Prison Conditions and Criminal Sentencing in Kansas: A Public Policy Dialogue

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Recent theories of law and public policy have stressed that judicial, executive and legislative roles can best be understood in relationship to each other. Instead of independently declaring or enforcing rights and rules, judges, administrators and legislators participate in a dialogue, seeking mutual understanding.\(^1\) Effective dialogue, in turn, embodies the democratic process.

The evolution of criminal sentencing policies demonstrates the dialogue among participants in the policymaking process. As conditions change, administrators seek in rapid responses based upon their direct experience with the system. The legislative reaction may or may not be consistent with the perspective of the administrators. When administrative actions or the legislative response pushes the outer boundaries of acceptable public policy, the judiciary steps in. Actions and reactions take place continuously within both the state and federal branches of government. The Kansas record illustrates these interactions. Our history provides a guide to future policy changes which will be part of an ongoing effort to establish and maintain a rational system of criminal justice.

My perspective on these issues has been shaped by experience. I became involved with criminal sentencing policies as a lawyer appointed to represent inmates who were challenging prison conditions in the State of Kansas. For nineteen years I worked on a case that, before it ended, involved virtually all aspects of life in prison. In the course of that litigation, I became convinced that development of rational sentencing policies was key to resolving fundamental problems in prisons, and that judicial action could provide the stimulus needed to reform irrational sentencing practices.

These observations are based upon certain assumptions regarding the meaning of rationality in sentencing. I use that phrase to include three basic assumptions:

- The goal of justice is to promote the common welfare.
- An individual's ability to contribute to that welfare may be impaired if he or she is unable to lead a normal life of productive activity.
- The right to lead a productive life should be accorded to all, irrespective of the crime.

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elements: Criminal sentences should be (1) fair, (2) proportionate and (3) humane. Any sentencing policy failing to meet these three standards also fails my test for rationality.

Experience demonstrates, however, that other people have very different lenses through which they view issues of rationality in sentencing. Crime triggers emotional reactions in all of us. We feel sorrow for victims of crime, and anger towards the perpetrators. When we ask policymakers to address these issues, we may ask for rationality, but we cannot ignore emotional responses. For members of the legislature, it is unquestionably rational to be responsive to constituents, and to be interested in reelection. Furthermore, when parents of a murdered child attend every legislative hearing on an issue, we should know that legislators are likely to respond, and it makes no difference whether we characterize their response as "rational" or "emotional." It will be impossible to develop realistic sentencing plans without considering the perspective of the legislators who take responsibility for their enactment.

In this article, I will explore actions and reactions of judicial and legislative bodies which have in turn shaped the criminal justice system in Kansas over a period of more than two decades. The first section of the article will look at prison conditions litigation and legislative responses that gave rise to major changes in criminal sentencing. Part two of the article will examine the immediate aftermath of criminal sentencing reform, and the ongoing struggle to maintain rational state sentencing policies in the face of changes in federal law. Finally, in part three, I will review future prospects for adjusting sentencing policies building upon lessons from the past.

I. PREREQUISITES TO SENTENCING REFORM

Sentencing reform in Kansas did not just come about as an inevitable step in an evolutionary process. It emerged slowly, and only after major flaws in the system of justice were exposed through a combination of litigation and education. My personal encounter with the issues came through litigation, and I will begin with an account of that experience. Court orders, however, were just one part of the process that led to reform in criminal sentencing. Of equal importance was the educational campaign carried on by other participants in the process, in particular members of the executive branch. Interactions among the branches of government, including ongoing dialogue with the public, contributed to enactment of reform and to limiting the reach of that reform.

A. Litigation

The litigation piece of the puzzle is the easiest for me to address. In 1978, three law clerks from the federal court came to my office and asked whether I would agree to represent a group of inmates who had filed pro se petitions challenging conditions at the Kansas State Penitentiary. I accepted the appointment as a project for the Washburn Law Clinic. I agreed to work with the Kansas Legal Services for Prisoners program, under the
Prison Conditions
direction of Stephen Kessler; together we would address the problems while students and I learned about prison life in Kansas.

The first phase of litigation proceeded in straightforward fashion. The central core of KSP had been built when Abraham Lincoln was president, and it badly needed renovation. Cell houses had four or five tiers. In winter, inmates froze on the first floor and broiled on the fifth. Cockroaches and rodents were plentiful. Health care was characterized by neglect. The inmates who had initiated the litigation had the foresight to identify "overcrowding" as a core problem in the prison, even though few cells housed more than a single prisoner. The overcrowding was caused by problems in administration; there were not enough jobs or other activities to keep the inmates busy, and as a result, a high percentage of them were forced to spend all day every day within their cells.

Under the circumstances, significant problems and reasonable solutions were easily identified. Patrick McManus was the secretary of corrections, and he understood the need to improve prison conditions. His primary focus, however, was on development of community corrections. He communicated a vision for improving prison conditions through a combination of facility improvements and diversion of inmates into more constructive alternatives.

The legislature responded to the obvious need for prison renovation by appropriating necessary funds, and within two years the case appeared to have been resolved. All of the fundamental goals and objectives agreed to by the state were consistent with the professional assessment made by the Department of Corrections. Defendants agreed that the physical structure of the penitentiary would be upgraded, and that by the end of 1983 the Department would "undertake an active good faith effort to comply with the provisions set forth in the [American Correctional Association's] Manual of Standards for Adult Correctional Institutions as required for accreditation." Health care would meet national standards, jobs would be provided, recreation facilities would be improved, and inmates would still only be housed with one person in each cell.

Although physical renovation of the cell-houses began as planned, complications gradually developed. Within three years there were signs of overcrowding which were initially explained as transitional problems to be resolved when renovation was completed. New cell houses were also under construction to relieve the overcrowding. As work proceeded, however, conditions worsened. Eventually, the state admitted that renovation could not continue at its projected pace because of the overcrowding. In spite of "good faith efforts," compliance with American Correctional Association standards became more and more remote.

In the mid 1980s, Michael Barbara was the secretary of corrections and he was determined to address and resolve the problems. He appeared before the legislature to explain the increasingly desperate situation, with two inmates then housed in cells that
were built in the 1860s for one person. A member of the legislative committee asked whether it would be possible to fit a triple bunk instead of just a double bunk in such cells.\textsuperscript{9} They were responding "rationally," even if not by my definition of that term, and prospects for reform were bleak.

In 1986, I received a telephone call from a staff attorney with the United States Department of Justice Office of Civil Rights. She reported receiving complaints from inmates about conditions in Kansas prisons. She had discovered our existing consent decree, and asked whether we were involved in active litigation. By that time, I had recognized that we did not have the resources for a major class action lawsuit. We had no money to hire experts, and the case had grown from simple to very complex. I explained our situation to the lawyer for the Department of Justice and asked for their assistance, pledging not to engage in more active litigation while they were investigating.\textsuperscript{10}

It took almost two years for the Department of Justice to investigate. They had to make two thorough investigations by experts; the delay following their first visit was so long that an update was needed before senior justice department officials would send a demand letter to the state. In June 1987, a letter was sent by William Bradford Reynolds, assistant attorney general for the civil rights division, to Governor Mike Hayden, informing the governor that inmates at the Kansas State Penitentiary were "being subjected to flagrant or egregious conditions which deprive[d] them of certain of their constitutional rights."\textsuperscript{11}

After sending that letter, staff attorneys for the Department of Justice informed me that the time had come for revival of our litigation. They expressed concern that, if we relied entirely upon the Justice Department, there would be lengthy delays and minimal relief. After receiving that notice, I sought and received funding from the Edna McConnell Clark Foundation and finally felt prepared to ask the court to certify a class action. Armed with expert reports from the Department of Justice and joined by Professors Lisa Nathanson and Michael Kaye, we informed the Department of Corrections of our plans and began additional discovery.

Also in 1987, Roger Endell became the new secretary of corrections for Kansas. Secretary Endell arrived with ambitious plans for prison improvement. He argued that plaintiffs should delay litigation and give the legislature a chance to act solely in response to his rational and persuasive arguments about the need for relief in Kansas prisons.\textsuperscript{12} Our clients would not hear of additional delay; overcrowding had been building for a decade in spite of numerous efforts by prior administrations to confront the problem.\textsuperscript{13} On their behalf we went to court seeking immediate injunctive relief that would include reductions in inmate populations at KSP.

Our case was not difficult to make. Virtually all of the inmates at KSP were housed with two men in a cell. There were literally hundreds of inmates in need of
“protective custody.” Many of those inmates were mentally ill. They lived for at least twenty-three hours per day with two people in 6 x 10-ft. cells that included their bunk-beds, sink, and toilet. It was not difficult to paint the picture of an inmate on a bunk bed six inches from a toilet and either above or below a fellow inmate whose personal hygiene left much to be desired. There was barely room for both inmates to stand and turn at the same time. In preparation for our hearing, I investigated accreditation standards for large primates in zoos\(^{14}\); Kansas prison conditions were so deficient, however, that references to zoo standards had limited utility.\(^{15}\)

The judicial hearing did not take place in a vacuum. In addition to the harsh public assessment by the United States Department of Justice, Secretary Endell was on record saying that Kansas faced an “immediate need to develop alternative placements for 2,400 offenders.”\(^{16}\) On the eve of the hearing Governor Hayden held a news conference at which he informed the press that the state expected to lose its arguments in court.\(^{17}\) On April 1, 1988, Judge Richard Rogers ordered the state to begin reducing the KSP inmate population by one hundred inmates per month, with the added note that the state should not transfer inmates “to other institutions where similar unconstitutional conditions of confinement exist.”\(^{18}\)

It would have been possible for the Kansas legislature to respond to the court order in 1988 by taking swift and complete corrective action. In spite of pleas from the correction’s secretary, however, that did not happen. Judge Roger’s order had set the stage for the next phase in our litigation, as inmates from the Kansas State Penitentiary in Lansing were moved to other institutions. Conditions were most extreme at the reformatory in Hutchinson where 1,738 inmates were being held in a prison built for 847.\(^{19}\) Dwight Corrin and Roger Theis, both of whom practice law in Wichita, Kansas, agreed to take responsibility for challenges to that problem. In that institution, two inmates were being housed for twenty-three hours daily in cells with just forty square feet; actual floor space for moving around totaled about seven square feet.\(^{20}\) Once again, outcome of the litigation seemed predictable, but potential remedial issues had become much more difficult and complex. In order to cure the problems at Hutchinson, the state could not simply continue to transfer inmates to prisons that had not yet been challenged. System-wide relief was obviously needed. It had also become clear that the Kansas legislature would be unlikely to act without a clear directive from the court.

After lengthy arguments, Judge Rogers issued an order for relief on April 13, 1989. The core of the judge’s order again reflected the professional correctional standards that had been identified by the defendants in the 1980 consent decree. In addition, however, instead of simply requiring good faith efforts to achieve the intended results, the judge now included specific dates by which goals and targets were to be met. Population reductions were to begin immediately, and the state complied with that order by adjusting amounts of “good time credit” that could be earned by inmates.\(^{21}\) While some of the most
extreme problems were relieved through such adjustments, the state was given more time to provide long-term relief. For example, the maximum security unit in which the most dangerous inmates were segregated from the general population was deemed unfit, but the state was given more than two years in which to build a replacement. The state also was given more than a two-year period in which to meet long-term objectives of reducing prison populations so that no prison was filled beyond its capacity.22 In order to prevent future over-crowding, the state was ordered to develop a “population management system which assures that the Kansas inmate population remains within the operating capacity of the state’s correctional institutions [to] be in effective operation no later than July 1, 1991.”23

In his order, Judge Rogers did not give the state explicit instruction on how various objectives were to be met. He also rejected requests by plaintiffs to appoint a special master or to order an immediate, large-scale release of inmates. The state had been given enough time to choose between building prisons or altering sentencing policies. Either strategy could have worked. The one absolute requirement, however, was that sentencing policy had to be brought in line with prison resources.

B. Education

On a separate track from the litigation, the executive branch of state government initiated what can best be described as an education campaign. In 1988, Governor Hayden appointed a Criminal Justice Coordinating Council chaired by Attorney General Robert Stephan and charged with shaping criminal justice policies for the state. The 1988 legislature built upon this structure by creating the Kansas Criminal Justice Commission which was asked to “study the state’s system of dealing with criminals and develop recommendations to the governor, Legislature and Supreme Court on revisions of sentencing laws, parole policies and the state’s criminal code.”24 Based upon recommendations from that body, the 1989 legislature established the Kansas Sentencing Commission.25 Although prison overcrowding had been a primary concern of the governor and the legislature when these bodies were formed, that focus was broadened in 1989 so that the newly established sentencing commission would also investigate the presence or absence of racial and/or geographical biases in the sentencing process.26 The work of that commission followed a number of prior efforts to highlight the same issues. Prior studies had already identified serious inequities in the state’s sentencing practices.27

The commission, chaired by Attorney General Stephan and directed by Ben Coates, found graphic evidence of the inequities. After controlling for criminal history and seriousness of offenses, the commission found that racial discrimination appeared throughout the process: from initial sentencing, to sentence reviews, and to parole board decisions.28 The commission found that the disparity was not deliberate, but was rather an artifact of factors being used to make decisions.29
There was not only racial disparity, but also geographic disparity. In the case of *Bush v. Gore*, the Supreme Court recently instructed us that, when fundamental rights are involved, significant variations in treatment from one county to another should not be tolerated. In Kansas, there was not only disparity among counties. In some instances, the length of a person’s sentence had more to do with the floor at which the elevator stopped for sentencing than with the severity of the crime committed. If the elevator stopped on two, maybe there was a shot at probation; if it went on to three, expect to do at least five years.

In addition to the fairness problem, the commission also found serious problems of proportionality. As their 1991 report explained, “criminal codes often grow in a patchwork fashion, with new crimes added every legislative session. These crimes are placed into an existing hierarchy, usually without a great deal of effort being expended to ascertain the harm relative to other crimes. The decision to rank the seriousness of a crime [was] often an ad hoc event driven by some exceptional set of circumstances.”

The Kansas Sentencing Commission attempted to bring order to this patchwork by developing a set of “working principles” to guide a process of crime-severity ranking. The first principle was that the primary determinant of crime severity should be “harm or threat of harm produced by the criminal conduct.” Second, factors indicating culpability “should be considered primarily when assessing aggravating and mitigating circumstances” rather than when determining the appropriate basic sentence. Finally, societal interests were weighted first to protect individuals from “physical and emotional injury,” second to “protect private and public property rights,” and third to “protect/preserve the integrity of governmental institutions, public peace and public morals.” Applying these principles, the commission developed sentencing grids that would provide for presumptive sentences based upon severity of crimes and criminal history of defendants. Sentences could only be modified in individual cases based upon specific findings of aggravating or mitigating circumstances.

When sentencing guidelines were finally proposed to the Kansas legislature, the stage had been well set. There was strong opposition, especially from members of the Kansas parole board and some members of the judiciary who objected to losing discretionary authority. They argued that individualized assessments of defendants, combined with victim participation, permitted more carefully calibrated punishment. It has also been noted that sentencing guidelines based upon severity of offense and prior criminal behavior meant abandonment of a primary focus on rehabilitation. Those arguments, however, failed to offer reasonable solutions to the extensively documented problems and abuses.

Most participants in the process understood that some form of guidelines would emerge from the legislature, but as in all such cases, the devil was in the details. The one detail that proved most difficult for the legislators involved a single sentence in proposed
legislation providing for retroactive implementation. The sentencing commission had noted that "especially in light of the findings of significant racial and geographical disparity" the guidelines should be retroactive. For years I had worked with the Kansas inmates who were the victims of the biased sentencing practices that had been so clearly identified by the sentencing commission. By my definition, no rational sentencing reform could fail to address inequities imposed upon the existing inmate population. But this was a clear instance in which my definition of rationality conflicted with that of others.

The news media didn't help. As the sentencing guidelines were being debated, newspapers sounded the alarm of a potential release of hundreds of prisoners. Headlines raised fears, while concern for correcting entrenched patterns of discrimination was either relegated to the fine print or ignored entirely. The only inmates released through retroactive guidelines would have been those who had been measurably discriminated against under existing laws, and their early release would simply mean that they were being treated like others and in keeping with current legislative judgments regarding fair and proportionate sentencing. Furthermore, the vast majority of those "released early" would be near the end of their sentence at the time of release; all would eventually rejoin the community regardless of whether the law was changed. Unfortunately, however, editorial writers and politicians seemed to agree that these explanations were too complex to be effectively communicated to the public.

After long meetings led by chairpersons of both the Senate and House Judiciary Committees, they managed to salvage a plan for partial retroactivity, that would be applicable only to non-violent felons. Two years later, the Senate Judiciary Committee chairman ran for the office of attorney general which Bob Stephan was vacating. He was excoriated for having played a part in the release of hundreds of inmates through retroactive implementation of the sentencing guidelines, and he narrowly lost the ensuing primary election. His concerns about retroactivity had not been irrational.

A second major issue at the time when the guidelines were introduced in Kansas had to do with treatment of drug offenders. There was a rising tide of anger towards anyone who either sold or possessed illegal drugs, and a widely accepted belief that the answer was longer prison terms. Separate drug grids were developed which helped legislators avoid questions about proportionality when criminal histories and drug crimes were compared to other violent or non-violent felonies.

A final element of the sentencing guidelines that became a significant focus of debate had to do with future adjustments. In keeping with the language from Judge Rogers' order and the goal of assuring that the inmate population would never exceed the capacity of Kansas prisons, I proposed seeking annual review of the guidelines by the sentencing commission. If at any time the inmate population exceeded 95 per cent of the total prison capacity, then the commission would propose adjustments in the sentencing grids which would automatically take effect unless countermanded by the legislature.
I did not succeed with this argument. The sentencing commission would make regular reports to the legislature, but it remained the responsibility of that body to take action.\textsuperscript{48} In a fundamental sense, I could not disagree with the conclusion that changes in sentencing policy, including adjustments of the grid, are core legislative responsibilities. Therefore, it is up to those who care about the issues to constantly educate the legislature so that future adjustments will take place in an orderly, humane and rational manner.

The Kansas sentencing guidelines were the most rational alternative that was possible at the time. They were far from perfect, but they provided a framework from which sensible adjustments could be made. The judicial, executive and legislative branches of government had all participated in the process of reform; their dialogue generated a new system of criminal sentencing in Kansas.

II. MAINTAINING RATIONALITY

Establishment of an initial court order setting broad parameters for prison capacities and conditions, combined with legislation to make sentencing policies consistent and predictable, did not end the process. More details in the prison system needed to be addressed in order to establish humane treatment of inmates. Other changes initiated by both federal and state branches of the government also affected this picture. I will begin by briefly explaining some additional issues involving the ongoing relationship between prison conditions and sentencing policies. In parts two, three and four of this section I will review changes in the law enacted or developed by Congress, the United States Supreme Court and the state legislature which have impacted state management of its criminal justice system. In significant respects, these legislative and appellate court decisions have come about in response to lower court decisions regarding prison conditions.

A. Prison Conditions

Sentencing policies interact with prison issues in two fundamental ways. First, and perhaps most important, life within the prisons is affected in dramatic ways by a lack of perceived fairness in the criminal justice system. When two inmates compare their treatment by the state and discover that one will be in prison five times longer than the other in spite of virtually identical criminal histories and culpability, the inmate with the longer sentence feels anger and resentment. Those feelings are exacerbated when the person with the short sentence is white and the one with a long sentence is black.

Failure to achieve full retroactivity meant that there continued to be a significant number of long-term inmates who felt that they had been treated unfairly. Some undoubtedly remain in prison today even though they might have been freed many years ago if covered by the guidelines.\textsuperscript{49} The Kansas parole board, whose members had strongly resisted adoption of the guidelines, didn’t help. Unlike the parole boards in Washington
and Minnesota,\textsuperscript{50} the Kansas board refused to consider the public policies that were underlying the guidelines when they made subsequent decisions about the “seriousness” of an individual’s offense.\textsuperscript{51} Adoption of the guidelines in fact highlighted these problems, which have not entirely disappeared.

In the long term, however, the guidelines have given inmates a greater sense of equal treatment.\textsuperscript{52} The added element of definite sentencing has also helped immensely to restore a sense of fairness within the prisons. In contrast to indefinite sentences, which were determined by parole board members’ reactions to the “look in the eye” of frightened inmates who appeared for annual review,\textsuperscript{53} inmates preferred the “truth-in-sentencing” that guidelines brought about. When I sought inmate input prior to framing arguments for the court, one of the questions I asked was whether inmates would prefer to have a sentence of three to ten years with a high likelihood of release after four years, or a fixed sentence of six years. To a person, the inmates expressed a preference for fixed sentencing.

While sentencing guidelines in Kansas have not eliminated indeterminate sentencing practices or immunized the criminal justice system from racial discrimination, they have had a significant impact.\textsuperscript{54} Perceptions of unfairness still exist, but those perceptions are not nearly as strong as they were at one time.

A second way in which sentencing policy interacts with prison conditions has to do with the state’s ability to keep its population within its resources. Policymakers frequently debate the question of whether resources should control sentencing policy or the other way around.\textsuperscript{55} I don’t have an answer to that question, but I would underscore the relationship. States should not be allowed to increase incarceration without committing the resources needed to establish a safe and humane living environment for inmates. Litigation has been a means towards assuring that goal.

In Kansas, prison conditions litigation did not end when the legislature decided to build a new prison, reduce the overall inmate population, and adopt sentencing guidelines. Numerous other issues needed to be addressed in order to bring the resources of the state into balance with existing sentencing policies.

Health care was an obvious starting point. For a long time the state had neglected medical care resources. The Department of Justice had found “medical care which is deliberately indifferent to the serious needs of prisoners,” including inadequate staffing levels, lack of hot water in the infirmary, roaches seen throughout the infirmary, equipment “in a dangerous state of disrepair,” and “inmates whose deaths or serious ailments could have been prevented with adequate medical care.”\textsuperscript{56} At one point, sick inmates at Lansing were required to wait outside, in the cold, snow and rain, in order to fill prescriptions.\textsuperscript{57} In Hutchinson, a doctor explained that he was not concerned about the lack of a sink in the room where he examined inmates, because he usually did not need
to touch his patients. These problems were so endemic that the state chose to solve them through private contracts for health care services.

While reliance upon private health care providers poses significant problems, especially if profits are increased by reducing levels of care, careful contractual relationships can lead to improvements in care compared to what the state had previously offered. The providers were obligated by contract to meet acceptable standards of care, and a health care provider that failed to meet those standards when sued in one state would quickly lose business in other states as well. In order to maintain their reputation and their contracts, serious abuses had to be eliminated. And the cost of the health care contract was determined by market mechanisms which were, in turn, less susceptible to politically motivated cuts.

A second major element of the battle for humane treatment of inmates involved those who suffered from mental illness. The state needed to develop clear policies for identifying and treating mentally ill inmates. It also needed to eliminate the musical chairs alternative by which the most seriously ill inmates were sent to short term hospitalization followed by a return to the general population – in order to quickly make room for another inmate in crisis – with constant repetition of a downward cycle. In Kansas, resolution of this issue took lengthy studies and extended expert testimony. Plaintiffs sought establishment of new facilities that would meet full civilian hospital accreditation standards; the court eventually ordered construction of a mental health treatment facility that offered transitional treatment between hospital care and the general population, and that would meet correctional health care standards. Implementation of this plan required several years of supervision by mental health care professionals.

Plaintiffs also sought treatment of inmates needing protective custody in a safe environment with liberties that were comparable to those of the general population. Fortunately, reductions in overcrowding also sharply reduced the need for protective custody. Nevertheless, conditions of confinement for the protective custody inmates required a substantial amount of attention from lawyers and the court.

Finally, plaintiffs also tried to obtain greater relief for inmates placed in "administrative segregation." These were inmates who, for a range of reasons, were perceived as threatening to the general population and therefore needed to be confined to their cells. The state had been ordered to close the putrid, windowless facility in which such inmates had been housed, and move the inmates to a new prison with brighter lights, better ventilation, narrow windows, and lower noise levels. Nevertheless, plaintiffs objected to the length of time for which these inmates were held, and to the manner of their treatment.

The judge did not allow plaintiffs to address serious questions of race discrimination which appeared to have played a hand in determining who would be placed in administrative segregation. Given that a number of Kansas prisons have an extremely...
high percentage of white guards and minority inmates, racial tensions are almost inevitable. When guards perceive a threat from the inmates—real or imagined—then the inmates are likely to be transferred into administrative segregation. Their due process rights were virtually nonexistent, and they could be kept indefinitely in solitary confinement.

After extended litigation, however, plaintiffs failed to obtain substantial relief on behalf of these inmates.

Through litigation, plaintiffs who sought improvements in prison conditions won some arguments and lost others. Perhaps of greatest import, however, they were able to establish a minimum resource base that would be needed to maintain a humane living environment for Kansas prisoners. By use of American Correctional Association accreditation standards and clearly identified capacity limits, outside parameters were established. Maintenance of those standards has become a vital continuing part of maintaining rational sentencing policies.

B. Acts of Congress

Other changes in the law have taken place which have a clear and direct affect on the effectiveness of using litigation as a source of direction for sentencing policies. Both the experience with prison reform litigation and reactions to that experience have varied widely around the nation. In some jurisdictions, judges reacted to recalcitrant legislators and state officials by appointing special masters who wielded broad authority over the details of prison administration. Those judicial actions, however, triggered political reactions on a national scale. Prisoners have often been an easy target for politicians, and in marked contrast to Kansas experience, political leaders from various parts of the nation curbed what they perceived as “intrusion” by federal judges by passing of the Prison Litigation Reform Act of 1995. It was as if, instead of a dialogue between the courts and Congress, the two sides were shouting at each other without serious thought about what was being said. With enactment of the PLRA, Congress attempted to silence the debate.

Prison litigation reform really meant the establishment of curbs on the power of federal judges to impose remedies on states. Commentators immediately recognized the unique extent to which the PLRA intruded upon traditional judicial authority to remedy constitutional violations. Remedies are to be narrowly fashioned and limited to resolving specific constitutional complaints. Time limits were imposed on orders for prospective relief. Capacity limits, which were key components of litigation in Kansas, can only be ordered by a panel of three federal judges, and even then the length of relief should be limited. Contrast that to the order issued by Judge Rogers in Kansas which required all Kansas prisons to permanently operate within their institutional capacities; if they fail to do so, then litigation will be reopened and the state will again become subject to more detailed and more stringent oversight.
The PLRA became effective in April 1996, just one month prior to what was expected to be the final step in Kansas litigation. The state and plaintiffs appeared to have settled all outstanding issues when Judge Rogers notified us that we needed to rethink the situation and to consider whether the relief that was to be ordered would violate the PLRA. Plaintiffs argued that Congress lacked the power to reopen prior final judgments, but would have to concede that some aspects of their litigation had not ended; the anticipated final order of the court had not yet been issued. After several additional months of wrangling, the parties decided to avoid that issue rather than make the Kansas litigation a test case for resolving fundamental questions about separation of powers. Although the April 1989 order of Judge Rogers is still good law in the District of Kansas, and the state must continue to live within prescribed population limits, enforcement of that principle will be difficult if put to the test.

Because the PLRA was explicitly targeting structural reform litigation of the type that had been developed with some success in Kansas, it will also have the effect of lessening the value of litigation as an impetus for future sentencing reform. In Kansas, Judge Rogers set broad parameters, and gave the state full authority to decide how to achieve relief. For example, the judge did not order the direct release of inmates, and always allowed the legislature to decide how many prisons to build, whether to modify standards for parole or probation, and how to change sentencing practices. The only requirement was that the changes meet the intended targets, and by doing so not only eliminate unconstitutional conditions of confinement, but also prevent their redevelopment. While the approach taken by Judge Rogers triggered some complaints by legislators, most of those involved both understood and appreciated his approach. The judge and the legislature carried out a classic “dialogue.” Both understood the perspective of the other, and as a result, policy changes occurred with minimal conflict or disruption. The model established by that relationship, however, has been undermined by the PLRA.

While the PLRA appears on its face to limit judicial authority, it is at least possible that it could backfire against state interests. For example, durational limits in the PLRA would seem to prevent a judge from giving the state more than two years in which to correct unconstitutional conditions of confinement. In Kansas, such a provision could have meant that, rather than giving the state legislature ample time to resolve deeply entrenched problems, Judge Rogers would have been forced to order quicker and more drastic state actions in order to secure compliance with constitutional standards within permissible time constraints.

Another element of the PLRA was a new limit on attorneys fees that can be awarded to lawyers who prevail in such work. The limits are harsh to a point of unreasonableness. Lawyers are limited to receiving $60 per hour for their services, which may seem adequate until some of the other changes in the law affecting this
litigation are also understood. First, in many parts of the country, $60 per hour will not
cover the overhead of a law office – the time of support personnel and the cost of
maintaining space, libraries, computer connections, etc. – none of which is likely to be
directly compensable.\(^{85}\)

It should also be noted that the $60 per hour fee is only payable to successful
litigants.\(^{86}\) It is, in that sense, a contingent fee. That means that a lawyer who succeeds
in prison litigation three-quarters of the time – which is problematic given the extent to
which the courts have narrowed the scope of relief – that highly successful lawyer will
only end up with a net average payment of $45 per hour.

Furthermore, serious prison litigation requires extensive reliance upon expert
witnesses. Without experts, lawyers and inmates will not be able to determine whether
leftover food has been stored at temperatures that meet minimum health and safety
standards, let alone evaluate the adequacy of medical and mental health care.
Unfortunately, the Supreme Court decided several years ago that expert fee expenses did
not fall within the definition of “attorneys fees as part of costs” and, therefore, did not fall
within the realm of expenses that needed to be paid to prevailing parties.\(^{87}\) What that
means is that lawyers end up taking the cost of experts out of their own fees. That could
work when the amount of fee awards could be adjusted to take such expenses into
account.\(^{88}\) In all other civil rights cases, lawyers are still able to make such adjustments.
In prison cases, however, the $60 per hour cap makes such litigation virtually impossible
without other funding sources.

Again, there is a possibility that this congressional action will have opposite
consequences from those intended. Substantial due process and equal protection
challenges could be made against the fee constraints in prison conditions litigation. To
the extent that lawyers are effectively precluded from challenging unconstitutional
conditions of confinement, an argument could be made that Congress has placed an undue
burden on the fundamental rights of inmates.\(^{89}\) An equal protection claim would also be
based upon the fundamental right to raise constitutional claims, and on the arbitrary line
that has been drawn between constitutional rights of inmates and constitutional rights of
all other persons. Legislators argued that reform was needed to curb frivolous litigation,\(^{90}\)
but most frivolous suits are \textit{pro se}; lawyers become involved either through appointment
or because they are convinced that a case has merit, and lawyers only receive fees when
they prevail.\(^{91}\) In Kansas, while law school faculty may be able to participate in prison
conditions litigation, especially if supported by external grants to cover the costs of expert
witnesses,\(^{92}\) it would be extremely difficult to continue to recruit private lawyers for such
litigation if limited by the constraints of the PLRA.

In addition to the PLRA, Congress also made changes which have a direct impact
upon the remedies that states might choose in order to keep prison populations within their
resource limits. An example of such restrictions came from the Violent Crime Control
and Enforcement Act of 1994 which provided that any states receiving federal funds for prison construction had to limit the amount of good time credit that could be earned while in prison. The concept of “truth in sentencing” has obvious merit, but should not have been seized upon as a basis for constraining effective prison population management tools. There was never anything “untruthful” about telling an inmate, victims, and all others involved with the criminal justice system that a defendant was being sent to jail for a maximum of ten years with a possibility of parole after seven years in the event of good behavior. The public should be readily able to comprehend this concept, and the goal of seeking seven years of good behavior in prison should be seen as rational both in the short term, within the prison, and in terms of long-term public safety. Surely individuals who behave well in prison are likely to be better neighbors when they return to our communities. Participants in the criminal justice system, however, obviously failed to adequately explain that basic concept to lawmakers in Washington or to the general public. Instead, inmates on parole were consistently described as “getting off early” rather than as serving the full sentence as that sentence had been reasonably defined.

Modifications in good time rules gave the state an important tool for managing its inmate population. In Kansas, adjustments in good time were made to comply with the orders from Judge Rogers. Elimination of that tool limited the range of actions that states may take in order to assure that prison populations stay within state resource limits. Because that remedy was taken away, however, states may now have an increased incentive for adopting determinant sentencing and to require that courts stay within sentencing guidelines.

C. Supreme Court Opinions

As previously implied, Congress has not been the only player in the realm of changing laws to impact prison conditions and sentencing policy. The United States Supreme Court has also made its impact felt, especially through its articulation of Eighth Amendment and due process standards. The Eighth Amendment ban on “cruel or unusual punishment” has been interpreted over the years to reflect “evolving standards of decency.” Thus, conditions that may have been tolerated in the 1780s or the 1860s do not necessarily determine what is acceptable today.

The Supreme Court has been exercising its own level of discipline, constraining the impulses of lower federal court judges who would impose stringent standards of protection for inmate populations. For example, the Court has made it clear that crowding in and of itself does not violate the Eighth Amendment. Thus, the Court noted that conditions of confinement violate “contemporary standards of decency” when “alone or in combination . . . [they] deprive inmates of the minimal civilized measure of life’s necessities.” Fortunately for litigators – and unfortunately for both inmates and guards who are affected by the conditions – overcrowding is often accompanied by problems
such as fire safety code violations, excessive idleness, poor sanitation often accompanied by the presence of insects and rodents, and inadequate medical or mental health care.\textsuperscript{97}

The related general test that the Supreme Court has devised for Eighth Amendment litigation is a "deliberate indifference standard."\textsuperscript{98} The Court has explained that for inmates to obtain relief, offending conduct of the state must be "wanton"; in cases involving challenges to prison conditions, deliberate indifference to the serious needs of the prisoner constitutes wantonness.\textsuperscript{99} If inadequate funding leads to the kind of problems just described, it should be possible to meet the deliberate indifference standard.

The Eighth Amendment ban on cruel or unusual punishment only applies to individuals who are being "punished." As a result, it does not apply to those being held in jail prior to trial, or to individuals like "sexual predators" who are held for treatment after completion of their criminal sentence. Where the Eighth Amendment does not apply, however, the Due Process Clause fills the void.\textsuperscript{100} As the Supreme Court has explained, "freedom from punishment" is included "within the liberty which no person may be deprived without due process of law."\textsuperscript{101} Protection for pre-trial detainees established by the Court does not differ substantially from Eighth Amendment standards.\textsuperscript{102}

In sum, the Supreme Court has established difficult, but not impossible, hurdles to cross to establish Eighth Amendment and due process violations. In recent years, those standards have "evolved" to make enforcement of inmates’ rights more difficult rather than less.\textsuperscript{103} When combined with the Prison Litigation Reform Act, the difficulty of prison conditions litigation has increased, but still remains as a potentially significant factor in states which allow prison conditions to dramatically deteriorate.

Conversations between courts and the legislature have not been restricted to the Eighth Amendment context. In 1996, a Supreme Court opinion in the case of Lewis v. Casey\textsuperscript{104} restricted systemwide relief in a challenge to the adequacy of Arizona prison law libraries and legal assistance. Subsequently, some states have interpreted that decision as a green light to cutting back on such services to inmates.\textsuperscript{105} The fundamental nature of the right of access to the courts, however, has not changed. While states are free to experiment with the types of legal assistance that they provide to inmates, access must remain adequate, and the cost of failing to meet that standard could be enormous both in terms of human rights and long-term fiscal impact. States that make short-term decisions to cut legal assistance programs are showing disrespect for the Constitution while exposing themselves to long-term judicial sanctions.

The Supreme Court has also thrown curves directly at the criminal sentencing process, as they did in 2000 with their decision in the case of Apprendi v. New Jersey.\textsuperscript{106} The Apprendi decision struck down a New Jersey law which allowed a judge to essentially double a criminal sentence with a finding that a crime was racially motivated.
The Court ruled that such factual decisions needed to be made by a jury based upon proof beyond a reasonable doubt.

It's still too early to fully assess the impact of *Apprendi*. A broad interpretation could mean that all upward deviations from sentencing guidelines must be submitted to juries rather than being resolved by judges. Regardless of how *Apprendi* is interpreted, it appears that there will be a need for some legislative review of sentencing guidelines, which could even have the regressive impact of causing guideline states to revert to purely discretionary sentencing schemes.

It is also possible, however, that the Supreme Court will eventually limit application of *Apprendi* so that it does not invalidate guidelines and only applies to the idea that the jury should determine every fact that would normally amount to a separate crime. That narrower alternative is more consistent with the actual language used by the Court. It is also more consistent with the reality of the fact that judges have traditionally been allowed to exercise discretion in sentencing, and that legislative roles include prescribing the range of sentencing options. The legislatures will be asked to be clear about what constitutes permissible discretion, and to distinguish elements of a crime from discretionary deviations. If this is the long-term affect of *Apprendi*, it is difficult to object.

Unfortunately, lack of clarity in the Supreme Court’s opinion has led to likely over-reactions in other courts. The Kansas Supreme Court, for example, essentially disallowed all judicially imposed upward departures from sentencing guidelines; proof of aggravating circumstances must be found beyond a reasonable doubt by a unanimous jury. While in the very short term criminal defendants may benefit from this ruling, in the long term the consequences could be the reverse. First, juries who only view a single case may have difficulty assessing the uniquely aggravating circumstances of a crime; appealing victims, graphic pictures or unattractive defendants may feel the wrath of capricious juries in spite of the need for proof beyond a reasonable doubt. Depending upon how the special verdict questions are asked, some juries may even feel compelled to find aggravating circumstances. In contrast, judges are more accustomed to the process and may be better able to apply consistent standards.

In addition to problematic questions about jury responses, there is also the possibility that legislatures will respond to the Supreme Court decision in *Apprendi* by explicitly expanding judicial discretion. Ironically, that would mean that a judicial directive to enforce due process standards by requiring submission of specific factual issues to a jury could have the actual effect of causing legislatures to give broad discretion to the judges without needing to base those decisions on specific factual judgments. If legislatures choose that course of action, the practical results would undermine due process and disrupt efforts to establish more rational sentencing policies.
This threat to sentencing guidelines results from lack of clarity on the part of the Supreme Court and a resulting breakdown in its dialogue with legislatures. Without questioning the Court’s preference for limiting the scope of its opinions to narrow issues that must be resolved, there are reasons why clearer direction should have been given in this context. Justice Stevens’ opinion referred in broad terms to the “elusive distinction between ‘elements’ and ‘sentencing factors.’”112 At the same time, it reaffirmed prior holdings of the Court authorizing judges to “find specific aggravating factors before imposing a sentence of death.”113 In her dissenting opinion, Justice O’Connor, joined by three other justices, explains the ambiguity of the Court’s decision specifically as applied to “all determinant sentencing schemes” and she appropriately chastises the majority for failing to address and clarify that issue.114 Because ambiguity in this case raises questions about the validity of criminal sentencing, all legislatures with determinant sentencing schemes will be forced to respond, and may react in ways which undermine both due process and rationality in sentencing.

D. State Legislature

In the foregoing sections I have described congressional and Supreme Court actions that have changed the legal climate in ways that affect efforts to develop rational sentencing policy. Since the adoption of sentencing guidelines, the Kansas legislature has also established a record for managing sentencing policy. Guidelines in Kansas have not been an unqualified success. There have been years in which legislators were confronted with the dramatic long-term consequences of their decisions on future prison populations, and yet they ignored that information and lengthened sentences without making plans for handling increased numbers of inmates. The most egregious of these developments took place immediately after implementation of the guidelines, at a time when at least some legislators were undoubtedly reeling from the charge that they had been “soft on crime.” They responded in the next election year by dramatically lengthening sentences.115

It should be understood that increasing future prison sentences is, in the short term, a cheap and popular course of action. Legislators take the credit for being tough on crime, but generally do not have to face the consequences. If, for example, the prison term for manufacturing methamphetamine is increased from three years to fifteen years, stacking costs of that change will not begin to be felt for at least three years. In an election year, changes like that are easy; it is much more difficult, however, to enact offsetting downward adjustments in the guidelines so that the total need for resources doesn’t change, or to make appropriations that would be needed if more prisons were to be built. As experienced in Kansas, the popular actions of short-sighted legislators often impose heavy burdens on their successors.

Another significant change in Kansas law has been the adoption of sexual predator laws, providing for confinement of selected inmates after their criminal sentence. The
Prison Conditions

United States Supreme Court accepted the myth that such confinement was not "punishment;" that inmates were being held for treatment, therefore, ex post facto and double jeopardy arguments were not applicable. Because of those laws, however, space needed for treatment of mentally ill inmates is now being filled by sexual predators.

The state has also taken actions which, on the surface, have little to do with criminal justice, but in reality may have a tremendous impact. For example, compounding the difficulty caused by sexual predator laws, Kansas has engaged in "mental health care reform."

State hospitals were closed, but community treatment facilities were not expanded as promised. One result is that the percentage of mentally ill persons in prison has continued to climb. As a result of this combination of factors, if prison litigation were to be reopened, the state's treatment of mentally ill inmates would again come under close judicial scrutiny.

The three issues described above are all examples of changes in Kansas laws that have a significant impact on the balance between sentencing policies and prison resources, and that were adopted without substantially addressing that balance. Failure to address resources issues compounded existing problems of long-term growth in the prison population. The seriousness of the problems in Kansas reached a high point in 1999 as prisons were all at or near their capacity, projections demonstrated that the populations would continue to spiral upwards, and budget constraints caused by prior tax cuts virtually eliminated the increased appropriations needed to care for the growing population. In that year, the economy was strong and the Department of Corrections was having trouble retaining its employees who were able to make more money in other fields or other states. High staff turnover meant that the prisons themselves were becoming more and more dangerous. As part of the effort to cope with these pressures, education and treatment programs within the correctional institutions were being cut.

This combination created an ideal environment for continuation of the dialogue regarding prison conditions, sentencing policies and state resources. In Kansas, an active and effective sentencing commission met repeatedly with legislative leaders with mixed results. As Judge Lewis has pointed out, evidence suggest that in some years the legislature took "direct punitive action against the commission after it recommended something the legislature did not want to hear."

More recently, however, the commission has played a critical role in developing sentencing policy. In the 2000 legislative session, changes were made in the length of parole and in the amount of time that inmates served when returned to prison on technical parole violations. Other adjustments meant that the state would be able to hang on for at least a short time before once again running out of space. Effective education efforts meant that litigation could be forestalled.

The mixed results in Kansas appear to be fairly typical of experiences in other guidelines states. More than one third of the states have now adopted sentencing
guidelines, and in a number of states which have studied the issue, sentencing disparity appears to have been reduced.\textsuperscript{123} It has also been noted that the various commissions have "begun to develop useful sentencing policy expertise, a comprehensive statewide view of punishment priorities, better management of resources, and a long-term perspective."\textsuperscript{124} Results have led at least one commentator to conclude that, although still evolving and with room for improvement, "state sentencing guidelines have proven to be much better than any other sentencing system which has been tried or proposed."\textsuperscript{125}

III. FUTURE PROSPECTS

Experience with these issues over the course of more than twenty years provides a basis for some observations regarding the future of rational sentencing policy. One thing we can be sure of, it will never be easy. Litigation will be a more difficult and less predictable tool to handle than it has been in the past. Fewer lawyers will be in a position to work on behalf of inmates; litigation is likely to have a shorter life span but conceivably more extreme impact with less opportunity for legislative input. Local courts, the United States Supreme Court, Congress, the state legislature and voters will all participate in the process; no actions by any one of these participants will take place in a vacuum, and it is difficult to calculate the long-term consequences of any single influencing factor.

Because of the changed role likely to be played by litigation, education will be more important than ever, and bodies like the Kansas sentencing commission will hold the key to effective education. With the adoption of guidelines in Kansas, this state has the information needed so that legislators should always know the impact of their decisions. They need to be held accountable for ignoring that information – by the media as well as by their fellow legislators – and, with enough public education, by their constituents as well.

But it's also important to stay focused on the realities of life as a legislator. In Kansas, it will be difficult to persuade politicians to make major changes in sentencing that have retroactive effect and that will result in the early release of inmates. The backlash to such changes has been too dramatic in the past.\textsuperscript{126} While it is conceivable that litigation could again bring about such results, that would only happen if conditions were allowed to deteriorate dramatically. Instead, the most likely changes will be those which have incremental effects and that continue to make our sentencing policies more rational. Those who care about these issues will need to constantly stay ahead of the process, rather than fall behind and have to take dramatic action. Several examples may help to illustrate the kind of incremental change that might meet with legislative approval while also keeping sentencing policies in line with state resources.
A. Juvenile Adjudications

First, every sentencing guidelines state needs to review the way in which it treats juvenile records, so that juvenile adjudications are not considered the equivalent of adult records when calculating a criminal history. I make this point because I really don’t think that law makers adequately appreciate the differences in the juvenile and adult criminal justice systems. First, there is of course dramatic variation in juvenile court systems around the nation. In many states, however, the number of counts for which a juvenile is adjudicated has little to do with the ensuing sentence. Due process standards are often only loosely applied, and criminal records can be shaped without serious consideration of long-term consequences. Yet in the post Apprendi world we know that criminal sentences are the one factor that can and will be used to enhance sentences without the need for jury findings. In Kansas, the state should reduce, if not presumptively eliminate, the weight given to juvenile adjudications. At the very least, this state should condense simultaneous adjudications so that they only have the effect of a single conviction.

B. Concurrent Sentences

Second, and closely related, there should also be a presumption that when an adult is convicted on multiple counts but then given concurrent sentences, all of the crimes giving rise to the conviction are inter-related and should only be counted once. An illustration should help to explain the basis for this concern. Whether an individual is convicted on one or five counts of selling drugs to undercover police officers, none of us would really believe that those were the only times the person engaged in drug selling activity. When a judge decides that the person was guilty on all five counts, but then orders concurrent sentences for the five offenses, the judge has made a logical decision that the individual should be treated in the same manner as a person who was only caught once while selling drugs. It’s often an issue of law enforcement procedure or prosecutorial discretion, rarely an issue of true culpability. As a general rule, whenever judges impose concurrent sentences, they are sending the message that the crimes involved should be understood as a single instance of criminal behavior. Again, the presumption should be that only a single offense – the most serious of those involved – took place for purposes of measuring criminal history.

C. Drug Treatment and Alternatives to Prison

Finally, in Kansas the legislature should take a serious look at how it is dealing with drug offenses. An effort needs to be made to be sure that sentences for drug crimes are proportional to those imposed for other crimes. The need for this effort has grown as funding for treatment programs within the correctional system has been reduced.
Producing methamphetamine in Kansas is now considered to be a more serious criminal act than second degree murder;\textsuperscript{131} that change in law came about because of a perception that prior Kansas law did not impose high enough penalties for manufacturing of meth. The legislature adopted the amendment to match what surrounding states were doing, but without seriously considering how that particular drug crime compared to crimes of violence. Legislators need to ask whether that is rational, and to seriously look at whether we have struck a proper balance between imprisonment and treatment.

Expansion of treatment programs is especially important given the extent to which sentencing guidelines shifted the emphasis of criminal sanctions away from rehabilitation. Expanding treatment alternatives can help to restore rehabilitative goals, both at the time of sentencing and as a prelude to rejoining society for those who have been incarcerated.

Members of the legislature also need to continually ask whether the state is taking proper advantage of alternatives to prison. In recent years states have developed a range of intermediate sanctions that are less severe than imprisonment but more restrictive than standard probation – including treatment programs, home detention, daytime reporting centers, substance abuse monitoring, community service, restitution and fines.\textsuperscript{132} New technologies that permit intensive supervision within communities have the advantage of both maintaining public safety and keeping persons convicted of crimes in productive activities. In Kansas, however, there has been a serious problem with implementation of laws that would provide for some form of community corrections. After more than a year, both Kansas City and Wichita had delayed implementation of legislative plans to establish day reporting centers because they are unable to agree on placement of those centers.\textsuperscript{133} No one wants such centers placed in their “backyard,” or within ten blocks thereof. Community resistance can undermine the most reasonable legislative acts and needs to be understood as an element of policy development.

CONCLUSION

For many years I have been an advocate for inmates. I am not, however, antiprison, and I don't believe that the only purpose of imprisonment is rehabilitation. Proportionate punishment may be appropriate. Serious violation of society’s rules, especially violations that inflict harm on other persons, should lead to a period of constraint, at times including removal from society. A period of removal is consistent with reasonable conceptions of equity and reciprocity. But the removal will come at a cost, because it needs to be consistent with underlying concern for the dignity of all human beings.

Criminal sentencing should be fair, proportionate and humane. Most legislators and most of the public would agree with these principles, even if they disagree about the details. In order to fashion rational sentencing policies that meet these standards, there must be continuous dialogue between courts, corrections officials, legislators and the
Prison Conditions

public so that we can respond intelligently to the deep emotional responses we feel towards criminal behavior. The better the education, the less the need for judicial intervention.

Notes


3. Id. at 3.


6. Id. at 7-12.

7. See Letter from Charles E. Simmons, Kansas Department of Corrections Chief Legal Counsel, to Scott McKenzie, Legal Intern (May 10, 1984) (noting "substantial increases in population have made achieving this goal considerably more difficult") (on file with author).

8. Secretary Barbara was on leave from the Washburn Law School faculty. Observations about his intentions and experiences are based upon conversations with him which took place after his return to the faculty.

9. Conversation with Secretary Barbara (Spring 1985).


11. Letter from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, United States Department of Justice, to Governor Michael Hayden (June 3, 1987) (on file with author).


13. See Martin Hawver, Hayden Withholds Endorsements of Prison Plan, THE TOPEKA CAPITAL-JOURNAL, Mar. 18, 1988, at 1A (quoting Governor Hayden saying that “The problem is documented to be especially aggravated over the last eight years” and that “Two previous governors tried to deal with the problem either by changes in sentencing or changes in the infrastructure, and were unsuccessful”).


17. See Roger Myers, State Likely to Lose Suit by Inmate, Hayden Says, THE TOPEKA CAPITAL-JOURNAL (Mar. 9, 1988), at 1A (noting that Governor Hayden “admitted Tuesday that the state probably will lose a lawsuit filed on behalf of prison inmates that alleges that overcrowding is so severe at the Kansas penitentiary that the inmates’ constitutional rights are being violated”).
20. Id. at 8.
21. See Kan. Stat. Ann. § 21-4706, 4722 (1995) (Good time credit was calculated so that inmates who remained on good behavior could move up the date at which they would be released on parole).
23. Id.
29. Id. at 25.
31. For discussion of disparity among judges within a judicial district, see Robert T. Stephan, Sentencing Reform, National Association of Sentencing Commissions, 2001 Conference Program (Aug. 6, 2001) (proceedings to be published by the association).
32. Kansas Sentencing Commission, supra n. at 3.
33. Id. at 28.
34. Id.
35. Id.
36. Id. at 67-77.
38. See Memorandum from C. Fred Lorentz, President, The Kansas District Judges’ Association, letter to Senator Wint Winters, Chairman, Senate Judiciary Committee, and Representative John Solbach, Chairman, House Judiciary Committee, (Feb. 21, 1992) (opposing sentencing guidelines) (on file with author).
39. See Gottlieb, supra note at 82.

41. KANSAS SENTENCING COMMISSION, supra note at 115.
42. See Stephan, supra note at .
43. At approximately this point in the process, an advisor to the governor explained to me that explanations of more than one sentence were never politically salable.
44. K.S.A. § 21-4724(c)(1) (Supp. 2000).
46. See KANSAS SENTENCING COMMISSION, supra note at 4 (noting that “drug crimes and other crimes grow at different paces and need different strategies”).
47. See William J. Rich, Testimony before the Special Joint Committee on Judiciary regarding Kansas Sentencing Guidelines (July 26, 1990) (on file with author).
50. See Minn. Stat. § 590.01, subd. 3 (2000); Addleman v. Board of Prison Terms, 730 P. 2d 1327, 1332 (1986) (ruling that the Washington Reform Act as “remedial legislation presumed to apply retroactively” and requiring Washington parole board to “consider the purposes, standards and ranges to the [sentencing guidelines] and make decisions reasonably consistent with them”).
52. At the time when sentencing guidelines were considered in Kansas, the Sentencing Guidelines Commission noted a 1988 Rand Corporation Study which found that “the California structured sentencing system with the virtual elimination of racial disparity.” SENTENCING COMMISSION RECOMMENDATIONS, supra n.28 at 4. But see Associated Press, Minorities make up about half of Kansas prison population, TOPEKA CAPITAL-JOURNAL (Aug. 13, 2001) at 4B (noting “Percentage of black inmates six times percentage of black people in overall population” and that percentage of black inmates had only dropped from 39 per cent of the inmate population in 1993 to 36 per cent of that population in 2000).
53. Hearing before the Kansas Senate Judiciary Committee (July 26, 1990) (statement of Carla J. Stovall) (recollections of author).
54. See Lewis, supra note at 339 (noting that “racial disparities still exist but on a lesser scale than was observed prior to July 1, 1993).
55. See National Association of Sentencing Commissions, 2001 Conference, Aug. 6, 2001, first plenary session, at which panel members were asked to address the question: “Should sentencing policy drive resource allocations or should resource availability drive sentencing policy?” (Publication of conference proceedings pending).
56. Letter from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, United States Department of Justice, to Governor Michael Hayden (June 3, 1987) (copy on file with the author).
57. See Olson v. Bennett, No. 77-3045 (July 31, 1978) (affidavit of Donald G. Henderson) (on file with author).
In Kansas, the state legislature has seemed far more willing to increase funding in response to demands by private providers of service as compared to requests from government agencies. For example, Kansas was the first state in the nation to “privatize” its delivery of foster care services. The prior system, managed by the State Department of Social and Rehabilitation Services, had been chronically underfunded and understaffed, with long lists of children in need of care. In the four years following privatization, funding for foster care families has risen from $10 per day to as much as $70 per day; adoptions are up by 78%. See “Privatized Child Welfare,” The Topeka Capital Journal (Aug. 18, 2001) at <http://www.cjonline.com/stories/081801/opi_childwelfare.shtml>.

60. See generally WILLIAM S. LOGAN, LEGISLATIVE CONSULTATION ON MENTAL HEALTH CARE IN THE KANSAS DEPARTMENT OF CORRECTIONS, (June 23, 1989) (assessing mental health needs of department of corrections).


67. See Farrier, supra note at 9.


70. See, e.g., comments of Senator Dole, denouncing “liberal Federal judges.” 141 CONG. REC. S14,414 (daily ed. Sept. 27 1995). Also see comments of Senator Abraham that people “deserve better than to have their money spent on keeping prisoners in conditions some Federal judge feels are desirable, although not required by any provision of the Constitution or any law.” 141 CONG. REC. S14, 419 (daily ed. Sept. 27, 1995).


79. The court orders of Judge Rogers are currently dormant. They could be revived if the state lost accreditation at its facilities in Lansing, Hutchinson or El Dorado, or if the prison population once again exceeded the capacity of its facilities. See Order, Arney v. Hayden (D.Kan. Apr. 13, 1989) (granting permanent injunctive relief). Under the PLRA, the revived standards issued by Judge Rogers should then be enforceable for a period of two years.
82. To Talk about Prisons, Lawmakers Meet with Judge, INDEPENDENCE DAILY REP., May 2, 1989, at 1.
83. See articles cited supra note .
85. At the associate level, a law firm can expect to have an “overhead factor” equal to approximately 125% to 135% of compensation. What You Need to Know About the “New” Leverage, COMPENSATION & BENEFITS FOR LAW OFFICES, Sept. 2000, at 1.
88. See CHESTER JAMES ANTEAU AND WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 49.18 (2d ed. 1997).
89. For comparison, see Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) (finding that Congress violated First Amendment by barring legal services lawyers from challenging welfare legislation).
92. The Edna McConnell Clark Foundation provided major funding for prison reform litigation in Kansas; that foundation grant was repaid from funds awarded as attorneys fees.
95. The major difficulty in bringing successful separation of powers challenges to the Prison Litigation Reform Act is that the Supreme Court appears to view prison conditions litigation in a manner that bears a close resemblance to the perspective of Congress. See Lloyd C. Anderson, Congressional Control Over the Jurisdiction of the Federal Courts: A New Threat to James Madison's Compromise, 39 BRANDEIS L.J. 417, 441-42 (2000).
97. See, e.g., Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980); Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977).
99. Id. at 302.
102. Id. (finding that over-crowding did not constitute a due process violation).
105. Id. at 406 (Stevens, J., dissenting).
108. In his opinion for the Court, Justice Stevens stressed that “nothing in this history suggests that it is impermissible for judges to exercise discretion — taking into consideration various factors relating both to offense and offender — in imposing a judgment within the range prescribed by statute.” Apprendi, 530 U.S. at 481 (emphasis in the original).
109. Id. (noting that “judges in this country have long exercised discretion of this nature in imposing sentence within statutory limits in the individual case”) (emphasis in the original).
110. Id.
112. Apprendi, 530 U.S. at 494.
114. Id. at 540 (O'Connor, J., with whom Rehnquist, C.J., Kennedy, J. and Breyer, J., join, dissenting).
120. See Lewis, supra note at 355.
124. Id. at 437.
125. Id. at 426.
127. In Kansas, juvenile adjudications are generally treated in the same manner as adult convictions, and age of the defendant at the time of prior convictions is not even treated as an explicit mitigating factor when imposing sentences. KAN. STAT. ANN. § 21-4712(f) (Supp. 2000).
128. See supra, text accompanying note .
129. Kansas law currently requires that “all convictions, whether sentenced consecutively or concurrently, shall be counted separately in the offender’s criminal history.” KAN. STAT. ANN. § 21-4710(c) (1995). In contrast, Kansas gives the judge discretion whether to impose consecutive or concurrent sentences when ruling upon multiple convictions, and if the record is silent it is presumed that sentences will run concurrently. KAN. STAT. ANN. § 21-4720(b) (Supp. 2000).
130. Note that comparable problems could be identified with assumptions that criminal sentences for drug-related crimes should vary dramatically based upon the amount of the drug found in the defendant’s possession at the time of arrest.
131. Producing methamphetamine is a level 1 drug felony, KAN. STAT. ANN. § 65-4159 (Supp. 2000), while second degree murder can be either a level 1 or 2 person felony. KAN. STAT. ANN. § 21-3402 (Supp. 2000). For a person with no prior criminal record, a level 1 drug felony carries a more severe punishment (138 to 154 months) than a level 2 person felony (109 to 123 months) and overlaps with the range of incarceration provided for a level 1 person felony (147 to 165 months). KAN. STAT. ANN. § 21-4704, 4705 (Supp. 2000).
132. See Frase, supra note at 441 (indicating that some states have incorporated the range of intermediate sanctions into their guideline grids).