2 been robbed five times, and was caught carrying it
3 from his house to the store. Or, the individual who
4 had possessed a gun in his pocket because he'd been
5 threatened and his family had been threatened.

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

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

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

1 pull that trigger. Don't pull that trigger.

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

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

21 And, I thank you all for listening.

22 COMMISSIONER O'DONNELL: Thank you, Judge.

23 [Applause]

24 COMMISSIONER O'DONNELL: Any questions,
25 quickly?

1 COMMISSIONER NEWTON: I have a question.

2 COMMISSIONER O'DONNELL: Yes.

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

5 JUSTICE FISHER: Okay.

6 [Laughter]

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

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

23 So, why then do we now want to put on the
24 judiciary function this notion of uniformity by virtue
25 of narrowing sentences to limit discretion? I'm just

1 curious. What do we get out of this?

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

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

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

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

1 JUSTICE FISHER: Well, they can, but they
2 have to point --

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

5 JUSTICE FISHER: -- to specific things, --

6 COMMISSIONER NEWTON: -- yes, I understand
7 that.

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

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

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

20 JUSTICE FISHER: Any time, and I wish you
21 --

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

24 JUSTICE FISHER: -- I wish you well.

25 COMMISSIONER O'DONNELL: Okay. Thank you,

1 very much.

2 We are going to take a ten-minute break, and
3 then we're going to move to the prosecution side of
4 the issue.

5 (Off the record.)

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

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

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

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

19 UNIDENTIFIED: They can't hear you.

20 COMMISSIONER O'DONNELL: Okay, in Albany?
21 Okay.

22 And -- and that affects your perception on
23 these issues. We know many of these issues are
24 difficult, controversial, and that people have
25 different perspectives.

1 And we've heard, essentially, the defense
2 perspective. And now, we're going to hear the
3 prosecution perspective.

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

8 But, Mike Bongiorno, our first speaker, is
9 currently the President of the District Attorney's
10 Association. Mike has had a very long and
11 distinguished career. He currently is the prosecutor
12 in Rockland County, where he has served since May,
13 1995.

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

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

19 COMMISSIONER O'DONNELL: Okay.

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

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

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

25 [Laughter]

1 UNIDENTIFIED: They may be here by Tuesday,
2 next week.

3 COMMISSIONER O'DONNELL: Help is on the
4 way.

5 UNIDENTIFIED: Maybe I can just sign for
6 five minutes?

7 COMMISSIONER O'DONNELL: Do we know where
8 the major microphone is, though, to -- that we could
9 try to --

10 UNIDENTIFIED: Is that the one at the
11 podium?

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

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

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

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

21 [Laughter]

22 COMMISSIONER O'DONNELL: Okay.

23 Mike is a graduate of the New York County
24 District Attorney's Association, and we're delighted
25 to have you here to speak to us today.

1 POLICY VIEWS ON SENTENCING REFORM

2 FROM THE PROSECUTION

3 MR. BONGIORNO: Thank you.

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

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

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

1 the six years he was District Attorney.

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

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

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

22 Let me talk about Rockland's experience for
23 just a bit here. Rockland County, in 1980, we'd say,
24 which would be right in the middle of this crime wave,
25 had 3,500-plus burglaries. That's people breaking

1 into homes or businesses to steal, but it can be to
2 commit other crimes, as well. And, in Rockland
3 County, it's burglary that is the major felony most
4 likely to impact the average citizen. The average
5 citizen of Rockland is not going to get mugged on the
6 subway, because we don't have subways. But, someone
7 can break into their home, their apartment, or their
8 business.

9 The last three years in Rockland County, we
10 have had 3,000 approximate fewer burglaries in that
11 year. We're down to 500 and change, as opposed to
12 3,500. That reflects the same types of reductions
13 we've seen in other parts of New York State, on
14 particular types of crime. And we have focused in
15 particular in Rockland, since I became District
16 Attorney, on going after burglars, and career burglars
17 and, if appropriate, seeking life sentences against
18 them as persistent violent felons.

19 Why are they persistent violent felons?
20 Because if you break into a residence where people
21 sleep at night, a dwelling, it is a violent felony.
22 You heard Judge Fisher mention, well, if there's no
23 violence involved. The reason that's a violent felony
24 is because the legislature understood that when people
25 are home, and someone breaks in, even if it's to

1 steal, it has the potential for violence, including
2 injuries and even the killing of the people in the
3 home.

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

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

21 You're talking about 541 burglaries in 2006,
22 in a community of close to 300,000 people. I
23 challenge anyone to look at any other community in the
24 country with 300,000 people, and find fewer
25 burglaries.

1 But, that has been played out not just in
2 Rockland County, but throughout New York State, in
3 terms of the historic reduction in crime.

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

15 I remember when I arrived in Manhattan in
16 1981 -- once again, in the middle of that crime wave
17 -- we would sometimes get old files for people, look
18 at their records. Now, they're back. They were back
19 in the system.

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

23 Basically, I remember seeing in a file where
24 a guy had committed eight or nine knife-point
25 robberies, and the judge gave him zip to three, which

1 was a zero to three year sentence, which means the
2 moment he was sentenced, he was eligible for parole.
3 And, I said to myself this is -- this is ludicrous.
4 This is what has created the situation that we're in
5 today.

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

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

22 And, I have seen the pain on the faces of
23 these victims repeatedly. And, it -- it's shocking to
24 me sometimes that we in the -- in the Government
25 bureaucracy sometimes detach ourselves from the pain

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

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

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

25 I remember one particular night being up for

1 40 straight hours, four murders I had to handle in one
2 night, most of them were in Washington Heights. I
3 couldn't get out of Washington Heights.

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

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

19 And, even people who themselves do not,
20 quote, engage in violence, by simply selling drugs, in
21 my personal view, engage in an act of violence against
22 the people to whom they sell the drugs. I hear people
23 talk about low-level drug dealers. "Oh, you know,
24 this is a low-level drug dealer. He just sells a few
25 crack vials now and then." No one is a low-level drug

1 dealer if they're selling drugs to someone who is a
2 child. No one is a low-level drug dealer if they're
3 selling drugs to people that cause people to overdose
4 and die, which is a huge problem that we've seen in
5 this state and in this country.

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

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

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

25 Now that reflects, in part, the success

1 story we've had in law enforcement and reducing crime,
2 and the critical role that the sentencing laws have
3 played in that regard.

4 In the bad years -- I'm going to call them
5 the "bad years" -- I'll cite 1966 to 1972. There was
6 a tremendous increase in crime in New York State and
7 New York City, an 85 percent increase in violent crime
8 in those years, but the prison population decreased by
9 30 percent, from 18,000 to 12,500. There's a
10 correlation.

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

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

24 We talk about the drug law reform act. I
25 can tell you how it's impacting me. Many people who

1 have benefitted from the drug law reform act, people
2 who were discharged from parole early, or people who
3 have had their sentences shortened by merit release
4 and other provisions of the law for drug sentences?
5 They're right back selling drugs again in the streets
6 of Rockland County, and we're re-indicting them, and
7 re-prosecuting them on a regular basis. I see it on
8 their rap sheets. It comes up, statutory discharge
9 from parole. And, they're right back selling drugs.

10 Many of these people are not addicted to
11 their wares. They're not in need of treatment. They
12 didn't get treatment. They have simply had their
13 sentences or their parole shortened. They went right
14 back to selling drugs, the same trade that they had
15 before.

16 Why? They have been encouraged now to
17 return to the trade. They were given original
18 sentences. Their sentences were shortened. From
19 their perspective -- and you have to look at it from
20 -- don't look at it from your perspective of the
21 law-abiding citizen. Look at it from the perspective
22 of the drug dealer. They gave me a break. They don't
23 have the will to deal with me. There are people who
24 are out there telling other people that dealing drugs
25 isn't a big deal. They go out and do it again.

1 Now, not all of them return to selling
2 drugs. I've had at least one guy who decided to come
3 back and rob a bank. But still, with the drug law
4 reform, before you do anything, look back at the
5 results of that reform and see if those people that
6 benefitted, who were discharged from parole early, or
7 released from prison early because of merit release,
8 are coming back into the system. And, you will see
9 that there are many of them, and I can give you a list
10 of them.

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

25 We recently had a robbery in Rockland

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

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

24 But, do not neglect the intimate nexus, when
25 you look at these reforms, between drugs, narcotics,

1 and violent crime. Because, if you do, we're going to
2 go back to the bad old days.

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

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

20 I do think, from an administrative
21 viewpoint, that the sentencing laws have become a
22 hodgepodge and very complicated. In order to
23 determine appropriate sentences, you have to look at
24 provisions, look at charts. We have computer programs
25 now in the D.A.'s Association, where you plug in the

1 variables. It's because over time we've changed
2 different laws at different times, and it's become --
3 there's a lack of uniformity in where to find the
4 laws, and how they should be applied.

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

16 So, I'm running out of time, so let me just
17 conclude by saying I do not view New York's sentencing
18 laws as being inappropriate or unnecessarily harsh. I
19 think they -- they fit, for the most part, a proper
20 balance of what we need to do to protect ourselves. I
21 think incarceration has played a vital role in the
22 historic crime reduction we've seen in New York State.
23 I think there's a need to simplify our laws, and unify
24 them, and to make them more understandable for
25 everyone.

1 And, I think the goal of this Commission
2 should be to protect the law-abiding members of the
3 public from those who would violate that trust and go
4 out and victimize, repeatedly, those law-abiding
5 people. That should be the focus.

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

9 Thank you.

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

12 [Applause]

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

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

23 Bridget has been responsible for many new
24 and innovative prosecution models in the Special
25 Narcotics Prosecutor's Office, including an emphasis

1 on prosecuting violent drug gangs, and as well as
2 money-laundering offenses related to narcotics
3 trafficking.

4 Bridget, thank you for joining us today.

5 MS. BRENNAN: Thank you, very much.

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

9 (Pause)

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

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

24 I'm going to give you a little bit of an
25 overview of my office and why I think we have good,

1 credible, important information for you, a perspective
2 on where we are today on what the impact of the most
3 recent drug law reform acts have had on us and our
4 practice, and give you some suggestions for policy
5 revisions.

6 I was appointed by the five City District
7 Attorneys to serve in 1998. I was appointed as a
8 Manhattan Assistant District Attorney in 1983. I have
9 been serving as a prosecutor in this City for almost
10 25 years now. And I, like Mike Bongiorno, served as a
11 Homicide Assistant in Manhattan during the absolute
12 worst times of the crack epidemic.

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

20 When I went over to Narcotics, I went over
21 to the Office of Special Narcotics to serve in a
22 bureau that handled very high-level narcotics offenses
23 in 1992, and that was after my days as a Homicide
24 Assistant. And, I was extremely frustrated when I was
25 a Homicide Assistant because I felt that I was on the

1 back end of the problem.

2 When I looked at my homicide cases, they
3 were all about drugs. It was people high on crack
4 shooting each other, people shooting each other over
5 crack spots, it was drug-related robberies, it was all
6 about drugs, and I can't tell you how happy I was to
7 go over and be on the front end of the problem. And,
8 I'm extremely proud of the work that we've done in
9 Special Narcotics.

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

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

23 My office, along with Joe Hynes' office,
24 pioneered incarceration to drug treatment about twenty
25 years ago. We started to recognize that the threat of

1 incarceration could be turned into something positive.
2 That people who knew that they were otherwise going to
3 state prison could then use that -- or we could use
4 that as leverage to help them turn their lives around.

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

10 Last year, we prosecuted 3,000 felony
11 crimes. We sent 1,000 defendants -- a little over
12 1,000 defendants to state prison last year. And keep
13 in mind, we handle very high-level offenses in my
14 office.

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

21 Here in New York City, we do international
22 importation cases. And, by the way, we have no
23 kingpin statute here in New York City or in New York
24 State, and so my international prosecutions end up as
25 A-I prosecutions. We do transportation cases.

1 But the things that affect the people in
2 this City more than anything else are the cases on
3 that bottom level, the cases involving street sales on
4 your blocks, in your neighborhoods, where your kids
5 have to stumble past drug dealers on their way to
6 school.

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

13 It's -- it's run like a business. There's
14 steerers, low-level workers, lookouts, managers, money
15 collectors.

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

24 This is crack cocaine. Sales, after sales,
25 after sales.

1 This is a 220.39. This is a B felony
2 narcotics sale offense. It's that sale, what we call
3 a hand-to-hand.

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

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

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

24 The people buying the drugs, this person
25 right here, that's a misdemeanor offense. That is

1 your low-level user. That is not a person we send to
2 prison.

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

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

24 But, the community wanted to know why they
25 were not getting more time. That was the community's

1 response, because they don't want to see these people.
2 This is a letter I got just a couple of weeks ago. It
3 was received July 2nd.

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

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

20 "Many people are afraid to come out of their
21 houses, because of drug activity going on day and
22 night. It's dangerous for children to play in front
23 of our houses. We are concerned about the example
24 being set for children who have been drawn into this
25 criminal lifestyle. All these negative impacts are

1 directly related to the drug activities taking place
2 on a daily basis in our community."

3 This is a letter I received two weeks ago.

4 Now, let me turn to the 2004 drug law
5 revisions. There were two. There was the DLRA in
6 2004 and 2005.

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

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

20 It decreased sentences for all narcotics
21 offenders. And, to give you some sense of what that's
22 done to our practice, I told you that some of the
23 individuals who were arrested on 114th Street in that
24 surveillance video I just showed you were offered
25 treatment. There were first-time offenders who were

1 offered treatment and declined because they were
2 otherwise facing such a minimal sentence.

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

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

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

25 You have to understand that a half a pound

1 of coke is not like a half a pound of sugar. It's
2 like a half a pound of anthrax, that the potency in
3 one grain -- and the grain is a jeweler's measure.
4 It's a very minuscule amount. But, the potency of one
5 grain of cocaine is tremendous. And so, those amounts
6 are substantial amounts.

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

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

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

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

1 great thing that he was re-sentenced.

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

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

18 The 2005 revision extended re-sentencing to
19 A-II offenders, because A-II offenders, too, had life
20 sentences. But, most A-II offenders had been
21 plead-downs from A-Is, and so, you know, the kind of
22 person who was applying for A-II re-sentencing
23 possessed 70 pounds of cocaine and a loaded
24 .45-caliber weapon, 715 pounds of cocaine, 25 pounds
25 of crystal meth. I mean, these are the people who

1 were accessing the benefits of the re-sentencing law.

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

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

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

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

24 This is your B felony offender. Each one of
25 those sales is a B felony offense. Under State Law,

1 we are not permitted to aggregate those sales. Each
2 one is a B level felony offense.

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

5 COMMISSIONER O'DONNELL: Okay.

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

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

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

21 On marijuana, New York is off the charts in
22 terms of leniency. And marijuana is a huge problem
23 for us. We have tons of violence, violent
24 organizations involved in the selling of marijuana,
25 and no real way to attack that problem.

1 So, here are my recommendations:

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

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

9 Enhanced penalties for gun possessions.
10 There are many in controlled substance and marijuana
11 crimes.

12 Give us some kind of kingpin statute.

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

15 And, retain the mandatory prison sentence
16 for repeat offenders.

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

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

21 [Applause]

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

24 [Laughter]

25 COMMISSIONER O'DONNELL: Okay. Do you have

1 copies of your handout, by any chance?

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

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

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

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

9 MS. BRENNAN: I did provide copies --

10 COMMISSIONER O'DONNELL: -- Commission --

11 MS. BRENNAN: of some of the --

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

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

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

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

24 What is equally impressive is that under Bob
25 -- or Rob's watch, violent crime has been reduced in

1 Bronx County by 72 percent, and homicides by
2 77 percent.

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

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

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

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

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

23 One of the things that was left out in that
24 introduction of me is also that I began my career as a
25 defense attorney, and after proceeding to be an

1 Assistant D.A., I became a judge. So, I think that I
2 have a unique perspective of the criminal justice
3 system.

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

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

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

24 I want to also dispel some misconceptions
25 that people have about who we are and how we approach

1 crime. It's something that I feel that we, in my
2 office, try to dispel the very first day our Assistant
3 D.A.s come in the office.

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

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

22 Reality is that we use incarceration for the
23 violent defendants, for the person who is a threat to
24 our community. And we use rehabilitation for the
25 person who we believe can turn their life around and

1 become a productive member of our community, and not a
2 threat the others.

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

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

19 In fact, one of our greatest problems
20 because of the successes we've had with violent crime,
21 is misdemeanor crime. Nowadays, when you go to
22 community meetings, you hear complaints about
23 graffiti, you hear complaints about marijuana sellers,
24 and those kinds of things we have no control over, I
25 mean, zero, because it's totally in the hands of the

1 judiciary.

2 And the judiciary, unfortunately, sometimes
3 when they see somebody coming in over, and over, and
4 over again, still will give them time served, or still
5 will give them a fine. And that, to me, is sending a
6 message to people that we really are not serious about
7 what we're doing.

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

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

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

1 of defendants who are driving the debate.

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

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

18 And, in addition to that, when we look at
19 the statutes prior to the reforms, there were, like,
20 60,000 or 70,000 people, as D.A. Bongiorno said, in
21 state prison. There were 618 of them who were in for
22 A-I felonies, and that includes the ones who were
23 selling. And I'm certain that of the ones who were
24 there for possession with intent, not every single one
25 of them was -- was an unwitting mule who was

1 transporting the property. So, it was a very, very
2 small portion of the prison population.

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

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

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

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

24 Yes, I have been in community meetings where
25 people are saying "I have to come home at night and I

1 have to step past the dealers as they're in my lot."

2 You saw it on the videotape.

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

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

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

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

25 There are people like the Latinos and

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

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

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

22 Finally, I want to talk a little bit about
23 this issue of the B felonies and whether it should be
24 completely in the discretion of the judges and not in
25 the discretion of the District Attorneys. And people

1 always feel that this is a power play on the part of
2 the District Attorneys. But, I'm going to tell you
3 why it's not a power play.

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

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

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

21 It's appropriate for District Attorneys to
22 have that discretion because we have the track record.
23 You hear about the B felony sellers now who have the
24 minimum of one year and previous to the reforms, a
25 minimum of one to three years. And how many in the

1 Bronx, in the ten years from '93 to -- to 2003, 800 a
2 year into treatment. In the last three years, the
3 average was 900 people, over 1,000, over 1,100 in 2006
4 who were being put into treatment.

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

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

17 You know, we had a homeowner who, with the
18 crime of prostitution, was having people proposition
19 her daughter in front of her house, and people
20 defecating and urinating on the street in front of her
21 house. And of course, it's a misdemeanor, and we had
22 control over it. And, we tried to explain this to the
23 judges. And, we asked to have this person just let
24 the judges know what the condition was. And, one of
25 the judges was gracious enough to say "Yes, she can

1 come in and just generally speak to us." Some of the
2 judges walked out, because they didn't want to hear
3 what the condition was.

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

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

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

21 And, in fact, when compared to the District
22 Attorney, the judges are almost anonymous. I dare
23 even our Senator to name all the Supreme Court Judges.
24 I couldn't do it, off the top of my head, the people
25 who are making judgments about the people in my

1 county.

2 But, the District Attorney does not work in
3 anonymity. The District Attorney stands for
4 re-election every four years. The judge stands for
5 re-election every fourteen years. There's an
6 accountability there for the District Attorney that is
7 not there. If we're not doing what our communities
8 ask us to do, whether it be tough on this case or
9 lenient on that case, we have to be responsible for
10 everyone in the community. If we're not doing that,
11 we're going to know about it, and we're going to
12 answer for it. And my two colleagues here in the room
13 have races this year. I'm going to be a little more
14 fortunate, I believe, this year. So, in short, we
15 have not abandoned the notion of fairness.

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

21 Thank you, very much.

22 COMMISSIONER O'DONNELL: Thank you, very
23 much.

24 [Applause]

25 COMMISSIONER O'DONNELL: I want to thank

1 you for joining us. And, we will reach out to you
2 with our various subcommittees and ask you for
3 additional information, but appreciate you taking the
4 time, and the information that you've shared with us
5 today.

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

10 We will -- we do have a speaker scheduled at
11 3:00 o'clock, if it's possible for you to come back.
12 He was having problems flying here -- Doug Berman.

13 (Off the record.)

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

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

24 He will speak to us about future trends in
25 sentencing, the Federal Sentencing Guideline System,

1 which we haven't really focused on at any great
2 length,

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

6 Professor Berman?

7 NATIONAL PERSPECTIVES ON SENTENCING REFORM

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

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

21 My instinct is to spend this time talking
22 about the forest, on the assumption that you guys have
23 spent a lot of time already with the trees, not only
24 because, by inclination, I'm an ivory tower type that
25 can see the forest a little bit better, and because I

1 think, interestingly, one of the reasons that a lot of
2 sentencing reform efforts have been less successful
3 than they might have been is because of a failure, I
4 think, to keep the sort of forest and trees
5 perspective in mind at all times. Because, that's
6 what I've sort of observed, both looking over the
7 history of modern sentencing reforms and, in
8 particular, watching some very ambitious reforms,
9 particularly in the federal system, go off the rails
10 in different kinds of ways.

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

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

1 practice in New York.

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

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

17 And, you may have heard from others that
18 things are not nearly as rosy as they seem to me.
19 But, compared to what I see operating in the federal
20 system, what's going in California, what's going on in
21 a number of other states, where sentencing reform is
22 not developing out of a sort of model of good
23 government, but out of a matter of just pure
24 desperation, it's very encouraging that you guys
25 aren't under the gun of either a federal order or

1 having to release inmates because of a severe
2 overpopulation problem, or having to cut budgets in a
3 variety of ways.

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

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

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

23 And, in particular, as I mentioned to the
24 folks who invited me here, a lot of knowledge is a
25 dangerous thing. I know a lot about a lot of

1 different aspects of the national scene. And so, I'm
2 eager to be available to answer questions and to be a
3 resource for you more generally, not just today, but,
4 you know, in any follow-up that you all are doing.

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

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

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

23 The key idea was there wasn't much
24 sentencing law, because the instinct that prevailed at
25 sentencing was that it wasn't a task for lawyers, per

1 se. It was a task for social workers. It was an --
2 often talked about as a medical model of sentencing,
3 the instinct being the goal of sentencing was to
4 reform the offender, not to punish the crime. And, I
5 think it was both accurate and, at the same time, sort
6 of insightfully dangerous to view sentencing systems
7 before the modern reform era as lawless.

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

16 And, the instinct, again, was this medical
17 model, this idea that crime was a by-product of either
18 a social disease or an offender's own dysfunction.
19 And, once we have decided that person had violated
20 legal norms, had committed a crime, then the job of
21 the legal system was, essentially, to get law out of
22 the way and to provide whatever resources or
23 mechanisms to rehabilitate the offender. And this
24 was, at least in theory, the model of sentencing that
25 really dominated the national landscape through the

1 mid-'60s.

2 There's lots of particularized stories here
3 about how that theory was not as well accepted down
4 the line as it seemed to be, but the important legal
5 part of the story was that's what all the formal legal
6 structures were built around. We had a system of
7 sentencing that was designed to give judges broad
8 discretion to decide, at sentencing, what sort of
9 outcome would best serve the rehabilitative interests
10 of, presumably, the defendant, and also society.

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

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

25 And, the same criticisms applied to parole

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

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

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

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

25 But, I think it's more accurate, and I've

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

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

16 It wasn't just that rehabilitation wasn't
17 working. It wasn't just that different judges, based
18 on their background, and their history, and their own
19 perceptions of defendants, were taking different
20 approaches and ascribing different sentences to
21 different defendants, even if they have committed the
22 same crime. It was that there were no legal
23 standards. The law had, in some sense, to its
24 discredit, washed its hands of the criminal justice
25 system after a defendant had been adjudicated as

1 guilty of a crime. And, that that was an
2 inappropriate way to structure the deprivations of
3 liberty and the other penal consequences that were
4 thought to be inherent in any punishment and
5 sentencing system. And so, you get what are described
6 as structured sentencing reforms.

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

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

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

21 There's a lot of terms that go around. I
22 like the term "structured sentencing" to describe the
23 idea of just bringing some form, some structure to the
24 way in which sentencing is going to take place. And,
25 the value of that term is it's amorphous enough and

1 anomalous enough, or open-ended enough, that it can
2 describe a variety of different kinds of structures.

3 It can describe an institutional structure.
4 So, one aspect of, I think, the best structured
5 sentencing reform systems is one that includes a
6 structure to the rule making of both sentencing law
7 and then, ultimately, sentencing policy, in the form
8 -- and maybe I'm speaking to the converted, although
9 not quite -- here in the form of a sentencing
10 commission.

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

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

25 So, despite all the criticism of the federal

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

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

20 I mean they created sentencing commissions.
21 I think having a permanent sentencing commission --
22 this is what the ALI is saying, this is what just
23 about every academic who looks at this field
24 ultimately concludes -- having a body with the unique,
25 and distinctive, and committed responsibility to

1 monitor, assess, advise all of the other sentencing
2 players, helps the system operate effectively long
3 term.

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

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

22 And so, that's why, again, the model penal
23 code, in its reform provisions, has a sentencing
24 commission at the center of its model. That's why, in
25 California, where the system is dysfunctional in

1 dimensions that are just mind-boggling, the people
2 really trying to get something done have figured out
3 that the smartest thing to do in the first instance is
4 just to create a permanent sentencing commission who
5 can be the shepherd for ongoing development.

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

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

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

17 But, what commissions can do, what
18 commissions should do, how big commissions can get, I
19 think is something that there are models out there of
20 many dimensions. And, one of the things that you all
21 may do -- and I saw it as one of the list of questions
22 -- major issues for consideration, you know, whether
23 to have a permanent commission. I think it's easier
24 for people who are well informed on this issue, that
25 the answer to that should be yes, it's valuable to

1 have a permanent commission. What that commission
2 looks like, what that commission's ongoing
3 responsibilities are, are subject to lots of debate,
4 and we can talk about that.

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

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

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

21 [Laughter]

22 MR. BERMAN: You can force somebody else to
23 go through the hard work, and it is hard work, at
24 every level. But, that's an important point that I
25 think I wanted to get out at the beginning.

1 The next part, though, about creating
2 structure, is the challenge of going from a sound
3 institutional structure -- and by that, I mean having
4 a commission involved that's helping to produce these
5 rules, that's working with all three branches to
6 implement sensible sentencing reforms -- to go from
7 that to a specific substantive legal structure that
8 makes sense.

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

17 The important thing to appreciate about the
18 failing of the rehabilitative model that led to all of
19 the reform wasn't that a rehabilitative model doesn't
20 make sense. Lots of debate can be put forward, and I
21 would bet that a heck of a lot of people have come and
22 suggested to you, and you've done reading saying that
23 there ought to be a greater commitment to
24 rehabilitation in the operation of our sentencing
25 system.

1 And, one of the things I think is a shame is
2 that, to my knowledge, no jurisdiction has ever really
3 invested fully and completely, and without
4 reservation, in a true rehabilitative model.

5 But, that's not surprising because a true
6 rehabilitative model is extraordinarily costly and
7 subject to not only debate, but attack, as an
8 incomplete vision of what a state ought to be doing in
9 response to criminal offenses.

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

19 Well, first, judges had, as they had to make
20 initial rehabilitative choices, a variety of competing
21 pressures that influenced the ways in which they made
22 choices at sentencing. Some of those are political
23 stories. Some of those were legal stories. Some of
24 those were social stories. Lots of different
25 dimensions there.

1 The same went for politicians, at the
2 legislative level, at the executive level. The same
3 went particularly for prison officials, those who
4 supposedly were in charge of rehabilitating and
5 monitoring rehabilitation. You know, one of the
6 consistent themes was the extent which there weren't
7 the resources, there weren't the training and the
8 mechanisms in place to do rehabilitation fully.

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

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

25 But, what gets lost is an awareness for the

1 way in which politics influences not only how the
2 formal rules get made, right? Obviously, the
3 legislature is subject to political influences, the
4 executive is subject to political influences, but that
5 politics necessarily is going to influence every
6 choice that's made in the development of the
7 particular substantive rules and the way in which
8 those get implemented. And this is, in particular,
9 where the federal authority gets off the rails, after
10 the creation, driven, I think, by generally pretty
11 healthy politics.

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

22 We got a combination of the left and the
23 right at the federal level, to change sentencing
24 federally, and so the politics coalesced around what I
25 continue to believe was an extraordinarily impressive

1 massive sentencing reform -- the Sentencing Reform Act
2 -- appreciating, among other things, that the
3 seemingly benign commitment to rehabilitation wasn't
4 so benign. It wasn't so benign to defendants who were
5 being treated differently, and sometimes more harshly
6 than they should. It wasn't so benign to society if
7 folks were being recycled through the system and going
8 on to commit more crimes, increased crime rates, and
9 so on, and so forth.

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

19 And so, when the ink was still drying on the
20 Sentencing Reform Act -- and, just to give you a
21 little background, the Sentencing Reform Act was
22 passed in 1984, almost a decade. If you guys get
23 something done in a year, you're ten times faster than
24 the Feds. The Feds took a decade to think through
25 exactly how to structure sentencing reform, with

1 Senator Kennedy really a leading voice, starting in
2 the early '70s, talking about the need to do something
3 about federal sentencing law and policy. In '84 is
4 when the Sentencing Reform Act gets passed, signed by
5 President Reagan.

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

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

24 But, it's sort of the right place, wrong
25 time -- or wrong place, right time. Tip O'Neill, then

1 the Speaker of the House, understandably disappointed
2 that his star player is not going to continue the
3 Celtics positive development going forward, jumps on
4 the "we've got to do something about these crack
5 epidemics taking over our inner cities, destroying our
6 nation's youth, we've got to get tough on crime."

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

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

24 That necessarily echoes through the work of
25 the Sentencing Commission. The Sentencing Commission,

1 trying to be as insulated from politics as they
2 reasonably can, has to then incorporate what Congress
3 has done through these mandatory minimum sentences
4 into the sentencing structure that they are creating.

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

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

22 The one-way ratchet of politics continues,
23 and continues quite dramatically at the federal level,
24 and that necessarily trickles down to the states in a
25 variety of ways.

1 We get, and I assume you all, you know, have
2 heard about all this. During the Clinton years, the
3 Truth in Sentencing laws that tied federal monies to a
4 requirement that states require offenders to serve a
5 certain percentage of their sentence time. As we all
6 know, a politicians' vision of truth is always
7 nuanced. So, even true Truth in Sentencing only means
8 you have to serve 85 percent of your time, rather than
9 100 percent. But, I guess 85 percent of truth is
10 actually a pretty good standard for most politicians.

11 COMMISSIONER O'DONNELL: That's pretty
12 high.

13 MR. BERMAN: So, we shouldn't criticize
14 that much.

15 [Laughter]

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

24 And, to me, again, I mean to emphasize --
25 and this is as I work my way through the two

1 dimensions that I've gone so far -- legally, I think
2 the Feds did things relatively well, in terms of
3 creating a structure, a commitment to guidelines,
4 whether you call them mandatory or advisory. I
5 actually think they had in mind being advisory, in a
6 sense, even when they were mandatory. Now, they're
7 advisory again, and I'll talk a little bit about that
8 Supreme Court story in a minute.

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

18 But also structure breaking down in the
19 sense that Congress shouldn't be doing this at all.
20 You created a commission whose job it is to do this
21 stuff. Congress should try to stay out of the way at
22 least until they get their first blueprint out there.
23 And this is something that I think is uniquely
24 challenging, not just for an Executive Commission, as
25 you all are, but for any structure, is to encourage

1 the politicians to stay out of things, because they
2 think they're supposed to be involved in things. And,
3 they think that's how they get involved.

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

15 And so, creating a sound structure of a
16 sentencing commission, but putting it in the same city
17 where all the politics goes crazy -- meaning inside
18 the Beltway in Washington -- necessarily meant that
19 the commission wasn't going to be nearly as insulated
20 from the day-to-day politics of sentencing reform as
21 they likely ought to be. It necessarily meant,
22 especially for a system designed to be nationwide,
23 that they were going to be uniquely attentive to what
24 the politicians down the street were saying to them,
25 or just uniquely aware. You know, they're reading the

1 Washington Post, they're hearing the tough on crime
2 sentiments, they're -- whether they mean to be or not
3 -- not insulted from the day-to-day debate there, and
4 not hearing the folks out in California, or the folks
5 on the border states, or the folks in other regions.

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

11 [Laughter]

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

20 And, I want to highlight, and I want to
21 emphasize in a lot of different ways, you can't ignore
22 the political, and you can't -- don't fool yourselves
23 into believing -- and this is really what the first
24 wave of reform showed -- that you can get insulated
25 from politics completely, and that the goal should be,

1 all right -- and again, this is what the academics --
2 this is actually what I feel is the failure of my
3 industry, to some extent -- well, if we just sit up
4 here in this ivory tower and think, and think, and
5 think enough, and just spend all our time saying,
6 well, the politicians don't know what they're talking
7 about, and so they ought to listen to us instead of
8 each other, that you'll come up with sort of the
9 Platonic form of an ideal way to do things, and that
10 can then be just handed over to the politicians to
11 embrace and adopt, and then the world will be a better
12 place.

13 Politics gets a bad name, but it shouldn't
14 get a bad name if it's done well. If it means being
15 attentive to public concerns, being drawn into the
16 healthy debates over competing priorities among
17 different policy options, whether it can be an
18 understanding that -- and this is where I think the
19 rehabilitative model sort of never competed with the
20 politics -- the reality that, as much as we may want
21 to rehabilitate offenders, when we have limited social
22 services, a limited budget for things like mental
23 health, for things like job training, for things like
24 all of the educational opportunities that we know
25 correlate with various criminogenic factors, people

1 who have committed crimes are necessarily going to be
2 fairly late on the list of persons for whom we want to
3 get the first cut of those opportunities.

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

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

22 And that's -- what's funny about this is
23 it's the way other areas of the law work, as well,
24 right? It's not clear to me that other arenas are
25 that much healthier at avoiding the influence of

1 anecdote and extreme reactions to not so simple
2 problems.

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

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

22 And that has been, at least from what I've
23 heard nationwide, the most effective way to channel
24 the political instincts and influences, and yet allow
25 sensible reform to dominate rhetoric.

1 The politicians could still introduce the
2 bill which says "I'm going to triple sentences on sex
3 offenders," but before that goes for a vote, it has to
4 necessarily go to a commission, or a committee, or
5 whatever structure. Sometimes, it's built into the
6 structure of the legislative committees to produce a
7 report along these lines. And, that report takes a
8 little while, which itself is valuable. You get the
9 value of time to sort of de-emphasize that one
10 headline case of the short guy who got the short
11 sentence, or the sex offender who got probation this
12 way or that way.

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

23 And that is important not only to
24 de-emphasize that this is only about getting tough,
25 but that it has some consequences, but it makes it

1 easier for other politicians to say, well, gee, before
2 we spend \$18 million on this little pet thing that you
3 want for your one person in your jurisdiction, your
4 community that had this problem, what about the
5 \$10 million I've been trying to push forward for this
6 education program, or for this other good social
7 services? It makes the terms of the debate healthier.

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

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

25 It can be very beneficial to get a

1 conversation started. All right, maybe we do need to
2 spend \$20 million on rehabilitation for sex offenders,
3 because we do have evidence that suggests these are
4 repeat offenders, over, and over, and over again. And
5 then, the answer isn't to simply hope that they'll go
6 away. The answer is to develop some resources for
7 reentry, for other social services, but that doesn't
8 mean that residency restrictions, or some other kind
9 of new age, new wave, hot idea that doesn't really
10 have any sensible empirical backing is -- is the way
11 to go right away.

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

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

24 But, unless and until the line actors who
25 are actually going to implement the system are on

1 board, it doesn't matter. And that's itself another
2 funny, amazing aspect of the federal system in
3 operation.

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

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

13 The instinct was -- and this again shows you
14 how misguided academics are -- well, gee, when nobody
15 knows exactly what's going to happen because of the
16 rehabilitative model, everybody is going to bargain to
17 try to get some certainty. And so, that's why we had
18 80 percent of the cases plea bargaining before.

19 Now that the rules are out there, everybody
20 can see the rules, everybody can understand the way
21 the game is played, and there will be some consistency
22 here. Defendants will go to trial, and they'll know
23 how that goes, and there won't be as much plea
24 bargaining. There won't be as much horse trading on
25 factors, because there will be a consistent set of

1 rules that can be applied consistently, and the
2 influence of prosecutors won't be as great, the degree
3 to which plea bargaining affects the operation of the
4 system will be diminished.

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

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

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

21 And, I don't have to remind you all -- or
22 maybe you were a part of the favorite local son, Rudy
23 Giuliani, when he was U.S. Attorney, who had his
24 famous federal day. Right? That was the day in which
25 he decided, as U.S. Attorney, "I'm just going to go

1 and take a bunch of street crimes and make them
2 federal one day a week. Why am I going to do that?
3 Well, partially, because it's low-hanging fruit, and
4 it will make me look good. Partially because I think
5 this is the way to help my local community. And
6 partially because federal criminal law is written so
7 broadly, that the Feds can do almost anything they
8 want, no matter what they think they're trying to
9 achieve."

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

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

22 And, this is what's even more profound, the
23 legal rules are nothing more, when all is said and
24 done, than just the shadow in which the real system is
25 going to operate. And, it's the dirty little secret

1 the prosecutors won't always tell you, but all of them
2 will admit to it if you get them drunk enough, is --
3 and, that's the way the system should work. The rules
4 shouldn't be written for what should happen. The
5 rules should be written for what I can go tell the
6 defendant will happen if they don't play ball with us.

7 Because, that's the way the criminal system
8 not only operates practically, but should operate.
9 Defendants should have very good reasons to admit to
10 their guilt when they're guilty, and to tell us about
11 all the other people who are guilty with them. That's
12 the way in which the system operates healthy.

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

20 Because, the bad guys don't play fair, which
21 I think is probably accurate. That's why they're bad
22 guys. And so, it's extra important that we have rules
23 that we can describe to the bad guys, to force them to
24 play by our rules, rather than continue to use their
25 rules. And so, that's why plea bargaining is

1 inevitable. That's why plea bargaining, in
2 particular, will always be localized.

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

11 There were so many immigration cases, and
12 especially because without really a conscious
13 decision, but a kind of implicit decision to invest
14 more federal resources in immigration offenses, there
15 was a much larger percentage of illegal aliens being
16 brought into the federal criminal justice system. All
17 of the prosecutors and, to some extent, the defense
18 attorneys in that system, couldn't afford to play even
19 by the plea bargaining rules.

20 Doing formal plea bargaining was taking too
21 long. Getting an official indictment from a grand
22 jury, working that through a traditional plea
23 agreement, and getting that system done when you were
24 processing, literally, hundreds and hundreds of cases
25 almost every week of people crossing the border, and

1 wanting to throw them back out, was taking so long
2 that, across the border districts, the U.S. Attorney's
3 Offices created, sub rosa, this thing called "fast
4 track."

5 What was "fast track"? Fast track was this
6 well understood local convention, not authorized by
7 the Department of Justice, not authorized by the
8 Sentencing Commission, not authorized by Congress, but
9 decided by local prosecutors and local defense
10 attorneys, that if a defendant caught for illegal
11 immigration was willing to waive indictment, waive all
12 the traditional procedures, and plead instantly guilty
13 to illegal entry, their sentence, essentially, would
14 be cut in half.

15 What's the big deal? They're getting
16 deported anyway, was the thought of all the
17 prosecutors. We can save everybody's time. We get
18 them kicked out. What's the point of wasting all our
19 federal resources keeping these folks locked up twice
20 as long before they get deported anyway? Let's just
21 fast track these people through the system. That's
22 going to be more effective.

23 Interesting question, debatable question. A
24 fascinating example of how local pressures are going
25 to produce a kind of law and a kind of local politics

1 that no matter how good the general rules are, are
2 going to necessarily impact how each community is
3 going to deal with the unique crime and punishment
4 problems within that community.

5 And, what's fascinating and, in some sense,
6 I think ultimately healthy, is you get enough of that
7 and, if a good structure is in place, that will be
8 formalized in more effective law. So, what ultimately
9 happened was the U.S. Attorney's Offices started
10 creating their own guidance. They created their own
11 manuals for how to do fast tracking. Rather than
12 being this individual prosecutor and this individual
13 defense attorney negotiating a super fast system, they
14 created their own internal DOJ policies for dealing
15 with fast track.

16 And then, Congress got involved and said,
17 well, wait a minute. You guys are making up your own
18 rules. We're supposed to have these national rules.

19 Because the Department of Justice has a
20 unique ear of Congress people, they ultimately
21 legitimized these fast track programs. So now, it's a
22 formal bit of the law, and the U.S. Sentencing
23 Commission actually wrote guidelines for these fast
24 track programs.

25 And though a lot of people complained, and I

1 think understandably complained, that there's a
2 different kind of justice depending on whether you're
3 in a quote/unquote, fast track district or non-fast
4 track district, and the truth is, if you're an illegal
5 immigrant and make the mistake of migrating your way
6 to a non-fast track district, you will get a much
7 longer sentence, even if you're willing to plead
8 guilty very quickly.

9 But again, the idea is all of this is going
10 to be localized. All of this is going to be
11 negotiated. All of this is going to be the product of
12 compromise. And, all of it's going to be the
13 by-product of limited resources, time, money, energy,
14 competing priorities.

15 And, that gets me to the last piece of the
16 legal story, and then I'm going to get to the
17 futuristic story, and then finally wrap up.

18 This is where the whole Blakely, Booker,
19 Apprendi, 6th Amendment revolution comes in. And,
20 what's that all about?

21 What that's about, at its simplest level --
22 and you guys haven't had to deal with it head on yet,
23 but you need to be certainly aware of this -- is we're
24 supposed to have an adversarial system of criminal
25 justice. There is an inevitable disconnect between

1 the inevitability of compromises, and plea bargains,
2 and fact-finding, and everything that goes on in
3 sentencing, when everything is localized, everything
4 is negotiated, everything is the product of
5 compromise.

6 And, you might call it the "Law and Order"
7 vision of our criminal justice system, which is a jury
8 of one's peers sits in a room and hears all this
9 evidence that actually takes two years to develop, and
10 not just a 40-minute episode to develop, and then a
11 jury decides what really happened, and then a judge,
12 based on the jury's decision, makes some judgement at
13 sentencing.

14 The only people who sort of still believe in
15 that are Supreme Court Justices, because they're the
16 only ones who are removed enough from the system --
17 academics are, to some extent, too -- to believe that
18 we could actually still have an adversarial criminal
19 justice system, given the extraordinary pressures --
20 economics, time, money, energy, competing priorities
21 -- that the system necessarily is functioning with.
22 And so, what the Supreme Court has said in a series of
23 decisions that has necessarily produced a lot of
24 controversy is you just can't be that functional. You
25 can't work your way around the very formal adversarial

1 models that the founders put into the 6th Amendment in
2 the form of a right to a jury trial and the right to
3 due process.

4 And, the reason this is so controversial,
5 the reason the Justices continue to fight over this,
6 the reason that I can say with ultimate confidence
7 I'll always be in a job trying to figure out what the
8 Justices are saying, is because the formal and the
9 functional are always going to butt heads in this
10 region. The formal notion of full adversarial
11 processes, with a complete indictment that gives you
12 sufficient notice of all the things the State thinks
13 you did wrong, and then the opportunity to have a full
14 and fair hearing with complete process where a jury
15 will hear all the evidence and then come to
16 resolutions on a variety of issues, that then will
17 inform the judge in his or her own effort to
18 adjudicate a fair sentence under the law, and policy,
19 and procedures that are in place there sounds great.
20 That's what Justice Scalia wants. That's what Justice
21 Thomas wants. That's what Justice Stevens wants,
22 Souter, Ginsburg, the Blakely five. But, it's just
23 never going to happen.

24 That doesn't mean it shouldn't be an
25 aspiration. And I, in fact, have become a fan of what

1 the Supreme Court is trying to do, because it's the
2 only voice that says as we're all operating a
3 functional system, let's not lose sight of some of our
4 traditional premises. Let's not lose sight of the
5 value of giving defendants some chance to dispute the
6 facts of which they're accused of, if there is a
7 legitimate dispute to be had.

8 But, I think it's important to not lose
9 sight of how unrealistic the Supreme Court's vision
10 here is. And, among the reasons I know that is
11 because not only have they hemmed and hawed when the
12 rubber has hit the road about whether these jury trial
13 rights, and these indictment rights, and these due
14 process rights are going to apply across the board,
15 but it's not just an issue at initial sentencing.

16 I believe in New York it's been these sort
17 of recidivist enhancements that have come up through
18 habeas. That's, you know, a particularly peculiar and
19 interesting way to look at some of these questions.

20 But, I'm actually lead counsel on a
21 surpetition looking at supervised release revocation,
22 right? So one of the issues I know, the back end
23 sentencing issues. If you take Blakely and Booker
24 principles at face value, and really believe the
25 Supreme Court Justices are committed to what they're

1 saying, this isn't just an issue that happens at
2 initial trial and sets the framework for initial
3 sentencing. Well, what if a certain person is out
4 there on probation or parole, and a parole officer
5 says, "Well, I think you've violated the terms of your
6 parole, time to go back"? Or, the terms of your
7 probation.

8 Well, if you read Blakely carefully, it says
9 any fact that's going to increase your punishment.
10 And so, I actually have a case where -- and it's a
11 remarkable case, and I think if you take Blakely
12 seriously, the Supreme Court ought to take this issue
13 up -- defendant, federal defendant serving five years
14 of supervised release, after having already served
15 three years in prison, the State of Virginia said,
16 "Oh, we saw you stealing some money out of an ATM."
17 They indict her on that. They realize that she's
18 still serving a term of supervised release.

19 And they say, "Oh, we'll just give this over
20 to the Feds." The probation officer walks into the
21 sentencing judge who had sentenced this woman ten
22 years earlier, and said, "Oh, we have this footage on
23 a surveillance camera that said she stole some money
24 from an ATM. Revoke her supervised release, and send
25 her back to prison for three years."

1 And the defendant, my client, says, "No,
2 that wasn't me." So, what does the judge do? Not
3 have a full trial here? Well, no, she has a
4 supervised release revocation hearing. She takes
5 evidence, she hears witnesses, and she says,
6 "Fortunately, this isn't sentencing for a crime. This
7 is just whether I'm going to revoke your supervised
8 release. So, I don't need to be convinced beyond a
9 reasonable doubt whether that was you in this
10 surveillance photo. I just have to be convinced by a
11 preponderance. And, I know you're a liar, because you
12 lied to me before when I sentenced you the first time,
13 so I think that really is you, and so I'm revoking
14 your supervised release and sending you back to prison
15 for three years."

16 And, we say, well, wait a minute. Blakely
17 says any fact that increases your punishment has to be
18 proved to a jury beyond a reasonable doubt. Isn't
19 this one of those facts? And, I fear, they didn't
20 hear it from me, that we're going to have cert denied,
21 not because we don't have a good argument, but because
22 we have too good an argument.

23 This is going to be one of those settings in
24 which the court is going to go, "Oh, my God. We said
25 those Blakely rights were so important, but maybe we

1 can force California now, and a lot of other states,
2 to cope with these rights at initial sentencing. But,
3 did we also really mean that this applies to
4 revocation of parole, and probation, and supervised
5 release, and all of these back end functions?"

6 Does it also mean -- and I don't know if you
7 guys have these problems -- that when somebody has a
8 fine imposed, or restitution, or forfeiture, all those
9 facts have to be proved to a jury, and noticed in an
10 indictment, et cetera, et cetera?

11 The reason what little hair I had left was
12 lost when Blakely came out was because I realized not
13 just how profoundly consequential this would be to the
14 federal sentencing system and all of those sentencing
15 systems that depended on judicial fact-finding for
16 initial sentencing determinations, but in fact
17 depended on what might be sort of called
18 administrative justice, rather than adversarial
19 justice, in the operation of a sentencing system.

20 And, that's because -- and this is, again,
21 I'll sort of compliment the founders and give you a
22 thought to think of -- something to think about --
23 adversarial justice is inefficient. From a framer's
24 perspective, I think that was good, because an
25 inefficient government is a less oppressive

1 government. An inefficient government can't put
2 2.2 million people behind bars, which is our current
3 incarceration rates. An inefficient government can't
4 monitor 7 million people on probation. An inefficient
5 government can't afford to lock people up through
6 civil commitment and other mechanisms that we now use
7 to lock a heck of a lot of people up. I think that
8 was very much the framers' vision.

9 Adversarial justice is costly and
10 inefficient. The problem is we've, in a lot of ways,
11 decided we need to be more efficient in the operation
12 of our criminal justice system. And, I am pretty
13 darned confident Governor Spitzer won't be pleased if
14 you were to come back and say, "Well, Berman helped us
15 see the light, just like the founders suggested, we
16 should be less efficient in operating the system, and
17 that will make things go better."

18 No, that will mean the State will have less
19 ability to do what it wants to do. Again, depending
20 on your faith in the State, your faith in the
21 government's exercise of its power in the criminal
22 justice system, that could be a very good thing to
23 safeguard individuals, but it could be a very bad
24 thing, in terms of getting good things done. Right?

25 And, that's especially one of the points

1 that I don't know if you've heard about, drug courts
2 or, you know, a variety of diversionary programs, or a
3 variety of mechanisms to use what I think, again, can
4 fairly be described in general terms as very
5 administrative models of adjudicating criminal justice
6 issues, that's going to necessarily be in some kind of
7 tension with what the Supreme Court is doing through
8 this modern sentencing jurisprudence.

9 But I'm -- as I look to the future, and
10 that's where I want to get to my last dimension, I'm
11 relatively confident that the practical will always
12 ultimately prevail, right?

13 And so, let's just finish up the third
14 dimension of the practical. Whatever the legal is,
15 whatever the political is, you could be confident the
16 practical will always prevail. So, another dimension
17 that, as a sentencing commission, you need to be
18 attentive to, as you're putting law together, as
19 you're making recommendations about politics, is to be
20 attentive to the inevitability of the practical.

21 And, that's another variation of the
22 political story. I mean, maybe this is all just a
23 kind of version of realism. But, it means make sure
24 the judges who actually have to put in sentences, or
25 the prosecutors who actually have to bring

1 indictments, or the defense attorneys who actually
2 have to argue points or bring up ideas, are bought
3 into the system, right? So, that's really where the
4 federal system went off the rails across a couple of
5 dimensions.

6 The commission didn't do a great job of
7 buying the politicians into the system at the front
8 end. So that instead of having Congress constantly
9 pass suggestions to the commission, they passed
10 mandatory minimum statutes.

11 Conversely, the commission also didn't
12 effectively buy the judges into the system. So, the
13 judges were told what they could and couldn't do,
14 rather than being encouraged to write opinions that
15 criticized the guidelines.

16 And, one of the fascinating things that I
17 only learned recently was that, initially, the
18 commission, itself, recommended the guidelines be
19 advisory in the federal system before they became
20 mandatory. And, I think if that had happened, it
21 would have profoundly impacted the development of the
22 federal sentencing system, because judges would have
23 embraced the guidelines. Hey, this is really helping
24 me. This is a good idea. I like this. Here's what
25 needs to be changed a little bit, and here's what

1 doesn't.

2 Instead, the guideline system got mandated
3 on the judges. They reacted adversely, Half of them
4 ruled the system unconstitutional. When the Supreme
5 Court finally said the system was constitutional, they
6 were already so embattled against the commission, and
7 there was such antipathy between the commission and
8 the judges that, practically speaking, the system was
9 already dysfunctional across that dimension, as well,
10 and that's why we got plea bargains and all sorts of
11 complaints about how the system works.

12 Okay. The last dimension. This is a
13 dimension that really is the fourth dimension, and
14 that's the passage of time or the future, right? So,
15 this gets back to the first story of -- and I don't
16 want to be depressing to be the final thought on a
17 long day, after five consecutive weeks of doing this.
18 But, there's no way you guys can do anything close to
19 this by October 1 or, you know, whenever your full
20 report is done. All you can do is get started.

21 And, I don't know if that makes you feel
22 better or worse, but these things change so quickly,
23 there's so much there, this is so complicated, I often
24 in a very self-serving way tell my students at the end
25 of the semester when I teach my sentencing course, if

1 they're more confused at the end of the semester than
2 they were at the beginning, then I've done my job
3 well. Because, this stuff isn't easy.

4 And, as time passes, and as you learn more,
5 you just come to appreciate, like I suggest, all of
6 these different dimensions, and how that when you get
7 one piece of this puzzle figured out -- and again, I'm
8 trying to suggest to you that the parts that I have
9 figured out -- having a permanent commission who is in
10 charge of doing this, and focusing on these issues,
11 and being attentive to these issues -- once you get
12 that one piece figured out, then you all of a sudden
13 realize, oh, wait, yeah, but if that commission is too
14 close to the political centers, that commission's
15 priorities will get distorted in a variety of ways
16 that may be unhealthy.

17 Oh, and if that commission isn't working
18 directly with the individuals having to implement
19 these rules on the ground, the commission is
20 necessarily going to do things that sound great in
21 general, but then get implemented in very disparate
22 ways, in different regions, based on different
23 community norms, and things like that.

24 And so, even when you get something that you
25 feel confident about, the more you understand about

1 how the system operates, the more you watch the system
2 unfold, the more challenging you see this is, and the
3 more you recognize the need to constantly monitor,
4 constantly attend to, constantly adjust the way the
5 system operates.

6 And, that's only going to get worse, or
7 harder, or more difficult, or challenging because the
8 technology of crime, you might say the sort of
9 technology of our knowledge about crime and responses
10 to crime, and the technology to combat crime is moving
11 ever faster, right? And so, you know, think about one
12 of the reasons we get this drive-by legislation is
13 because we get new crimes. Whether it's -- now we're
14 worried about meth instead of crack, or we're worried
15 about extasy instead of heroin. New weaponry of
16 various sorts, right? Different kinds of threats to
17 the community. The computer, right? That's the new
18 weaponry, I guess. Identity fraud, right? Back
19 dating, I guess is the corporate level of this. Child
20 porn downloading. You name it.

21 The technology is not going to slow down.
22 The threats to public safety are going to be evolving
23 in ways. And that, itself, has been a part of what's
24 gone on at the federal level. It's Congress says,
25 "Oh, gosh, here's a new problem," whether it's

1 corporate crime, or this, or that. I guess the answer
2 is pass a new statute.

3 And that's itself one of the really
4 fascinating stories here, is the U.S. Sentencing
5 Commission was in the middle of a 8-year project to
6 revise how it dealt with fraud and theft crimes. And,
7 at the -- literally six months after they passed all
8 of these new guidelines to completely revamp the way
9 it dealt with fraud and theft in a sophisticated way,
10 and to its credit, it did field testing of its
11 proposal, I mean it's just a brilliant project, then
12 Enron collapsed.

13 And, six months later, Sarbanes-Oxley gets
14 passed, and the commission has to go back and sort of
15 re-write all the rules. Not because they didn't write
16 them brilliantly the first time, but because all of
17 that hard work -- I guess no good deed goes unpunished
18 -- was necessarily recast, in light of the economic
19 changes of the day.

20 And, I don't need to lecture folks in this
21 City particularly about how crime priorities changed
22 from the war on drugs, to the war on terrorism, to all
23 sorts of other wars going forward. It's inevitable
24 that whatever choices make perfect sense now, they're
25 going to look differently a year from now, five years

1 from now, ten years from now, fifteen years from now.

2 New knowledge, right? So, new information
3 about what works, what doesn't work. New knowledge
4 about what our society's commitments are, too, on a
5 variety of different kinds of fronts, right?

6 So, whether we're talking about different
7 kinds of identity theft, or different kinds of
8 economic harms, or whether we're -- you know, now, the
9 big debate in another part of the criminal justice
10 realm is should virtual child porn count? You know,
11 what about the people who can get the computers to
12 simulate all sorts of awful pornography, but no real
13 people are involved? Is that a crime, in and of
14 itself? What if a person is thinking about doing
15 that? What if a person is describing that? Et
16 cetera, et cetera.

17 The criminals, good and bad, are always
18 going to come up with all sorts of new visions of what
19 they want to do, and society's responses to those
20 concerns are necessarily going to evolve.

21 The last piece of this -- and this is the
22 piece that I think I have not done nearly the studying
23 on, but I mentioned when thinking about coming here I
24 wanted to leave you all thinking about -- is what
25 seemed like brave new world technologies, but that I

1 think are the inevitable future of modern correction
2 systems, right?

3 So, one is already front and center. I
4 don't know if you all have talked about this at all,
5 but California passed an initiative that called for
6 GPS tracking of all sex offenders. I think it's
7 inevitable in that we already have electronic
8 monitoring, home confinement, a variety of techniques
9 to people confined, especially to the extent that that
10 ends up being cheaper and easier to monitor through
11 computers than keeping people locked up in cells.
12 And, there's almost nothing that's more expensive than
13 keeping people locked up 24/7 through traditional
14 incarceration. I think GPS is going to become more
15 and more a part of the operation of the system.

16 Lately, we're hearing about microchip
17 implants, which I think is just GPS in a even more
18 intriguing and scary form.

19 There is talk about brain monitoring, brain
20 implants, chemical castration has been around for a
21 while, other kinds of chemical approaches to keeping
22 offenders from being violent, or predators of various
23 sorts. These things are inevitable for a couple of
24 reasons.

25 One is, the technology is going to keep

1 advancing. We're just going to learn more about how
2 the world works. And, you know, one of the surprising
3 things than only an academic like me could cast in
4 these terms, is imprisonment was a newfangled
5 technology that made America great at one point,
6 right? So, this is the long historical vision.

7 Why was the death penalty and banishment the
8 common forms of punishment during the era of the
9 framers? It's because it's the only ones we had
10 really sort of figured out at that time.

11 Then, along comes a fairly progressive
12 vision. Hey, we shouldn't just kill everybody or send
13 them to Australia. We can lock them up. And, won't
14 that be good? Because when we lock them up, what are
15 we going to do? We're going to give them the Bible.
16 We're going to have them reflect on their harms.

17 One of the amazing experiences that I had,
18 it was at a conference of the National Association of
19 Sentencing Commissions. I don't know if you all have
20 plans to go there, in Oklahoma City, but you ought to
21 think about attending if you can get the budget for
22 it, because there you'll meet all your colleagues and
23 can commiserate with how they're lucky, they get to do
24 this all the time, and you guys only get to do this
25 for a year. But last year's meeting was in

1 Philadelphia. And, we got to tour the Eastern State
2 Penitentiary, which was one of the first famous
3 penitentiaries, which was very much designed to be
4 this progressive vision of let's not just kill them or
5 throw them out of the country. Let's give them a
6 chance to be locked up in a cell and to reflect on
7 their misdeeds and to go better.

8 And, one of the many fascinating insights
9 was that, according to the tour guide, the Eastern
10 State Penitentiary had indoor toilet facilities before
11 the White House did. Now, imagine that these days,
12 right?

13 [Laughter]

14 MR. BERMAN: You know, Governor, I know
15 you're working on some new technology in the
16 Governor's mansion. We think we ought to put this in
17 prisons first because, you know, of course, they
18 deserve the new technology first. Unfathomable,
19 right? And, I loved that moment, just as an awareness
20 of, you know, in at time that seems so cold and
21 distant, they were treating prisoners better than they
22 were treating the President. I won't make a political
23 statement about wanting to do that now, perhaps.

24 But, I will say that technology changes the
25 equations all the time. And, it's inevitable that

1 we're on the cusp of a variety of technological
2 advances that could change this. And again, you know,
3 think about ways that it's not as scary, right?

4 Trigger locks on guns as a technological
5 way. Imagine a system in which you could create a
6 database -- and we're working on this -- a DNA
7 database, as fingerprinting databases, for all
8 criminal offenders. If you can create a mechanism,
9 through technology, that anybody with a criminal
10 record would have their fingerprint encoded in a way
11 that would disallow them from being able to fire
12 certain kinds of firearms. Rather than locking up
13 people for 10 years for being a felon in possession,
14 we would just make sure those persons couldn't
15 actually use the weapons, through a technological
16 means.

17 A variety of techniques to keep drunk
18 drivers from getting back on the road and driving.
19 There's all sorts of ways.

20 This doesn't mean that you all should become
21 a brave new world commission. But it is something
22 that I encourage you to be thinking ahead about, not
23 only because I think there's a lot more potential
24 there than most people realize, but also because if
25 you don't do it, the companies will.

1 There is an economic reason why GPS is
2 becoming successful. It's because there are companies
3 out there marketing their services, saying "We can,
4 cheaper than keeping all your sex offenders locked up,
5 make them little dots on this system. And, for half
6 the price, you can monitor twice as well. And, trust
7 us, this report, that we had this very expert
8 scientific community do" -- which, of course, is their
9 own paid researchers -- "has shown that this is twice
10 as effective as keeping these folks locked up in civil
11 commitment, in this form, or that form."

12 And, I don't need to tell you all how
13 appealing that's going to sound when marketed that
14 way. And so, I think, as I look ahead and think about
15 the future, it's not just that new technology has
16 extraordinary potential to recast the way we look at a
17 lot of these issues, but that there are going to be
18 people with a very significant economic incentive to
19 present those issues, both to the politicians and to
20 the people working practically, right?

21 So, this gets back to these dimension
22 levels. This gets back to the inevitability of
23 whatever legal rules you guys put forward, the
24 politics and the practicalities are going to influence
25 things. And, if it turns out that you come up with a

1 brilliant way to deal with any of these problems, but
2 then the local community is struggling to make their
3 budget, and some -- I don't know what's sort of the
4 technological equivalent of a snake oil salesman --
5 comes along and says, "Look, we can get you the same
6 end at half the price," that's going to be very hard
7 to resist.

8 And that's what I see time and time again,
9 at a different level, the way these things sort of pop
10 up from the grassroots. Oftentimes, again, those are
11 very valuable things to think about.

12 The entire drug court movement, which has
13 been so popular, and I know your own Chief Justice has
14 spoken, justifiably proudly, about, grew out of a
15 Miami court system that said there has to be a better
16 way.

17 But, it's important that people are soberly
18 realistic about those innovations and are prepared,
19 especially if there is a commission like this in
20 place, to help the people on the ground see which ones
21 really are worth trying and which ones may sound
22 better than they truly prove to be.

23 I think I've saved a little time for
24 questions.

25 COMMISSIONER O'DONNELL: You did. Thank

1 you.

2 MR. BERMAN: Thank you.

3 COMMISSIONER O'DONNELL: This has been
4 great, very thoughtful. I know we do have a lot of
5 very tired people who have to catch trains and planes.
6 But, I do want to -- are there any questions that you
7 would like to discuss at this point?

8 I would really appreciate it if we could
9 reach out to you --

10 MR. BERMAN: Absolutely.

11 COMMISSIONER O'DONNELL: -- as we do our
12 work, and bounce ideas off you and get your thoughts.

13 MR. BERMAN: It would be my pleasure to do
14 so. I'm already excited and looking forward to seeing
15 whatever you produce October 1st, because I'm sure it
16 will be --

17 [Laughter]

18 COMMISSIONER O'DONNELL: It might be we
19 need more time.

20 MR. BERMAN: Right. Nothing wrong with
21 that.

22 Let me just say, as sort of a last
23 appropriately flattering point, that my sense is you
24 guys are taking the appropriate first approach of
25 trying to bring in a lot of bright people to tell you

1 a lot of things. And, I'm sure that's more
2 overwhelming than it is inspiring at this stage.

3 Because I was just, even looking over who
4 you had on the agenda today, let alone who you've had
5 before, and they're all top notch people who I have,
6 you know, heard great things about. And, the problem
7 is we all have too much to say, and have too much
8 experience seeing all of this stuff have incredible
9 potential and then not always live up to that
10 potential.

11 And so, my guess is not only do you have --
12 that's why I didn't bring any reading, because I
13 figure you have plenty to read already on your train
14 rides back, and that you should feel comfortable
15 coming to me, you know, just in whatever ways that I
16 can help. Because, my goal is to not only continue to
17 look favorably on the New Yorkers who I still consider
18 myself a part of, but that I think, as I mentioned at
19 the outset, New York is well positioned to not have to
20 simply just overreact to sort of current problems, but
21 rather sort of take this moment to build the sort of
22 next era of reform and provide, then, an effective
23 blueprint for other states that I know are sometimes
24 directly, sometimes indirectly, struggling with the
25 same issues.

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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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C E R T I F I C A T E

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

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