

4-1-2010

The End of Indeterminate Sentencing in New York: The Death and Rebirth of Rehabilitation

Joshua Logan Pennel

University at Buffalo School of Law (Student)

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Criminal Law Commons](#)

Recommended Citation

Joshua L. Pennel, *The End of Indeterminate Sentencing in New York: The Death and Rebirth of Rehabilitation*, 58 Buff. L. Rev. 507 (2010).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol58/iss2/5>

This Comment is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

COMMENT

The End of Indeterminate Sentencing in New York: The Death and Rebirth of Rehabilitation

JOSHUA LOGAN PENNEL†

INTRODUCTION

For years, New York has steadfastly clung to the outdated model of indeterminate sentencing. Since the 1970s, state after state has discarded this antiquated model and the ‘incarceration as rehabilitation’ theory that supported it.¹ The Federal Sentencing System functioned on an indeterminate model for more than half a century before it gave way to determinate sentencing with the implementation of the Federal Sentencing Guidelines.² In the 1980s, New York attempted to move towards determinate sentencing by implementing sentencing guidelines, but the attempt failed.³ In reaction to this failure, the New York Legislature took it upon itself to pass ad hoc revisions making individual crimes punishable by determinate sentencing, but currently New York still has

† J.D. Candidate, Class of 2010, University at Buffalo Law School, State University of New York; M.S., 2007 University of Central Missouri; Member, Buffalo Law Review. Special thanks to Professor Markus Dubber for his guidance and to Elizabeth Blazey for her continuing support.

1. See PAMALA L. GRISET, DETERMINATE SENTENCING: THE PROMISE AND THE REALITY OF RETRIBUTIVE JUSTICE 27-29 (1991).

2. Theresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 398 (1991).

3. GRISET, *supra* note 1, at 166-72.

more than 200 crimes that typically receive an indeterminate punishment.⁴ The system has become confused and difficult to navigate; the system is calling for change.

Despite the overwhelming push for changes to the indeterminate model, and regardless of the confusing state of the system, New York has seen nearly two decades of correctional success. Since determinate sentencing began in the 1970s and '80s, the prison population in America has skyrocketed. In 1982, shortly after the first determinate guideline systems were implemented, the United States had 2.2 million people under the care of a correctional program.⁵ That amounted to 1 out of every 77 adults in America; in 2007 that ratio was 1 in 31.⁶ Over 7.3 million people are under the control of a correctional system.⁷ However, during this same time, New York's prison population has been on a steady decline.⁸ What's more, the crime rate has been dropping; public safety has not been jeopardized by the decrease in incarceration.⁹ So when the New York Sentencing Commission was established it had the difficult job of updating a system from a bygone era without disrupting the success of the current system and without causing the prison population to balloon.

In January 2009, the New York State Sentencing Commission ("O'Donnell Commission" or "Commission") published its *Recommendations for Reform*.¹⁰ This document was the culmination of over two years of work which began when then-governor Eliot Spitzer requested that the

4. See N.Y. STATE COMM'N ON SENTENCING REFORM, THE FUTURE OF SENTENCING IN NEW YORK STATE: RECOMMENDATIONS FOR REFORM, at III (2009) [hereinafter RECOMMENDATIONS FOR REFORM], available at http://criminaljustice.state.ny.us/pio/csr_report2-2009.pdf.

5. See Richard S. Frase, *Defining the Limits of Crime Control and Due Process*, 73 CAL. L. REV. 212, 246 (1985) (reviewing HANS ZEISEL, THE LIMITS OF LAW ENFORCEMENT (1982)); *Study: 7.3 Million in U.S. Prison System in '07*, CNN, Mar. 2, 2009, <http://edition.cnn.com/2009/CRIME/03/02/record.prison.population/index.html>.

6. *Study: 7.3 Million in U.S. Prison System in '07*, *supra* note 5.

7. *Id.*

8. See RECOMMENDATIONS FOR REFORM, *supra* note 4, at 23.

9. *Id.*

10. See generally *id.*

Commission be formed to evaluate and transform the method and practice of sentencing in New York. The system had grown overly complicated and confusing by years of piecemeal reforms enacted by the legislature and by the fact that formal sentencing recommendations had not been revised since the 1960s.¹¹ The O'Donnell Commission's mission was to "conduct a comprehensive review of New York's current sentencing structure, sentencing practices, community supervision, and the use of alternatives to incarceration"¹² in order to streamline the system and make it more efficient and effective.

Although the O'Donnell Commission's reforms have the potential to achieve these goals, the success of the new system is almost entirely dependent on what portions of the report the New York Legislature decides to adopt. While adopting determinate sentencing may streamline the system, it also has the potential to undermine the success of the previous twenty years. Partial implementation may result in the creation of numerous problems within the correctional system. The O'Donnell Commission has developed a plan that, if carefully implemented, may not only improve the New York system, but may serve as a model for other states.

The two largest reforms that the O'Donnell Commission recommends include (1) a shift from indeterminate sentencing to determinate sentencing, and (2) the expansion of "personalized corrections," which allows for individualized categorization and placement of offenders.¹³ In order to gauge the potential effectiveness of the O'Donnell Commission's recommendations, one must first explore the problems of the current system and discuss why these recommendations are seen by many as a better alternative. The second step is to look at the path that led to the current system. This path will trace the changes effected by past commissions to allow comparisons between those commissions and the current O'Donnell Commission. These comparisons may help predict the amount of support the current recommendations might find in the legislature. The third step involves looking at how the O'Donnell

11. *See id.* at 6-8, 25-28.

12. Exec. Order No. 10, 29 N.Y. Reg. 103 (Mar. 28, 2007).

13. RECOMMENDATIONS FOR REFORM, *supra* note 4, at I-IV.

Commission's recommendations, if enacted, may affect individual players within the system. This analysis will help paint a picture of what a determinate sentencing system will look like under the O'Donnell Commission's recommendations.

Part I of this Comment discusses New York's correctional history. New York has produced many innovative techniques when dealing with criminal sanctions. These techniques, which have been built upon to arrive at the current system, are important to explore in order to gather an understanding of both the uniqueness of the New York system and how the current recommendations fit within this history. Part II looks at a method of reform that has become an important part in New York correctional history: the sentencing commission. New York has relied on numerous commissions in an attempt to propel its sentencing structure forward. The Bartlett Commission has proven to be one of the most influential due to its recommendation to implement indeterminate sentences—a style of sentencing that the O'Donnell Commission recommends eliminating. Part III explores this recommendation to implement determinate sentencing and the results that similar recommendations have produced in jurisdictions across the country. Part IV begins to discuss the reason that change in New York is necessary. The current sentencing structure produces hardship for almost all of the people involved in an individual's sentence. This part will also begin to explore how the current recommendations will alleviate these hardships. Part V will lay out the case for change; why reform should be undertaken and why it should be undertaken at this time. Part VI will take a critical look at the O'Donnell Commission's recommendations. While the recommendations have the potential to significantly improve the current sentencing system they also present potential problems and challenges that must be considered. Part VII will compare the current recommendations with those made during past commissions. While past New York Sentencing Commissions have had mixed results in having its recommendations passed by the legislature, the O'Donnell Commission may have certain characteristics that make passage of its recommendations more plausible. Finally, Part VIII will look at the practical effects that the O'Donnell Commission's recommendations will have on individuals who participate in the criminal sentencing process. I conclude by arguing that an ad hoc approach or

one stymied by fiscal restraints could undo decades of progress New York has seen in lower crime and incarceration rates. The O'Donnell Commission carefully crafted its recommendations, and the legislature would be wise to follow them.

I. A BRIEF HISTORY OF PENAL PRACTICE IN NEW YORK

New York, during the colonial period, had more than 200 crimes which could result in the death penalty.¹⁴ Long-term incarceration was rare.¹⁵ “County jails were reserved primarily for pretrial detainees and debtors.”¹⁶ Harsh penalties that consisted of public shaming or death were “intended to frighten, and thereby deter, the would-be offender from committing a crime.”¹⁷ Following the model that had been used in Europe for centuries, New York continued these practices even into early statehood.¹⁸

Beginning in the late eighteenth century, theories on crime and punishment began to change. Proportional sentences given in a civilized manner (i.e. abolishing torture, public spectacles, and the excessive use of capital punishment) became the cornerstone of the Enlightenment push for penal reform.¹⁹ “European humanitarianism was well-suited to New York’s populist government [and] the nineteenth century movement away from capital punishment and towards the creation of the fortress prison.”²⁰

Also in the late eighteenth century, the Quaker sect in Pennsylvania, who “abhor[ed] all shedding of blood [and] had always protested against the barbarous laws which the colonies inherited from their mother country,” began to

14. GRISET, *supra* note 1, at 9.

15. *See id.*

16. *Id.*

17. N.Y. STATE COMM’N ON SENTENCING REFORM, THE FUTURE OF SENTENCING IN NEW YORK STATE: A PRELIMINARY PROPOSAL FOR REFORM 3 (2007) [hereinafter PRELIMINARY PROPOSAL FOR REFORM], *available at* <http://www.criminaljustice.state.ny.us/legalservices/sentencingreform/2007prelimsentencingreformrpt.pdf>.

18. GRISET, *supra* note 1, at 10.

19. *Id.*

20. *Id.*

change the focus of sentencing.²¹ Classification and incarceration of prisoners began to occur, replacing the draconian punishments held over from Europe.²² The practice eventually found its way into New York and was put into practice in the Auburn Prison System.²³

The Auburn System, in some ways, marks the beginning of the modern penal system in New York.²⁴ The system focused on rehabilitation through isolation by taking those who had transgressed out of the environment that had contributed to their wayward actions and giving them solitude to contemplate their reform.²⁵ Auburn was called the "pride of the nation" and was used as one of the models for the plethora of facilities that sprang up around the nation by 1850.²⁶ The modern age of corrections had begun in New York.

II. THE DEVELOPMENT OF INDETERMINATE SENTENCING AND THE BARTLETT COMMISSION

By the mid-twentieth century, the correctional system was the product of layer upon layer of legislation passed in attempts to keep the system current.²⁷ The legislature's attempts to keep the system "up to date" were done by "individual additions and subtractions which rarely had any relationship to each other and never to any rational overall scheme."²⁸ In 1961, Governor Nelson A. Rockefeller created

21. G. DE BEAUMONT & A. DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 37 (Francis Lieber trans., S. Ill. Univ. Press 1964) (1833).

22. *See id.* at 37-38.

23. *See id.* at 40.

24. *See id.* at 39-40. In 1833, de Tocqueville arrived in America to explore the newly emerging country. One of the intended purposes for his visit was the evaluation of the newly formed penal systems and the fortress prisons that had been developed in New York and Pennsylvania. *See* Thorsten Sellin, *Introduction to DE BEAUMONT & DE TOCQUEVILLE*, *supra* note 21, at xv.

25. GRISET, *supra* note 1, at 11.

26. *Id.*

27. *See* Herman Schwartz, *Criminal Law Revision Through a Legislative Commission: The New York Experience: An Interview with Richard Bartlett*, 18 BUFF. L. REV. 211, 211 (1968).

28. *Id.*

the Bartlett Commission to revise the penal law and determine the proper role and function of sentencing.²⁹ New York's penal law had been implemented shortly after the Civil War.³⁰ Since that time, the system had gone through eighty years without any overarching reforms,³¹ making the Bartlett Commission's job both incredibly complicated and vitally important.

While the Bartlett Commission had a monumental task, the task was, fortunately, unencumbered by the legislature. The legislature gave the Bartlett Commission carte blanche to develop both a penal law and a complimentary sentencing structure.³² In contrast, the Federal System's Sentencing Guidelines, developed in the early 1980s, were hindered by the inability or unwillingness of Congress to reconsider the laws which governed criminal sanctions.³³ Reforming the penal law was a necessity in order for the Bartlett Commission to enact the type of sentencing structure that it envisioned for New York State. In other words, both parts of the system needed to be reformed for either part to work correctly. "Instead of a modern set of guidelines to help effectuate the deterrence of crime . . . and [the] reformation of criminals, the State of New York [had] a . . . structure designed for a retributive system."³⁴ The Bartlett Commission wanted to erase that "retributive system," and replace it with a system focused on rehabilitation and deterrence.

Simplification of the penal law was one of the first steps that the Bartlett Commission took. For example, the Bartlett Commission suggested eliminating repetitive and verbose language from the statutes, installing a topical arrangement for offenses, and modernizing the code for the

29. *See id.* at 211-12.

30. *Id.* at 211.

31. *Id.*

32. GRISSET, *supra* note 1, at 13-19.

33. *See* Gerard E. Lynch, *The Sentencing Guidelines as a Not-So-Model Penal Code*, 10 FED. SENT'G REP. 25 (1997).

34. PRELIMINARY PROPOSAL FOR REFORM, *supra* note 17, at 6 (quoting N.Y. TEMP. COMM'N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, INTERIM REPORT OF THE STATE OF NEW YORK TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE 27 (1963) [hereinafter BARTLETT COMMISSION REPORT]).

twentieth century.³⁵ Overall the Bartlett Commission's purpose was to recommend a system that would modernize an outdated model.³⁶

The Bartlett Commission wished to pursue a modernist approach towards sentencing that highlighted rehabilitation, deterrence, and incapacitation.³⁷ The chief concern was to treat offenders while protecting the public from criminal behavior. The Commission thought the best way to achieve this was to expand a practice that had been in limited use in New York for many years—indeterminate sentencing. The Bartlett Commission decided indeterminate sentencing would be the predominate method of sentencing in New York with the Bartlett Commission envisioning “that the ultimate responsibility for sentencing should be distributed among the judge, the penal and parole authorities, and the executive.”³⁸ Within this system the legislature would set the outer limits for sentencing specific crimes. The legislature would then “delegate control over sentence length to the courts, corrections, and parole . . . to individualize the sentence.”³⁹ An offender would typically be given a sentence by the judge that fell anywhere under the maximum penalty laid out by the legislature.

The Bartlett Commission's focus on rehabilitation was the antithesis of mandatory minimum sentences.⁴⁰ The Bartlett Commission thought that if a “court is to be entrusted—as it should be—with authority to decide whether to impose a sanction, it can certainly be entrusted with authority to decide whether a minimum period of imprisonment in excess of one year is necessary.”⁴¹ If a judge failed to set a minimum incarceration period then the minimum sentence would be left up to the parole board.⁴² An offender would, therefore, be placed in custody for an

35. See B.J. George, Jr., *A Comparative Analysis of the New Penal Laws of New York and Michigan*, 18 BUFF. L. REV. 233, 235-36 (1968).

36. See GRISET, *supra* note 1, at 19.

37. *Id.* at 15.

38. *Id.* at 16 (quoting Richard Bartlett, Chairman, Bartlett Commission).

39. *Id.*

40. *Id.* at 17.

41. *Id.* (quoting BARTLETT COMMISSION REPORT, *supra* note 34, at 280).

42. *Id.*

amount of time dictated by either a judge or the parole board. The punishment that an offender underwent would then be tailored by the penal institution towards the individual offender. It was thought that in order to abide by the ideal that “[d]ifferent offenders required different treatment programs; one needed only to understand the offender’s life history to devise a cure.”⁴³

Indeterminate sentences were designed to individualize a sentence for each offender.⁴⁴ The theory behind indeterminate sentencing holds that each offender requires a unique amount of time to rehabilitate and that this individualized approach is accomplished by sentencing an offender to a sentencing range.⁴⁵ After the offender has been in his or her rehabilitation program for some time, the parole board makes a decision about whether the indeterminate sentence conditions have been fulfilled.⁴⁶ Also, before release, the offender could reduce the maximum sentence by having time subtracted through the use of “good time.”⁴⁷ This “good time” allowed the institution to provide incentives for compliance while the offender completed rehabilitation.

Indeterminate sentencing can trace its roots to New York State and was in limited use at the time of the Bartlett Commission. “The earliest practical applications [of indeterminate sentencing] were in New York, in the 1870s, at the Elmira reformatory.”⁴⁸ Post-Civil War, Elmira only received “young” offenders, between the ages of 16 and 30 “not known to have been previously sentenced to a State prison.”⁴⁹ These offenders were treated in a manner that indicated society’s view that there was still a chance that they might reform their ways. “[P]risoners were supposed to learn trades; and, of course, the prison furnished programs of religious and moral uplift.”⁵⁰ Levels were used to denote

43. *Id.* at 11.

44. SANFORD H. KADISH, *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 250 (1987).

45. *See* GRISET, *supra* note 1, at 17.

46. *See* KADISH, *supra* note 44, at 250.

47. RECOMMENDATIONS FOR REFORM, *supra* note 4, at 26.

48. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 597 (2d ed. 1985).

49. *Id.* (quoting 1870 N.Y. Laws ch. 427, § 9).

50. *Id.*

how well an inmate "behaved and showed progress."⁵¹ The inmates could advance through these levels by showing improvement.⁵² Those prisoners who attained the "highest class were eligible for parole."⁵³ The Elmira system showed enough promise that, in 1889, New York became the first state which imposed a system of indeterminate sentences for many first time offenders.⁵⁴ By 1907 the program was expanded to include all first-time offenders except murderers.⁵⁵

The Bartlett Commission accomplished its dual purpose of both revising the penal law and determining the proper role and function of sentencing.⁵⁶ It succeeded in providing recommendations for the legislature to adopt. Among its suggestions was a move toward making all of the criminal offenses committed in New York punishable by indeterminate sentences.⁵⁷ Influenced by the American Law Institute's Model Penal Code and the emergence of the medical model,⁵⁸ the Bartlett Commission hoped that indeterminate sentencing could provide offenders with opportunities to benefit from individualized sentences and rehabilitate while incarcerated.⁵⁹ Although the legislature adopted the indeterminate model at the suggestion of the Bartlett Commission, the indeterminate model came under immediate fire.⁶⁰

51. *See id.*

52. *Id.*

53. *Id.*

54. *See id.*; see also Jeanie M. Schupbach, Note, *New York's System of Indeterminate Sentencing and Parole: Should It Be Abolished?*, 13 FORDHAM URB. L.J. 395, 403 (1984).

55. PRELIMINARY PROPOSAL FOR REFORM, *supra* note 17, at 5 (citing 1907 N.Y. Laws ch. 737).

56. *See* Schwartz, *supra* note 27, at 211-12.

57. *See* GRISET, *supra* note 1, at 19.

58. *See* Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1130-33 (1952) (noting that "medical, psychological and social sciences" should guide a legislature in determining which reformatory model to choose from).

59. GRISET, *supra* note 1, at 17.

60. *See* Schupbach, *supra* note 54, at 409.

III. THE CALL FOR DETERMINATE SENTENCING AND THE SENTENCING GUIDELINE COMMISSION

Outside New York, sentencing systems across the country criticized, ridiculed, and discarded the rehabilitative model.⁶¹ Instead, a retributivist model became popular; this model relied on tougher sanctions and dismissed the concept that incarceration could be used as a rehabilitative tool.⁶² The crime rate was increasing across the country and the public was pushing for more punitive measures.⁶³ The Federal System abandoned its indeterminate sentencing model and adopted a strict guideline system that was touted as being fairer and more uniform.⁶⁴ “Liberals, conservatives, defense advocates and law enforcement professionals all claimed that the rehabilitative philosophy was theoretically and empirically flawed.”⁶⁵ This broad criticism, coupled with the turbulent changes of the 1960s and 1970s, allowed the rehabilitative model only a brief window of opportunity.⁶⁶ “Rehabilitation was cast aside in favor of retribution and incapacitation as the most valid purposes of sentencing.”⁶⁷

New York felt the pressure to change as well. The Attica Prison riot prompted the formation of a new commission to investigate the sentencing practices in New York.⁶⁸ After that commission, political pressures prompted the government to create additional commissions, each charged with bringing change to the system. These attempts culminated in a proposal for New York to entirely abandon its indeterminate sentencing and develop its own sentencing guidelines.⁶⁹ In 1983, New York established the Committee on Sentencing Guidelines and charged that

61. See Herbert J. Hoelter et al., *Future Trends in the United States Federal Sentencing Scheme*, 13 AM. U. INT'L L. REV. 1069, 1073-74 (1998).

62. See *id.* at 1074.

63. *Id.*; Karle & Sager, *supra* note 2, at 394.

64. See Karle & Sager, *supra* note 2, at 398.

65. RECOMMENDATIONS FOR REFORM, *supra* note 4, at 11.

66. See *id.* at 15.

67. *Id.* at 11.

68. See Schupbach, *supra* note 54, at 410 n.83.

69. See generally GRISSET, *supra* note 1.

Committee with ending the indeterminate model and establishing a set of guidelines to achieve “proportionality and ‘truth in sentencing.’”⁷⁰ While New York was attempting to establish guidelines, states across the nation and the federal government were undergoing similar changes.⁷¹ The Federal Sentencing Guidelines, passed in 1984,⁷² reflected the demand across the country for more rigid and rigorous sentencing.

However, despite the development of guidelines at the federal level and despite the recommendations presented to the New York Legislature by the Committee on Sentencing Guidelines, the recommendations for changing the indeterminate sentencing model never got out of committee.⁷³ The push for change in New York was ultimately unsuccessful. After the push failed, the legislature, still under pressure, began to develop policies that superseded the indeterminate sentences.⁷⁴ By allowing for “back-end” sentencing,⁷⁵ setting mandatory minimum sentences, and removing indeterminate sentences for particular crimes, the legislature partially bypassed the indeterminate sentencing model.⁷⁶ However, for the majority of criminal offenses, indeterminate sentences remained.⁷⁷

70. RECOMMENDATIONS FOR REFORM, *supra* note 4, at 17-18.

71. See Symposium, *A Decade of Sentencing Guidelines*, 28 WAKE FOREST L. REV. 181 (1993).

72. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 & 28 U.S.C.).

73. PRELIMINARY PROPOSAL FOR REFORM, *supra* note 17, at 10.

74. Although the attempt to circumvent the indeterminate system began shortly after the Bartlett Commission's recommendations were adopted, the trend continued after the Sentencing Guideline Commission's Recommendations failed to garner the support necessary to be implemented. See RECOMMENDATIONS FOR REFORM, *supra* note 4, at 18-19.

75. Back-end sentencing is the practice of allowing offenders to reduce the amount of time that they must serve by accumulating “good time,” “merit-time,” or participating in additional programs while incarcerated. See *id.* at 63 (internal quotations omitted).

76. See *id.* at VIII.

77. *Id.* at III.

IV. THE O'DONNELL COMMISSION'S RECOMMENDATIONS

A. *The Current State of Indeterminate Sentencing*

The “ad hoc and piecemeal”⁷⁸ reforms passed by the legislature have resulted in a system that confuses even the most seasoned practitioner. Since some crimes now carry determinate sentences, a prisoner sentenced for multiple crimes has a good chance of being given both determinate and indeterminate sentences.⁷⁹ And while the indeterminate sentence may make the offender eligible for release on one date, the determinate sentence may require a different release date.⁸⁰ So called “good time” may allow an offender to be released after serving a set amount of time, but this may conflict with the parole board’s decision on whether the indeterminate sentence’s conditions have been fulfilled.⁸¹ Couple this with the already nebulous concepts used by the parole board to determine if an offender has met the indeterminate sentence conditions,⁸² and the system becomes nearly un navigable.

To satisfy the universal call for simplification, the O’Donnell Commission recommends that indeterminate sentences be replaced with determinate sentences.⁸³ The reformative ideals that many in the 1950s and 1960s had toward incarceration have finally been determined to be unmanageable and ineffective. With the end of indeterminate sentences, the O’Donnell Commission seems to recommend that the incarceration as rehabilitation model has come to an end. However, this is not a complete dismissal of rehabilitation.

78. *Id.* at 25.

79. *See id.* at 27-28.

80. *See id.* at 26-27.

81. *See id.*

82. *See New York Commission on Sentencing Reform: Public Hearing in Buffalo* 9-10 (2007) (statement of Gerald Balone, former inmate of the New York penitentiary system).

83. *See* RECOMMENDATIONS FOR REFORM, *supra* note 4, at III.

B. *Redefining Rehabilitation*

Along with ending indeterminate sentences, the O'Donnell Commission also suggests that offenders should be categorized and placed in individualized correctional programs.⁸⁴ In order for this goal to be achieved, the O'Donnell Commission suggests the implementation of a "criminogenic needs" assessment⁸⁵ and the expansion of the correctional programs which are currently available.⁸⁶ The criminogenic needs assessment is expected to evaluate each offender's particular needs and is meant to identify "critical deficits that can contribute to recidivism."⁸⁷ Deficits in "personality traits such as impulsivity and aggressiveness; criminal attitudes; absence of pro-social peers and mentors; low educational achievement; low employment; and substance abuse,"⁸⁸ will then be accounted for when sentencing and supervising an offender. However, in order to properly place an offender based on their needs, it is imperative that a multitude of options are available to divert offenders away from incarceration. By taking programs that have records of proven success, building on those successes, and expanding them to serve a larger population, individual needs can be met with greater frequency.

One of the most eagerly anticipated proposals that many thought would be discussed by the O'Donnell Commission was the reformation of the "Rockefeller Drug Laws."⁸⁹ The Commission's report indeed "examines positions both for and against additional drug law reform" and provides "recommendations for the future direction of

84. *See id.* at IV.

85. "A large number of research studies have identified critical deficits that can contribute to recidivism (also called "criminogenic needs" or "dynamic risk factors") . . ." *Id.* at 138. By accurately identifying and targeting the individual deficits of offenders through the use of a "scientific risk and needs instrument," correctional personnel and supervising agents can ensure that "comprehensive assessments and supervision plans" are developed. *Id.*

86. *Id.* at IV.

87. *Id.* at 138.

88. *Id.*

89. For background and commentary on the Rockefeller Drug Laws, see the discussion in Ira Glasser, Executive Director, ACLU, American Drug Laws: The New Jim Crow, *in* 63 ALB. L. REV. 703, 717 (2000).

drug law reform.”⁹⁰ In the 1970s, the so-called “Rockefeller Drug Laws” established mandatory incarceration for offenders found guilty of certain classifications of drug crimes.⁹¹ Their draconian harshness embodied the new “tough on crime” stance that was becoming popular in the United States. “[J]udges were no longer permitted to exercise discretion over whether to incarcerate or impose an alternative sanction”⁹² for offenders found in violation of all Class A, B, and C drug offenses.⁹³

When the O’Donnell Commission’s preliminary report was released, very little was said about drug law reform.⁹⁴ As a demonstration of the passion that drug reformers in New York feel and their disdain for the current drug policies, the amount of criticism that was heaped on the Commission was intense.⁹⁵ Although the drug laws were not specifically discussed in the Executive Order signed by Governor Spitzer forming the O’Donnell Commission,⁹⁶ many thought that if true reform were to occur, the drug laws were the natural starting point.

District Attorney Michael Green, a member of the O’Donnell Commission and Monroe County District Attorney, suggested that some in the Commission had come to believe, as had many other segments of the population, that long-term incarceration for drug offenders has failed to alter behavior drastically.⁹⁷ It does little to treat the offender, costs a considerable amount of money, and takes away the ability to use programs that have proven successful with drug addicts.⁹⁸ The pendulum, which began

90. RECOMMENDATIONS FOR REFORM, *supra* note 4, at III; *see also id.* at 67-132.

91. *See id.* at 69.

92. *Id.* at 12.

93. *Id.* at 69.

94. *See* PRELIMINARY PROPOSAL FOR REFORM, *supra* note 17, at 21-22.

95. *E.g.*, Press Release, Drug Policy Alliance, New York Sentencing Commission Report Ignores Rockefeller Drug Law Reform (Oct. 16, 2007), <http://www.drugpolicy.org/library/pr101607.cfm>.

96. *See* Exec. Order No. 10, 19 N.Y. Reg. 103 (Mar. 28, 2007).

97. Telephone Interview with Michael C. Green, Monroe County District Attorney and O’Donnell Commission Member (Feb. 9, 2009).

98. *See* RECOMMENDATIONS FOR REFORM, *supra* note 4, at 131. One of the Commission’s recommendations is for the drug treatment program at Willard

swinging towards rehabilitation with the implementation of indeterminate sentencing, may have, in some ways, swung too far, imposing overly harsh penalties in response to the indeterminate model. The recommendations of the O'Donnell Commission attempt to place the system more in balance without upsetting any progress that the system is currently experiencing.⁹⁹

C. *Reforming New York's Drug Laws*

The O'Donnell Commission lays out a number of proposals which would increase the number of offenders that are eligible to enter diversion programs.¹⁰⁰ The number of offenders eligible for these diversion programs varies for each of the models proposed. This allows the legislature to pick a model that it feels will work best for New York. It also allows the legislature to choose a modest change. New York has seen great success in the past twenty years, achieving a remarkably low prison population while continuing to maintain a decreasing crime rate.¹⁰¹ The "not-so-fast" approach that permeates much of the Commission's report may be a result of not wanting to upset this progress.

The "Judicial Diversion" model is the most radical of the models proposed by the O'Donnell Commission. It would allow both "first-time non-violent Class B felony drug offenders and non-violent second felony offenders" to be diverted from incarceration and enter drug rehabilitation.¹⁰² The Commission suggests that as many as 1200 first-time offenders and 1800 second-time offenders admitted to the Department of Correctional Services (DOCS) in 2006 would have been eligible for Judicial Diversion.¹⁰³ However, the

Drug Treatment Center in Seneca County to be expanded. This not only satisfies the best practices qualifier that the Commission wishes to impose, it also reduces the need to incarcerate drug addicted, non-violent felons for long periods of time. *See id.* at 166-68.

99. *See* Telephone Interview with Michael C. Green, *supra* note 97.

100. RECOMMENDATIONS FOR REFORM, *supra* note 4, at 96-132.

101. *See id.* at 95 (citing figures from the Department of Correctional Services (DOCS)).

102. *See id.* at 97.

102. *See id.* at 97.

103. *Id.* at 108.

exact number is in part dependent on the assessment and criteria developed for the program.¹⁰⁴ The other models that the O'Donnell Commission propose allow for fewer offenders to be eligible for diversion programs.¹⁰⁵ While any of the models suggested by the O'Donnell Commission will likely change the manner in which drug offenders are treated, it will be the legislature that chooses a model that it is comfortable with. However, if the O'Donnell Commission's recommendations are passed into law, its proposal to eliminate mandatory prison sentences for first-time offenders with offenses involving small quantities of drugs¹⁰⁶ will allow the diversion programs which it recommends to be utilized to a fuller extent.

D. *Expanding Treatment Facilities*

One of the program expansions that the O'Donnell Commission recommends is the increased use of the Willard Drug Treatment Center ("Willard").¹⁰⁷ Willard is a sentencing option for "low-level second felony drug and property offenders and as a revocation option for parole rule violators."¹⁰⁸ It "focuses on recovery and decision-making skills in the context of a therapeutic community and is usually followed by outpatient treatment in the community."¹⁰⁹ Due to the success that Willard has demonstrated the O'Donnell Commission recommends that this program be expanded.¹¹⁰ Expanding Willard would entail modifying the treatment program to include more individualized care and depending on the model of diversion

104. In order for an offender to be eligible under the Judicial Diversion Model, the offender must have been charged with a Class B, C, D, or E felony drug offense for either a first or second time. *See id.* at 103. Other criteria which would exclude violent and sexual offenders must also be met. *See id.* at 98-99. Finally a "[m]andatory [a]ssessment of [t]reatment [n]eed" would be conducted to show that the offender would benefit from the treatment model. *Id.* at 99.

105. *See id.* at 120-32.

106. *See id.* at 127.

107. *See id.* at 168.

108. *Id.* at 166.

109. *Id.* at 166 n.413.

110. *See id.* at 144 n.377, 168.

that the legislature decides to adopt, to accommodate more offenders.¹¹¹

Willard is based on the Shock Incarceration Model which has been present in New York for over twenty years.¹¹² Programs based on this model, which currently exist at four state correctional facilities, combine an intensive regimen of “hard physical labor, academic education, drug treatment, and personal counseling” that allow offenders not only to avoid prison, but also be released from DOCS custody “as much as 30 months early.”¹¹³ These programs have proven success records of treating offenders and lowering recidivism rates without compromising public safety.¹¹⁴ The O’Donnell Commission wants the maximum age limit for participation, which currently stands at thirty-nine, to be expanded to forty-nine.¹¹⁵ DOCS will continue to use assessment tools to select participants that will benefit from the program; increasing the age limit will simply expand the overall pool of applicants.¹¹⁶ Further, the O’Donnell Commission recommends allowing currently incarcerated individuals with a limited amount of time remaining on their sentence be diverted to the Shock Programs as well.¹¹⁷

Both Willard and other Shock Programs are examples of diversion programs that allow inmates to reduce the

111. Currently 80% of those sent to the 916-bed intensive residential drug treatment center are there on parole violation. This is in part due to the fact that judges are only allowed to sentence those offenders convicted of a Class-E felony or, with prosecutorial approval, a Class-D felony, to Willard. *Id.* at 167.

112. See generally Press Release, Dep’t of Corr. Servs., N.Y. Marks 20 Years of Successful Shock Incarceration (Sept. 5, 2007), <http://www.docs.state.ny.us?PressRel/ShockIncarceration.html>.

113. *Id.*

114. See *id.*

115. RECOMMENDATIONS FOR REFORM, *supra* note 4, at 161.

116. The Legislature has expanded the age criteria before and DOCS has continued to recruit and graduate offenders that are able to participate and benefit from the unique program. *Id.* at 161.

117. Currently only those inmates that are within three years of release when they come to DOCS are eligible for the Shock Programs. “For example, an inmate with a 4-to-12 year indeterminate sentence would not be eligible at reception, and could not thereafter become eligible. However, if this recommendation is adopted, such an inmate would become eligible for Shock after spending one year in general confinement.” *Id.*

amount of time incarcerated and potentially avoid prison. Expanding these programs will allow DOCS to reserve prison space for those offenders that judges or the assessment tools find unsuitable for alternative sentencing. The Shock Programs alone have been estimated as saving New York State over one billion dollars in the past twenty years, while also protecting public safety and reducing recidivism.¹¹⁸ By providing a two-step process: first, having a judge weigh the seriousness of an offense and the danger that an offender poses to society; and second, having an assessment tool gauge the effectiveness of the program for an individual offender; the needs of an offender can be met while satisfying the public safety purpose of correctional confinement.

E. *Redefining Parole and Probation*

While many of the diversion programs that the O'Donnell Commission recommends are directed at an offender before he or she is sentenced to prison, recommendations were also made that would expand the use of parole for those offenders reentering society. One of the perceived causes of increased prison populations across the nation is the reduced use of parole.¹¹⁹ Removing indeterminate sentencing will likely affect the role of the Division of Parole. No longer will they sit in judgment of offenders in order to determine when rehabilitation is complete and release can occur. And while their power may have been significantly limited in some respects, the O'Donnell Commission makes recommendations for the expansion and modernization of both parole and probation.

The first expansion that the O'Donnell Commission recommends is the use of an assessment tool to categorize offenders, allowing parole and probation officers to gauge the relative dangerousness of an offender and then assign the level of supervision that is suitable.¹²⁰ The O'Donnell

118. See Press Release, *supra* note 112.

119. Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 55 (2008).

120. See RECOMMENDATIONS FOR REFORM, *supra* note 4, at 139. Under the O'Donnell Commission's recommendations parole will still be utilized to determine if merit time, good time, and early release are available to incarcerated individuals. See, e.g., *id.* at 162. Both probation and parole will be

Commission further recommends that parole supervision be focused on the first year of release, the period with the statistically highest amount of recidivism.¹²¹ Probation and Parole are also encouraged to tailor the amount of supervision to conserve resources; supervision may range from traditional parole (i.e. weekly meetings and surprise visits) as the most intensive form, down to “kiosk” supervision.¹²² Kiosk reporting has been used in New York City for low-risk probationers without any increased threats to public safety.¹²³ After the probationer is assessed and deemed low-risk, he or she is required to report on a regular basis to kiosk machines located in probation offices around the city.¹²⁴ A similar program utilized by federal probation uses kiosks that use “biometric fingerprint scan[s to] verif[y] identity” and then ask the probationer a series of questions.¹²⁵ This “streamlines” the process, removing the necessary paperwork traditionally used and can also shorten or eliminate the amount of time a probationer is required to see his or her probation officer.¹²⁶ This “triaging” of offenders allows probation officers to focus their efforts on the more serious offenders with a higher risk of recidivism. It also reduces the risk associated with low-risk and high-risk offenders intermixing and has shown some ability to lower the recidivism rate among low-risk offenders.¹²⁷

An additional way in which the O’Donnell Commission recommends adjusting the way parole is carried out is through the implementation of graduated sanctions.¹²⁸

able to utilize the assessment tool to more properly use their limited resources. See *infra* p. 547.

121. See RECOMMENDATIONS FOR REFORM, *supra* note 4, at 142. “[D]ata indicates that the risk of re-arrest is highest during the first few months after release, significantly declines between the sixth and twelfth months, and continues to decrease through to the thirtieth month following release.” *Id.*

122. *Id.* at 141.

123. *Id.*

124. *Id.*

125. *Kiosks in Pilot Program Take over Routine Reports*, THIRD BRANCH (Admin. Office of the U.S. Courts Office of Pub. Affairs, Washington, D.C.), Dec. 2008, available at <http://www.uscourts.gov/ttb/2008-12/article04.cfm>.

126. *Id.*

127. See RECOMMENDATIONS FOR REFORM, *supra* note 4, at 140-41.

128. *Id.* at 147.

Currently, the only official sanction for non-compliance by a parolee is revocation of parole.¹²⁹ This means that many parole officers are left with the option of either ignoring technical violations or returning an offender to custody. Many parole officers have begun to informally use a system of graduated sanctions to correct a parolee's behavior.¹³⁰ The O'Donnell Commission recommends that this system of graduated sanctions be formally adopted, with uniform standards throughout the state and written guidance for officers.¹³¹

Finally, the O'Donnell Commission recommends that conditions of parole be assigned through the use of an assessment tool with the focus being on public safety.¹³² Currently, general conditions are placed on every parolee with little thought given to the offender's individual needs or the threat he poses to the community.¹³³ By reducing the number of conditions that are automatically and mechanically placed on a parolee (currently it is not uncommon to have twenty or more placed on an individual) the likelihood of returning to prison on a technical violation is naturally decreased.¹³⁴ The O'Donnell Commission recommends that conditions of parole be used primarily to ensure public safety and that conditions placed on an offender be applied using a more individualized approach.¹³⁵

V. THE CASE FOR CHANGE

Since the mid-1960s, indeterminate sentencing has become the dominant method of sentencing offenders. This method sprang forth from the desire to reform inmates through the most modern approach possible. Using scientific evidence in a controlled environment was intended to ensure that offenders would only be released when the

129. *Id.* at 145.

130. *Id.*

131. *Id.*

132. *Id.* at 148-49.

133. *Id.*

134. *Id.* at 149.

135. *Id.*

parole board deemed them reformed.¹³⁶ Unfortunately, the scientific evidence was non-existent, and the reformation did not prove to be the success envisioned.¹³⁷ Furthermore, the piecemeal reforms which occurred eliminated the use of indeterminate sentences for certain offenses, causing the system to develop into a hybrid of both determinate and indeterminate sentences. This hybrid system, and the confusion that it spawned, was in many ways the beginning point for the O'Donnell Commission. As District Attorney Green put it: "When defense attorneys, offenders, victims, and victim advocates all state their opposition to a practice, it's not tough to think that maybe this is something we should take a look at."¹³⁸ While change seems to be an obvious necessity, the timing seems to be ideal for change to be explored.

"New York's sentencing and correctional systems are not in a state of absolute crisis [as are those of] so many other states."¹³⁹ While the system may be complicated and difficult to navigate for offender, victim, and attorney alike, there is no warning sign that the system is in dire need of quick action. Change can be explored without an answer having to be quickly constructed to bolster a faltering system. Members of the O'Donnell Commission seemed somewhat cognizant of the fact that moving too fast could upset the system that has proven effective over the previous two decades.¹⁴⁰ This gives the O'Donnell Commission and the New York Legislature the opportunity to act in a deliberate and calm manner. Unlike some other states, New York is in a good position—one where it has a functioning and relatively successful system—while at the same time recognizing the shortcomings of the system. New York has

136. "The Bartlett Commission [readily] acknowledged the lack of scientific evidence on the link between sentencing and crime control. Nevertheless, the Commission maintained that problems with the rehabilitative structure centered on the techniques employed or the manner of implementation, not on the overall design." GRISSET, *supra* note 1, at 15.

137. After the Bartlett Commission completed their task, Governor Rockefeller created another Commission whose responsibility it was to "recommend[] improvements in the post-adjudicatory treatment system." *Id.* at 20.

138. Telephone Interview with Michael C. Green, *supra* note 97.

139. RECOMMENDATIONS FOR REFORM, *supra* note 4, at 23 (internal quotation marks omitted) (alteration in original).

140. Telephone Interview with Michael C. Green, *supra* note 97.

the time to change without being pressured by an overabundance of outside influences.

VI. POTENTIAL PROBLEMS WITH THE NEW RECOMMENDATIONS

A. *Determinate Sentencing Concerns*

The O'Donnell Commission was wary of simplification for its own sake. One of the chief goals of the Commission was to simplify the system while retaining the successful components.¹⁴¹ New York State's prison population has slowly been on the decline over the past two decades. The number of inmates incarcerated within New York is, by some estimates, at a twenty-year low.¹⁴² During the 1990s, New York had the "third slowest growing prison population in the U.S."¹⁴³ To put this into perspective, Texas had the "fastest growing prison system in the country during the 1990s" and "added more prisoners to its prison system . . . than New York's entire prison population."¹⁴⁴ Further, while states like California are being ordered by the federal courts to release as much as a third of their population due to dangerous overcrowding,¹⁴⁵ New York continues to develop correctional programs that keep non-violent offenders out of prison.¹⁴⁶ As a result, the number of offenders convicted of

141. The Commission calls for reform using terminology such as "targeted reforms" and "specifically recommend[s]." RECOMMENDATIONS FOR REFORM, *supra* note 4, at 25. It also speaks at length about properly balancing the recommendations with the goal of public safety. District Attorney Green mentioned that those on the Commission were aware of the successes that had occurred in the previous years within the correctional system. He said that the Commission's recommendations reflected some of the members' feelings that making changes too rapidly would disturb this progress. Telephone Interview with Michael C. Green, *supra* note 97.

142. See RECOMMENDATIONS FOR REFORM, *supra* note 4, at 95 (citing figures from the DOCS).

143. Robert Weisberg, *How Sentencing Commissions Turned Out to Be a Good Idea*, 12 BERKELEY J. CRIM. L. 179, 217 n.216 (2007).

144. *Id.*

145. Solomon Moore, *Court Panel Orders California to Reduce Prison Population by 55,000 in 3 Years*, N.Y. TIMES, Feb. 10, 2009, at A12.

146. See RECOMMENDATIONS FOR REFORM, *supra* note 4, at 80-88.

drug offenses is also at a nearly twenty-year low.¹⁴⁷ However, the amount of crime in New York is also at a near-record low.¹⁴⁸ New York is the fourth safest state in the nation when based on crime rate.¹⁴⁹ When comparing only “large” states, New York ranks number one.¹⁵⁰ The Commission seemingly noticed what many others have taken note of: while decreasing the prison population, New York has not only been able to maintain the public safety concerns that serve as one of the chief focuses of correctional programs, but has actually made the state safer.

Compare California, a state that cannot boast the crime rate of New York and yet, has nearly three times as many incarcerated individuals.¹⁵¹ On February 10, 2009, the practice of incarcerating all varieties of offenders for long prison terms came to a head when a federal, three-judge panel ruled that California “must reduce overcrowding by as many as 55,000 inmates within three years to provide a constitutional level of medical and mental health care.”¹⁵² One of the often perceived shortcomings of the Determinate Model of Sentencing is the explosion of incarcerated individuals that can result.¹⁵³

Since the Federal Government imposed a system of determinate sentencing in the 1980s, the prison population in the federal system has increased dramatically. Since

147. See RECOMMENDATIONS FOR REFORM, *supra* note 4, at 95 (citing figures from DOCS).

148. The Uniform Crime Report (UCR) shows that index crimes are at their lowest level since the 1960s. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT (2007), available at <http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/State/statebystaterun.cfm?stateid=33>. Crime rates have been on a steady decline since 1990. *Id.*

149. RECOMMENDATIONS FOR REFORM, *supra* note 4, at 23 (citing U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES (2006), available at http://www.fbi.gov/ucr/cius2006/data/table_05.html).

150. *Id.*

151. WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE STATISTICS, BULL. NO. NCJ217675, PRISON AND JAIL INMATES AT MIDYEAR 2006 (June 2007).

152. Moore, *supra* note 145.

153. Although not a view without detractors, many see the implementation of determinate sentencing as one of the contributing factors to the exploding prison population over the past twenty years. See Gershowitz, *supra* note 119, at 55; see also Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 72 (1993).

1995, the federal system has grown by eighty-one percent.¹⁵⁴ And while this rate represents an increase nearly three times that of state systems,¹⁵⁵ many states have also experienced a stark increase in their incarcerated population. Today, the United States has over two million adults incarcerated.¹⁵⁶ The United States has more people incarcerated per capita than any other western country; more than double the prison population of Russia; more than six times the per capita population of Canada.¹⁵⁷ The United States has both the highest prison population and per capita population of documented inmates in the world.¹⁵⁸ Over a roughly thirty-year period from 1972 to 2003, the number of inmates has increased by more than 500%.¹⁵⁹

While determinate sentencing alone is not responsible for this increase, it is seen by some as a major contributor.¹⁶⁰ In New York, increases in the prison population which occurred during the 1970s and early 1980s were seen as the product of a system that “vacillated between periods of tough, but unenforceable, mandatory sentencing laws and periods of nebulous indeterminate sentences.”¹⁶¹ New York found that indeterminate sentencing, poorly managed, could pose the same risk of an increased prison population as lengthier determinate sentences. The O’Donnell Commission developed its recommendations with New

154. THE SENTENCING PROJECT, THE FEDERAL PRISON POPULATION: A STATISTICAL ANALYSIS (2004), available at http://www.sentencingproject.org/Admin/Documents/publications/inc_federalprisonpop.pdf.

155. *Id.*

156. Gershowitz, *supra* note 119, at 52.

157. *Id.*; see ROY WALMSLEY, WORLD PRISON POPULATION LIST 1 (7th ed. 2007), available at [http://www.apcca.org/stats/7th%20Edition%20\(2007\).pdf](http://www.apcca.org/stats/7th%20Edition%20(2007).pdf).

158. WALMSLEY, *supra* note 157, at 1.

159. Gershowitz, *supra* note 119, at 52-53

160. Mandatory minimum sentencing, “three-strike” policies, and the reduction of probation and parole have all be cited as causes of this dramatic increase. See *id.* at 54-57. Interestingly, the O’Donnell Commission is attempting to combat many of these issues. Eliminating mandatory minimums for certain drug offenses and increasing probation and parole is meant to counterbalance any increase in the prison population due to the use of determinate sentencing.

161. RECOMMENDATIONS FOR REFORM, *supra* note 4, at 16 (citing the Liman Commission, founded in 1981, which led up to the Sentencing Guidelines Commission).

York's recent successes in mind. While programs seem to have been developed to counteract any increase in the prison population, the opposite occurrence also appeared to make the O'Donnell Commission hesitant to recommend drastic change.

District Attorney Green voiced his concern over moving the Commission too far, too fast, and simply "throwing open the doors" of the prisons, thereby sacrificing public safety.¹⁶² Therefore, these recommendations are, in some ways, a step along the path to complete reformation. The Commission's recommendations make great strides in some regards, while in other regards seem reluctant to build too much, too fast. What the recommendations certainly do, however, is build upon the successes of New York's system, while being willing to discard certain practices that have been tried but are now being dubbed as failures. Further, the O'Donnell Commission recommends that a permanent sentencing commission be established in New York,¹⁶³ allowing for gradual change to be a realistic goal.

B. *Rehabilitative Issues*

While the O'Donnell Commission seemed to choose a return to rehabilitative efforts in order to counteract the risk of determinate sentencing increasing the prison population, this "solution" is not without its problems. One of the first hurdles that the recommendations must overcome is the relatively low opinion of rehabilitation within the correctional context.¹⁶⁴ Rehabilitation was discarded almost unanimously in the 1970s and 1980s. "Between the mid-1970s and the mid-1980s, all fifty states and the District of Columbia enacted or considered enacting legislation"¹⁶⁵ that called for changes to be made to their rehabilitative models of sentencing. A perceived return to the model that seemed to be so resoundingly defeated more than two decades ago may seem unwise. The criticisms that began shortly after the legislature adopted the Bartlett Commission's rehabilitative recommendations included

162. Telephone Interview with Michael C. Green, *supra* note 97.

163. RECOMMENDATIONS FOR REFORM, *supra* note 4, at 179.

164. See GRISSET, *supra* note 1, at 28.

165. *Id.* at 39.

claims by “[l]iberals, conservatives, defense advocates and law enforcement professionals . . . that the rehabilitative philosophy was theoretically and empirically flawed.”¹⁶⁶ However, the model that the O’Donnell Commission is recommending is not simply a rehash of the Bartlett Commission’s recommendations.

Perhaps most importantly, by removing the indeterminate sentencing that was the cornerstone of the Bartlett Commission’s recommendations, the O’Donnell Commission separates its recommendations from the ‘failed’ policy of rehabilitation.¹⁶⁷ One of the chief criticisms of incarceration as rehabilitation is that that “behavior in prison (and hence their suitability for parole) [is] a poor indicator of future criminality.”¹⁶⁸ “With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.”¹⁶⁹ The O’Donnell Commission, however, seems to focus its rehabilitative recommendations on those individuals that are able to rehabilitate in the community, not those offenders in need of incarceration. New York now seems ready to join the rest of the nation, and in some ways complete the revolution that started with the New York commissions of the 1970s and 1980s. Aside from expanding merit time within the facilities¹⁷⁰ and selectively incorporating education and job training for reentry candidates,¹⁷¹ the focus of the O’Donnell Commission is predominately *not* one that wishes to add reformatory programming within the walls of penitentiaries.

166. RECOMMENDATIONS FOR REFORM, *supra* note 4, at 11.

167. See GRISET, *supra* note 1, at 64 (discussing then-Governor Rockefeller’s growing dismay with the rehabilitation sentencing structure. Spurred on in large part by the growing drug problem that was developing within the state, this had direct links to the formation of the Rockefeller Drug Laws).

168. *Id.* at 31.

169. *Id.* at 29 (quoting Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, PUB. INT., Spring 1974, at 22, 35).

170. Merit time allows for offenders to receive as much as one-sixth off their sentence for accomplishing certain programs. RECOMMENDATIONS FOR REFORM, *supra* note 4, at 163. The O’Donnell Commission’s recommendation to expand the merit time program would allow the majority of offenders to receive the time credit, instead of only non-violent felony offenders. See *id.* 165-66.

171. *Id.* at 165 n.409.

One final problem that could result from an increase in the rehabilitative effort is the undermining of the purported benefits of determinate sentencing. The determinate model is touted as bringing an end to the overly complex system of sentencing, allowing offenders, their families, and crime victims to have a realistic estimate of an offender's sentence. However, allowing for a multitude of programs to be used may undermine this new certainty for all parties involved. While the length of a prison sentence may be well known, the type and length of an alternative sentence may not be as certain.

C. *Additional Challenges*

When the Bartlett Commission recommended changes to New York's sentencing practices, it provided a focus for corrections. The recommendations were formed around the ideals that "the purposes of punishment were '[t]o insure the public safety by preventing the commission of offenses through the *deterrent* influence of the sentences authorized, the *rehabilitation* of those convicted, and their confinement [that is, *incapacitation*]when required in the interests of public protection."¹⁷² These ideals seemed to revolve around deterrence and rehabilitation. While these purposes of punishment seem very broad and unfocused, they provide significantly more guidance than the O'Donnell Commission provides. When the Federal Sentencing Commission discarded rehabilitation as its single purpose for punishment, it adopted a "smorgasbord approach."¹⁷³ This

172. GRISET, *supra* note 1, at 15 (alteration in original) (quoting Chairman Richard Bartlett).

173. The "smorgasbord" or "cafeteria" approach was a term used when discussing the numerous purposes that the federal and English systems developed when changing their sentencing structure in the 1980s and early 1990s, respectively. See ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 58 (1992); Andrew Von Hirsch & Julian V. Roberts, *Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions*, 2004 CRIM. L. REV. 639, 640-42. The Federal System, in reaction to the outpouring of criticism directed towards rehabilitation, abandoned the single focus approach in favor of listing four separate purposes for the Federal Sentencing Commission to consider when adopting sentencing guidelines. ASHWORTH, *supra*, at 58. Other sentencing systems have also followed the Federal Systems example and installed a multitude of purposes for their sentencing structure. England lists "(a) the punishment of offenders, (b) the reduction of crime (including its

approach “attracted strong criticism [because it did] nothing to inform judges of the relative importance of the goals that courts ought to seek to achieve.”¹⁷⁴ The O’Donnell Commission seems to provide no guidance or overarching theme that can help to inform judges what goals they should be attempting to reach when sentencing offenders. Certainly, criteria such as public safety are mentioned as guiding principles for consideration,¹⁷⁵ but these are not stated objectives. And while the O’Donnell Commission may receive criticism for providing no guidance, it is possible that this criticism will in actuality be no different than criticism directed at the “smorgasbord approach.” Judges can almost certainly be relied on to understand the general purposes of sentencing. By providing no guidance, the O’Donnell Commission has achieved the same outcome as the Federal System, which allows the judges to choose from a general, well-known list of purposes as if they had adopted numerous focuses. While the O’Donnell Commission recommendations may face the same criticisms as those systems that allow judges to choose from a list of purposes, (deterrence, rehabilitation, incapacitation, retribution, etc.), they also seem to achieve the exact same results.

An additional issue that may arise with the implementation of the O’Donnell Commission’s recommendation is the creation of disparate sentences for minority offenders. Determinate sentencing is traditionally touted as a solution to racial disparity. The Federal System chose a determinate model, and the Federal Sentencing Guidelines “were drafted *primarily* with an eye toward resolving disparity problems.”¹⁷⁶ Minnesota enacted a new sentencing system in 1980, and as a result was able to significantly reduce its sentencing disparity.¹⁷⁷ The O’Donnell Commission spends a significant amount of time

reduction by deterrence), (c) the reform and rehabilitation of offenders, (d) the protection of the public, and (e) the making of reparation by offenders to persons affected by their offences” as the focuses of its system. Criminal Justice Act, 2003, ch. 44, § 142 (Eng.).

174. Hirsch & Roberts, *supra* note 173, at 641.

175. RECOMMENDATIONS FOR REFORM, *supra* note 4, at III.

176. Karle & Sager, *supra* note 2, at 412 (emphasis added).

177. *See* Frase, *supra* note 5, at 246.

justifying the need for change to the drug laws by highlighting the racial disparity that exists among felony drug offenders confined in state prison.¹⁷⁸ Its solution is to establish “a uniform statewide diversion program for drug-addicted non-violent felony offenders.”¹⁷⁹ However, the assessment tool utilized to divert offenders into different programs may itself lead to disparate impact. The criminogenic needs assessment includes evaluating “personality traits such as . . . absence of as pro-social peers and mentors; low educational achievement; [and] low employment.”¹⁸⁰ If this assessment dictates which offender goes to which treatment program, then broad social trends may lead to further racial disparity. For example, although some progress has been made in the field of education over the past years, “the black-white gap in college graduation rates remains very large.”¹⁸¹ Whites still graduate high school at a ten percent higher rate than blacks.¹⁸² Using an assessment tool may provide for more individualized treatment. If such discretion and individualized treatment is allowed, disparity within the system is a possibility. Providing adequate funding to develop and evaluate an assessment tool will be necessary in order to avoid disparate impact.

VII. HOW SUCCESSFUL WILL THE O'DONNELL COMMISSION BE IN COMPARISON TO OTHER COMMISSIONS?

When indeterminate incarceration was adopted in the 1960s, one of its intended purposes was to aid in the rehabilitation of incarcerated offenders by using what were considered the most up-to-date methods of sentencing. However, the link between sentences and the accomplishment of any of the principles of punishment has never been established.¹⁸³ It is just as rare now as it was

178. RECOMMENDATIONS FOR REFORM, *supra* note 4, at 78.

179. *Id.* at 79.

180. *Id.* at 138.

181. *Black Student College Graduation Rates Inch Higher but a Huge Racial Gap Persists*, J. BLACKS HIGHER EDUC., Winter 2006/2007, at 58, 58, available at www.jbhe.com/preview/winter07preview.html.

182. See Ron Haskins, *Moynihan Was Right: Now What?*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 2009, at 281, 286-87.

183. GRISET, *supra* note 1, at 8.

during the Bartlett Commission for social scientists to find statistically significant correlations between incarceration and deterrence, incapacitation or rehabilitation.¹⁸⁴ The Bartlett Commission acknowledged this defect, but insisted that allowing adequate scope in sentencing would allow some of these goals to be achieved.¹⁸⁵ The lack of underlying data and support may provide some insight for why the indeterminate sentence was dubbed a failure by many systems.

In contrast, the O'Donnell Commission has made program evaluation and personalized assessment one of the cornerstones of its recommendations.¹⁸⁶ By expanding proven programs such as Willard and Shock,¹⁸⁷ the Commission is showing the importance it places on success and effectiveness. Further, every program which is developed for treating offenders will need to undergo routine evaluations to assure that the program is producing significant results. By utilizing "best practices" programs that have demonstrated positive results, the commission is recommending the use of "evidence-based sentencing and correctional strategies to reduce crime and enhance public safety," and the development of a "more efficient and cost-effective way[] to use the State's limited correctional and community-supervision resources."¹⁸⁸ This is a considerable departure from the recommendations proposed by the Bartlett Commission. By utilizing only "proven" programs that show the ability to affect change within offenders, the O'Donnell Commission is not simply hoping for the best outcomes, but pursuing programs that can foster the desired change.

In addition to its system-wide evaluations, the O'Donnell Commission recommends personal, individualized assessments for offenders. By developing a tool that can be used to estimate an offender's risk score¹⁸⁹

184. *Id.*

185. *Id.*

186. RECOMMENDATIONS FOR REFORM, *supra* note 4, at 135-43.

187. *See supra* notes 107-18 and accompanying text.

188. *Id.* at III, 151.

189. The Division of Criminal Justice Services (DCJS) developed a risk assessment for offenders leaving correctional custody. The score is calculated based on age, gender, and the offender's history. It then places the offender on a

and identify their criminogenic needs, the assessment tool can direct offenders into a “sufficiently restrictive” environment while providing individualized treatment. Using scientific bases to develop treatment helps to correct the folly of the Bartlett Commission, which established the tools but then assumed that the science and positive results would naturally follow.

Like the Bartlett Commission, the O’Donnell Commission will benefit from the implementation of changes to the penal law. Some of the criticism heaped on the Federal System’s Sentencing Guidelines revolved around the inability or unwillingness of Congress to reconsider the laws which governed criminal sanctions.¹⁹⁰ Not only does the O’Donnell Commission recommend certain necessary penal law reforms,¹⁹¹ its recommendations also benefit from changes previously made to the New York system. In 2004, the Drug Law Reform Act was enacted by the New York Legislature.¹⁹² This Act “eliminated life sentences for Class A felony drug offenses . . . while making all drug sentences determinate with generally shorter available ranges.”¹⁹³ One of the reasons why drug reform was a controversial topic when discussed by the Commission¹⁹⁴ was that some individuals felt that the called-for reform happened with the passage of the Drug Law Reform Act.¹⁹⁵ Piecemeal adoption of the sentencing recommendations without the penal law recommendations

scale from one (lowest) to ten (highest) attempting to predict the likelihood of reoffending. The O’Donnell Commission recommends that parole and the intensiveness of supervision be based on this system. *Id.* at 137, 139.

190. See generally Lynch, *supra* note 33.

191. See RECOMMENDATIONS FOR REFORM, *supra* note 4, at 91-132 (discussing various reforms to the drug laws).

192. Drug Law Reform Act, 2004 N.Y. Laws ch. 738.

193. RECOMMENDATIONS FOR REFORM, *supra* note 4, at 70 (citing 2004 N.Y. Laws ch. 738, §§ 70.70-70.71).

194. Drug reform was not entirely ignored in the preliminary report. However, with the time frame which the Commission had to work with—Executive Order 10 was signed on March 5th and the report was issued seven months later—it was necessary for some issues to remain “before the Commission for consideration.” PRELIMINARY PROPOSAL FOR REFORM, *supra* note 17, at 26.

195. Telephone Interview with Michael C. Green, *supra* note 97.

would send mixed messages. It also might reduce the effectiveness of the recommendation.

An additional reason why the O'Donnell Commission's recommendations may meet with greater success than previous commissions is the timing of the recommendations. The national movement towards determinate sentencing in the 1970s and 1980s was in many ways a reaction to the rehabilitative policies associated with indeterminate sentencing. The entire country was moving away from indeterminate sentencing and rehabilitation. Therefore, the political pressure that helped to shape the New York Sentencing Guidelines Commission and its recommendations was strong.¹⁹⁶ Similarly, when the Bartlett Commission recommended changes to the sentencing structure, a need for a modern approach was widely sought after, making change an immediate necessity.¹⁹⁷ Unlike these previous commissions, however, the O'Donnell Commission's recommendations have occurred at a time when change is welcome and necessary, but not desperately needed. The O'Donnell Commission is making recommendations from a position of strength, during a time when the system as a whole is already functioning to reduce both the crime rate and the incarcerated population. Thus, the O'Donnell Commission was able to function with less political pressure driving the agenda, allowing it more time to develop recommendations.

Another reason why the O'Donnell Commission's recommendations may be met with legislative support involves external pressures. Incarceration is expensive. When asked what the status of the Commission's recommendations would be during the current fiscal difficulties, District Attorney Green maintained that while there may be some short-term setbacks regarding the expansion of certain programs, "finances are always a concern," and the Commission's plan would reduce the use of prison for non-violent offenders.¹⁹⁸ Treatment and supervision, while costly, can be done primarily within the community. The use of "kiosk" reporting for certain low risk offenders would nearly eliminate the need for personal

196. See *GRISSET*, *supra* note 1, at 61.

197. See *RECOMMENDATIONS FOR REFORM*, *supra* note 4, at 8-9.

198. Telephone Interview with Michael C. Green, *supra* note 97.

supervision.¹⁹⁹ Shock Programs reduce the amount of time an offender spends incarcerated.²⁰⁰ The expansion of this program would reduce the cost of incarcerating a larger number of offenders. While cost is a nearly constant concern for legislatures and the government, the current fiscal situation may foster even more support for cost-saving measures. It has been estimated that “prison costs 22 times more than community-based corrections.”²⁰¹ The cost of not incarcerating may, in the end, help the Commission’s report garner the necessary support from the legislature.

The O’Donnell Commission’s greatest attribute may be the manner in which the need for change is balanced against the need to change gradually. District Attorney Green mentioned two reasons why this quality is a strength. First, he stated that he did not help develop these proposals so that they could gather dust on a shelf in Albany.²⁰² Recommendations that are too radical can sometimes cause problems within the legislature, as the Bartlett Commission discovered. Some of the recommendations that the Bartlett Commission made had to be incorporated as separate amendments, so as not to threaten the passage of the recommendations as a whole.²⁰³ Issues such as an “attempt to repeal the prohibitions on adultery and on consensual adult homosexuality” were submitted to the legislature separately and were defeated.²⁰⁴ As a pragmatic concern, certain proposals had to be withdrawn from the packaged recommendations to avoid jeopardizing the passage of the entire bill.²⁰⁵ While it is difficult to state with any certainty whether there are any sections of the O’Donnell Commission’s recommendations that have the potential to jeopardize the passage of a

199. RECOMMENDATIONS FOR REFORM, *supra* note 4, at 141.

200. *Id.* at 158.

201. *Study: 7.3 Million in U.S. Prison System in '07*, *supra* note 5.

202. This was made in obvious reference to previous commissions, such as the Sentencing Guidelines Commission which spent years developing their recommendations only to have them never get out of legislative committee. Telephone Interview with Michael C. Green, *supra* note 97.

203. Schwartz, *supra* note 27, at 224.

204. *Id.* at 211.

205. *Id.* at 224.

packaged bill,²⁰⁶ the recommendations should be sufficiently noncontroversial to garner support. Further, in sections that the O'Donnell Commission anticipated controversy, such as the reform of drug laws, it gave the legislature numerous choices so that a compromise might be reached among the legislators, making passage more likely.²⁰⁷

The second statement made by District Attorney Green that highlighted the O'Donnell Commission's desire to change the system gradually was the Commission's awareness of the successes that had occurred in the previous years within the correctional system.²⁰⁸ He said that some members of the Commission were wary of making changes that would disturb this progress.²⁰⁹ Moving too fast or making radical recommendations may not only present problems once the recommendations go to the legislature, but may also disrupt a system that has shown itself to be successful over the previous few decades. For both these reasons, it appears that the O'Donnell Commission was sensitive to the fact that while change was necessary, keeping the changes conservative would better ensure that they were adopted. Nothing within the O'Donnell Commission recommendations demonstrates this sensitivity better than the push for a permanent sentencing commission. A permanent commission would be able to gradually tweak the current recommendations, address new problems in a politically neutral environment, and "continue the progress that New York State has made."²¹⁰

Overall, the O'Donnell Commission's recommendations should meet with tremendously more success than either the Bartlett Commission or the Sentencing Guideline Commission. Although there may be some hesitation to immediately address the O'Donnell Commission's report due to the fiscal concerns that will undoubtedly take precedent, eventually the recommendations should make it

206. Even Chairman Bartlett could not predict the controversial sections of the Bartlett Commission's recommendations; it was not until the recommendations began to be considered by the legislature that the controversies became apparent. *See id.* at 223-25.

207. *See* RECOMMENDATIONS FOR REFORM, *supra* note 4, at 96-132.

208. Telephone Interview with Michael C. Green, *supra* note 97.

209. *Id.*

210. RECOMMENDATIONS FOR REFORM, *supra* note 4, at 180.

out of legislative committee²¹¹ and quite possibly help to shape New York's sentencing. If they are in fact instituted, they should also face less resistance once they begin to be implemented. Unlike the Bartlett Commission, which faced almost immediate backlash, the O'Donnell Commission's recommendations are not reliant on a single ideal. Once rehabilitation began to fall out of favor in the United States, there were those in New York that immediately began calling for changes to be made. The O'Donnell Commission's recommendations will change the system in less radical ways than the Bartlett Commission's recommendations. While the O'Donnell Commission does make changes to the system—some that might even prove to be controversial—the changes that are being made appear to be incremental and relatively modest in nature.

VIII. THE PROJECTED IMPACT OF THE NEW RECOMMENDATIONS

The New York Sentencing System needs change. The O'Donnell Commission developed recommendations that call for the elimination of indeterminate sentences and an expansion of rehabilitation. But what will the change look like if the recommendations are enacted? Who will be impacted and in what manner? Although in some ways, the recommendations made are not revolutionary, they will affect nearly every "player" that is involved in the correctional system. From prosecutors to parole officers, nearly every facet of the system will have to adjust to the new sentencing structure.

211. Due to the passion with which many critics of the Rockefeller Drug Laws expressed their disappointment at the preliminary recommendations, *see infra* p. 521, it is little surprise that drug reform was the first recommendation to be signed into law by Governor Paterson. *See* Barry Kamins, *New 2009 Drug Crime Legislation—Drug Law Reform Act of 2009*, N.Y. CRIM. L. (New York State Bar Ass'n, Albany, N.Y.), Fall 2009, at 5, available at <http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=31901>. These reforms followed the O'Donnell Commission's recommendations closely and may be a predictor of how the other recommendations will be received by the New York Legislature. However, further action has been slow and the Commission's full recommendations have yet to be considered by the legislature.

A. *Offenders*

One of the two largest changes for offenders and their families is that they will now have a more accurate understanding of their sentence. Currently, an offender sentenced in a New York court faces the possibility of receiving an indeterminate sentence, for example, three to nine years incarceration. The O'Donnell Commission's first recommendation is to take the nearly 200 non-violent offenses that are currently eligible for indeterminate sentences, and reclassify them as punishable by determinate sentences.²¹² In theory, this is supposed to "promote[] greater uniformity, fairness[,] 'truth-in-sentencing'" and predictability.²¹³ It should allow those sentenced to periods of incarceration the ability to better predict when they will be released. Under the indeterminate model, a person sentenced to incarceration "may have as many as four potential release dates prior to the maximum expiration date of the sentence."²¹⁴ The situation is further complicated for offenders that are sentenced for multiple offenses, with some carrying indeterminate sentences while others carry determinate ones.²¹⁵

The result of this change is to allow offenders to make "more informed plea bargain[s], with both the parties and the court having a clearer picture of the actual time the defendant is likely to spend under custody on the agreed-to sentence."²¹⁶ A determinate sentence also makes it less likely that an offender will be unsure what is necessary to secure his or her release.²¹⁷ The options for early release are limited in the determinate sentencing structure; however, they are still available, and determinate sentencing makes it less likely that "an inmate who has 'followed the rules' and earned the maximum good time and merit time allowances while in custody will be inappropriately or inexplicably denied release by the Board of Parole."²¹⁸

212. RECOMMENDATIONS FOR REFORM, *supra* note 4, at III.

213. *Id.* at V.

214. *Id.* at 26.

215. *Id.* at 27-28.

216. *Id.* at 27.

217. *See id.*

218. *Id.*

The second large change for offenders under the O'Donnell Commission's reforms is a greater opportunity for them to avoid imprisonment. Implementing a system that allows for greater diversion away from incarceration would have the natural effect of fewer offenders going to prison. Those offenders who qualify for these diversion programs will find alternative sentences to incarceration; for low-risk offenders, these sanctions may allow them to remain within their community.²¹⁹ Offenders who commit non-violent felonies that have ties to the community (family, school, employment) may find that the amount of disruption to their lives can be significantly reduced. For a first-time, non-violent offender with a steady job, imprisonment is counterproductive. By utilizing greater community treatment, the offenders are allowed to continue to foster their positive, "pro-social networks, which are the very attributes (e.g., school, employment, family) that make them low risk."²²⁰

B. *Victims*

In addition to offenders obtaining a greater certainty of their sentences under the O'Donnell Commission's recommendations, victims too will feel more secure in the knowledge of a victimizer's period of incarceration. However, the O'Donnell Commission asserts that simplicity within the system will also strengthen a victim's voice within the entire correctional process.²²¹ By unifying the existing statutes within New York law, the rights of victims will be better understood, not only by victims, but by judges and prosecutors who can better ensure that these rights are protected.²²² Some of these rights, such as having a voice during the sentencing process, obtaining restraining orders, and receiving restitution, should be better understood by court officers and better explained to the victims of crime. The O'Donnell Commission also recommends that many of

219. *See id.* at 79 & n.232.

220. *Id.* at 141.

221. *Id.* at 171.

222. *Id.* at 172.

the current rights of victims be evaluated for effectiveness and expanded to better protect such rights.²²³

C. *Legal Practitioners*

When calculating a sentence at the federal level, a judge need only review the pre-sentencing report, find the appropriate range of time on the Sentencing Guidelines and make any necessary upward or downward departures.²²⁴ Due to the complexity of sentencing in New York, many practitioners rely on software that was developed to help calculate an offender's sentence.²²⁵ CrimeTime was first developed in 1996 and has been used "throughout New York State by judges, prosecutors, defense attorneys, probation officers . . . and others who need to understand sentencing possibilities."²²⁶ The effects of streamlining the system are all too apparent for legal practitioners; even the most seasoned lawyer may find the current system difficult to navigate. When determining an accurate sentence becomes a challenge, plea bargaining and accurately advising a client becomes difficult. Determinate sentencing should reduce this uncertainty for all legal practitioners.

For prosecutors, the recommended changes to the sentencing structure may reduce the amount of power they have. Currently, prosecutorial discretion is highly utilized for certain drug offenses. The New York City Legal Aid Society has criticized the current status of the drug laws due to the fact that "the sentencing judge has very little independent authority to place a drug offender into treatment[; t]he prosecutor effectively determines who enters a treatment program and who does not."²²⁷ Changes to the manner in which drug offenders are sentenced may have the effect of stripping this power from prosecutors. However, since the O'Donnell Commission gave the

223. *Id.* at 176-77.

224. *See generally* U.S. SENTENCING GUIDELINES MANUAL (2008).

225. *See* Tompkins County Dist. Att'y, CrimeTime, <http://www.co.tompkins.ny.us/distatto/CrimeTime.html> (last visited Feb. 22, 2010).

226. *Id.*

227. RECOMMENDATIONS FOR REFORM, *supra* note 4, at 72 (quoting LEGAL AID SOC'Y, ONE YEAR LATER: NEW YORK'S EXPERIENCE WITH DRUG LAW REFORM 10-11 (2005), *available at* http://www.drugpolicy.org/docUploads/DLRA_2005_Report.pdf).

legislature numerous options from which to choose, exactly what powers will be allotted to prosecutors is unknown. Even if some power is removed from prosecutors, the court may still need to either consult with prosecutors or have a prosecutor's consent when sentencing certain offenders.²²⁸

D. *Court Officials: Judges, Parole, and Probation*

If the legislature determines that the prudent course of action is to relieve prosecutors of some of their power, the power void will almost certainly be filled by judges. Prosecutorial approval or consultation is itself, in some ways, a departure from the traditional roles of sentencing. Since even before "the beginning of the Republic . . . judges were entrusted with wide sentencing discretion."²²⁹ Prior to the implementation of the Federal Sentencing Guidelines, "judges had relatively wide discretion in sentencing federal offenders up to the statutory maximum"²³⁰ with "virtually no appellate review of the trial judge's exercise of sentencing discretion."²³¹ To many, one of the necessary requirements, in order for the Federal Sentencing Guidelines to be successful was for them to be binding on judges, forcing them to comply and thereby reducing their ability to deviate from the prescribed guidelines.²³² By "spell[ing] out in detail the rules that decision makers must apply, [the guidelines could] reduce the need or opportunity for the exercise of judgment."²³³ This reduction in judicial discretion was common during the reforms of the 1970s and 1980s. In many ways, an increase in judicial discretion will be a return to previous methods of sentencing.

228. *Id.* at 98 n.283, 103 n.303.

229. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993).

230. Daniel A. Chatham, Note, *Playing With Post-Booker Fire: The Dangers of Increased Judicial Discretion in Federal White Collar Sentencing*, 32 J. CORP. L. 619, 620 (2007).

231. Stith & Koh, *supra* note 229, at 226.

232. See Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1428 (2008).

233. *Id.*

The return to previous methods may also re-create the problem of disparity in sentences. Some of the O'Donnell Commission recommendations will "afford judges wide discretion in sentencing."²³⁴ Many times, it was this discretion and the disparity that resulted from it that led many jurisdictions to revise their indeterminate sentencing.²³⁵ It has already been noted that the O'Donnell Commission recommendations lack a coherent theme that would provide guidance for sentencing judges.²³⁶ This, coupled with the potential of the assessment tool to treat racial minorities differently, may allow the problem of disparate impact to re-emerge.

While parole's role under a system shaped by the O'Donnell Commission's recommendations might be reduced in some ways, it may be increased in other ways. Although there may be a reduction in parole officers' ability to decide when an offender is released from prison, they may increase their ability to have greater, more individualized supervision over offenders. Further, they may be allowed to use more precise sanctions for non-compliance. Instead of having the choice to either ignore a rule violation or revoke an offender's parole, parole officers under the O'Donnell Commission's recommendations will have a plethora of tools and sanctions available to them. This flexibility should make their efforts more effective and efficient.

Probation officers may see an increase in the size of their case load under the O'Donnell Commission's recommendations; however, they may also be able to reduce the amount of time devoted to each individual. If the legislature adopts the O'Donnell Commission's recommendation to allow probationers to receive less intensive supervision with methods such as "kiosk" reporting, the effect on the probation office would allow them to focus their efforts on the offenders with the highest risk of violating probation or committing future crimes. This should allow the office to function in a more efficient

234. RECOMMENDATIONS FOR REFORM, *supra* note 4, at 128.

235. See Chatham, *supra* note 230, at 621. It was this disparity which arose from, as some saw it, a lack of guidance and oversight, which led some to describe the pre-Sentencing Guidelines federal sentencing practices as a "national disgrace." *Id.* at 621 n.6.

236. See *supra* pp. 534-35.

manner with greater results both to offender success rates and public safety.

E. *Cost and Effectiveness of the System*

Overall, if properly implemented by the legislature, the O'Donnell Commission's recommendations should achieve the purpose that the Commission was designed to address. By streamlining the system's method of sentencing and allowing for a greater number of diversion programs, the system should see an increase in both efficiency and cost savings. While the initial investment of "additional resources for evaluation, treatment, referrals and supervision" may prove to be significant, "in the long run, this investment will result in substantial savings in judicial, law enforcement, correctional and supervision resources."²³⁷ However, this initial cost may affect the legislature's decision of whether to allocate the necessary resources to make the recommendations successful. Currently, the fiscal situation within New York is grim.²³⁸ Investing money into a system that is considered to function at a relatively high level may not take priority in Albany. Simply by converting the system to one that predominately uses determinate sentencing, the system will be streamlined. However, without adding the financial resources necessary to expand the diversion programs, the legislature runs the risk of increasing the prison population. Many of the programs which are used by the DOCS have shown both success and significant savings; ignoring the expansion recommendations by the O'Donnell Commission could increase the cost of corrections.

CONCLUSION

The relative success of the O'Donnell Commission's recommendations will, in large part, depend on how comprehensively the legislature adopts the proposed measures. With the current financial crisis in Albany, it

237. RECOMMENDATIONS FOR REFORM, *supra* note 4, at 131.

238. See Posting of Sewell Chan to City Room: Blogging from the Five Boroughs, *Paterson Warns of 'Historic Economic Challenge,'* <http://cityroom.blogs.nytimes.com/2009/01/08/Paterson-delivers-his-first-state-of-the-state/> (Jan. 7, 2009, 13:25 EST) (reporting on Gov. David Paterson's State of the State address).

would be very easy for the legislature to adopt only the first recommendation—determinate sentencing—which requires little up-front cost, and to justify ignorance of the other recommendations by citing the budget shortfall. Expanding alternative correctional measures, evaluating programs, and the categorization of offenders will all require a sizable investment to implement. However, adopting determinate sentencing without also adopting the O'Donnell Commission's other recommendations could prove both costly and counterproductive; ballooning the State's prison population and reducing its overall effectiveness. Further, adopting other recommendations, such as the assessment tools, without properly researching, evaluating, and questioning how the tools will be used, may simply exchange one problem for another.

The O'Donnell Commission's recommendations have the potential to significantly change the sentencing system; but one of the reasons that the proposed changes include the establishment of a *permanent* sentencing commission is that the O'Donnell Commission has made recommendations that have room to grow and may need to be 'adjusted' in the future. Gradually changing the system balances the goals of making the necessary changes to the system without threatening the progress of successful programs. Making small changes and using the program evaluation to gauge success may require a modest investment, but can also ensure that money is not poured into ineffective programs.

Offenders, victims, legal practitioners, and court administration and staff may all benefit from the implementation of the O'Donnell Commission's recommendations. Again, however, this will in large part depend on the decisions that the legislature makes when considering the proposals. The legislature's choices regarding drug law reform, parole instructions for minor parole infractions, and the amount of funding allocated to a permanent sentencing commission will dictate the degree to which the system can change and, therefore, the extent of the effect on individual players. With the implementation of determinate sentencing, victims, offenders, and their families can feel more "secure" in the length of time a criminal will be incarcerated or supervised by the DOCS. However, this recommendation is only the starting point for the O'Donnell Commission. The legislature has made the mistake of ad hoc, piecemeal, or only "partial" reforms in the past. Despite the current economic crisis, the legislature

has an opportunity to enact a progressive system of reform before the need to change becomes dire. The legislature can enact change that gradually reshapes the system without shocking the system. By properly evaluating the O'Donnell Commission's recommendations, the legislature can bring about change that will once again make New York's sentencing system a model other states can emulate.