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## Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions

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# SMART PUBLIC POLICY: REPLACING IMPRISONMENT WITH TARGETED NONPRISON SENTENCES AND COLLATERAL SANCTIONS

Nora V. Demleitner\*

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## INTRODUCTION

Federal sentencing increasingly differs from sentencing in the states. While both systems have shared rising imprisonment rates throughout the last two decades, the federal rate has grown more sharply and continues to increase.<sup>1</sup>

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1. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2004, at 2-4 & tbls.1-2 (2005) (stating that between 1995 and

States have developed some strategies to combat the growing costs of prisons, which have been fueled by the imprisonment of nonviolent drug offenders, lengthened sentences for violent offenders, and the return to prison of those who violated parole and supervised release conditions.<sup>2</sup> Increasingly, some states have diverted offenders who pose a low risk to public safety to nonprison sanctions.<sup>3</sup> The federal regime, however, currently permits and offers only a few nonprison options.

In 2003, 83.3% of all defendants sentenced in federal court were sent to prison.<sup>4</sup> More than half of those receiving nonprison terms were sentenced to probation, while almost 5% received a split probation/confinement sentence and 3% received a prison/community split sentence.<sup>5</sup> The small number of nonprison-bound offenders may explain the relative inattention that has been paid to nonprison sentences in the federal system. However, as judges may be able to use their increased discretion in a post-*Booker* world, the use of nonprison sentences could increase. The danger of unguided discretion in this area coupled with the budget cutbacks in the federal prison system should provide an incentive for the judiciary and Congress to explore greater use of nonprison sentencing options.<sup>6</sup> The expansion of nonprison punishments and guidelines regarding their imposition would allow judges to individualize sanctions while protecting public safety.

Nonprison sanctions have been one avenue for the states to limit prison

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2004, the federal correctional population increased annually by an average of 7.8%, while the states added 2.7% inmates per year), <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf> (last visited Sept. 25, 2005).

2. DANIEL F. WILHELM & NICHOLAS R. TURNER, *VERA INST. OF JUSTICE, IS THE BUDGET CRISIS CHANGING THE WAY WE LOOK AT SENTENCING AND INCARCERATION?* (2002), [http://www.vera.org/publication\\_pdf/167\\_263.pdf](http://www.vera.org/publication_pdf/167_263.pdf) (last visited Sept. 25, 2005); see PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2002*, at 10 (2003), <http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf> (last visited Sept. 25, 2005).

3. See, e.g., Richard P. Kern & Meredith Farrar-Owens, *Sentencing Guidelines with Integrated Offender Risk Assessment*, 16 FED. SENT'G REP. 165, 165-66 (2004) (describing Virginia's risk-based diversion program).

4. U.S. SENTENCING COMM'N, *SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 2003*, at 29 fig.D (2005) [hereinafter U.S. SENTENCING COMM'N, 2003 SOURCEBOOK], <http://www.uscc.gov/ANNRPT/2003/SBTOC03.htm> (last visited Aug. 31, 2005). The percentage of federal offenders sent to prison increased from 54% to 72% from fiscal year 1988 to fiscal year 1999. See GEN. ACCOUNTING OFFICE, *PRISONER RELEASES: TRENDS AND INFORMATION ON REINTEGRATION PROGRAMS* 12 (2001).

5. U.S. SENTENCING COMM'N, 2003 SOURCEBOOK, *supra* note 4, at 29 fig.D (showing that 9.0% received probation; 4.7% probation and confinement; 3.0% prison and community split). In addition, 775 individuals received neither prison nor probation sentences. *Id.*

6. See, e.g., Harley G. Lappin, *Message from the Director*, in STATE OF THE BUREAU 2003: ACCOMPLISHMENTS AND GOALS 3 (Fed. Bureau of Prisons ed., 2003) (noting resource constraints amidst increasing number of inmates and other obligations), <http://www.bop.gov/news/PDFs/sob03.pdf> (last visited Sept. 25, 2005); Todd Bussert & Joel Sickler, *Bureau of Prisons Update: More Beds, Less Rehabilitation*, CHAMPION, Mar. 2005, at 42 (discussing savings measures "to reduce costs due to continuing budget cutbacks"). At the end of 2003, federal prisons operated at 39% above capacity. HARRISON & BECK, *supra* note 1, at 1.

growth. Because of the large number of individuals released annually from confinement,<sup>7</sup> states have begun to use reentry assistance to help released offenders readjust into society. This has proven difficult, in part because of the vast panoply of often-mandatory restrictions imposed on ex-offenders. These so-called “collateral sanctions” run the gamut from disenfranchisement to the denial of welfare benefits. While the states impose a number of such sanctions, other sanctions result from congressional legislation. These sanctions impact federal and state offenders and frequently pose a substantial hurdle to reintegration.<sup>8</sup> Some sanctions are justified based on public safety grounds; others are merely retributive, even vengeful. Many are neither imposed in open court nor subjected to a proportionality analysis. In light of congressional funding for reentry programs, legislation that counters reentry efforts should be curtailed. Instead, collateral sanctions can usefully be integrated into the framework of nonprison sentences. They should be based on individualized assessments akin to other aspects of a criminal sanction, imposed as part of the sentence, and narrowly restricted so as not to interfere with the difficult process of reintegration. These changes would allow some collateral sanctions to complement a nonprison sanction or, in some cases, to stand on their own.

In Part I, this Article will focus on intermediate sanctions. It will highlight the limited availability of such sanctions in the federal system and then propose a set of options to increase nonprison sanctions. Part II will focus on the panoply of collateral sanctions and the impact of congressional legislation on the reintegration of state and federal offenders. As collateral sanctions could become an integral and effective part of a sentence, the Article will conclude with a set of prescriptions for the effective use of collateral sanctions in the Federal Sentencing Guidelines regime.

### I. EXPANDING AND REGULATING INTERMEDIATE SANCTIONS

Nonprison sentences include confinement and nonconfinement options. In the 1970s, the latter were referred to as “alternatives to imprisonment,” while today all nonprison sanctions tend to be labeled “intermediate sanctions” to capture their mid-level severity, which falls between probation and imprisonment.<sup>9</sup> Ideally, any sentencing regime would have a continuum of sanctions ranging from the least to the most restrictive, all roughly proportionate to the seriousness of the crime. The Federal Guidelines, however, currently offer only very limited options for intermediate sanctions.

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7. Jeremy Travis, *But They All Come Back: Rethinking Prisoner Reentry*, 7 SENT’G & CORRECTIONS: ISSUES FOR 21ST CENTURY, May 2000, at 1, 1, <http://www.ncjrs.org/pdffiles1/nij/181413.pdf> (last visited Sept. 25, 2005).

8. See, e.g., Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153 (1999).

9. MICHAEL TONRY, NAT’L INST. OF JUSTICE, INTERMEDIATE SANCTIONS IN SENTENCING GUIDELINES 3 (1997), <http://www.ncjrs.org/pdffiles/165043.pdf> (last visited Sept. 25, 2005).

*A. Intermediate Sanctions in the Federal Guidelines*

The Guidelines' Sentencing Table consists of a horizontal axis detailing an offender's criminal history category, ranging from I to VI and measured in "criminal history points," and a vertical axis, with offense levels from 1 to 43.<sup>10</sup> Offense levels are determined based on the type of offense committed—the base offense—and offense specific characteristics and adjustments.<sup>11</sup> The intersection of the two axes provides the sentencing range measured in months of imprisonment. Up to Offense Level 8, an offender with Criminal History Category I falls into Zone A, which allows for a probation-only sentence. The possibility of a probation-only sentence decreases for offenders who have prior criminal records, so that an offender with a criminal history in Category VI—the highest criminal history category under the Guidelines—may only receive probation if his offense is at Offense Level 1.<sup>12</sup>

Zone B allows for a split sentence with some confinement but is only available up to Offense Level 10 for those in the lowest criminal history category and up to Offense Level 6 for those in the highest criminal history category.<sup>13</sup> Finally, Zone C mandates imprisonment, but offenders may serve up to half of their minimum sentence in alternative confinement. This zone tops out at Offense Level 12 for those offenders with the shortest criminal history and with Offense Level 5 for those in Criminal History Category VI. Mandatory minimum sentences trump the Guidelines and make it impossible for a court to impose a nonprison sanction.

The Sentencing Table indicates the limited availability of nonprison sanctions for those offenders sentenced within the applicable Guidelines range. Many of the offenders sentenced within Zones A or B, however, do not receive probation or intermediate sanctions. Of 58,463 cases for which the Commission had completed files in 2003, approximately one-sixth of the offenders were eligible for a nonprison sentence.<sup>14</sup> Less than two-thirds of them received such a sentence. The likelihood of a nonprison sentence declines dramatically as offenders move from Zone A into the other zones. Only 42% of Zone C offenders received a nonprison sanction, and approximately 5% of those in Zone D—the presumptive imprisonment zone—did.<sup>15</sup>

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10. U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. A (2004).

11. *Id.* § 1B1.1.

12. *Id.*

13. Confinement must take place in a nonprison setting. House arrest with electronic monitoring, for example, has been extended since the early 1990s, when the technology became available. U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINE SENTENCING 44 (2004) [hereinafter U.S. SENTENCING COMM'N, FIFTEEN-YEAR REPORT], [http://www.ussc.gov/15\\_year/15year.htm](http://www.ussc.gov/15_year/15year.htm) (last visited Sept. 25, 2005).

14. U.S. SENTENCING COMM'N, 2003 SOURCEBOOK, *supra* note 4, at 37 fig.F (finding that 10,093 cases fell into Zones A or B).

15. *Id.* at 36 tbl.16.

The likelihood of an offender receiving a nonprison sentence depends not only on the number of offense levels, but also on the type of offense for which he was convicted and his background. While only 20% of larceny offenders received a prison sentence, almost 90% of immigration offenders did.<sup>16</sup> Most of the latter were noncitizens with immigration detainers. Noncitizen offenders generally are not eligible for nonprison sanctions and early release programs and frequently experience harsher sanctions for that reason.

The Supreme Court's decision in *Booker*,<sup>17</sup> in which the Court declared the Federal Guidelines to be advisory only, may change sentence disposition. Data available as of six months after the decision indicate, however, that this is not (yet?) the case.<sup>18</sup> Sentence type as well as sentence length appear remarkably stable, although intercourt variations may increase after the Court's decision.

The most lenient sentence available under the Federal Guidelines is probation. Under the federal system, fines are not recognized as a separate, noncustodial sentencing option, in contrast to many state guidelines systems. In the federal system, fines can only be imposed as part of a probation, intermediate, or confinement sanction.

The total number of offenders who received straight probation has declined by over two-thirds since the pre-Guidelines period.<sup>19</sup> While the Commission considers this change to be due, to some extent, to white-collar offenders now receiving split sentences, firearm and drug traffickers are also more likely to be sentenced to prison than such offenders were in the past.<sup>20</sup> These numbers should be viewed in light of state data and international comparisons. In 1999, for example, Germany sentenced 80% of those convicted to a fine, and only about 6% to prison.<sup>21</sup>

The availability of intermediate sanctions under the Guidelines is limited. Courts may employ certain forms of confinement either as probation conditions or as prison replacements. Community confinement, which falls into the former category, can consist of residence in a drug-treatment facility, a halfway house,

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16. *Id.* at 37 fig.F (showing that in Zones A and B prison sanctions were imposed in about 36% of the fraud cases, 38% of the embezzlement cases, 42% of the drug-trafficking cases, 58% of the simple drug possession cases, 30% of the firearms and forgery cases, and 28% of all remaining cases).

17. *United States v. Booker*, 125 S. Ct. 738 (2005).

18. U.S. SENTENCING COMM'N, SPECIAL POST-*BOOKER* CODING PROJECT 13 (Aug. 3, 2005) (showing the distribution of offenders receiving sentencing options for the most frequently applied Guidelines), [http://www.ussc.gov/Blakely/PostBooker\\_080805.pdf](http://www.ussc.gov/Blakely/PostBooker_080805.pdf) (last visited Aug. 20, 2005).

19. U.S. SENTENCING COMM'N, FIFTEEN-YEAR REPORT, *supra* note 13, at 43 fig.2.2.

20. *Id.* at vi, viii-ix.

21. FED. MINISTRY OF INTERIOR & FED. MINISTRY OF JUSTICE, FIRST PERIODICAL REPORT ON CRIME AND CRIME CONTROL IN GERMANY 33 (2001), [http://www.uni-konstanz.de/rtf/ki/Download\\_Abridged\\_Version.pdf](http://www.uni-konstanz.de/rtf/ki/Download_Abridged_Version.pdf) (last visited Sept. 25, 2005). These data are, of course, difficult to compare with federal sentencing data, as most foreign criminal justice systems do not make a federal-state distinction in their disposition of criminal cases.

or a similar center.<sup>22</sup> Home detention, on the other hand, is only available as a replacement for imprisonment.<sup>23</sup> Other conditions include community service<sup>24</sup> and occupational restrictions designed to protect the public.<sup>25</sup> Some sentencing components are available independent of the type of confinement imposed. These include an order of notice to fraud victims<sup>26</sup> and the denial of federal benefits to drug traffickers and possessors.<sup>27</sup> In addition, judges are mandated to impose restitution orders on defendants, regardless of their ability to pay.<sup>28</sup>

In contrast to many state and foreign systems that allow for fines, restitution orders, and community service as stand-alone sanctions,<sup>29</sup> the Federal Guidelines permit them only as part of a probation sentence. The federal criminal justice system only offers limited forms of alternative sanctions. Among the notable omissions are intensive probation with enhanced supervision of offenders and day fines that are based directly on the gravity of the offense and an offender's economic situation.<sup>30</sup>

Offenders in Zone C and some in Zone D are eligible for shock incarceration,<sup>31</sup> more commonly called "boot camp." These programs require strict discipline but allow offenders, upon completion, to serve the remainder of

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22. U.S. SENTENCING GUIDELINES MANUAL § 5F1.1, cmt. nn.1-2 (2004).

23. *Id.* § 5F1.2, cmt. nn.1-3.

24. *Id.* § 5F1.3. The Manual suggests a maximum of 400 hours of community service. *Id.* § 5F1.3, cmt. n.1.

25. *Id.* § 5F1.5.

26. *Id.* § 5F1.4, cmt. background.

27. *Id.* § 5F1.6. Courts have taken very limited advantage of this provision. The denial has been largely ineffective because of administrative hurdles. *See* GEN. ACCOUNTING OFFICE, DRUG CONTROL: DIFFICULTIES IN DENYING FEDERAL BENEFITS TO CONVICTED DRUG OFFENDERS (1992); Robert W. Musser, Jr., *Denial of Federal Benefits to Drug Traffickers and Drug Possessors: A Broad-Reaching but Seldom Used Sanction*, 12 FED. SENT'G REP. 252 (2000). After a third drug conviction, the benefit denial is mandatory unless certain exceptions apply. *See* 21 U.S.C. § 862(a)(1)(C), (b)(2), (c), & (e) (2005); *see also infra* Part II (discussing collateral sanctions).

28. Mandatory Victim Restitution Act of 1996, Pub. L. No. 104-132, § 204(a), 110 Stat. 1227 (1996) (codified as amended at 18 U.S.C. § 3663A (2005)); 18 U.S.C. § 3664(f)(1)(A) (2005)). For a discussion of whether restitution orders are a criminal or a civil sanction, see Brian Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711 (2005).

29. Some systems even allow courts to dispense with punishment upon a guilty verdict. *See* 42 PA. CONS. STAT. § 9723 (2005) (entitled "Determination of guilt without further penalty"). This sentence, however, is likely to be imposed only in conjunction with penalties on other counts. Personal Communication with Professor Steven Chanenson, Member, Pennsylvania Sentencing Commission (May 28, 2005).

30. *See generally* GEN. ACCOUNTING OFFICE, SENTENCING: INTERMEDIATE SANCTIONS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 7 (1994) [hereinafter GAO, SENTENCING: INTERMEDIATE SANCTIONS]. For a discussion of day fines, see *infra* note 103 and accompanying text.

31. 18 U.S.C. §§ 3582(a), 3621(b)(4), 4046 (2005); U.S. SENTENCING GUIDELINES MANUAL § 5F1.7 (2004).

their sentences in nonprison confinement.<sup>32</sup> The program has been relatively small, with only about 750 prisoners annually—out of more than 170,000.<sup>33</sup> The Bureau of Prisons is in the process of closing all boot camps, also called “Intensive Confinement Centers,” on cost grounds.<sup>34</sup> Some federal judges and members of Congress have opposed the decision.<sup>35</sup>

This opposition may be surprising, as research on boot camps has shown that they have failed to live up to expectations; most importantly, they did not lead to a perceptible decrease in recidivism. The boot camps’ failure may not have been preordained, but may have been due in part to the divergent goals they were meant to serve.<sup>36</sup>

Judicial opposition to the abolition of boot camps should be read in the context of the findings in a 2003 judicial survey, which indicated that most judges oppose restrictions to the availability of nonprison alternatives.<sup>37</sup> The survey indicates that almost half of all district court judges demanded greater access to nonprison sentences for drug-trafficking offenders to meet the goals of punishment set out in the Sentencing Reform Act. Only a slightly smaller number of district court judges expressed the same desire for theft, larceny, embezzlement, and fraud offenders. For the remaining offenses, approximately a third of all district judges would like to see expanded probation and split-sentence options.<sup>38</sup> Without such options, the current sentence regime fails to accomplish its retributive, deterrent, and rehabilitative goals.

#### *B. Prerequisites for Successful Nonprison Sentences: Proportionality, Public Safety, and Effectiveness*

Even though annual reports indicate that the United States now has the highest per capita imprisonment rate in the world and that the federal system is the largest jailer in the United States—with the highest growth rate in recent years<sup>39</sup>—why does this development necessitate the adoption of more nonprison sanctions? Imprisonment falls disproportionately on the shoulders of minority communities, excludes offenders from economic and political

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32. U.S. SENTENCING GUIDELINES MANUAL § 5F1.7, cmt. background (2004) (citing BOP operations memorandum).

33. Bussert & Sickler, *supra* note 6, at 43.

34. *Id.* at 42.

35. *Id.* at 42-43.

36. *See, e.g.*, DALE G. PARENT, NAT’L INST. OF JUSTICE, CORRECTIONAL BOOT CAMPS: LESSONS FROM A DECADE OF RESEARCH 1 (2003), <http://www.ncjrs.org/pdffiles1/nij/197018.pdf> (last visited Sept. 25, 2005).

37. LINDA DRAZGA MAXFIELD, U.S. SENTENCING COMM’N, FINAL REPORT: SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES ES-5 (2003), <http://www.ussc.gov/judsurv/execsum.pdf> (last visited Sept. 25, 2005).

38. *Id.* at ES-5 to ES-6.

39. HARRISON & BECK, *supra* note 1, at 1-2.



participation, and loosens prisoners' relationships with families and communities.<sup>40</sup> While prison may not necessarily function as a "crime school," it destroys many of the connections an offender ultimately needs to regain his place in society.<sup>41</sup>

Nonprison sentences, on the other hand, allow—and even require—individuals to be employed, pay fines and make restitution, pay taxes, and assist their families.<sup>42</sup> Such demands are crucial to allowing them to regain their place in society.

While intermediate sanctions hold the promise of successful reintegration and cost savings, they are not a magic bullet. Existing analyses indicate that intermediate sanctions do not reduce criminal behavior, but neither does imprisonment.<sup>43</sup> Research has shown that nonprison sanctions cannot "simultaneously . . . divert offenders from incarceration, reduce recidivism rates, and save money."<sup>44</sup> For that reason, many nonprison sanctions appear to be failing. Cost savings, for example, are only feasible as long as judges divert offenders from prisons rather than sentence otherwise probation-bound offenders to intermediate sanctions.<sup>45</sup> Instead of diverting offenders from prison, alternatives may be used in addition to (rather than instead of) probationary sentences, which will lead to the so-called "net-widening."<sup>46</sup>

Even without net-widening, some alternatives with enhanced supervision have proven more costly than originally envisioned. They have led to the discovery of a greater number of minor violations that have resulted in immediate incarceration.<sup>47</sup>

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40. For a discussion of the justifications for imprisonment and negative individual and societal consequences of high imprisonment rates, see Ben Trachtenberg, *State Sentencing Policy and New Prison Admissions*, 38 U. MICH. J.L. REFORM 479, 522-30 (2005).

41. *Id.* at 524-26; see also JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 223-26 (2003) (discussing "criminogenic or contagion effects of prisons").

42. Cf. GEN. ACCOUNTING OFFICE, REPORT TO THE ATTORNEY GENERAL: COMMUNITY-BASED CORRECTIONAL PROGRAMS COULD BE MORE EXTENSIVELY USED WITHIN THE FEDERAL CRIMINAL JUSTICE SYSTEM 3-4 (1982) (describing savings in Oregon and Georgia because of alternative sentences, which allowed individuals to be employed or engage in compulsory public-service work).

43. PAULA SMITH ET AL., THE EFFECTS OF PRISON SENTENCES AND INTERMEDIATE SANCTIONS ON RECIDIVISM: GENERAL EFFECTS AND INDIVIDUAL DIFFERENCES 2002-01, at ii (2002), [http://www.psepc-sppcc.gc.ca/publications/corrections/200201\\_Gendreau\\_e.pdf](http://www.psepc-sppcc.gc.ca/publications/corrections/200201_Gendreau_e.pdf) (last visited Sept. 25, 2005).

44. TONRY, *supra* note 9, at 2.

45. See, e.g., GEN. ACCOUNTING OFFICE, INTENSIVE PROBATION SUPERVISION: COST-SAVINGS RELATIVE TO INCARCERATION (1993) (documenting cost savings of intensive probation programs in Maricopa and Pima counties, Arizona).

46. This has occurred—by design—in the federal system. U.S. SENTENCING COMM'N, FIFTEEN-YEAR REPORT, *supra* note 13, at 44.

47. TONRY, *supra* note 9, at 2, 9-10; see also KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA 198-99 (2d ed. 2004). For changes in state approaches to this issue, see JON WOOL & DON STEMEN, VERA

In light of these problems, three issues are crucial for the development of a system of nonincarcerative sanctions for federal sentencing. First, the sanctions must be sufficiently, but not excessively, retributive so as to be roughly proportionate to the offense committed and must function as an effective deterrent. Judges confronted with the choice between straight probation and prison often choose the latter because they find probation to fulfill neither goal.<sup>48</sup> Judges must be able to choose from a more extensive list of intermediate sanctions.

However, judges will take advantage of these options as an alternative to imprisonment only if they no longer view imprisonment as their first choice. This appears to be the major difference between the United States and Europe in sentencing. Europe's imprisonment rate is dramatically lower than that of the United States not only because more intermediate sanctions are available, but also because the public and courts view imprisonment as a sentence of last resort.<sup>49</sup> Even though the American public has displayed a very punitive attitude during the last few decades, public opinion polls have increasingly indicated growing support for rehabilitative measures and for greater judicial freedom in choosing sentences.<sup>50</sup>

Second, nonincarcerative sanctions may not endanger the public unnecessarily. No nonprison sanction can guarantee the same level of safety as imprisonment,<sup>51</sup> but such sanctions may be imposed on offenders who pose only a slight risk of committing a serious offense. Risk-assessment tools may help determine the potential for recidivism. The U.S. Parole Commission has

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INST. OF JUSTICE, CHANGING FORTUNES OR CHANGING ATTITUDES? SENTENCING AND CORRECTIONS REFORMS IN 2003, at 6 (2004), [http://www.vera.org/publication\\_pdf/226\\_431.pdf](http://www.vera.org/publication_pdf/226_431.pdf) (last visited Sept. 25, 2005). Additional problems, including the small size of intermediate sanctions programs, are described in GEN. ACCOUNTING OFFICE, INTERMEDIATE SANCTIONS: THEIR IMPACTS ON PRISON CROWDING, COSTS, AND RECIDIVISM ARE STILL UNCLEAR 19-29 (1990) [hereinafter GAO, INTERMEDIATE SANCTIONS]. For federal approaches to violations of probation and supervised release, see 18 U.S.C. app. 3 (2005).

48. For a discussion of the importance of purpose in imposing probation conditions, see Wayne A. Logan, *The Importance of Purpose in Probation Decision Making*, 7 BUFF. CRIM. L. REV. 171 (2003).

49. See, e.g., Michael Tonry, *Why Aren't German Penal Policies Harsher and Imprisonment Rates Higher?*, 5 GERMAN L.J. 1187, 1199, 1202 (2005) (discussing International Crime Victim Survey responses indicating dramatic national preferences for imprisonment in the United States and the United Kingdom); Thomas Weigend, *Sentencing and Punishment in Germany*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 188, 194-201 (Michael Tonry & Richard S. Frase eds., 2001) (outlining intermediate sanctions available in Germany). Michael Tonry cautions that American concerns with proportionality drive ever more severe sentences. "If punitive literalism governs, the range for substitution between prison and community penalties is tiny." Michael Tonry & Mary Lynch, *Intermediate Sanctions*, 20 CRIME & JUST. 99, 136 (1996).

50. PETERSILIA, *supra* note 41, at 231-35.

51. See GAO, INTERMEDIATE SANCTIONS, *supra* note 47, at 45-46; see also Tonry & Lynch, *supra* note 49, at 104-05.

developed a risk-assessment tool to decide on parole release.<sup>52</sup> Increasingly, state parole commissions use risk-assessment instruments in release decisionmaking.<sup>53</sup> Some states have begun to use risk-assessment tools at sentencing to determine whether a particular offender should be diverted from prison. Virginia has developed the most extensive and detailed risk-assessment score, leading to the diversion of low-level drug and property offenders.<sup>54</sup>

Virginia's sentencing commission developed a risk score by adding up eleven factors listed on the risk-assessment instrument. The higher the total score, the more likely the offender will commit further offenses.<sup>55</sup> The best predictors of recidivism in Virginia were gender and prior record. The determination of the cutoff point for a diversion recommendation is a policy choice that impacts cost savings.<sup>56</sup> Virginia's judges are not mandated to follow the commission's recommendation but should consider the total risk score in setting a sentence.<sup>57</sup>

While many judges already consider prior offense type and prior record in determining an offender's sentence, such decisions are frequently impressionistic. In contrast, Virginia's model applies a statistical classification to determine an offender's future risk. Such actuarial risk assessment allows for more principled decisionmaking, less discretion, and better predictability of sentences and resource use.<sup>58</sup> Nevertheless, the nonmandatory character of the grouping allows judges to use the actuarial risk assessment merely as a guide.

The Federal Guidelines' prior criminal history score implies such a risk assessment and is largely predictive of recidivism.<sup>59</sup> It can therefore serve as

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52. See, e.g., Peter B. Hoffman, *Twenty Years of Operational Use of a Risk Prediction Instrument: The United States Parole Commission's Salient Factors Score*, 22 J. CRIM. JUST. 477 (1994); Peter B. Hoffman & James Beck, *The Origin of the Federal Criminal History Score*, 8 FED. SENT'G REP. 192 (1997) (discussing Salient Factor Score).

53. See, e.g., TEX. BD. OF PARDONS & PAROLES, REVISED PAROLE GUIDELINES (2005), [http://www.tdcj.state.tx.us/bpp/new\\_parole\\_guidelines/new\\_parole\\_guidelines.html](http://www.tdcj.state.tx.us/bpp/new_parole_guidelines/new_parole_guidelines.html) (last visited Sept. 25, 2005); Letter from Board of Parole Commissioners, State of Nevada, to Legislative Council Bureau (Feb. 2, 2005) (on file with author) (discussing adoption of risk assessment methodology for parole release decisionmaking). Risk assessment is used particularly frequently for sex offenders. See Kern & Farrar-Owens, *supra* note 3, at 166-68; Philip H. Witt & Natalie Barone, *Assessing Sex Offender Risk: New Jersey's Methods*, 16 FED. SENT'G REP. 170 (2004).

54. See Kern & Farrar-Owens, *supra* note 3, at 165-66; see also BRIAN J. OSTROM ET AL., NAT'L CTR. FOR STATE COURTS, OFFENDER RISK ASSESSMENT IN VIRGINIA (2002), [http://www.vcsc.state.va.us/risk\\_off\\_rpt.pdf](http://www.vcsc.state.va.us/risk_off_rpt.pdf) (last visited Sept. 25, 2005).

55. OSTROM ET AL., *supra* note 54, at 6.

56. *Id.* at 29.

57. *Id.* at 15.

58. *Id.* at 28-29.

59. See U.S. SENTENCING COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES (2004) [hereinafter U.S. SENTENCING COMM'N, MEASURING RECIDIVISM], [http://www.ussc.gov/publicat/Recidivism\\_General.pdf](http://www.ussc.gov/publicat/Recidivism_General.pdf) (last visited Sept. 25, 2005).

the starting point for a Virginia-style risk-prediction model. The use of some factors, however, may be disputed. Demographic factors, especially gender and age, often help in assessing the likelihood of recidivism.<sup>60</sup> Congress, however, has mandated that sentencing be neutral as to gender,<sup>61</sup> and the Commission has determined that only old age and infirmity may play a role at sentencing.<sup>62</sup> The extent to which such factors should be considered in a risk-assessment score should be subject to a debate that examines not only their value as risk predictors, but also larger societal goals, such as sex equality.

Finally, alternative sanctions must be effective. A 2005 study by the Government Accountability Office indicated, for example, that the government had collected only about \$40 million from a number of individuals convicted of white-collar fraud offenses who had been sentenced to pay a total of \$568 million to their victims. Substantial further collections seemed unlikely, in part due to administrative inefficiencies and in part due to fraud.<sup>63</sup> Were restitution in these cases the only penalty, the public would conclude that such punishment is ineffective and deceptive, akin to the public reaction to indeterminate sentencing. This response would likely lead to a more punitive method of punishment, and a move away from intermediate sanctions.<sup>64</sup> For that reason, only intermediate sanctions whose completion can be effectively implemented and monitored should be imposed. Courts must be provided with a host of available responses in the case of offender noncompliance with the intermediate sanction, ranging from immediate incarceration for the remaining sentence to a warning.<sup>65</sup>

### C. Expanding Eligible Offender Groups

As states have confronted the growth of prison populations, they have adopted a host of strategies to cut prison costs. Those designed to divert low-level offenders have included the abolition of mandatory minimums and adoption of treatment programs for nonviolent drug offenders.<sup>66</sup> The legislative

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60. See OSTROM ET AL., *supra* note 54, at 11-12.

61. 28 U.S.C. § 994(d) (2005); U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (2004).

62. U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (2004).

63. GOV'T ACCOUNTABILITY OFFICE, CRIMINAL DEBT: COURT-ORDERED RESTITUTION AMOUNTS FAR EXCEED LIKELY COLLECTIONS FOR THE CRIME VICTIMS IN SELECTED FINANCIAL FRAUD CASES (2005) (detailing five case studies), <http://www.gao.gov/htext/d0580.html> (last visited Sept. 25, 2005).

64. Cf. John Raine et al., *Financial Penalties: Who Pays, Who Doesn't and Why Not?*, 43 HOWARD L.J. 518, 518-19 (2004) (discussing English reaction to nonpayment of fines).

65. Cf. Julian V. Roberts, *Evaluating the Pluses and Minuses of Custody: Sentencing Reform in England and Wales*, 42 HOWARD J. CRIM. JUST. 229, 237 (2003) (discussing options available to Canadian judges).

66. See, e.g., WOOL & STEMEN, *supra* note 47, at 6-7; Fox Butterfield, *With Cash Tight, States Reassess Long Jail Terms*, N.Y. TIMES, Nov. 10, 2003, at A1 (discussing

and guidelines strategies appropriate for the federal system should target specific offender groups and mandatory sentences. Federal offenders differ from state offenders in some crucial ways. In fiscal year 2003, over one-third of all federal offenders were sentenced for drug offenses, followed by immigration offenses. Fraud and firearms offenders each constituted about one-tenth of federal offenders.<sup>67</sup> Demographically, state and federal offenders also differ, with federal prisons housing slightly more women and better educated inmates, and substantially more older and Hispanic inmates than their state counterparts.<sup>68</sup>

### 1. *Abolishing mandatory minimum drug sentences*

In recent years a number of states have reduced or even abolished mandatory drug sentences, as such sentences had proven too expensive because they led to the incarceration of low-risk offenders.<sup>69</sup> Some states give judges discretion to divert offenders to probation when drug or alcohol abuse was a contributing factor to an offense.<sup>70</sup> This approach allows for the individualization of sentences, in contrast with the Federal Guidelines, which declare that drug or alcohol abuse is not a reason for a downward departure.<sup>71</sup>

Congress has passed a number of mandatory minimum sentences governing drug offenses. The best known are the mandatory minimum sentences for powder and crack cocaine.<sup>72</sup> Courts cannot sentence an offender below a mandatory minimum unless the offender fits under the so-called "safety valve."<sup>73</sup> In 2000, courts took advantage of this provision in more than

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Kansas law that mandates drug treatment instead of prison for first-time, nonviolent drug offenders).

67. U.S. SENTENCING COMM'N, 2003 SOURCEBOOK, *supra* note 4, at 13 fig.A. In 2004, immigration offenses displaced drug offenses as the primary offense category in federal court. The percentage of state drug offenders is slightly below one-third; property offenses make up approximately another third of all state offenses, and violent crimes about nineteen percent. Only about three percent of all state felony convictions in 2002 were for weapon offenses. MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, STATE COURT SENTENCING OF CONVICTED FELONS, 2002: STATISTICAL TABLES, at 6 tbl.1.1 (2005), <http://www.ojp.usdoj.gov/bjs/pub/pdf/scscf02.pdf> (last visited Sept. 25, 2005).

68. BUREAU OF JUSTICE STATISTICS, CRIMINAL OFFENDERS STATISTICS, <http://www.ojp.usdoj.gov/bjs/crimoff.htm> (last visited May 16, 2005).

69. WOOL & STEMEN, *supra* note 47, at 6-7, 10-11.

70. *Id.* at 7-8 (describing Indiana's approach).

71. U.S. SENTENCING GUIDELINES MANUAL § 5H1.4 (2004). For a comprehensive set of options for dealing with drug offenders, see MINN. SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE ON DRUG OFFENDER SENTENCING ISSUES 74-75 (2004).

72. 21 U.S.C. § 841(b)(1) (2005).

73. See 18 U.S.C. § 3553(f) (2005). For a discussion of the "safety valve" and its impact, see Michael Edmund O'Neill, *Abraham's Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System*, 42 B.C. L. REV. 291, 331-39 (2004).

Another avenue for a sentence below the mandatory minimum is through a government

one-third of all powder cocaine cases, but only in about fifteen percent of crack cocaine cases.<sup>74</sup> The abolition or limitation of mandatory minimums would allow a larger number of offenders to be sentenced to nonprison punishments.<sup>75</sup> Many of them may be eligible for a treatment-based sentence instead of jail (as is mandated in California and Arizona<sup>76</sup>), possibly in conjunction with some form of detention.<sup>77</sup>

Moreover, restrictions on mandatory minimum sentences should be combined with recidivism risk assessments before an offender is diverted from prison. These assessments should be based not only on criminal history, but also on demographic factors, including family obligations and age.

## 2. *Factoring in recidivism risks*

As the incapacitation of dangerous recidivists has become a goal of sentencing reform,<sup>78</sup> nondangerous offenders may merit a nonprison sanction. According to the Sentencing Commission's data, for example, older offenders show a decreased recidivism risk as compared to younger offenders.<sup>79</sup> As they constitute a large financial burden,<sup>80</sup> older offenders might be a primary target group for nonincarcerative sanctions. The same holds true for parents, especially those of young children.

Even though the Commission found that the recidivism risk of women in lower criminal history categories does not vary dramatically from that of men, it remains lower.<sup>81</sup> Existing data indicate that women's lower recidivism rate

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motion. The court may impose a sentence below a mandatory minimum when the government makes a substantial assistance motion to that effect.

74. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 60 (2002), [http://www.ussc.gov/r\\_congress/02crack/Ch4.pdf](http://www.ussc.gov/r_congress/02crack/Ch4.pdf) (last visited Sept. 25, 2005).

75. The expansion of the safety-valve provision may accomplish similar results, as it is likely that some of its criteria—especially a low criminal history score—would also be part of a judge's decision whether to release an individual. However, the abolition of mandatory minimum sentences would achieve larger systemic goals, remedy existing disparities, and restrict prosecutorial power.

76. Ariz. Prop. 200 (Nov. 1996); Cal. Prop. 36 (Nov. 2000).

77. For an analysis of the advantages and disadvantages of various sentencing options for drug offenders, see GEN. ACCOUNTING OFFICE, CONFRONTING THE DRUG PROBLEM: DEBATE PERSISTS ON ENFORCEMENT AND ALTERNATIVE APPROACHES 34-39 (1993).

78. See, e.g., CAL. PENAL CODE §§ 667(d), 1170.12(b) (West 2004) (California's three-strikes law); FLA. STAT. ANN. § 775.084 (West 2004).

79. U.S. SENTENCING COMM'N, MEASURING RECIDIVISM, *supra* note 59, at 12, 28 exhb.9.

80. Cf. RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, AGING BEHIND BARS: "THREE STRIKES" SEVEN YEARS LATER (2001) (detailing costs to California's prison system from incarcerating increasingly older inmates under the state's three-strikes law), <http://www.sentencingproject.org/pdfs/9087.pdf> (last visited Sept. 25, 2005).

81. U.S. SENTENCING COMM'N, MEASURING RECIDIVISM, *supra* note 59, at 11, 28 exhb.9.

may be connected to their family and childcare responsibilities. Those should also be a reason for considering women—and men with such responsibilities—for nonprison sanctions.

More than half of the women incarcerated in federal prisons have children, and more than eighty percent of them lived with their children prior to incarceration.<sup>82</sup> Because of the sparseness of federal women's prisons, most of the women are housed far from their families, making it more difficult for them to stay in regular, close contact with their children.<sup>83</sup> Longer prison terms often automatically end parental rights.<sup>84</sup> On the other hand, children of incarcerated parents are more likely to experience a host of negative consequences, including a greater likelihood of going to prison themselves.<sup>85</sup>

Since many of the offenders with young children also constitute lower recidivism risks in light of their offense of conviction and their prior criminal records, sentencing judges should at least be allowed to consider the impact of a prison sentence on families and minor children. For that reason, more offenders with heavy family responsibilities, and especially those with minor children, should be eligible for intermediate sanctions.<sup>86</sup>

### 3. *Noncitizen offenders*

Noncitizen offenders frequently receive prison sentences and are precluded from halfway-house placements because of their citizenship status, which makes them a greater flight risk.<sup>87</sup> Immigration detainment and the possibility of deportation make it unlikely that they will be released on probation or even to nonprison confinement options. The flight risk, however, may not be equally high for all of them, and alternatives to confinement may exist.

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82. CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, INCARCERATED PARENTS AND THEIR CHILDREN 2-3 (2000) (noting that while over sixty percent of all men incarcerated in federal prisons have children, only slightly over half lived with them at the time of their arrest), <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf> (last visited Sept. 25, 2005). For a general discussion of women offenders in the criminal justice system, see Myrna S. Raeder, *A Primer on Gender-Related Issues that Affect Female Offenders*, 20 CRIM. JUST. 4 (2005).

83. See, e.g., MUMOLA, *supra* note 82, at 5 (detailing amount of contact between incarcerated parents and their children).

84. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.); see also Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1678 (2003).

85. See Raeder, *supra* note 82, at 5-7; see also PETERSILIA, *supra* note 41, at 227-28.

86. California's Little Hoover Commission has suggested an increase in community confinement for women. LITTLE HOOVER COMM'N, BREAKING THE BARRIERS FOR WOMEN ON PAROLE 48-49 (2004), <http://www.lhc.ca.gov/lhcdir/177/report177.pdf> (last visited Sept. 25, 2005).

87. GEN. ACCOUNTING OFFICE, PRISONER RELEASES: TRENDS AND INFORMATION ON REINTEGRATION PROGRAMS 22 (2001).

In the 1990s, the Vera Institute of Justice, upon request of the Immigration and Naturalization Service, ran a supervision program for noncitizens in removal proceedings. Rather than incarcerating these individuals, which was costly, or releasing them with little supervision, which led to an appearance rate of 50%, the Vera Institute implemented a community supervision program that was cheaper than incarceration and led to a 90% appearance rate.<sup>88</sup> The program was especially successful for noncitizens who were awaiting removal hearings because of a criminal conviction. Nevertheless, the final removal rates were only around 50%, while imprisonment of these noncitizen offenders would have presumably allowed for the deportation of all of them.

Program modifications are possible, though, to increase the effectiveness of nonprison sanctions for noncitizens.<sup>89</sup> In light of the promise held out by the Appearance Program, noncitizens should not be automatically precluded from participation in intermediate sentences. They may be particularly suited for custodial confinement or an enhanced supervision program. Currently, however, the federal system offers only limited sentencing options for such offenders.

#### *D. Integrating Nonprison Sentences into a Guidelines Regime*

Guidelines regimes are based on promises of predictability, uniformity, and truth in sentencing. Intermediate sentences can become part of such a system as long as judges are provided with guidelines that encompass an array of available, effective, and well-publicized intermediate sanctions.

##### *1. Zones of discretion and categorical exceptions*

As some of the state guidelines systems demonstrate, intermediate sanctions and sentencing guidelines are compatible.<sup>90</sup> The most successful integration models are zones of discretion and categorical exceptions. The Federal Guidelines exemplify the former—in a rather limited version, however. Many state guidelines provide judges with broader zones of discretion and with more sentencing options than the federal system.<sup>91</sup> Categorical exceptions allow judges to disregard otherwise applicable guidelines for certain types of offenders. Oregon, for example, allows judges to disregard guidelines for first

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88. EILEEN SULLIVAN ET AL., VERA INST. OF JUSTICE, TESTING COMMUNITY SUPERVISION FOR THE INS: AN EVALUATION OF THE APPEARANCE ASSISTANCE PROGRAM 1-3 (2000), [http://www.vera.org/publication\\_pdf/aapfinal.pdf](http://www.vera.org/publication_pdf/aapfinal.pdf) (last visited Sept. 25, 2005).

89. *Id.* at 6.

90. Pennsylvania's guidelines, which allow restorative sanctions or restrictive intermediate punishments to replace incarceration, represent one example. PA. COMM'N ON SENTENCING, SENTENCING GUIDELINES IMPLEMENTATION MANUAL, tit. 204, pt. VIII, § 303.11 (6th ed. June 3, 2005), <http://pcs.la.psu.edu> (last visited Sept. 25, 2005).

91. TONRY, *supra* note 9, at xiii.



offenders who committed a nonviolent, nonsexual offense. Other exceptions apply to certain sex offenders who are amenable to treatment.<sup>92</sup>

Less successful have been the concepts of punishment units—which allow a conversion of all sanctions into generic units—and exchange rates—which establish a ratio between days in prison and days in alternative confinement. Oregon and Pennsylvania both failed in their efforts to implement punishment units.<sup>93</sup> These systems will consistently falter as long as prisons remain the norm and all other punishments must be equally oppressive.<sup>94</sup> In this respect, the United States differs from countries like Germany where the norm is a fine, making any other sanctions appear more oppressive. This system leads to a leveling down rather than a leveling up of sanctions. To avoid a further escalation of harshness in federal sentencing, an expansion of existing zone of discretion systems might be most effective, combined with an expansion of the types of intermediate sanctions available.

## 2. *Expanding the availability of intermediate sanctions*

Even though judges currently have the opportunity to impose nonprison sanctions, they frequently do not take advantage of it. In an early Guidelines study, the General Accounting Office attempted to determine why judges do not employ intermediate sanctions even when such sanctions are available to them. Among the reasons given were the absence of certain resources, such as halfway houses, in the district; the Sentencing Commission's recommendation against community confinement for offenders with a criminal history category of III or higher;<sup>95</sup> and the offender's prior failure on probation or in a community-based sanction.<sup>96</sup> Judges viewed yet another group of offenders, noncitizens, as possible flight risks because of the threat of deportation.<sup>97</sup> Many of these concerns may be counteracted through effective nonprison sanctions.<sup>98</sup>

Congress funds a wide array of alternative sanctions in the states.<sup>99</sup> It

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92. *Id.* at xiv-xv.

93. *Id.* at xiii-xv.

94. *Id.* at xiv.

95. In Guidelines commentary, the Commission indicates that it considers nonprison sanctions inappropriate for most offenders with a criminal history score of III or above because, so far, these offenders have not benefited from criminal justice sanctions, and may need to be imprisoned for future deterrence. U.S. SENTENCING GUIDELINES MANUAL § 5C1.1 cmt. 7 (2004).

96. GAO, SENTENCING: INTERMEDIATE SANCTIONS, *supra* note 30, at 59 app. IV.

97. *Id.*

98. Another set of justifications indicates the courts' reluctance to grant probationary terms because the offender has benefited from a downward departure, effectively shortening her sentence. This rationale may be grounded in retributive thought, while many of the others are based on incapacitative considerations and fear of recidivism. *Id.*

99. *See, e.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 50001, 108 Stat. 1796 (1994) (codified as amended at 42 U.S.C. §§ 13701-14223

might be useful to implement some of them as pilot projects in select federal districts. The drug-court model, for example, may also be promising for federal nonviolent drug and property offenders whose crimes can be ascribed to a drug addiction.<sup>100</sup> Drug courts currently have a wide array of approaches and characteristics. Based on the experience in the states, the federal system should be able to fashion a program that is particularly suitable for federal offenders.

Intermediate sanctions that have been successful abroad may also be suitable for federal sentencing. Germany, for example, has had very positive experiences with victim-offender mediation, even for violent offenses. Even though not all offenders fulfilled all agreed-upon conditions that resulted from the mediation, only about five percent failed entirely.<sup>101</sup>

Community service has not been used extensively in this country, despite successes abroad where it has often replaced short prison sentences. Community service appears to have public support and a number of administrative advantages that make it suitable for increased imposition.<sup>102</sup> Fines are also underused in the United States, in contrast to many foreign countries where they are considered a serious penalty. Congress may reinvigorate experiments with day fines, but on a larger scale than is currently conceived.<sup>103</sup>

For many offenders who pose a limited danger to the public or whose crimes are too severe for an alternative sanction, custodial alternatives may be most appropriate. Electronic bracelets, community confinement, and halfway houses constitute effective options. Intermittent sentences of imprisonment or short incarceration periods followed by a probationary period in the community

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(2005)) (authorizing awards of federal grants for drug-court programs). For a description of the variety of approaches and success rates, see GEN. ACCOUNTING OFFICE, *DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS* (1997).

100. A 1997 survey showed that almost three quarters of federal inmates had a history of illegal drug use, with over half of them having used drugs regularly before incarceration. GEN. ACCOUNTING OFFICE, *PRISONER RELEASES: TRENDS AND INFORMATION ON REINTEGRATION PROGRAMS* 14-15, 14 tbl.4 (2001). For a recent evaluation of the success of drug courts in decreasing criminal offending and drug use, see GOV'T ACCOUNTABILITY OFFICE, *ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES* (2005), <http://www.gao.gov/htext/d05219.html> (last visited Sept. 25, 2005).

101. See FED. MINISTRY OF INTERIOR & FED. MINISTRY OF JUSTICE, *supra* note 21, at 32-33. See generally HANS-JÜRGEN KERNER & ARTHUR HARTMANN, *INSTITUT FÜR KRIMINOLOGIE DER UNIVERSITÄT TÜBINGEN, AUSWERTUNG DER BUNDESWEITEN TÄTER-OPFER-AUSGLEICH-STATISTIK FÜR DIE JAHRE 1993 BIS 1999* (2003), [www.bmj.bund.de/media/archive/517.pdf](http://www.bmj.bund.de/media/archive/517.pdf) (last visited Sept. 25, 2005).

102. Tonry & Lynch, *supra* note 49, at 124-27 (discussing positive experiences with community service).

103. *Id.* at 128-31. For further information on day fines, see LAURA WINTERFIELD & SALLY T. HILLSMAN, NAT'L INST. OF JUSTICE, *THE STATEN ISLAND DAY-FINES PROJECT: RESEARCH IN BRIEF* (1993); Sally T. Hillsman, *Day Fines*, in *INTERMEDIATE SANCTIONS IN OVERCROWDED TIMES* (Michael Tonry & Kate Hamilton eds., 1995).

should also be investigated.<sup>104</sup>

Other offenders constitute no risk to public safety but deserve a substantial sentence. For them, a combination of fines, restitution, and community service may be most effective. However, the experience of some states should serve as a warning. As probation conditions multiply, offenders are more likely to fail. Such failure should not lead to the immediate imposition of a prison term. North Carolina's model is instructive, since it provides a list of failures and attendant, graduated sanctions for each.<sup>105</sup> Especially for addicts, an allowance for failure must be built into the system.

In addition to the sentence itself, a host of collateral sanctions befalls an offender, often automatically and without notice, upon conviction. As currently configured, such sanctions are inequitable and often counterproductive. They could, however, be employed more effectively and equitably in the sanctioning process.

## II. REFORMING COLLATERAL SANCTIONS INTO SENTENCING ELEMENTS

Collateral sanctions—often referred to as collateral consequences or civil disabilities—are not part of the sentence calculus, even though they derive from a criminal conviction. Some of them follow automatically upon a conviction; others must be imposed by an administrative agency or another regulatory body.<sup>106</sup> After a period in which collateral sanctions decreased dramatically, they have been on the increase in the last two decades.<sup>107</sup> They function as invisible mandatory minimum sentences, frequently imposed on a vast array of offenders without their knowledge and without any recourse. They lack any proportionality and negatively impact an offender's reintegrative efforts.<sup>108</sup>

Since the 1980s, Congress has substantially increased collateral sanctions,

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104. See, e.g., Roberts, *supra* note 65, at 241-45 (discussing "Custody Plus" and intermittent confinement, which are included as sentencing options in the English Criminal Justice Bill 2002).

105. N.C. DEP'T OF CORRECTION, VIOLATIONS POLICIES—PROCEDURES (2002), reprinted in NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY 528-33 (2004).

106. For a discussion of some of the differences between collateral sanctions and discretionary disabilities, see AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, COMMENTARY STANDARD 19-2.1 (2004). For a listing of collateral sanctions in every state, see LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY, A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS (2004), [www.lac.org/lac/upload/lacreport/LAC\\_PrintReport.pdf](http://www.lac.org/lac/upload/lacreport/LAC_PrintReport.pdf) (last visited Sept. 25, 2005).

107. Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10, 14-15 (1996) (detailing growth of collateral sanctions in the states, in contrast to the pre-1986 period that had generally shown declining restrictions on offenders' civil rights).

108. See generally INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002); Webb Hubbell, *Without Pardon: Collateral Consequences of a Felony Conviction*, 13 FED. SENT'G REP. 223 (2001).

which frequently target specific offender groups.<sup>109</sup> Federal legislation impacts not only those convicted in federal courts, but also state offenders because of congressional mandates imposed on the states.<sup>110</sup> Many of the sanctions deprive offenders of “critical ingredients of the support systems of poor people in this country.”<sup>111</sup> Among those federal reforms is the lifetime ban on welfare benefits for drug offenders, which almost half the states enforce in full. It prohibits persons convicted of a federal or state felony drug offense from receiving cash assistance and food stamps.<sup>112</sup> The ban has had the most negative impact on women and children.<sup>113</sup>

Since the 1996 immigration legislation, deportation has become mandatory for a host of criminal offenses. In addition, sex offender registration statutes exist now in all states. In many states, federal sex offenders must register with local law enforcement.<sup>114</sup> Federal law also prohibits convicted felons from possessing or receiving any firearms or ammunition unless they have had their civil rights restored.<sup>115</sup>

Specific laws targeting only federal offenders have also proliferated. Longstanding federal legislation prohibits convicted felons from serving on a jury unless their civil rights have been restored, which most courts have interpreted to mean that they must have received a presidential pardon.<sup>116</sup> Federal statutes also prohibit those convicted of certain felonies from holding public office, obtaining federal employment, and receiving military commissions.<sup>117</sup> A conviction may lead to the loss of federal licenses and registrations.<sup>118</sup>

Select rights may be restored through administrative or judicial action. A

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109. For employment- and licensing-related restrictions, see MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 6-11 (2005), <http://www.sentencingproject.org/pdfs/rights-restoration/execsumm.pdf> (last visited Sept. 25, 2005).

110. See Travis, *supra* note 7, at 23.

111. Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 18 (Marc Mauer & Meda Chesney-Lind eds., 2002).

112. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 115(a), 110 Stat. 2105 (1996) (codified at 21 U.S.C. § 862a (2005)); see also PATRICIA ALLARD, THE SENTENCING PROJECT, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES 1-2 (2002), <http://www.sentencingproject.org/pdfs/9088.pdf> (last visited Sept. 25, 2005).

113. See generally ALLARD, *supra* note 112.

114. OFFICE OF THE PARDON ATTORNEY, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY 12 (1996).

115. 18 U.S.C. §§ 921-922 (2005). The restoration exception has triggered substantial litigation surrounding state restoration procedures. See OFFICE OF THE PARDON ATTORNEY, *supra* note 114, at 14-18.

116. OFFICE OF THE PARDON ATTORNEY, *supra* note 114, at 6.

117. *Id.* at 6-8.

118. *Id.* at 8-9.

host of state sanctions can be removed through a restoration of rights under state law. For federal offenders, the only possibility of having their civil rights restored is through a presidential pardon. Even though the Bureau of Alcohol, Tobacco, and Firearms is empowered to restore federal firearms privileges, Congress has not funded this provision since 1992.<sup>119</sup> Other discretionary waivers of collateral sanctions may be available from select government agencies or through other restoration processes.<sup>120</sup> However, federal law lacks a statutory restoration procedure and an expungement statute.<sup>121</sup> Both have become more important as criminal-record checks have played a more dominant role in employment decisions in the wake of the terrorist attacks of September 11, 2001, as the federal criminal justice system has grown exponentially, and as ever greater numbers of individuals have federal records. At the same time, the number of presidential pardons has steadily decreased.<sup>122</sup> In light of this development, a statutory restoration procedure is crucial, as federal offenders are among those with the least ability to be restored to full status as a citizen. In addition, the role of collateral sanctions must be reconsidered.

Because of the panoply of state-imposed collateral sanctions that vary dramatically, federal convictions have an inherently inequitable impact on offenders. Many offenders suffer from a host of sanctions that limit their political, social, and economic participation in society, but which do not count as part of their punishment.

All collateral sanctions that hinder an offender's political participation or exclude her from other crucial functions of the modern state should be eliminated. These sanctions merely serve to set offenders continually apart without providing a tangible benefit.<sup>123</sup> Therefore, they hamper the reintegration of offenders into society,<sup>124</sup> a goal Congress and the President

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119. 18 U.S.C. § 925(c) (2005); *see* *United States v. Bean*, 537 U.S. 71, 71 (2002).

120. *See* LOVE, *supra* note 109, at 7.

121. *Id.* at 4. For very limited expungement provisions in federal law, *see id.*

122. *See* Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT'G REP. 139 (2001).

123. The most telling example may be congressional legislation that mandates states to impose a lifetime bar on individuals with drug-related felony convictions from receiving federally funded public assistance and food stamps. 21 U.S.C. § 862a (2005). About half the states have opted out of this provision. *See, e.g.,* Travis, *supra* note 7, at 23. The most dramatic state restriction is disenfranchisement. For recent changes to disenfranchisement provisions, *see* MARC MAUER & TUSHAR KANSAL, THE SENTENCING PROJECT, BARRED FOR LIFE: VOTING RIGHTS RESTORATION IN PERMANENT DISENFRANCHISEMENT STATES (2005), <http://www.sentencingproject.org/pdfs/barredforlife.pdf> (last visited Sept. 25, 2005).

124. *See, e.g.,* Mark M. Stavsky, *No Guns or Butter for Thomas Bean: Firearms Disabilities and Their Occupational Consequences*, 30 FORDHAM URB. L.J. 1759 (2003). Many bans, such as disenfranchisement, also impact communities negatively. *See, e.g.,* Marc Mauer, *Political Report: Disenfranchising Felons Hurts Entire Communities*, FOCUS, May/June 2004, at 5, 5-6.

have declared to be crucial.<sup>125</sup>

Some collateral sanctions appear risk-based. They do not rely on individual risk assessments but instead categorize offenders into large, overinclusive groups. Often they impose harsh additional sanctions on those who are not dangerous, unnecessarily restricting offenders' lives while draining limited enforcement resources.

Even worse criminal justice policy concerns non-risk-based sanctions, which the Supreme Court has ruled constitutionally permissible.<sup>126</sup> These sanctions dilute enforcement efforts and ban nondangerous offenders from reentering society fully. Individualized risk-based collateral sanctions, and those with a retributive component, should be imposed at sentencing and factored into the sentence. This initiative would accomplish two goals: it would appropriately focus sanctions on dangerous offenders,<sup>127</sup> and it would convert collateral sanctions into part of the penalty. All substantial collateral sanctions should be imposed at sentencing, as are the denial of benefits and the employment restriction under the Guidelines.<sup>128</sup>

Currently, non-risk-based and collateral sanctions are rarely used, in part because judges consider them ineffective or overly punitive.<sup>129</sup> As they are not integrated into the Guidelines scheme, judges may not consider them when fashioning a sentence. Like nonprison sanctions, which can be integrated into a guidelines framework, collateral sanctions can be converted into elements of a sentence and become an integral part of a guidelines regime.

First, many collateral sanctions apply only to certain types of offenders. Once the Sentencing Commission has determined their function, it can turn them into a probation condition, or treat them as a separate, additional sanction

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125. See, e.g., Second Chance Act, S. Res. 2789, 108th Cong. (2004); President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 20, 2004), [www.c-span.org/executive/transcript.asp?cat=current\\_event&code=bush\\_admin&year=2004](http://www.c-span.org/executive/transcript.asp?cat=current_event&code=bush_admin&year=2004) (last visited Sept. 25, 2005).

126. Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003).

127. Even though risk assessment remains an area fraught with difficulties, the actuarial model which consists of group-based risk assessment, especially when combined with individualized clinical assessments, has proven very promising. See, e.g., Nora V. Demleitner, *Risk Assessment: Promises and Pitfalls*, 16 FED. SENT'G REP. 161 (2004); Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment: How a Developing Science Can Enhance Accuracy and Accountability*, 16 FED. SENT'G REP. 176 (2004); Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 AM. CRIM. L. REV. 1443 (2003); Witt & Barone, *supra* note 53.

128. For examples of such models, see Nora V. Demleitner, *Abusing State Power or Controlling Risk?: Sex Offender Commitment and Sicherungsverwahrung*, 30 FORDHAM URB. L.J. 1621 (2003); Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753 (2000).

129. U.S. SENTENCING GUIDELINES MANUAL § 5F1.6 (2004); see also Musser Jr., *supra* note 27, at 255.

that must be considered in fashioning an overall sentence. Risk-based collateral sanctions may be most effective when combined with nonprison sanctions that lead to the release of offenders who might constitute a slightly higher risk than would otherwise be acceptable. The Commission should be tasked to assess the impact such sanctions may have on recidivism. It should also regularly determine how frequently used and how useful certain sanctions are.

Second, many currently enforced collateral sanctions are endless or can only be terminated upon a restoration of civil rights. Under a guidelines regime that converts collateral sanctions into a sentence component, these new sanctions will be limited in time, as is all other punishment.

Third, courts should be given discretion as to whether to impose collateral sanctions. The most dramatic change would occur in the immigration area, where federal courts would have to determine at sentencing whether an offender should be deported. This discretion would allow them to make individualized judgments and factor deportation into the overall sentence they impose. Alternatively, for some legally difficult additional sanctions, administrative agencies and tribunals might be better suited than the traditional court. However, in those cases, courts should be in a position to issue strong recommendations to such agencies, so as to indicate whether they considered these additional sanctions in the imposition of the sentence.

#### CONCLUSION

In their rush toward greater imprisonment, Congress and the Sentencing Commission have neglected nonprison sentences and failed to consider collateral sanctions in their punishment calculus. Even in a Guidelines world, imprisonment does not have to be the default, as some state guidelines regimes teach us. Nonprison sanctions and collateral sanctions can be successfully integrated into a guidelines framework so as to create greater sentence equality and uniformity, to function as an effective deterrent, and to protect public safety. Even though many will perceive them as less retributive than imprisonment, these alternative sanctions are the only viable solution to counteract the negative consequences resulting from large-scale imprisonment.