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ARTICLES

Difficult Times in Kentucky Corrections—Aftershocks of a “Tough on Crime” Philosophy

BY ROBERT G. LAWSON*

INTRODUCTION

Two sets of recent events, one that was open to public view and one that was carefully concealed from the public, dramatically portray the difficult times that prevail in Kentucky's corrections system, although in very different ways. The first set of events began near the end of 2002 with Governor Patton issuing an executive order that commuted the sentences of 567 convicted felons and ordered their immediate release from state custody,¹ a move made necessary according to Governor Patton as part of “continuing efforts to manage the financial woes of the state.”² The Governor was operating the state at the time on a spending plan rather than a budget (because the legislature had failed to enact a budget bill for 2002) and perhaps was acting to draw attention to the legislature's failure to perform its constitutional responsibility to pass a budget. Needless to say, his acknowledgement that the state had more inmates than it could afford to imprison achieved his objective and more. Word that Kentucky was releasing convicted felons early attracted attention far and wide, but it attracted more than just attention inside the state's boundary lines. Law enforcement officials described the

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¹ Exec. Order No. 2002-1379, Paul E. Patton, Governor, Commonwealth of Kentucky (Dec. 16, 2002).

² Press Release, Ky. Dep't of Corr., Governor Patton Orders the Early Release of Non-Violent Offenders to Offset Budget Shortfalls for the Department of Corrections (Dec. 16, 2002).

Governor's early release program as a "get-out-of-jail-free card"³ and took steps to let the public know that they were "miffed that [the Governor] ha[d] 'undercut' their work."⁴

Undaunted by this reaction, the Governor duplicated his decision within a few weeks and commuted the sentences of 328 additional convicted felons,⁵ describing his release order on this occasion as "a very difficult decision . . . that is absolutely necessary as a part of the solution to Kentucky's severe fiscal revenue shortfall."⁶ The reaction this time was louder, harsher, and more critical of the Governor. Prosecutors accused him of putting citizens at risk and of playing politics with the public's safety,⁷ editorial writers described his actions as "ill-fated"⁸ and "a colossal political blunder,"⁹ and the Attorney General tried without success to challenge his authority in court, describing "the early release . . . [as] 'an immediate and irresponsible danger' to the public."¹⁰ But when the fury died down and the dust settled over these events, the early release program had done nothing in one respect and much in another. Because the early releases were not in fact very early,¹¹ the program did almost nothing to reduce the mass of humanity in the state's incarceration facilities and provided no lasting relief from the budget problems that triggered it in the first place. On the other hand, the program cast some badly needed light on problems in the state's corrections system and for the first time in a long while aroused some public interest in the state's heavy, if not insatiable, appetite for incarcerating its citizens.

Overlapping this set of recent events involving the early release of convicted felons was a second set of events that spoke almost as

³ See Louise Taylor, *Inmates Get Early Release: Money-Saving Measure Miff's Prosecutors*, LEXINGTON HERALD-LEADER, Dec. 19, 2002, at A1 (quoting Fayette County Commonwealth's Attorney Ray Larson).

⁴ *Id.*

⁵ See Exec. Order No. 2003-37, Paul E. Patton, Governor, Commonwealth of Kentucky (Jan. 14, 2003).

⁶ Press Release, Ky. Dep't of Corr., Governor Patton Orders Second Early Release of Non-Violent Offenders to Offset Budget Shortfalls for the Department of Corrections (Jan. 14, 2003).

⁷ See *Governor Halts Early Releases; Warns They Could Resume*, LEXINGTON HERALD-LEADER, Feb. 1, 2003, at A1 (quoting prosecutors from several counties).

⁸ Larry Keeling, *No State Tax Increases? See Latest Tuition Hikes*, LEXINGTON HERALD-LEADER, Mar. 23, 2003, at D1.

⁹ Editorial, *Crime and Punishment*, KY. POST, Mar. 22, 2003, at K4.

¹⁰ Tom Loftus, *Hearing Set on Release of Prisoners*, COURIER-JOURNAL (Louisville), Jan. 18, 2003, at 1B (quoting former Kentucky Attorney General Ben Chandler).

¹¹ The inmates covered by the first commutation order were released an average of 80 days early, while those covered by the second order were released an average of 136 days early. See Press Releases, *supra* notes 2 and 6.

forcefully about the magnitude of problems for Kentucky corrections, although this time not so dramatically and not under the watchful eye of an interested public. At the center was a Kentucky statute providing that “[t]he period of time spent on parole shall not count as a part of the prisoner’s maximum sentence” if the inmate is returned to prison for violation of parole.¹² Not even inmates could complain with a straight face about the fairness and common sense of the position expressed in this law. Nonetheless, in 2002 (before the early release program described above) a bill was introduced in the legislature to amend the statute to require full credit on prison terms for time spent on parole by inmates returned to prison for parole violations not involving new felony convictions.¹³ The bill went to the Senate Judiciary Committee, was given minimal and probably indifferent consideration, and then died on the legislative vine without as much as a committee vote. The thought of equating time on parole with time in prison in calculating completion of sentences proved to be too much to swallow in a “tough on crime” environment, even with full prison facilities and a budget crisis on the horizon.¹⁴ At least, it was too much to swallow under the watchful eye of law enforcement officials and the general public.

The legislature opened its 2003 session with its members’ attention focused primarily on the state’s budget crunch. The inmate population problem in corrections was on the legislative radar screen because of the early release program, and it was on the public’s mind for the same reason.¹⁵ No bill was ever introduced to resurrect the idea of equating time on parole with time in prison in calculating sentences, and no entry on the subject can be found in the action ledgers of those committees that could be expected to discuss and debate such an idea. Nonetheless, there emerged from the session a prison–sentence–calculation law identical to the bill that had died in the 2002 session:

Notwithstanding KRS 439.344, the period of time spent on parole shall count as a part of the prisoner’s remaining unexpired sentence . . . when

¹² KY. REV. STAT. ANN. [hereinafter K.R.S.] § 439.344 (Banks–Baldwin 2004).

¹³ S. 173, 2002 Gen. Assem., Reg. Sess. (Ky. 2002).

¹⁴ The impact of this initiative on prison numbers promised to be substantial and lasting since many parolees are returned to prison for completion of their sentences, and about two-thirds of them are returned for parole violations that do not involve new felony convictions. See Ky. Dep’t of Corr., Recidivism 1999–2000, 11 (2000) (unpublished, on file with author) [hereinafter Dep’t of Corr., Recidivism].

¹⁵ See *Governor Halts Early Releases*, *supra* note 7. Critics wanted to cast doubt on the wisdom of the Governor’s actions and found opportunity to do so early. “In two noteworthy instances in Western Kentucky, one [former] inmate was arrested and charged with robbing several banks, while another [former] inmate . . . was charged with a rape that allegedly occurred . . . three days after he was released.” *Id.*

a parolee is returned as a parole violator for a violation other than a new felony conviction.¹⁶

The law came into existence without identifiable sponsors or supporters and without any open discussion or debate, buried away as a “special provision” in a budget bill that consisted of hundreds of pages in the session’s enacted legislation.¹⁷ As a part of the budget bill, it makes no permanent change in the sentencing laws, will have no effect at the end of the budget period unless reenacted into law in some other form, and for these reasons alone looks almost like a desperate, certainly a feeble, attempt to address the serious population problems of the state’s prison system. The fact that it came into existence as it did, out of the deep shadows of the General Assembly, suggests that there is enormous political risk in any action that appears to show softness toward crime, while the fact that it came into existence at all suggests that there are at least some people, most likely the professionals in the corrections department, who fully understand the magnitude and seriousness of the population problem in the prison system.

The inmate population problem disclosed or suggested by these two sets of events is not unique to Kentucky. The thirst for incarceration of citizens has reached levels far beyond anything ever experienced in this country’s history and seems to exist unchecked in almost every corner of the nation. In its annual report of crime statistics in 2003, the United States Department of Justice reported that in 2002 the inmate population in federal and state prisons and jails reached and exceeded the two-million mark for the first time.¹⁸ In light of this astounding statistic, it is no surprise that the country also has an astounding number of citizens on probation and parole: “On any given day, more than 5 million people are under the supervision of the correctional system This constitutes nearly 3 percent of the total [adult] resident population, a rate of state supervision that is unprecedented in U.S. history.”¹⁹ When the two populations are combined (incarcerated and supervised), the country’s corrections systems have custody or control over approximately seven million people.

The huge appetite for incarceration of citizens reflected in these numbers is a relatively new development for America, shown by the fact that just thirty years ago the country’s inmate population stood at less

¹⁶ 2003 Ky. Acts ch. 156, § 36(a), at 1876.

¹⁷ See *id.* at 1723–1912.

¹⁸ See Paige M. Harrison & Allen J. Beck, *Prisoners in 2002*, BUREAU OF JUST. STAT. BULL. 1 (July 2003).

¹⁹ Marie Gottschalk, *Black Flower: Prisons and the Future of Incarceration*, 582 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 197 (July 2002).

than 330,000.²⁰ The thought that the country holds more than two million citizens in custody is disquieting on its own, but is much worse than disquieting when put in a proper historical and comparative context:

From the mid-1920s to the early 1970s, the incarceration rate in the United States was remarkably stable, averaging 110 state and federal prisoners per 100,000 people. While the U.S. rate tended to be higher, it did not radically exceed the incarceration rates of other advanced industrialized countries. Since the early 1970s, the U.S. rate of imprisonment has accelerated dramatically, resulting in a fivefold increase in the incarcerated population between 1973 and 1997. Today, the rate of incarceration in prison is 478 per 100,000. If jailed inmates are included, the rate jumps to 699 per 100,000, which is six to ten times the rate of the Western European countries. This constitutes a higher proportion of the adult population than any other country in the world except Russia. *The United States, with 5 percent of the world's population, has 25 percent of its prisoners.* Even after taking into account important qualifications in use of the standard 100,000 yardstick to compare incarceration rates cross-nationally, the United States remains off the charts.²¹

The most salient points of this statement should be underscored—America has increased its incarceration rate 500% in twenty-five years, it has 5% of the world's population but 25% of its prisoners, and it competes only with Russia for world leadership in putting people in prisons and jails. No one defends these results by arguing that America has more lawlessness than other parts of the world, and no one argues that America has made great progress in controlling crime by filling prisons and jails to the brim and beyond, leaving open the not-so-remote possibility that the country has lost sight of the enormous pain of imprisonment and the fact that along with its two million inmates, it also holds in custody two million real people.

For the first time in twenty-five years, driven to some extent by the troubling facts and figures set out above and perhaps to a greater extent by harsh economic conditions in state budgets, law and policy makers have begun to manifest some serious concern over the masses of humanity in the prison systems and to question the soundness of tough-on-crime policies that work to overload a corrections system that is already bulging at every seam.²² There is a scent of reform in the air, and

²⁰ See MARC MAUER, RACE TO INCARCERATE 19–20 (1999).

²¹ Gottschalk, *supra* note 19, at 197 (emphasis added) (internal citations omitted).

²² For example, in February 2003 the National Conference of State Legislatures organized a meeting of state legislators from around the country that were responsible for criminal justice matters in their own states for a roundtable discussion on how to deal with corrections issues (especially those affecting the operation of prisons) in a period of

thus an opportunity for an enlightened debate over whether this country is well-served by laws and policies that fill to capacity all the prisons and jails the nation can build in pursuit of a belief that harsh punishment and long prison sentences are indispensable to public order and public safety. It remains to be seen whether this concern will vanish along with state budget shortfalls, whether it will lead to meaningful and far-sighted reform or to ill-advised, feeble, quick fixes like the one that made its way into Kentucky's 2003 budget bill, and whether lawmakers can and will run the political risk of reversing the nation's massive expansion of its reliance on incarceration in favor of less punitive and less intrusive forms of punishment. In the meantime, we need to better understand where we are since we began embracing a tougher approach to crime control, how we might have diminished the quality of criminal justice in this country and in our state, and where we may be headed without a significant change of direction in our course. All of this bears on the focus, objective, and content of this article.

The objective of this article is to cast some light on corrections-system problems brought on by elevated (and possibly unnecessary) levels of incarceration, and especially on problems that trouble the Kentucky corrections system and threaten to undermine the effectiveness of the state's justice system. Part II describes how the country came to embrace sentencing policies and practices capable of producing "a penal system of a severity unmatched in the Western world."²³ Part III describes Kentucky's embrace of equally harsh sentencing policies and practices and the inmate population explosion that has occurred as a direct result of those policies and practices. In Part III, attention is also given to the huge costs associated with Kentucky's tough-on-crime movement. Part IV is devoted to an identification of particular laws and practices that have contributed most significantly to the astonishing growth in Kentucky's incarcerated population over the last quarter century. Part V examines some trends and projections in the prison population in order to draw some attention to the most serious problems that lie ahead if the state chooses to maintain its present course.

budget shortfalls. See ROBIN CAMPBELL, DOLLARS & SENTENCES: LEGISLATORS' VIEWS ON PRISONS, PUNISHMENT, AND THE BUDGET CRISIS 3 (Vera Inst. of Justice 2003); see generally DANIEL WILHELM & NICHOLAS R. TURNER, IS THE BUDGET CRISIS CHANGING THE WAY WE LOOK AT SENTENCING AND INCARCERATION? 1 (Vera Inst. of Justice 2002) (suggesting the need for sentencing commissions to address the issue of fiscal resource management); Michael M. O'Hear, *The New Politics of Sentencing*, 15 FED. SENTENCING REP. 3 (2002) (discussing changes in the politics of sentencing).

²³ MICHAEL TONRY, SENTENCING MATTERS 24 (1996).

II. THE ROAD TO HARSHER PUNISHMENTS

A. Introduction

America's decision to wage war on crime through heavier incarceration of its citizens has no specific birth date, although many if not most authorities would agree that philosophical change with regard to incarceration had begun to rear its head by the mid-1970s, just as the state of Kentucky prepared to embark upon a new endeavor of its own involving the justice system. The Kentucky General Assembly undertook a major reform of the state's criminal laws during the late 1960s and early 1970s,²⁴ completed that effort in 1974,²⁵ and gave the state a modern penal code that took effect on the first day of 1975.²⁶

The concurrence of these two events—the beginning of a “tough-on-crime” era in the country and the nearly simultaneous adoption of a new comprehensive penal code for Kentucky—makes the Kentucky situation an especially suitable one for an examination of the inmate population explosion and its effects upon the justice system. The new code arose during an era not dominated by the belief that crime can and should be controlled by infliction of harsh punishment, and in most respects it duplicated the sentencing policies and practices that prevailed in most of America ahead of the tough-on-crime era. It provides a good benchmark for assessing policies and practices dominated by subsequent harsher beliefs, especially when looking for specific causes for an inmate population that has grown by nearly 600% since the new code was adopted. In its heyday, this benchmark was called the rehabilitative model of sentencing.

B. The Rehabilitative Model

Rehabilitation of offenders is only one of four goals that criminal law scholars and philosophers have used as justification for inflicting punishment (including imprisonment) on citizens:

²⁴ In 1968, the General Assembly directed the Kentucky Crime Commission and the Legislative Research Commission to prepare comprehensive recommendations for reform of the state's criminal laws. *See* 1968 Ky. Acts ch. 230, at 895–96 (1968). In 1971, these two agencies completed their work and published a recommended new penal code for Kentucky. *See* KY. CRIME COMM'N & LEGISLATIVE RESEARCH COMM'N, KENTUCKY PENAL CODE: FINAL DRAFT (1971) [hereinafter *PENAL CODE: FINAL DRAFT*]. In 1972, the General Assembly enacted this recommendation into law and gave the enactment a deferred effective date of July 1, 1974, intending to revisit the new legislation during the 1974 legislative session. *See* 1972 Ky. Acts ch. 385, at 1653.

²⁵ 1974 Ky. Acts ch. 406.

²⁶ *See* K.R.S. §§ 500–534 (Banks–Baldwin 2004).

Four major goals are usually attributed to the sentencing process: retribution, rehabilitation, deterrence, and incapacitation. Retribution refers to just deserts; people who do certain things deserve to be punished. . . . Deterrence emphasizes the onerous-ness of punishment; offenders will be deterred from committing crimes because of a rational calculation that the costs of punishment are too great. . . . Incapacitation deprives a person of the capacity to commit crimes because they are physically detained in prison; when offenders are in prison they cannot commit crimes in the community. Rehabilitation is directed toward changing offenders so they will not continue to commit crime in the future.²⁷

No one could claim that rehabilitation ever served as the exclusive goal of sentencing and punishment; however, no one could reasonably dispute its predominance during a lengthy period of American history. As one leading authority has stated, “[t]he twentieth century began with the confident march of rehabilitative trumpets,”²⁸ and “[r]ehabilitation remained the central professed goal of American criminal justice . . . until the final quarter of the twentieth century.”²⁹

The sentencing model that developed during this period varied somewhat from jurisdiction to jurisdiction but had far more common than uncommon components. The most prominent and influential formulation of the model occurred with the adoption of the Model Penal Code in 1962.³⁰ In its most general provision about punishment, the Model Code identified “crime prevention” as the first and broadest of several purposes for sentencing of offenders³¹ and said that this purpose was flexible enough to serve the traditional goals of deterrence, incapacitation, and rehabilitation.³² In addition, the Code indicates that its specific provisions on sentencing were designed “to promote the correction and rehabilitation of offenders.”³³ Then, in its specific provisions on sentencing, the Code recommended all of the essential components of a rehabilitation model—penalty ranges for most crimes,

²⁷ DORIS L. MACKENZIE, SENTENCING AND CORRECTIONS IN THE 21ST CENTURY: SETTING THE STAGE FOR THE FUTURE I (Nat’l Inst. of Justice 2000).

²⁸ Albert Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next*, 70 U. CHI. L. REV. 1, 1 (2003).

²⁹ *Id.* at 6.

³⁰ MODEL PENAL CODE (1962).

³¹ See *id.* § 1.02(2)(a).

³² “[P]enal sanctions may advance preventive ends in different ways—by fortifying normal instincts to refrain from injurious behavior, by deterrence both general and special, by incapacitating persons who are dangerously disposed to engage in criminal conduct, and by correcting those who manifest such antisocial disposition.” MODEL PENAL CODE § 1.02 cmt. 3(a) (1985).

³³ *Id.* § 1.02(2)(b).

indeterminate sentencing for serious offenses, individualization of punishment (i.e., fitting the punishment to the offender rather than the offense), broad discretion placed in the hands of sentencing authorities, and heavy use of parole for determining the actual lengths of incarceration.³⁴ More importantly perhaps, it recommended provisions that favored probation and parole over incarceration, and in its commentary spoke very strongly against excessive reliance on imprisonment in efforts to control criminal conduct:

The Code accords a substantial priority to sentences that do not involve imprisonment. There is no offense as to which imprisonment is absolutely required When the court is deciding between imprisonment and withholding imprisonment, it is to choose against imprisonment unless one of the specified grounds justifying imprisonment is found. A sentence not involving imprisonment avoids the poor associations and uselessness that confinement brings; and it can convey the community's confidence that an offender can live responsibly and give him a special incentive to do so. If the offender is imprisoned, the parole board is directed to release him when he is eligible for parole unless one of the specified reasons for further confinement is thought to obtain.³⁵

In this regard, and in most others involving sentencing, the Model Code was more reflective of the rehabilitative perspective of its time than it was innovative. It contained barriers to an excessive reliance on incarceration, encouraged and promoted the use of lesser rather than greater punishments, and supplied no fuel for a population explosion in the country's corrections systems. It could not have produced incarceration rates beyond anything ever seen before without a substantial modification of philosophy and substance.

³⁴ See *id.* arts. 6–7. “[C]onsiderable latitude to determine sentences in individual cases is left to the courts and to parole authorities. As far as major sentences to imprisonment are concerned, the Code affords considerable judicial discretion and accepts the desirability of substantial indeterminacy in the length of sentence actually to be served. One underlying assumption of this approach is that no legislative definition and grading of substantive offenses can capture all the factors that are relevant to an appropriate sentence and that, in the language of Section 1.02(2)(e), offenders should be differentiated ‘with a view to a just individualization in their treatment.’ A second underlying assumption is that only up to a point can this differentiation be carried out at the time of sentencing, that the proper length of imprisonment depends considerably on an offender’s response to conditions of imprisonment and on his perceived capacity to refrain from criminal acts at the time he is to be released.” *Id.* arts. 6 & 7 introductory cmt. at 4.

³⁵ *Id.* at 8–9.

C. "A Perfect Storm"

Perhaps even before the ink was dry on the final draft of the Model Code, seeds for a much tougher attitude toward crime had been planted and conditions necessary for a radical change in the direction of the justice system were barely beyond the horizon. At least some, maybe much, of the impetus for this change is traceable to the tumultuous and troubled times of the 1960s. There was war abroad, disobedience at home, and aggressive group and individual misbehavior never before seen in America. This misbehavior was delivered daily, in disturbing doses, to living rooms and workplaces across the country:

This decade [the 1960s] was a period of increasing crime, youthful experimentation with drugs, police repression of civil rights demonstrators, draft-card and flag burning, Stokely Carmichael, Jane Fonda, the assassinations of John F. Kennedy, Robert Kennedy, and Martin Luther King, Jr., Black Panthers, Richard Speck . . . sexual liberation, the Chicago Eight, and the Warren Court's due process revolution.³⁶

Violence in the streets, burning and looting in inner cities, and rioting in a major prison system combined with some of the tragic events described above to create a much greater public fear of crime, increased doubts about the effectiveness of the justice system, and a very intense resentment of criminals. By the end of the 1960s and the beginning of the 1970s, the public was in the mood for an elevated war on crime and for a "law and order" strategy that would seek to restore social order by inflicting substantially harsher punishments on offenders. These events set the stage for "a perfect storm," an unusual combination of events and forces that would produce a very abrupt change of direction in the criminal justice system, one that would seem in hindsight to have come to pass "almost in an instant."³⁷

In the early 1970s, a highly respected jurist questioned the fairness of the rehabilitative model in a widely distributed publication³⁸ at about the same time that a group of respected social science scholars were raising doubts about the effectiveness of rehabilitation efforts.³⁹ Critics of

³⁶ Alschuler, *supra* note 28, at 13.

³⁷ *Id.* at 9.

³⁸ See MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

³⁹ See, e.g., Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 25 (1974) ("With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism."); D. LIPTON ET AL., THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF

existing policies and practices seized the moment. Some “argued that judicial discretion [in sentencing] leads to widespread disparity and arbitrariness in individual sentences [and that] discretion in parole boards to determine date of release is similarly productive of injustice.”⁴⁰ Others argued that “[r]ehabilitation, tested empirically, is a failure; nothing works as a prison reform program to reduce recidivism,”⁴¹ while still others argued that parole boards “are unable to assess the benefits of corrections programs to individual offenders and unable to predict the likelihood that an offender will commit further crimes.”⁴² Although some would later retreat from earlier views and positions,⁴³ the critics at least provided further fuel for an environment that had already been inflamed by the public’s fear of crime and its elevated level of resentment of criminals.

Then there arrived on the scene, still in the 1970s, a coalition of forces favoring sentencing reform that virtually guaranteed a radical change of direction in the justice system. Law and policy makers at both ends of the political and social spectrum (the “hawks and the doves of the criminal process”)⁴⁴ moved concurrently, if not jointly, against the rehabilitation sentencing model, although pushed in that direction by vastly different motives. Conservatives believed that rehabilitation was a fantasy and a failure and that the sentencing system merely coddled the criminal elements of society; they raved about and railed against sentencing discretion, indeterminacy, and alternatives to tough punishment. Liberals brought to the coalition concerns about fairness

TREATMENT EVALUATION STUDIES ch. 8 (1975) (summarizing treatment outcomes of rehabilitative efforts).

⁴⁰ MODEL PENAL CODE arts. 6 & 7 introductory cmt. at 11–12 (1985).

⁴¹ Leonard Orland, *From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation*, 7 HOFSTRA L. REV. 29, 33 (1970); see also Martinson, *supra* note 39, at 25.

⁴² MODEL PENAL CODE arts. 6 & 7 introductory cmt. at 12 (1985); see also Peter B. Hoffman & Michael A. Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 HOFSTRA L. REV. 89, 91 (1978) (“After several decades of research . . . empirical evidence generally fails to demonstrate that institutional rehabilitative programs are effective or that the ‘optimum time’ for release can be ascertained.”).

⁴³ For example, the social scientist who had presented the most influential criticism of the effectiveness of rehabilitation later retracted his position on the basis of further study: “And, contrary to my previous position, some treatment programs *do* have an appreciable effect on recidivism.” Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 244 (1979). In addition, a noted legal scholar who had argued for abandonment of the rehabilitative model later had a change of heart and adopted a different position: “As a former critic of indeterminacy, I must now express my serious reservations about the abandonment of rehabilitation.” Orland, *supra* note 41, at 34 (footnote omitted).

⁴⁴ Alschuler, *supra* note 28, at 9.

and, in particular, about the sentencing disparities that flow naturally and unavoidably from punishments that are made to fit offenders rather than offenses; they often criticized the rehabilitation model more vehemently and more pervasively than did the conservatives, as illustrated by the following statement from Senator Edward Kennedy in opening a 1978 symposium on sentencing reform:

Sentencing in America today is a national scandal. Every day our system of sentencing breeds massive injustice. Judges are free to roam at will, dispensing ad hoc justice in ways that defy both reason and fairness. Different judges mete out widely differing sentences to similar offenders convicted of similar crimes.⁴⁵

Although not without some fear that sentencing reform might ultimately lead to harsher punishment of defendants,⁴⁶ liberals joined conservatives in an assault upon the existing system and thereby left the rehabilitative model without defenders. By the early 1980s, most law and policy makers had abandoned rehabilitation as the predominant justification for punishment; the rehabilitative sentencing model described above was dead or dying in most jurisdictions.⁴⁷ What was to emerge as a replacement model was yet to be settled, although conditions were ripe for a very sharp turn toward sentencing policies and practices far more compatible with the "get tough" agenda of the conservatives than with the "fairness" agenda of the liberals.

D. "Just Deserts" and "Punitive Penology"

The coalition for abandonment of the rehabilitative model never converted into a coalition for a replacement model. Public opinion continued to move further to the right concerning crime and criminals, and sentencing policies and practices quickly followed, especially after candidates for public office began to discover that "law and order" was an unbeatable political strategy. Scholars formulated a new sentencing

⁴⁵ Edward M. Kennedy, *Symposium on Sentencing, Part I, Introduction*, 7 HOFSTRA L. REV. 1, 1 (1978).

⁴⁶ See *id.* at 4 ("The issue is not whether more offenders should be sentenced to prison (they should not).").

⁴⁷ The most visible rejection of the rehabilitation model occurred when Congress enacted the Sentencing Reform Act of 1984. Pub. L. No. 98-473, 98 Stat. 1988, (codified at 18 U.S.C. §§ 3551-3586, 3621-3625, 3742 (1988)). In this legislation, Congress created the Federal Sentencing Commission and laid the groundwork for elimination of judicial discretion in federal sentencing, indeterminate sentences, and the use of a parole board for determining release.

philosophy that was called “just deserts,” which relied mostly on the idea of retribution as justification for punishment:

There are four commonly accepted goals of criminal punishment: Retribution, deterrence, rehabilitation, and incapacitation/isolation. However, only retributivism contains a valid philosophical premise upon which a coherent, organized system of just punishment can be built: It is the sole penal rationale concerned exclusively with doing justice. A retributive punishment scheme is not inherently incompatible with other enumerated penal goals. Indeed, any incidental deterrent, rehabilitative, or preventive effects which result from just punishment are certainly welcome. However, these additional social-utilitarian goals cannot morally *justify* the imposition of criminal sanctions.⁴⁸

The theory of “just deserts” was that “an offender should receive in punishment as much as, and no more than he deserves.”⁴⁹ Punishment would be linked primarily to the severity of the offense so that “two offenders who commit the same offense and have similar criminal records [would] deserve [and get] the same penalty.”⁵⁰ Punishment would be fixed mostly by the law (not a judge exercising sentencing discretion), would be certain at the outset (determinate rather than indeterminate sentencing), and would be exacted in full from the offender (no parole). The shift in sentencing philosophy needed to embrace the new approach was monumental; “the new code word was ‘just desert,’ rather than the . . . discredited terms ‘punishment,’ ‘vengeance,’ or ‘retribution,’”⁵¹ but the focus of the new philosophy and approach was clearly and unmistakably on punishment for the sake of punishment.

The influence of the “just deserts” philosophy is very difficult to measure even with the benefit of hindsight. It was occasionally embraced explicitly and in pure form, as in California: “The Legislature finds and declares that the purpose of imprisonment for crime is punishment.”⁵² Most of its principles are found in the federal Sentencing Reform Act of 1984 (minimal judicial discretion, determinate sentences, no release by parole, and almost no room for alternatives to incarceration),⁵³ undoubtedly the most prominent sentencing reform of modern times. But

⁴⁸ Robert A. Pugsley, *Retributivism: A Just Basis for Criminal Sentences*, 7 HOFSTRA L. REV. 379, 381 (1979).

⁴⁹ MODEL PENAL CODE arts. 6 & 7 introductory cmt. at 13 (1985).

⁵⁰ TONRY, SENTENCING MATTERS, *supra* note 23, at 19.

⁵¹ Orland, *supra* note 41, at 33.

⁵² CAL. PENAL CODE § 1170(a)(1) (West 1985).

⁵³ Pub. L. No. 98-473, 98 Stat. 1988 (codified at 18 U.S.C. §§ 3551–3586, 3621–3625, 3742 (1988)).

neither this approach nor any other ever commanded the kind of support that had earlier been accorded to the rehabilitation model,⁵⁴ the end result of which was reform without the benefit of direction, consistency, coherence, or purpose:

If a group of corrections officials, judges, and academics from the mid-1950s were brought by time machine to our time, they would likely be astonished by the seeming confusions, complexities, and inconsistencies of policies and practices. They would be surprised by the lack of broad agreement about the purposes of the criminal justice system and the goals of sentencing and corrections.⁵⁵

The politics of crime were decidedly retributive and punitive, however, and needed no coherence to succeed. They catered to the public's fear of crime and its resentment of criminals, twisted the reform movement out of shape, and steered the country down a road "so 'tough' on crime that it would result in world record rates of incarceration".⁵⁶

The sentencing reform movement of the 1970s and 1980s prompted America's reconsideration of its penal goals. Initially, this movement seemed to be about reducing the sentencing disparities that can result from the differing views and personalities of judges. The hawks and doves of criminal process both welcomed it. In retrospect, however, the movement appears to have been a Trojan horse whose procedural facade concealed the soldiers of substantive change. It proved to be less about correcting disparities than about radically altering sentencing standards, deemphasizing the personal characteristics of offenders, substituting aggregated for individualized sentences, enhancing the power of prosecutors, and increasing the severity of criminal penalties.⁵⁷

The label "penal populism" has been used by some authorities to describe the country's turn toward punitive penology.⁵⁸ It reared its head when rehabilitation began to lose its supporters, was never presented "as a package for public debate,"⁵⁹ gained unstoppable momentum during

⁵⁴ "In 1970, every state and the federal system had an 'indeterminate sentencing system' in which judges had wide discretion to decide who went to prison and to set maximum and sometimes minimum prison terms. Parole boards decided when prisoners were released." TONRY, SENTENCING MATTERS, *supra* note 23, at 4.

⁵⁵ Michael Tonry, *The Fragmentation of Sentencing and Corrections in America*, SENTENCING AND CORRECTIONS ISSUES FOR THE 21ST CENTURY: PAPERS FROM THE EXECUTIVE SESSION ON SENTENCING AND CORRECTIONS 1, 3 (Nat'l Inst. of Justice 1999).

⁵⁶ MAUER, *supra* note 20, at 53.

⁵⁷ Alschuler, *supra* note 28, at 9.

⁵⁸ See Gottschalk, *supra* note 19, at 198.

⁵⁹ *Id.* at 196.

the last two decades of the twentieth century, and has only recently shown some signs of exhaustion. It deserves most of the credit, or most of the blame, for a criminal justice system that has “produced a wave of building and filling prisons [that is] virtually unprecedented in human history,”⁶⁰ and for rates of incarceration that qualify as disgraceful when measured against world standards.

E. Perspectives

The country’s late twentieth-century thirst for incarceration of its citizens is put in helpful perspective by statistical data contained in an especially informative book entitled *Race to Incarcerate*.⁶¹ Included in that data is a chart showing that the incarceration rates in state and federal prisons for the period from 1925 to 1970 averaged only 110 inmates per 100,000 population,⁶² a period of “remarkable stability” in America’s prison systems.⁶³ The total inmate population (all state and federal prisons) in 1972 stood at approximately 200,000, increased gradually for the next 10 years (from 200,000 to 400,000), and skyrocketed during the fifteen-year period 1982 to 1997.⁶⁴ By 1997, the total inmate population stood at approximately 1.2 million inmates,⁶⁵ an increase of 500% during a period in which the country’s population increased only 28%.⁶⁶ Needless to say, the country was exceedingly busy during part of this period providing new living quarters for inmates. “In the ten-year period beginning in 1985, federal and state governments . . . opened a new prison a week to cope with the flood of prisoners.”⁶⁷ They built them, opened them, and filled them, and by 1997 “there [were] five times as many U.S. citizens locked up as there were twenty-five years

⁶⁰ MAUER, *supra* note 20, at 9.

⁶¹ *Id.*

⁶² *See id.* at 16–17. The information for this chart and for others included in *Race to Incarcerate* was drawn from data reported by the Department of Justice’s Bureau of Justice Statistics.

⁶³ *Id.* at 16. The rate at the beginning of the period was about 80 inmates per 100,000 population (in 1925) and at the end of the period was less than 100 inmates per 100,000 (in 1970). It spiked moderately upward during the Great Depression years (“perhaps because more crimes were being committed as a result of the difficult economic circumstances”) but never reached 140 inmates per 100,000 population during this period. *See id.* at 17–18. Later, during the World War II years, the rate dropped slightly below the average for the full period (This is perhaps because “many of the young men who might otherwise have been committing crimes . . . were instead overseas fighting for their country.”). *Id.* at 16–18.

⁶⁴ *See id.* at 20.

⁶⁵ *See id.*

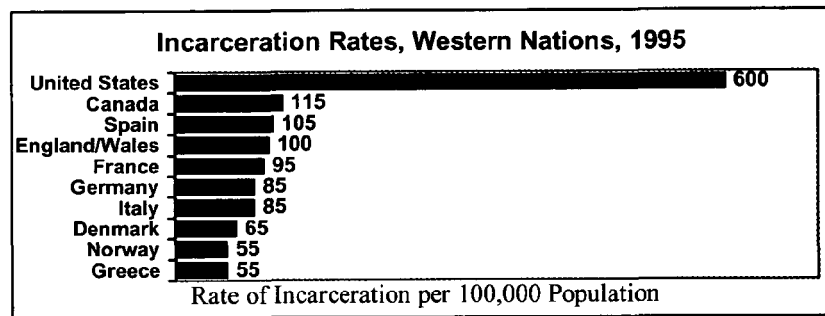
⁶⁶ *See id.* at 1.

⁶⁷ *Id.*

[earlier], for an overall rate of incarceration of 645 inmates per 100,000 population, or about one of every 155 Americans.”⁶⁸ The country’s facts and figures on incarceration have only grown more startling since the end of the period examined and reported upon in *Race to Incarcerate*.⁶⁹

In addition to providing historical perspectives concerning the country’s thirst for incarceration, *Race to Incarcerate* provides some eye-popping statistical comparisons of incarceration rates in America with incarceration rates reported by countries around the world, using the year 1995 for its comparisons. The study was designed “[t]o place some perspective on the use of imprisonment in the United States,” and involved comparisons from “59 nations in Europe, Asia, and North America for which data are available.”⁷⁰ The study produced what the author of the book called “a remarkable story.”⁷¹ The charts in Figures 1 and 2 show the study’s comparisons between incarceration rates in the United States and those of a selection of western nations, far eastern nations, and former Soviet bloc nations:

Figure 1



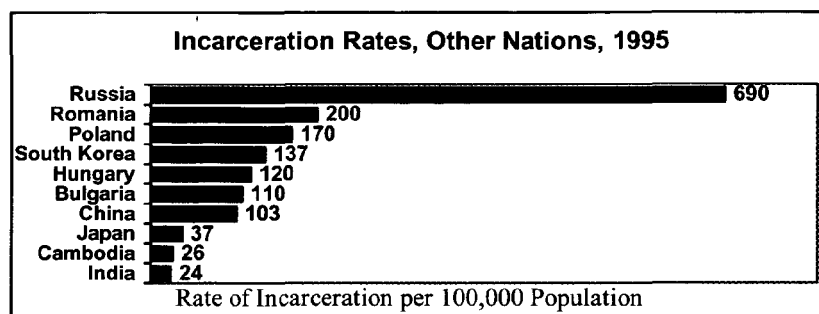
⁶⁸ *Id.* at 19.

⁶⁹ See Bureau of Just. Stat., Corrections Statistics, at <http://www.ojp.usdoj.gov/bjs/correct.html> (last visited Oct. 4, 2004) (summarizing current inmate population statistics).

⁷⁰ MAUER, *supra* note 20, at 19.

⁷¹ *Id.*

Figure 2



Although the comparisons speak loudly for themselves, *Race to Incarcerate* offered its own sobering observations:

The U.S. rate of incarceration per capita now dwarfs that of almost all [industrialized] nations: our nation locks up offenders at a rate six to ten times that of most comparable countries. Ironically, the United States now competes only with Russia for the dubious distinction of maintaining the world lead in the rate at which its citizens are locked up. Although the Cold War has ended and the arms race is essentially over, these two nations with vastly different economies and social conditions now are engaged in a race to incarcerate.⁷²

It is no great exaggeration to conclude, as one commentator has done, that in its willingness to incarcerate citizens in pursuit of crime control, “the United States remains off the charts.”⁷³

III. KENTUCKY’S RACE TO INCARCERATE

A. Background

The state of Kentucky built the first prison west of the Allegheny Mountains in Frankfort in 1799, and imprisoned its first inmate in 1800.⁷⁴ The state leased the facility for operational purposes to private citizens for several decades in return for a percentage of the profits from

⁷² *Id.* at 9.

⁷³ Gottschalk, *supra* note 19, at 197.

⁷⁴ See KY. DEP’T OF CORR., KENTUCKY DEPARTMENT OF CORRECTIONS HISTORY 1792–1850, at http://www.corrections.ky.gov/CorrectionsHistory/Corrections_History_Part1.htm (last visited Sept. 25, 2004) [hereinafter DEP’T OF CORR., CORRECTIONS HISTORY 1792–1850].

inmate labors (an early privatization of corrections).⁷⁵ The inmate population of the prison reached 200 by 1865,⁷⁶ spurted to nearly 1000 by 1878, was reduced by executive pardons in order to relieve overcrowded conditions, and stood at 800 inmates in 1880.⁷⁷

The state opened a new prison for about 400 inmates at Eddyville in 1890, added a juvenile facility called Kentucky Village (later to be named Blackburn Correctional Complex) in 1897, and acquired acreage for a correctional facility for girls and women at Pewee Valley in 1916.⁷⁸ The inmate population increased substantially during the Great Depression years, creating a need for additional prison capacity just as the old Frankfort prison deteriorated beyond repair.⁷⁹ As a result, the state demolished the Frankfort facility in 1937 and in that same year opened a new prison at LaGrange, the Kentucky State Reformatory.⁸⁰ Before World War II, the prison population reached and exceeded 4000,⁸¹ but declined during and after the war years.⁸² The rate moved moderately up and down during the next two decades,⁸³ stabilizing eventually at slightly less than 3000 inmates as the state entered the 1970s,⁸⁴ with most of the inmates housed in the state's two main prisons at Eddyville and LaGrange. The state's incarceration rate (number of inmates per 100,000 population) stood at eighty-eight in 1970,⁸⁵ a level

⁷⁵ *See id.*

⁷⁶ *See* KY. DEP'T OF CORR., KENTUCKY DEPARTMENT OF CORRECTIONS HISTORY 1851–1950, at http://www.corrections.ky.gov/CorrectionsHistory/Corrections_History_Part1.htm (last visited Sept. 25, 2004) [hereinafter DEP'T OF CORR., CORRECTIONS HISTORY 1851–1950].

⁷⁷ *See id.*

⁷⁸ *See id.*

⁷⁹ The state held 1559 prison inmates in 1922, 3499 in 1933, and 4300 in 1935, notwithstanding that actual capacity in the latter year was only 2240. *See id.*

⁸⁰ *See id.*

⁸¹ Records show that there were approximately 3000 inmates at LaGrange in 1942 (although 600 of them were paroled to enter military service) and about 1000 inmates at Eddyville in 1944. *See id.*

⁸² In 1952, the inmate population was 1122 at Eddyville and 1969 at LaGrange. *See* KY. DEP'T OF CORR., KENTUCKY DEPARTMENT OF CORRECTIONS HISTORY, 1951–1995, at http://www.corrections.ky.gov/CorrectionsHistory/Corrections_History_Part3.htm (last visited Sept. 25, 2004) [hereinafter DEP'T OF CORR., CORRECTIONS HISTORY 1951–1995].

⁸³ The total reached 4000 by 1961, but retreated to 3300 by 1969. *See id.*

⁸⁴ *See* Ky. Dep't of Corr., Felony Population Projections (2003) (unpublished, on file with author) [hereinafter Dep't of Corr., Population Projections].

⁸⁵ The number of inmates in 1970 was 2838, *see id.*, and the general population of Kentucky was 3,218,706. KY. STATE DATA CENTER, KENTUCKY AND COUNTY POPULATIONS, 1900–2000, at http://ksdc.louisville.edu/sdc/census1990/copop1900_2000.xls (last visited Sept. 25, 2004). This incarceration rate (and state rates described elsewhere in the article) only counts inmates required to be held in state custody (i.e., convicted felons) and does not count inmates required to be held in local custody (i.e., persons convicted of misdemeanors).

of incarceration that was neither exceptional by historical and national standards nor indicative of “punitive penology.” The state then entered a brief period of stability in the prison system (some calm before the storm) that provides a good benchmark for a quantitative assessment of Kentucky’s march through the tough-on-crime era.

B. Benchmarks

Neither the incarceration rate nor the total number of state inmates changed much during the early 1970s. The state had 2838 inmates in 1970, 2992 in 1971, 3120 in 1972, 2991 in 1973, and 3093 in 1974,⁸⁶ the year the new penal code was enacted into law. The prisons were relatively full, but there were no state prisoners being housed in county jails⁸⁷ and the state had not engaged in major prison construction for more than three decades.⁸⁸ The prison population reached 3216 and the incarceration rate reached ninety-five per 100,000 population in 1975,⁸⁹ the year the new penal code took effect. The state also had approximately 3500 offenders under supervision (i.e., on probation or parole) during this period of time.⁹⁰

If for no other reason than the fact that budget problems are responsible for some, if not most, of the new concerns over America’s incarceration practices, budget facts and figures from the benchmark period need at least minimal attention. The annual cost for incarceration during the early 1970s was approximately \$3100 per inmate, and the annual cost for supervision of persons on probation or parole was roughly \$580 per offender.⁹¹ The state’s operating budget for the Department of Corrections stood at slightly more than \$7 million in 1970 and slightly more than \$11 million in 1974 when the new penal code was

⁸⁶ See Dep’t of Corr., Population Projections, *supra* note 84.

⁸⁷ See Ky. Dep’t of Corr., State Felons Housed in Jails (2003) (unpublished, on file with author) [hereinafter Dep’t of Corr., Felons in Jails].

⁸⁸ The most recently constructed prison at that time was the one at LaGrange. It was built during the late 1930s, received its first inmates in 1937, and was formally dedicated as a prison on October 9, 1939. See DEP’T OF CORR., CORRECTIONS HISTORY 1851–1950, *supra* note 76.

⁸⁹ This rate was calculated by combining the inmate number of 3216 (as reported by the Department of Corrections) with the general population number of 3,396,000 (as reported by the Bureau of the Census). See Dep’t of Corr., Population Projections, *supra* note 84; BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 11 (1976).

⁹⁰ See DEP’T OF CORR., CORRECTIONS HISTORY 1951–1995, *supra* note 82.

⁹¹ See *id.*

enacted,⁹² costs that were not in any sense devastating to the state's budget and that were in fact minuscule in comparison to what was waiting just over the horizon.

C. *The Deluge*

Without the benefit of hindsight, the earliest signs that harsher punishment was in store for Kentucky offenders were barely noticeable. For much of the 1970s, and even earlier, the state's primary prison facilities were operating at full capacity or above,⁹³ which is nothing out of the ordinary since prisons are built to be filled, and thus are almost always bulging at their seams. Although undoubtedly nurtured somewhat earlier, the first signs of a tougher attitude toward criminals bubbled to the surface in 1976 (just a year after the new penal code took effect), when the state initiated an expansion of prison facilities that would qualify as extraordinary by any standard.⁹⁴ In this one year alone, the state opened three new minimum security prisons: one in Frankfort on the site of the state's first prison, one in northern Kentucky for the purpose of adding capacity for female inmates, and one in LaGrange where the state already had another major prison facility.⁹⁵ More strikingly and more importantly, though, the state announced plans to build a major new prison in Oldham County called the Luther Lockett Correctional Complex.⁹⁶ This announcement left little or no doubt about the state's commitment to get tougher on crime.

At first, the inmate population in the state's prisons increased gradually rather than dramatically. The number of incarcerated felons increased by about 900 during the 1970s and stood at 3723 in 1980,⁹⁷ with most of the increase occurring during the last half of the decade.⁹⁸ The incarceration rate (the number of inmates per 100,000 population) at this time stood at 115,⁹⁹ not shockingly higher than the rate of 88 that had existed at the beginning of the decade, and the rate was certainly not yet off the charts. But the state's commitment to harsher punishment took hold quickly and the deluge of inmates began, as shown in a chart drawn

⁹² See Ky. Dep't of Corr., Appropriations History DOC (2003) (unpublished, on file with author) [hereinafter Dep't of Corr., Appropriations History].

⁹³ See DEP'T OF CORR., CORRECTIONS HISTORY 1951-1995, *supra* note 82.

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ *Id.*

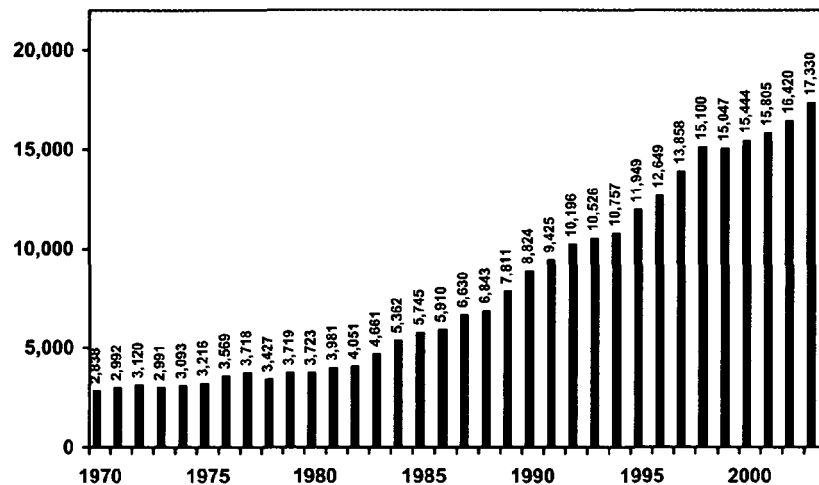
⁹⁷ See Dep't of Corr., Population Projections, *supra* note 84.

⁹⁸ The number of inmates in the prison system was 2838 in 1970, a number that increased by only 250 inmates by 1974 (the year the new penal code was enacted) and then by an additional 650 inmates by the end of the 1970s. See *id.*

⁹⁹ See *id.*

from Department of Corrections records and identified as Figure 3 below:

Figure 3
Kentucky Department of Corrections
Felony Inmate Population



Source: Kentucky Department of Corrections

As the chart shows, the inmate population more than doubled during the 1980s (from 3723 to 8824), almost doubled again during the 1990s (reaching 15,444 in 2000), and continued its staggering growth into the twenty-first century (reaching a total of 17,330 in 2003). To put the numbers into perspective, it is helpful to note that the state's overall population increased by only 25% during the period from 1970 to 2000 (from 3,218,706 to 4,041,769)¹⁰⁰ while its inmate population increased by a whopping 444% (from 2838 to 15,444). It is also helpful to note that the rate of incarceration increased from 88 in 1970 to 382 in 2000 (an increase of 434% for the period), and that the rate has continued to increase after the turn of the century. The rate in 2003 stood at 423.¹⁰¹

¹⁰⁰ See KY. STATE DATA CENTER, POPULATION 1900 THROUGH 2000, KENTUCKY AND COUNTIES, at http://ksdc.louisville.edu/sdc/census1990/copop1900_2000.xls (last visited Sept. 25, 2004).

¹⁰¹ The number of inmates reported for 2003 was 17,330 (as shown in Figure 3), and the population for that year stood at 4,117,827. See Dep't of Corr., Population Projections, *supra* note 84; U.S. CENSUS BUREAU, KENTUCKY QUICKFACTS, at <http://quickfacts.census.gov/qfd/states/21000.html> (last visited Sept. 25, 2004).

D. Another Building Boom and Privatization

The deluge of inmates into the system could not have started at a worse time, for in 1980 the state consented to a federal court decree settling a class action challenge to overcrowded conditions in the prison system and establishing population caps at the state's two principal facilities (Eddyville and LaGrange).¹⁰² The solution was additional prison construction and privatization. The state opened a new prison at LaGrange (the Luther Luckett Correctional Complex) in 1981,¹⁰³ opened a second new facility in 1983 (Northpoint Training Center), commenced construction of a third new facility in 1986 (Eastern Kentucky Correctional Complex) with plans to open it in 1990, and expanded most of its other facilities throughout the 1980s.¹⁰⁴ Notwithstanding this continuation of an unprecedented prison building boom, the demand for prison beds continued to outstrip supply.

In 1986 the state placed its first inmate in a privately owned and operated prison facility,¹⁰⁵ and shortly thereafter signaled an intention to rely more heavily on private prisons in the future.¹⁰⁶ Nonetheless, officials in the Corrections Department warned in the mid-1980s that Kentucky would have to build a new prison "every two years until 1995" if prevailing trends continued.¹⁰⁷ In 1988, after a decade of the heaviest prison construction and expansion ever and some privatization of its corrections responsibility, the state publicly acknowledged that it would have 800 more inmates than beds by 1990.¹⁰⁸ In fact, because of a monumental problem involving the housing of state prisoners in the county jail system, the situation was much worse than announced.

¹⁰² See DEP'T OF CORR., CORRECTIONS HISTORY 1951-1995, *supra* note 82.

¹⁰³ See *id.*

¹⁰⁴ For example, a new cellhouse was constructed at Eddyville in 1986, and capacity was doubled at the Bell County Forestry Camp in 1986 and expanded at two other minimum security facilities. The state's prison for women was expanded in 1989, new beds were added at the reformatory at LaGrange, and construction was commenced on a second phase of the new prison in Eastern Kentucky (Eastern Kentucky Correctional Complex). See *id.*

¹⁰⁵ In January 1986, the Department of Corrections moved ten inmates into the Marion Adjustment Center, which was operated by the U.S. Corrections Corporation, and made plans to incarcerate at least 200 prisoners in this facility. See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

E. Filling the County Jails

The 1974 Penal Code required convicted felons to be committed to the custody of the Department of Corrections,¹⁰⁹ as did the preexisting law.¹¹⁰ Further, the state constitution seemed on its face to require that such persons be housed in a state institution.¹¹¹ No unmanageable difficulty in complying with these requirements surfaced during the 1970s, although prison capacity came under some initial stress in 1980 because of the federal court consent decree described above. Not long into the 1980s, however, just as it began to struggle with federal court orders limiting the number of inmates that could be housed in state institutions, the state discovered that it could not build prisons fast enough to accommodate the tougher penal policies and practices that had taken hold in the court system. In response, it developed a program to control the intake of convicted felons into the state penal system and embraced as an offshoot of that program a practice of leaving convicted felons in county jails for indefinite periods of time until there were open beds in state facilities.¹¹²

The number of inmates so placed was small at first (564 in 1983) and stayed that way for a few years (623 in 1986),¹¹³ but it soon began to reflect the state's inability to build prisons as rapidly as the judicial system delivered inmates for incarceration.¹¹⁴ Local governments and jailers complained about financial burdens caused by the program, inmates complained about being incarcerated in local jails rather than prisons, and both groups ultimately lodged their complaints with the court system, filing lawsuits that reached the state's highest court in 1988.¹¹⁵

¹⁰⁹ Act of Apr. 2, 1974, ch. 406, § 282, 1974 Ky. Acts 874.

¹¹⁰ "This Section [unamended K.R.S. § 532.100] substantially restates existing law. With few exceptions, sentences of one year or more are presently served in state penitentiaries and designated facilities. . . . The same consequences will result from application of Section 3455" PENAL CODE: FINAL DRAFT, *supra* note 24, at 351.

¹¹¹ See KY. CONST. § 252; *see also* Campbell County v. Kentucky Corr. Cabinet, 762 S.W.2d 6, 8 (Ky. 1988) ("For almost 100 years no one has seriously questioned the constitutional mandate that state prisoners must be kept in the care and custody of the state penal system.").

¹¹² See *Campbell County*, 762 S.W.2d at 7–8.

¹¹³ See Dep't of Corr., *Felons in Jails*, *supra* note 87.

¹¹⁴ From 1986 to 1987, for example, the number of state felons in local jails nearly doubled (from 623 to 1187). *See id.*

¹¹⁵ Inmates in Fayette County's jail sought a court order requiring that they be delivered immediately to the custody of the Corrections Department. Campbell and Kenton Counties sought an order requiring the state to accept custody of convicted felons immediately, and inmates who had been held in the Daviess County jail for months sued for immediate transfer to state institutions. *See Campbell County*, 762 S.W.2d at 9, 11–12.

In this litigation, the state tried without success to rely on a “necessity” argument, stating that it had no alternative to use of the county jails, but the Kentucky Supreme Court held that the state has a constitutional responsibility to provide for the care and custody of convicted felons that cannot be shifted to local governments.¹¹⁶ In so holding, however, the court opened the door to an expanded program of local incarceration by noting that the state could satisfy its constitutional obligation by contracting with local jails for the care and custody of inmates under its direct supervision.¹¹⁷ At the time of this decision, the state had 1146 convicted felons in county jails (seventeen percent of all state prisoners), had absolutely no spare capacity in state facilities, and had far more inmates on the way to prison than the state could house on its own.¹¹⁸

State use of the county jails increased suddenly after the 1988 court decision (from 1146 inmates in 1988 to 1795 in 1990), decreased almost as suddenly when two new prisons opened (one a private prison),¹¹⁹ stabilized for a short period (going from 1342 inmates in 1991 to 1503 in 1994), and then headed skyward as the inmate flow into the system continued to outrun the state’s intensive efforts to expand its facilities.¹²⁰ The state opened a major new prison, the Green River Correctional Complex, in 1994, added significantly to the facility in 1999,¹²¹ and expanded many of its other facilities during the 1990s. But the number and percentage of state inmates in local jails continued to grow, as shown by records of the Department of Corrections in Figure 4 below:

¹¹⁶ See *id.* at 14. The court explained: “This then is the fundamental flaw in the Correction Cabinet’s defense based on inability to comply. The Constitution assigns the responsibility for care and custody of convicted felons to state government as a whole. . . . The basic equation is the state cannot pass penal statutes and create penalties that generate more prisoners than it is willing and prepared to provide for.” *Id.*

¹¹⁷ *Id.* at 14–15.

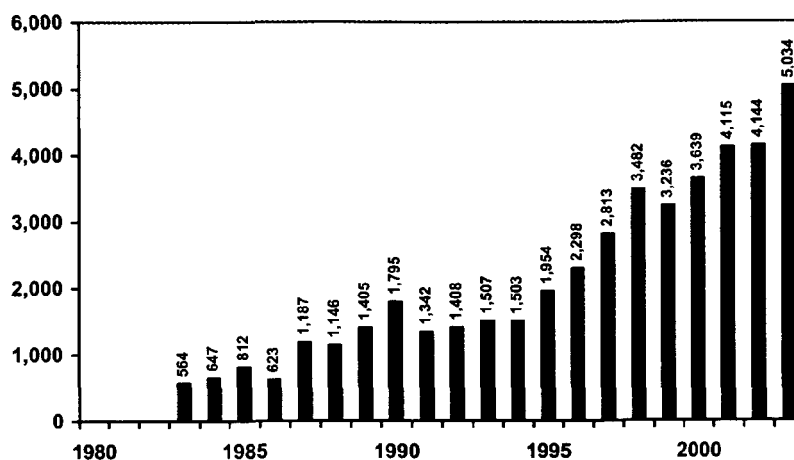
¹¹⁸ See Dep’t of Corr., *Felons in Jails*, *supra* note 87.

¹¹⁹ The state opened Phase I of the Eastern Kentucky Correctional Complex in 1990. In that year it also began to house inmates in a private prison called Lee Adjustment Center, and thus by fiscal year 1991 only 1342 state inmates were housed in the county jails. See *id.*

¹²⁰ See *id.*

¹²¹ See *id.*

Figure 4
Kentucky Department of Corrections
State Felons Housed in Jails



Source: Kentucky Department of Corrections

By the end of the decade, the state held 3236 prisoners in county jails, more than twice as many as it held in those facilities just a decade earlier and significantly more than it held in the entire corrections system when the new penal code took effect in 1975.

With inmate flows from the judicial system showing no signs of slowing at the beginning of the new century, the state made plans for even greater use of county jails for incarceration of convicted felons. After several years of housing state prisoners in county jails without statutory authority to do so,¹²² in 1992 the state obtained legislative authority for an already decade-old practice of incarcerating persons convicted of the penal code's least serious felony crimes (class D felonies) in county jails if such persons received sentences of no more than five years imprisonment.¹²³ In 2000, undoubtedly because of excessive inmate flows from the court system, the state obtained legislative authority to use the jails to house other class D felons (those receiving sentences of more than five years imprisonment) and for the

¹²² Some of this period predated the *Campbell County* jail litigation described above, when the state's penal code seemed to require that convicted felons be housed in state facilities. See K.R.S. § 532.100 (Banks-Baldwin 2004). The balance of this period followed the Kentucky Supreme Court's approval of local incarceration of state inmates and preceded action by the General Assembly to explicitly authorize such incarceration.

¹²³ Act of Apr. 7, 1992, ch. 262, § 8, 1992 Ky. Acts 725–26.

first time persons convicted of class C felonies (crimes carrying penalties of five to ten years imprisonment).¹²⁴

Figures on state incarceration practices since the date of this enactment suggest that the expanded authority arrived none too soon. Since 1999, the state's total inmate population, housed in all state facilities and county jails, has increased by 2283 (from 15,047 in 1999 to 17,330 in 2003). During this same period, the number of state prisoners in local jails has increased by 1798,¹²⁵ meaning that nearly eighty percent of all new inmates ended up in county jails rather than state prisons. The number of convicted felons in county jails stood at 5134 in 2003¹²⁶ and is undoubtedly growing, although Kentucky already ranks near the top of states holding state prisoners in county jails.¹²⁷ Of all the deleterious consequences that have flowed from Kentucky's race to incarcerate its citizens, the decision to fill the county jails with convicted felons tops the list, as discussed in Part V below.

F. The Costs of Getting Tough on Criminals

One of the legacies of twenty-five years of punitive penology is a corrections budget that looks completely out of control to state budget makers, and totally inadequate to corrections professionals who struggle to provide opportunities for inmates to improve their fates upon release from incarceration. Most of the tough-on-crime measures adopted during the subject period were embraced without concern for costs or price tags, since "no price was too high for initiatives that would protect public safety."¹²⁸ Estimates as to the nation's total cost of incarcerating citizens (now numbering in excess of two million persons) reach as high as \$40 billion.¹²⁹ Estimates of total corrections costs would have to be substantially higher since the nation has millions of additional citizens under the supervision of parole and probation officers.¹³⁰ Few if any

¹²⁴ Act of Apr. 7, 2000, ch. 384, § 3, 2000 Ky. Acts 1054-55.

¹²⁵ Dep't of Corr., Felons in Jails, *supra* note 87.

¹²⁶ *See id.*

¹²⁷ "Louisiana had the largest percentage of its State inmate population housed in local jails (45%). Two other States—Kentucky (31%) and Tennessee (26%)—had at least 25% of their population housed in local jail facilities." Paige M. Harrison & Allen J. Beck, *Prisoners in 2001*, 15 FED. SENTENCING REP. 66, 69 (2002).

¹²⁸ WILHELM & TURNER, *supra* note 22, at 1.

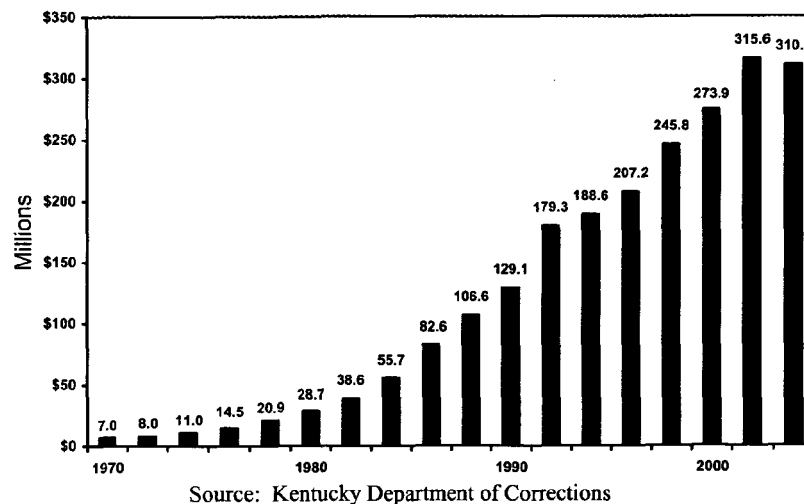
¹²⁹ *See* Vincent Schiraldi & Judith Greene, *Reducing Correctional Costs in an Era of Tightening Budgets and Shifting Public Opinion*, 14 FED. SENTENCING REP. 332, 332 (2002).

¹³⁰ *See* BUREAU OF JUST. STAT., PROBATION AND PAROLE STATISTICS, at <http://www.ojp.usdoj.gov/bjs/pandp.htm> (last revised July 25, 2004) ("At year end 2003,

items in state budgets could show the dramatic and relentless increases that have now been experienced for three decades with corrections. The Kentucky picture is undoubtedly typical of what could be found in the budgets of most states.

The Kentucky corrections budget stood at slightly more than \$7 million in 1970 (when the state held 2838 inmates) and at slightly more than \$11 million in 1974 (when the state's new penal code was enacted).¹³¹ That budget item quadrupled in the 1980s, doubled from that elevated level in the 1990s, exceeded \$300 million early in the new century, and in 2002 stood at a level forty-five times greater than it was in 1970, all as presented in Figure 5:

Figure 5
Kentucky Corrections Appropriations—1970–2004



There is nothing mysterious about the startling increases shown by this chart. A large part of the corrections budget is consumed by the cost of incarcerating the inmate population. In 2003, the average annual cost of incarcerating inmates stood at \$17,194 per inmate,¹³² and substantially more than this average for inmates housed in the state's biggest and most

over 4.8 million adult men and women were under Federal, State, or local probation or parole jurisdiction.”).

¹³¹ See Dep't of Corr., Appropriations History, *supra* note 92.

¹³² Ky. Dep't of Corr., Cost to Incarcerate FY 2002–03 (2003) (unpublished, on file with author) [hereinafter Dep't of Corr., Cost to Incarcerate].

important prison facilities.¹³³ The state's inmate population increased by more than 600% from 1970 to 2003 and the corrections line in the budget increased correspondingly, never exceeding by wide margins the bare cost of incarcerating an ever-increasing number of inmates.

The appropriations described in Figure 5 only provided for the operational costs of the corrections system. Appropriations needed for construction of new facilities and expansion of old ones added substantially to the costs of getting tougher on crime and criminals. The Eastern Kentucky Correctional Complex, opened in 1990, was constructed at a cost of approximately \$73 million, the Green River Correctional Complex, completed in the mid-1990s, cost approximately \$44 million, and the newest facility, Elliott County Phases I and II, is expected upon completion to have cost the state approximately \$123 million.¹³⁴ Yet, according to Corrections Department professionals who have overseen this unprecedented prison-building boom in Kentucky, there is no end in sight for these intimidating expenditures.¹³⁵

Law and policy makers have been warned repeatedly by professionals in state government about escalating costs associated with the get-tough-on-crime policies and practices currently embedded in the law. At least one set of policy makers, the Capital Planning Advisory Board,¹³⁶ has recently taken note of this warning and of the need to reexamine policies and practices that are believed to have pushed the state's corrections budget beyond affordable boundaries:

During discussion of the population projection data and proposed projects [for prison facility expansion], Board members have noted that root causes for these population increases must be identified and addressed because the state does not have the financial resources to

¹³³ The average incarceration cost was \$23,577 for each inmate at the state reformatory at LaGrange, \$23,096 for each inmate at the state penitentiary at Eddyville, and \$21,146 for each inmate in the women's prison. *See id.*

¹³⁴ *See* Capital Planning Advisory Board, 2004-2010 Statewide Capital Improvements Plan (2003) (unpublished, on file with author) [hereinafter Capital Planning Board, Improvements Plan]. The first phase of the new prison, which is now complete, is calculated to have cost approximately \$87 million, while the second phase, which remains to be completed, is projected to cost approximately \$35 million. *See id.*

¹³⁵ In its 2003 presentation to the Capital Planning Advisory Board, the Department of Corrections said it would need new beds for 4700 additional inmates by 2010 if current trends continue, that there would have to be major expansions of existing facilities, and that plans should be laid for a new major prison to be opened in 2010 (at a construction cost of approximately \$100 million). *Id.*

¹³⁶ The Capital Planning Advisory Board oversees state construction projects. It has members from all three branches of state government, advises the Kentucky General Assembly, is staffed by personnel from the Legislative Research Commission, and prepares and presents capital improvement plans to the General Assembly and other segments of state government.

construct the number of prison beds that would be needed if the projected increases continue.¹³⁷

It appears that the state may not even have the financial resources to operate the facilities that it has already built, if recent public discussions concerning its newest prison are fully or even partially justified.

On the eve of opening its newest prison in Elliott County, built at a cost of \$87 million, the state announced plans to either “mothball” the new prison or turn it over to one of the country’s corrections corporations for operation as a private prison, although it was built entirely with state dollars.¹³⁸ Although the state may eventually choke on these two options and chart a different course for use of this facility, such as housing fewer state inmates in county jails, the mere suggestion that the state may have built a major new prison that it cannot afford to operate speaks volumes about the need for some critical analysis of the tough-on-crime movement that has left the state (and most of the country) with an incarceration budget mess of huge proportions.

G. Conclusion

There is a whiff of criminal justice reform in the air for good reason. Kentucky is in the midst of a budget crisis that has no foreseeable termination date and, at the same time, is suffering from chronic prison overcrowding that is almost sure to get worse before it gets better. Sooner or later (and probably sooner), lawmakers will have to confront the undeniable connection of these two factors and undertake a full examination of the state’s aggressive incarceration practices. When that happens it will be important to know precisely what has happened to our laws and to our attitudes toward criminals to produce incarceration levels that have reached beyond anything that could have been imagined a generation ago, and that systematically produces more prisoners for incarceration than the state can handle (or, to use the words of the Supreme Court, than the state “is willing and prepared to provide for”).¹³⁹ The next part of the article is devoted to this important subject.

¹³⁷ Capital Planning Board, Improvements Plan, *supra* note 134.

¹³⁸ See Lee Mueller, *New Elliott Prison Might Be Privatized*, LEXINGTON HERALD-LEADER, Jan. 27, 2004, at B1.

¹³⁹ *Campbell County v. Kentucky Corr. Cabinet*, 762 S.W.2d 6, 14 (Ky. 1988).

IV. TOUGHER LAWS AND TOUGHER ATTITUDES

A. Introduction

The sentencing (and punishment) provisions of the 1974 Kentucky Penal Code were drawn mostly from the Model Penal Code and were designed to preserve the state's 75-year-old commitment to the rehabilitation of offenders. They fixed penalty ranges for felony crimes,¹⁴⁰ gave sentencing authorities discretion to fix maximum penalties within the ranges,¹⁴¹ imposed indeterminate sentences on convicted felons,¹⁴² made no provision for minimum sentences for any offenses,¹⁴³ and gave parole boards discretion to determine when convicted felons should be released from custody.¹⁴⁴ They authorized trial judges to use probation in all cases except where a penalty of death was imposed¹⁴⁵ and, like the Model Code from which they were drawn, strongly encouraged judges to use sentences of probation in lieu of sentences of imprisonment, explicitly providing that probation "should be granted unless the court is of the opinion that imprisonment is necessary for protection of the public."¹⁴⁶

A penal code with these provisions on sentencing and punishment could not have produced extraordinary, if not indefensible, levels of imprisonment. The Kentucky Penal Code sought to promote the reformation of offenders and embraced views on sentencing and

¹⁴⁰ The Code grouped felonies into four classifications: Class D (not less than one year nor more than five), Class C (not less than five years nor more than ten), Class B (not less than ten years nor more than twenty), and Class A (not less than twenty years nor more than life imprisonment). *See* Act of Apr. 2, 1974, ch. 406, § 278, 1974 Ky. Acts 873.

¹⁴¹ The Code retained jury sentencing, but gave trial judges broad authority to reduce prison terms fixed by juries so long as the reduced term fell within the penalty range fixed by the General Assembly. *See id.* § 279.

¹⁴² *Id.* § 278(1).

¹⁴³ "The actual length of his imprisonment is to be determined by the Parole Board in much the same manner as is done under the existing process. No minimum period of imprisonment is established in this code for a convicted felon." PENAL CODE: FINAL DRAFT, *supra* note 24, at 342.

¹⁴⁴ "KRS 439.340 provides that the Parole Board has sole responsibility for determining eligibility for parole. This means that an offender could conceivably be released from custody immediately after imposition of sentence. To some extent the Parole Board has restricted its [own] discretion in this respect through the promulgation of an administrative regulation which establishes a schedule for parole eligibility" *Id.* at 341.

¹⁴⁵ *See* Act of Apr. 2, 1974, ch. 406, § 285, 1974 Ky. Acts 875.

¹⁴⁶ *Id.*; *see also* PENAL CODE: FINAL DRAFT, *supra* note 24, at 358 ("This section seeks to establish a policy in favor of rehabilitation of offenders within the community and free of incarceration.").

punishment that were calculated to restrain rather than expand the use of imprisonment to control crime. The Code clearly reflected the following philosophies on sentencing: 1) the state should impose the least rather than the most intrusive of punishments, 2) society's long-term interests are best served by restoring offenders to full status in their communities as soon as possible, and 3) imprisonment should never be allowed to become a routine or semiautomatic punishment. Yet, since its enactment in 1974, the state has experienced an inmate population explosion that has overwhelmed the prison system, notwithstanding a prison-building boom of astonishing proportions. How this happened is an interesting and important inquiry, partly because it cannot be answered without a study of how the state has toughened its criminal laws and its attitudes toward offenders and partly because it leads naturally into a discussion of the more compelling question of whether the state is using imprisonment too much and at too high a cost to both the state and to inmates.

B. "Three Strikes" Law

The baseball metaphor ("three strikes and you're out") is used to describe laws that provide for elevated levels of imprisonment for habitual offenders and specifically for sentences of life imprisonment for commission of a third offense. Kentucky had a "three strikes" law before the 1970s law reform¹⁴⁷ and included that law in a modified form in the 1974 Code (calling it the "persistent felony offender" law).¹⁴⁸ Under this 1974 law, a person convicted of a third felony offense was subjected to penalty ranges higher than those that would normally apply to the offense most recently committed by the defendant; for some third offenses, the penalty range for the persistent felony offender included life imprisonment (thus partially deserving the label "three strikes and you're out").¹⁴⁹ In what it chose to do with this law, almost before the ink was dry on the 1974 Code, the General Assembly left no doubt that Kentucky

¹⁴⁷ Under the pre-Code statute, a person convicted of a second offense received a sentence twice what had been imposed for the first offense, and a person convicted of a third offense received a sentence of life imprisonment. See K.R.S. § 431.190 (repealed).

¹⁴⁸ Act of Apr. 2, 1974, ch. 406, § 280, 1974 Ky. Acts 873.

¹⁴⁹ The 1974 law provided that a persistent felony offender ("PFO") would be sentenced under the following elevated penalties: 1) if convicted of a Class A felony (which normally involves a sentence of twenty years to life) the PFO is sentenced to a term of life imprisonment; 2) if convicted of a Class B felony (which normally entails a sentence of ten to twenty years in prison) the PFO is sentenced to a prison term of not less than twenty nor more than life; and 3) if convicted of a Class C felony (which normally entails a sentence of five to ten years in prison) or a Class D felony (which normally entails a sentence of one to five years in prison), the PFO is sentenced to a prison term of not less than ten nor more than twenty years. *Id.* § 280(4).

had joined the tough-on-crime movement. More importantly, it took an early gigantic step toward much higher levels of incarceration for the state prison system.

The 1974 Code carefully and deliberately guaranteed that its "three strikes" law would be used only against high-rate offenders who had been unresponsive to extended rehabilitation efforts by the state. In addition to requiring the commission of a third offense (i.e., providing no enhanced punishment for a second offense), the original "persistent felony offender" provision of the Code explicitly required for "three strikes" punishments that the defendant be found to have committed his/her third offense after having been subjected to imprisonment on two separate occasions.¹⁵⁰ In this regard, the Code merely adopted a longstanding Kentucky common-law-based position,¹⁵¹ and in so doing expressed a clear intent to have these exceptionally harsh punishments used only as a last resort. The drafters of the Code included the following statement in their official commentary on the "three strikes" provision: "[T]he last resort idea implicit in the . . . provision should be applied with exceptional caution and not until an offender has clearly demonstrated his incapacity for rehabilitation through normal terms of imprisonment."¹⁵²

And, at least as importantly, the 1974 Code did not close the door to early releases from prison for offenders sentenced under the "three strikes" law, choosing instead to classify their sentences as indeterminate, and leaving it to the parole board to make the ultimate decisions on release.¹⁵³ In taking this position, it chose to leave persistent offenders with glimmers of hope for freedom and to give corrections professionals the authority to release long term prisoners who cease to be threats to public safety, a final exercise of special caution in using the draconian sanctions of the "three strikes" law.

¹⁵⁰ In one provision of the law, the General Assembly defined a previous felony conviction as one for which "the defendant was imprisoned under sentence for such conviction prior to commission of the present felony," and in a second provision of the law, the General Assembly provided that "two or more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one conviction . . ." *Id.* § 280(2)–280(3).

¹⁵¹ As far back as 1936, construing an earlier Kentucky version of a "three strikes" law, the Kentucky Court of Appeals erected identical obstacles to the use of enhanced punishments: "[B]efore the present charge could be considered a third conviction of a felony in contemplation of the statute, it was necessary that [the defendant] should have been convicted of a second felony subsequent to his conviction of the first and after he had paid the penalty inflicted for it; and, likewise, this third conviction should be subsequent to the second, and after he had paid the penalty for it." *Cobb v. Commonwealth*, 101 S.W.2d 418, 420 (Ky. 1936); *see also* *Ross v. Commonwealth*, 384 S.W.2d 234 (Ky. 1964) (same).

¹⁵² PENAL CODE: FINAL DRAFT, *supra* note 24, at 348.

¹⁵³ Act of Apr. 2, 1974, ch. 406, § 280, 1974 Ky. Acts 874.

The caution that produced the relatively benevolent “three strikes” law of the 1974 Code vanished in a historical flash and was nowhere to be found when the General Assembly reassembled in the state capitol for its 1976 session, exactly one year after the effective date of the new Code. Tough-on-crime advocates arrived on the scene with a firm belief that most crime is committed by a small group of incorrigible career criminals and a determination to convert the still new and largely untested “three strikes” law into a lethal weapon against repeat offenders. At the end of the session they had exactly what they wanted: a modification of the “three strikes” law that threw caution in sentencing persistent offenders to the wind and provided Kentucky’s prosecutorial forces with one of the toughest “three strikes” laws ever enacted.

In this first session after enactment of the Code, the General Assembly made four changes in the 1974 “three strikes” law. Each made a different major change in the state’s sentencing policies and practices and, when combined with the other three, brought about what can only be described as a monumental change of direction in the treatment of convicted felons.

One: The first and most notable of the changes was an addition to the persistent felony offender statute of a “two strikes” status, called “persistent felony offender in the second degree.”¹⁵⁴ The newly defined status required proof that the defendant had committed the charged offense after having been earlier convicted of a single felony crime and, once established, it required that the defendant be sentenced as though he or she had committed a felony offense carrying a classification for penalty purposes one level higher than the offense that had actually been committed.¹⁵⁵ A collateral effect of this change was a new name for the “three strikes” status, which was now called “persistent felony offender in the first degree.”¹⁵⁶

Two: The second and perhaps most significant of the four changes was an abandonment of the state’s longstanding unwillingness to classify defendants as habitual offenders (for purposes of harsher punishments) before they had ever been subjected to actual imprisonment for earlier offenses.¹⁵⁷ It mattered not after this change

¹⁵⁴ Act of Mar. 29, 1976, ch. 180, § 1, 1976 Ky. Acts 425.

¹⁵⁵ In other words, a Class D felony (with a penalty range of one to five years) was converted into a Class C felony (with a penalty range of five to ten years), a Class C felony (with its five to ten year range) was converted into a Class B felony (with a penalty range of ten to twenty years), and a Class B felony (with its ten to twenty year range) was converted into a Class A felony (which at that time had a penalty range of twenty years to life in prison). *See id.*

¹⁵⁶ *Id.* § 1(3).

¹⁵⁷ The General Assembly needed two attempts to accomplish this objective. It initially made the change during the 1976 regular session, but left the persistent felony

that a defendant had been granted probation for an earlier offense and had never stepped foot in a prison cell. The only thing now needed for the harsher levels of punishment for repeat offenders was proof that the defendant had been convicted of prior felony crimes.¹⁵⁸ In accepting this change, the General Assembly backed away from the state's longstanding commitment to rehabilitation (rather than mere punishment) of offenders and at the same time rejected the notion that "three strikes" laws are defensible only as a last resort measure against incorrigible offenders.

Three: The third change eliminated the possibility of probation, shock probation, and conditional discharge for all persistent felony offenders.¹⁵⁹ The 1974 Code strongly encouraged trial courts to use probation in lieu of imprisonment and put no limitations on their authority to do so (except where a jury had imposed a sentence of death).¹⁶⁰ The departure from this position for persistent felony offenders was probably not substantively significant, since trial judges would probably very rarely find probation suitable for repeat offenders. But it was significant symbolically, because it occurred so soon after enactment of the 1974 Code and because it reflected an early willingness of the General Assembly to respond to demands for tight restrictions on the judicial use of alternatives to imprisonment, demands that would quickly extend far beyond the treatment of persistent felony offenders.

Four: The fourth change was similar to the third but had more significance, both substantively and symbolically. It affected the availability of parole and read as follows: "A . . . persistent felony offender in the first degree shall not be eligible for . . . parole until having served a minimum term of incarceration of not less than ten years."¹⁶¹ The 1974 Code left matters involving parole eligibility to the parole board without exception (including parole eligibility for extended terms under the "three strikes" law);¹⁶² more importantly, it

offender law with considerable ambiguity as to both the "two strikes" and "three strikes" laws. *See id.* In a 1976 special legislative session, the Assembly eliminated this ambiguity, providing for use of the persistent felony offender law against persons who had never been imprisoned for earlier crimes. *See* Act of Dec. 22, 1976, ch. 14, § 474, 1976 Ky. Acts (Extra Session) 174-75.

¹⁵⁸ *See* Act of Dec. 22, 1976, ch. 14, § 474, 1976 Ky. Acts (Extra Session) 174-75.

¹⁵⁹ *See* Act of Mar. 29, 1976, ch. 180, § 1(5), 1976 Ky. Acts 425.

¹⁶⁰ "Any person who has been convicted of a crime and who has not been sentenced to death may be sentenced to probation or conditional discharge as provided in this chapter." Act of Apr. 2, 1974, ch. 406, § 285, 1974 Ky. Acts 875.

¹⁶¹ Act of Mar. 29, 1976, ch. 180, § 1, 1976 Ky. Acts 425.

¹⁶² Drafters of Kentucky's 1974 Code noted that the state had a history of leaving great discretion in the hands of the Parole Board: "The power to determine the period of incarceration passes at this point to the Parole Board. At the present time, this board has

provided for genuinely indeterminate terms of imprisonment for felony offenders and did not provide for a single mandatory minimum sentence.¹⁶³ In departing from these positions, the General Assembly toughened the “three strikes” law enormously, especially for persons committing the penal code’s least serious classification of offense.¹⁶⁴ In addition, it headed down a road that would one day find the state’s laws full of mandatory minimum sentences that play a very substantial role in the state’s chronic prison population problem, with very little evidence that they work to reduce crime rates and lots of opinion suggesting that they do not.¹⁶⁵

It is hard to find the right words to describe this repeat offender law after these changes took effect, although the words “brutally harsh” come readily to mind. The law was destined for heavy use and for a major impact on the state incarceration rate, and that impact was not long in manifesting itself in corrections statistics. In 1980, the state had only seventy-nine inmates serving extended terms under the repeat offender law.¹⁶⁶ By 1984, that number had skyrocketed to 1142 inmates and had only begun to have its long-term effect on the inmate population explosion; in 2004, the state held an astonishing total of 4187 inmates as persistent felony offenders.¹⁶⁷

exclusive control over that portion of sentence that a prisoner must actually serve. KRS 439.340 provides that the Parole Board has sole responsibility for determining eligibility for parole.” PENAL CODE: FINAL DRAFT, *supra* note 24, at 341. The following statement leaves no doubt that the drafters intended to maintain this preexisting position in the 1974 Code: “The actual length of his imprisonment is to be determined by the Parole Board in much the same manner as is done under the existing process.” *Id.* at 342.

¹⁶³ The following statement by drafters of the 1974 Code shows that the decision to refrain from the use of minimum mandatory sentences was deliberate and calculated: “No minimum period of imprisonment is established in this code for a convicted felon” *Id.* at 342.

¹⁶⁴ A person who commits a Class D felony (e.g., theft by deception of property worth \$300 or more) faces a penalty range with a maximum that falls somewhere between one and five years. A person who commits such an offense and who is classified as a first degree persistent felony offender faces a penalty range with a maximum that falls somewhere between ten and twenty years, and under the fourth change of the “three strikes” law must serve at least ten years of that elevated term. Stated more explicitly, a person who might have received from the jury a sentence of one year in prison (for theft of property worth \$300) cannot receive from the jury a sentence of less than ten years, might receive as much as twenty years, and must serve at least a full ten years before being considered for parole. *See* Act of Mar. 24, 1976, ch. 180, § 1, 1976 Ky. Acts 425.

¹⁶⁵ “The primary and strongest argument for mandatory penalties is that their enactment and enforcement deter would-be offenders and thereby reduce crime rates and spare victims’ suffering. This claim, if true, makes a powerful case. Unfortunately, both the accumulated evidence and expert opinion agree that it is not true.” TONRY, SENTENCING MATTERS, *supra* note 23, at 136.

¹⁶⁶ *See* DEP’T OF CORR., CORRECTIONS HISTORY, 1951–1995, *supra* note 82.

¹⁶⁷ E-mail from Jerry W. Somers, Information System Supervisor, Department of Corrections, to author (May 6, 2004) (on file with author).

The General Assembly made additional changes to the "three strikes" law in later sessions. In the middle of the 1990s, it softened the penalties slightly for repeat offenders of the lowest level,¹⁶⁸ explicitly indicating that it was driven to do so by "current prison and jail overcrowding."¹⁶⁹ In its most recent action, however, it has added to the harshness of the penalties by further reducing the possibility of parole for any repeat offender of either the first or second degree who is found to have committed "a violent act."¹⁷⁰ At present, this law (the "two strikes" and "three strikes" in combination) is one of the toughest in the whole country and has played a major role in pushing the inmate population to unprecedented, if not unmanageable, levels. Moreover, it has contributed greatly to projections of much higher numbers in the years ahead. For these reasons alone, it will draw early attention and critical scrutiny as lawmakers tire of overcrowded prisons and strapped budgets and begin to look seriously for ways to reduce the masses in or headed toward prison. What may emerge from such scrutiny are questions, maybe some doubt, concerning the need, effectiveness, and fairness of the provision.

The "three strikes" laws are aimed at a real problem and no one can, or should, deny that reality. These laws are based on the beliefs that lots of crime is committed by a small number of bad actors, that deterrence and incapacitation of such actors can significantly reduce crime rates, and that the best way to identify high-rate offenders is to rely upon a count of their prior criminal convictions. In determining whether the laws are effective, fair, and sound, at least the following issues have to be addressed: 1) Are the underlying beliefs grounded in reality (especially the promise of heightened crime control)? 2) Do the benefits of such laws (if they exist) outweigh their costs (especially with respect to their impact on inmate populations)? 3) Do they inflict unwarranted and unjustified punishments on some offenders, especially those who engage in nonviolent crimes such as theft and drug possession? Proponents of "three strikes" laws argue that such laws are effective in reducing crime,

¹⁶⁸ In 1994, the General Assembly restored the eligibility for parole of persistent felony offenders whose most recent offense was a Class D felony (thereby eliminating for this one type of repeat offender the ten-year minimum term of imprisonment). *See* Act of Apr. 11, 1994, ch. 396, § 11, 1994 Ky. Acts 1196. The General Assembly acted in the next session to make this new law on parole of Class D offenders retroactive. *See* Act of Apr. 4, 1996, ch. 247, § 1, 1996 Ky. Acts 979.

¹⁶⁹ Act of Apr. 4, 1996, ch. 247, § 2, 1996 Ky. Acts 980.

¹⁷⁰ Although somewhat ambiguous, the enactment in 1998 appears to require that any persistent offender (first or second degree) who is found to have committed a violent act (even one who is convicted of only a Class D felony) must serve no less than eighty-five percent of the extended term of imprisonment he receives under the "three strikes" (and now "two strikes") law. *See* Act of Apr. 14, 1998, ch. 606, § 76, 1998 Ky. Acts 3641-43.

while critics argue that they are grounded in false assumptions, impose huge costs on justice systems, and inflict unwarranted punishments on offenders. Lawmakers have generally enacted the laws without much consideration of the questions described above.

Simple common sense would suggest that greater punishment is likely to produce greater deterrence, a conclusion that would make something of a case for “three strikes” laws if it were true. The problem, according to the best authorities on the subject, is that “both the accumulated evidence and expert opinion agree that it is not true.”¹⁷¹ Deterrence is a function of two things: “the potential offender’s perception of the severity of the sanction and the likelihood that it will be imposed.”¹⁷² Some authorities believe that repeat offenders are less fearful than normal of apprehension and conviction and thus are not likely to be deterred by harsher punishments.¹⁷³ Others are far more skeptical generally about the deterrent effect of long-term mandatory penalties:

After the most exhaustive examination of the question ever undertaken, the National Academy of Sciences Panel on Research on Deterrent and Incapacitative Effects concluded, “In summary . . . we cannot assert that the evidence warrants an affirmative conclusion regarding deterrence.” The panel’s principal consultant on the subject . . . was less cautious: “The evidence is woefully inadequate for providing a good estimate of the magnitude of whatever effect may exist. . . . Policymakers in the criminal justice system are done a disservice if they are left with the impression that the empirical evidence . . . strongly supports the deterrence hypothesis.”¹⁷⁴

If this is so, common sense may be all that exists to support the belief that “three strikes” laws work to deter the activity of repeat offenders.

A stronger argument in support of the laws can be made on the basis of the belief that they reduce crime rates by incapacitating career criminals for longer periods of time. However, the common sense in this conclusion is once again put in doubt by the results of careful study by impeccable authorities:

¹⁷¹ TONRY, SENTENCING MATTERS, *supra* note 23, at 136.

¹⁷² Linda Beres & Thomas Griffith, *Habitual Offender Statutes and Criminal Deterrence*, 34 CONN. L. REV. 55, 61 (2001) [hereinafter Beres & Griffith, *Deterrence*].

¹⁷³ “Offender discounting of prison terms is consistent with empirical evidence suggesting that increasing the probability of conviction is a more effective deterrent than increasing the severity of the sentence.” *Id.* at 65–66.

¹⁷⁴ TONRY, SENTENCING MATTERS, *supra* note 23, at 136–37 (internal citations omitted).

[T]hree-strikes laws are sometimes premised on incapacitative rationales. Here too the clear weight of research findings is inconsistent with proponents' claims. In the 1970s, vigorous arguments were made that crime would be reduced substantially by adoption of policies calling for incarceration of all defendants convicted of particular crimes (sometimes called "collective incapacitation"). The National Academy of Sciences Panel on Research on Deterrent and Incapacitative Effects, however, soon demonstrated that such a policy would be ineffective. Most offenders commit few or no additional offenses; the vast increase in prison populations required to implement such policies could not be justified in cost-benefit terms. Few informed calls for adoption of collective incapacitation policies have been made since the early 1980s.¹⁷⁵

In support of this position, it is argued that high-rate offenders are likely to spend most of their lives in prison without "three strikes" laws because courts will fix long sentences for such offenders and those sentences will be served¹⁷⁶ (and especially violent offenders who qualify for lengthy imprisonment without penalty enhancements). And it is argued that the "three strikes" laws have less effect on crime rates than one might expect because of the fact that criminal careers, even for high rate offenders, begin at an early age and on their own diminish in a relatively short time.¹⁷⁷ Additionally and most importantly, it is argued that the difficulty of identifying repeat offenders in advance robs "three strikes" laws of their effectiveness and legitimacy at an extremely high cost by producing an incarceration of untold numbers of low rate offenders not likely to commit additional crimes in the absence of extended terms of incarceration.¹⁷⁸

¹⁷⁵ *Id.* at 138-39 (internal citations omitted).

¹⁷⁶ "We conclude that even if such statutes sentence high-rate offenders to long prison terms, they will have little impact on the crime rate because most high-rate offenders will spend most of their criminal career in prison even without such statutes." Linda S. Beres & Thomas D. Griffith, *Do "Three Strikes" Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 118 (1998) [hereinafter Beres & Griffith, *Incapacitation*].

¹⁷⁷ "Put another way, people begin to desist from property crimes after age seventeen and from violent crimes after age twenty-two. By the time offenders have accumulated enough convictions to make it reasonable to conclude that they are high-rate serious offenders, many will have reached ages at which they will soon desist from offending in any event. Extended confinement of such people will result in relatively little but very expensive crime prevention through incapacitation" TONRY, SENTENCING MATTERS, *supra* note 23, at 139.

¹⁷⁸ Michael Tonry summarizes the difficulties: "The National Academy of Sciences Panel on Criminal Careers and 'Career Criminals' considered the evidence concerning selective incapacitation and concluded that it, too, was impracticable The insuperable empirical problem was that no system of prediction could be developed that would identify high-rate serious offenders in advance with ethically defensible and

Then there is the problem of how far to go with these laws, made more difficult by the above described doubts as to whether they really deliver on the promise of crime reduction. Should they be used only against offenders who engage in violent crimes, or should they be used against all repeat offenders? Most scholars contend that the laws should be applied only to violent offenders, some out of fear of runaway incarceration rates¹⁷⁹ and some out of fear of unjust punishment of minor offenders.¹⁸⁰ Others express particular concern over use of the laws against drug offenders.¹⁸¹ Most “three strikes” statutes define “strikes” as prior violent felonies and then require that the charged offense also be a violent felony (a double limitation).¹⁸² Even California’s much maligned “three strikes” statute extends its harsher punishments only to offenders who have committed two prior serious and/or violent offenses, although the triggering offense is not required to be a violent felony.¹⁸³ In comparison with both the position recommended by scholars and the “three strikes” laws that exist in other jurisdictions, the Kentucky statute is simply “off the charts.” It defines prior “strike” as *any* felony crime, is triggered by the commission of *any* felony offense, and thus is essentially unlimited in its application to repeat offenders, especially since it has a “two strikes” as well as a “three strikes” component. As a result, it has a

economically affordable accuracy. Even the best prediction instruments overpredicted by 3 or 4 to 1. For each future high-rate offender incapacitated, two or three other people would also have to be confined for an extended period.” *Id.*

¹⁷⁹ “Three Strikes statutes are designed to incapacitate selectively high-rate offenders of serious crimes. The selectivity of such statutes is compromised if . . . the statutes apply to minor offenses. . . . [T]he number of low rate offenders is so large that incarcerating even a small portion of them for terms of twenty years or more imposes a significant burden on the criminal justice system.” (Beres & Griffith, *Incapacitation*, *supra* note 176, at 133).

¹⁸⁰ “[L]engthy prison terms . . . should be limited to serious crimes like armed robbery, aggravated rape, and murder. The . . . most extreme injustices in individual cases, arises under laws requiring severe penalties for minor crimes like possession or trafficking of small amounts of drugs.” TONRY, SENTENCING MATTERS, *supra* note 23, at 136.

¹⁸¹ See, e.g., Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 460 (1997) (“The terms of imprisonment for drug offenses have also increased, creating anomalies where some drug offenders are incarcerated for longer terms than far more dangerous offenders.”) [hereinafter Vitiello, *Three Strikes*].

¹⁸² Michael Vitiello, *Punishment and Democracy: A Hard Look at Three Strikes’ Overblown Promises*, 90 CAL. L. REV. 257, 261–62 (2002) (“[M]ost ‘three strikes’ legislation in other states targets only violent crime”) [hereinafter Vitiello, *Punishment*]; see, e.g., ARK. CODE ANN. § 5-4-501 (Michie 1987) (felonies involving violence); GA. CODE ANN. § 17-10-7 (1997) (violent felonies); LA. REV. STAT. ANN. § 15:529.1 (West 1991) (crimes of violence).

¹⁸³ CAL. PENAL CODE § 667 (West 1994).

huge effect on normal sentencing laws and practices, is capable of producing punishments that have no rational relationship to the crimes for which they are imposed, and has undoubtedly contributed substantially to the population problems that plague the state's corrections system.

The Kentucky law elevates punishments significantly at every level of crime, but it has its greatest and most troublesome effects on offenders who commit the state's least serious felonies or who commit drug offenses. The following situations are designed to illustrate how penalties imposed under this law can lose all proportionality to the conduct for which they are imposed:

Example 1: Imprisonment in this situation is to be imposed on a person who unlawfully took goods worth \$300 from a store and committed the crime of theft (shoplifting). Theft is ordinarily punishable by imprisonment of not less than one nor more than five years (a class D felony), a penalty range that fixes one year in prison as a standard penalty for the offense and then provides ample room for significantly harsher punishment for deserving offenders (including persons with prior records of conviction). However, if elevated by the "two strikes" provision of the Kentucky law, theft becomes a class C felony punishable by imprisonment of no less than five nor more than ten years; and, if elevated by the "three strikes" provision it becomes a class B felony that is punishable by imprisonment of not less than ten nor more than twenty years. Consequently, for his or her \$300 theft, the shoplifter would get no less than five and could get ten years under the two-strikes law and would get no less than ten and could get twenty years under the "three strikes" law. In other words, in the latter situation the shoplifter could receive twenty times the standard penalty of one year for the crime of theft; under the "two strikes" law, the shoplifter would get no less than one year in prison for every \$60 stolen and under the "three strikes" law no less than one year for every \$30 stolen.¹⁸⁴

Example 2: Imprisonment in this situation is to be imposed on a twenty-one year old who sells a small amount of marijuana to a seventeen-year-old acquaintance or friend and thereby commits the

¹⁸⁴ In case you think this scenario is unreal, consider the following report by one of the state's circuit judges: "Once a few years ago I had to sentence a poor black mother of five children to ten years because she appropriated someone's social security check after two priors for bad checks. She actually entered a guilty plea to PFO1. Admittedly, she didn't seem to learn much from her priors, and stealing some poor older person's social security check is pretty reprehensible, but with five kids and little wherewithal, perhaps understandable. There had to have been a better solution for her." Letter from Mary C. Noble, Fayette Circuit Judge, to author (Sept. 1, 2004) (on file with author).

offense of selling controlled substances to a minor. The offense is classified as a C felony and thus is severely punished as a first offense—no less than five nor more than ten years in prison. If elevated by the “two strikes” law, it becomes a class B felony punishable by imprisonment of no less than ten nor more than twenty years (doubling both the lowest and highest possible penalties for a first offense); if elevated by the “three strikes” law, the offender is again subject to class B felony penalties (not less than ten nor more than twenty years) but in this instance is required to serve ten years before gaining eligibility for parole consideration. Even conceding that selling drugs to a minor is a serious offense, one must surely doubt the proportionality of penalties for selling a small amount of marijuana to a peer that equal or exceed the law’s penalties for such crimes as attempted murder, kidnapping, assault causing serious bodily injury, most rapes and sodomies, all burglaries, and all robberies.

What these hypothetical situations illustrate above all else is how a “three strikes” law renders the seriousness of an offender’s conduct irrelevant to his sentence and permits (and sometimes even requires) punishment that is morally indefensible, that debases all notions of common sense, and that works to warehouse for extended periods offenders who are not likely to inflict serious harm on the public. It has been said that “[t]he story surrounding “three strikes” is symptomatic of the excesses of our nation’s crime prevention policy during the 1980s and 1990s,”¹⁸⁵ an observation that seems especially appropriate when thinking of a Kentucky law that easily qualifies as one of the toughest “three strikes” laws ever enacted.

C. Tougher Parole

The 1974 Penal Code delegated full discretion to the Parole Board to determine the ultimate punishment to be imposed on felony offenders.¹⁸⁶ It did so by giving courts the authority to fix maximum terms of imprisonment (within statutory ranges) and by giving the Parole Board authority to determine release dates within the maximum terms fixed by the courts (including the authority to establish initial eligibility requirements). It gave courts no authority to establish minimum terms of imprisonment and did not contain a single provision requiring felony offenders to serve fixed periods of time before being considered for parole. It left the door always open to the possibility of early release from

¹⁸⁵ Vitiello, *Three Strikes*, *supra* note 181, at 395.

¹⁸⁶ See PENAL CODE: FINAL DRAFT, *supra* note 24, at 341.

incarceration (by shunning the use of mandatory minimum terms of imprisonment), laid the foundation for a liberal rather than a hesitant use of parole in making final decisions on punishments, and in so doing built something of a barrier to an excessive reliance on incarceration in efforts to control crime.¹⁸⁷

Parole was used liberally before the tough-on-crime movement and undoubtedly served to suppress prison populations (although that was not its purpose). Kentucky's parole practices of the early 1970s show that felony offenders were far more likely to complete service of prison sentences on the street, under the supervision of parole officers, than in a prison facility:

Year	Hearings	Paroles	Deferrals	Serve Outs
1972-73	2,532	51%	30%	19%
1973-74	2,466	53%	28%	19%
1974-75	2,814	51%	32%	17% ¹⁸⁸

National statistics demonstrate that the Kentucky experience of this period was not unique: "In the late 1970s, approximately 70 percent of prison releases were discretionary parole releases entering the community because of a parole decision."¹⁸⁹ By this time, however, the tide had turned against the rehabilitation model, tough-on-crime advocates had taken aim on the whole concept of parole, and the situation and numbers were headed toward a dramatic adjustment.

The first shot against parole in Kentucky took the form of mandatory minimum terms of imprisonment for repeat offenders. In 1976, as discussed above, the General Assembly imposed a mandatory minimum sentence of ten years in prison for persistent felony offenders in the first degree (i.e., persons committing a third offense after two prior convictions).¹⁹⁰ Nearly two decades later, in 1994, the General Assembly dropped this mandatory minimum for repeat offenders most recently committing a class D felony,¹⁹¹ but kept it intact for all other repeat offenders.¹⁹² In 1986, the General Assembly moved against parole practices for "violent offenders,"¹⁹³ imposing a mandatory minimum of

¹⁸⁷ See *id.*

¹⁸⁸ See Ky. Parole Bd., *Summary of Parole Board Activities from July 1, 1972 to July 1, 1973* (1973); Ky. Parole Bd., *Parole Board Statistical Report: 1973-74* (1974); Ky. Parole Bd., *Parole Board Statistical Report: 1974-75* (1975).

¹⁸⁹ MACKENZIE, *supra* note 27, at 22.

¹⁹⁰ Act of Mar. 29, 1976, ch. 180, § 1, 1976 Ky. Acts 425.

¹⁹¹ Act of Apr. 11, 1994, ch. 396, § 11, 1994 Ky. Acts 1196.

¹⁹² See K.R.S. § 532.080(7) (Banks-Baldwin 2004).

¹⁹³ As used in this section, "violent offender" means any person who has been convicted of or pled guilty to the commission of a capital offense, Class A felony, or

twelve years for some violent offenders and requiring for all such offenders that they not be released before serving at least fifty percent of their sentences.¹⁹⁴ In 1998, the General Assembly got even tougher on the violent offender, increasing the mandatory minimum term to twenty years of imprisonment and requiring that all such offenders not be released from custody before serving eighty-five percent of their sentences.¹⁹⁵ The end result is an ever-growing number of offenders without eligibility for parole, a phenomenon that has had a substantial impact on the inmate population problem described above, although the full effects of the most recent and far-reaching of these changes (most notably the eighty-five percent requirement) have yet to be felt.

The tougher laws on parole have probably had more of an impact on the attitude toward the use of parole than on inmate numbers. The dilemma faced by the Parole Board is usually between a desire to protect the public from the commission of additional crimes and a desire to provide for supervised release of the inmate (and the assistance that goes with such release). Needless to say, decisions and rates of release ultimately depend upon the Board's willingness to run the risk of additional crimes by the inmate, for that risk cannot be eliminated from the equation. The Board has performed its duties for more than fifty years under a very flexible yardstick for granting or denying parole ("the best interest of society and not as an award of clemency"¹⁹⁶), but for at least two decades the Board has done so under the influence of a nationwide movement against the very idea of parole. It should be no surprise that under the influence of this movement (and the broader tough-on-crime movement), the Parole Board has put a premium on public safety and a damper on its enthusiasm for the use of parole.

No dramatic departures from prior practices can be found in Kentucky's parole statistics through the 1970s. Mandatory minimum terms were still fairly insignificant, supervised release continued to have the support of most corrections professionals, and punitive penology had only begun to have its effect on sentencing policies and practices.

The picture began to change during the 1980s and got even tougher on inmates during the 1990s, as the Parole Board grew increasingly more reluctant to grant parole (as shown by the data in Figure 6 below) and increasingly more willing to order full term serve-outs (as shown by the data in Figure 7 below):

Class B felony involving the death of the victim, or rape in the first degree, or sodomy in the first degree of the victim or serious physical injury to a victim." Act of Apr. 9, 1986, ch. 358, § 1, 1986 Ky. Acts 786–87.

¹⁹⁴ *See id.*

¹⁹⁵ Act of Apr. 14, 1998, ch. 606, § 77, 1998 Ky. Acts 3643.

¹⁹⁶ K.R.S. § 439.340(2) (Banks–Baldwin 2004).

Figure 6
Percentage of Hearings Producing Parole

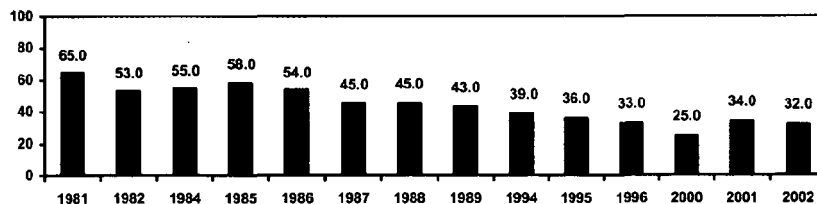
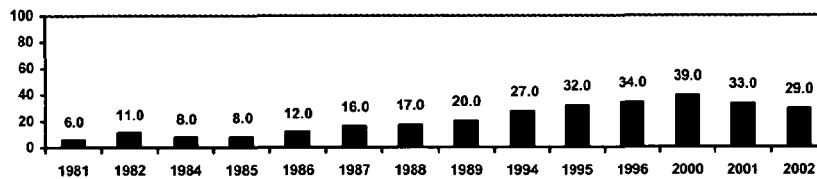


Figure 7
Percentage of Hearings Producing Serve-Outs



Source: Annual Reports of Parole Board

The Board did not merely slip into a tougher stance on parole. It carefully weighed the downside risk of releasing greater numbers of inmates “without restriction, supervision and access to certain community resources”¹⁹⁷ against the need to protect the public from criminal acts, and tilted very strongly in favor of the latter: “Without a doubt, public protection is the primary function served by the Parole Board and the parole system.”¹⁹⁸ It understood the relationship between parole and prison populations, knew that tougher parole would have a dramatic effect on incarceration rates that were already standing at record levels,¹⁹⁹ but was focused above all else on protecting the public from

¹⁹⁷ “It does concern the Board that 20% of all the inmates who received a parole hearing in 1989 were ordered to serve-out their sentence[s]. This means that these individuals who the Board viewed as very poor parole risks will be released from incarceration at their conditional release date and return to their communities without restriction, supervision and access to certain community resources.” Ky. Parole Bd., *1989 Annual Report of the Kentucky Parole Board* 26 (1989).

¹⁹⁸ *Id.* at 4.

¹⁹⁹ The clearest indication that the Board acted with full awareness of its effect upon prison population numbers is contained in the following statement from its 1989 annual report: “The total number of inmates paroled has fluctuated over the years but it is significant to note that 2534 paroles were granted in 1989 as compared to 2975 in 1980. The corresponding number of intakes to the prison system for these years was 4482 and 2716 respectively. Simple subtraction indicates that in 1980 approximately 250 more

additional inmate crime (even at the cost of overcrowded prisons): “Public protection . . . is and will remain the primary function of the Board rather than inmate population control.”²⁰⁰

The information in Figures 6 and 7 shows that parole got steadily tougher in Kentucky from 1985 to 2002; the information in Figure 3 shows that the state’s inmate population increased during this same period from 5,745 to 16,420 (an increase of 10,675 inmates). The connection between the two is obvious and substantial.

D. *The War on Drugs*

America’s drug problem is and has been enormous:

A 1991 survey revealed that 74.4 million (36.2%) of Americans aged twelve and older reported using an illegal drug at least once during their lifetime For those adults under the age of twenty-five, an estimated 15.8% have used cocaine at least once, and for those between the ages of twenty-six and thirty-four, an estimated 25.2% have used cocaine.²⁰¹

In addition to supplying the criminal justice system with an ever-increasing number of drug charges, the nation’s appetite for illegal drugs is blamed for a high percentage of the country’s violent crimes,²⁰² is undoubtedly responsible for higher levels of property crimes,²⁰³ and fully deserves to be blamed for the devastating effects on individuals, families, and even whole communities and for inflicting literally unbearable costs on society and on the justice system in particular. It is no wonder that there has been widespread public alarm and resentment, an equally widespread belief that special measures were needed to curb the tide, and that there was ultimately a declaration of war on the problem (the so–

inmates were paroled than entered prison. In 1989, however, almost 2000 more inmates came into prison than were paroled.” *Id.* at 30.

²⁰⁰ *Id.* at 6.

²⁰¹ Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 339 (1995).

²⁰² “Drugs such as cocaine, amphetamines and PCP, for example, affect physiological function, cognitive ability and mood. These effects increase the likelihood that users will act violently; at least sixty percent of violent crime is associated with drug use.” *Id.* at 341.

²⁰³ “Other drug-related offenses may be motivated by the user’s need for money to support continued use. Overall, 13.3% of convicted jail inmates in 1989 said that they committed their offense to obtain money for drugs. Some users commit property crimes to support their habits. Other users resort to prostitution, or increase their prostitution activity to finance their drug habits when drug prices rise.” *Id.*

called “war on drugs”). The war on drugs produced, above all else, a much tougher set of laws against users, dealers, and traffickers (harsher penalties, mandatory minimum sentences, lesser uses of probation and parole, etc.), an intensified law enforcement effort at all levels of government, and a determination to bring the problem under control without regard to costs or consequences.

The war effort included a little money for prevention and treatment (with an eye on the demand for drugs) and a lot for law enforcement and interdiction efforts (with an eye on reducing supply). The effort was affected to a significant degree by the politics of crime:

By 1992, the federal drug control budget had risen to almost \$12 billion, with only a small portion slated for prevention and treatment. For politicians, addressing the drug problem meant little more than “getting tough on drugs.” After all, it was easy to count the numbers of arrests and convictions for drug crimes, of users and dealers placed in prison cells, and of seizures of cocaine-laden vessels in the Caribbean, and this number counting made for good fodder for those on the election beat. Increasing the number of treatment beds appeared to be a “soft” approach, and as for prevention, that was not something you could count.²⁰⁴

The idea was to control the problem by reducing illegal activities at both the user and supplier ends of the spectrum, and to do so mostly through the combination of tougher laws and tougher enforcement, an incredibly daunting challenge at the user end of the spectrum to say the least:

There are vast numbers of hard core drug users who possess and obtain drugs. These numbers are far greater than the numbers of users and drug offenders who are now incarcerated and who potentially could be incarcerated. In 1991, there were over 6 million cocaine users, 5.7 million users of hallucinogens and inhalants, and approximately 700,000 heroin users. According to one estimate, only about one-eighth of the hard-core cocaine and heroin abusers are now incarcerated. If we add the “non-user” offenders to these “user” offenders, there are so many offenders that it is fiscally and practically unrealistic to incarcerate more than a small number of them.²⁰⁵

The war on drugs continues, the drug problem persists, noises about getting tougher on drug offenders have softened and are heard less often,

²⁰⁴ James A. Inciardi, *The Irrational Politics of American Drug Policy: Implications for Criminal Law and the Management of Drug-Involved Offenders*, 1 OHIO ST. J. CRIM. L. 273, 277 (2003).

²⁰⁵ Spencer, *supra* note 201, at 367–68.

and lawmakers have occasionally been heard to suggest that a different approach might be needed.²⁰⁶ In the meantime, professionals in the nation's corrections systems have been left with inmate flows from the war on drugs that are staggering, if not overwhelming.

The war on drugs has drawn a lion's share of blame for the most serious of the nation's corrections problems and/or dilemmas.²⁰⁷ The following observations on the subject from two different sources provide both content and perspective:

Both the number and the proportion of drug offenders in prison have exploded. In 1980, the drug incarceration rate was 15 inmates in state and federal prisons per 100,000 adults. By 1996, the rate had increased more than ninefold to 148 per 100,000, "a rate greater than that for the entire U.S. prison system in the fifty years to 1973."²⁰⁸

At the Federal level, prisoners incarcerated on a drug charge make up nearly 60% of all inmates. Since 1980, the number of drug offenders in state prisons has increased thirteen-fold, and drug offenses now comprise one-fifth of all state prisoners. Most of these persons are not high-level actors in the drug trade, and most have no prior criminal record for a violent offense. There is scant empirical evidence suggesting that this "get tough" policy has had any appreciable effect on stemming the flow of drugs into the country or decreasing the use of illicit narcotics.²⁰⁹

Nothing less could have been expected from policies that were designed to deter users at all costs and to incapacitate through lengthy imprisonment anyone who looked or smelled like a drug dealer. The war on drugs was driven from the beginning by a commitment to get tough on offenders, and that objective was pursued aggressively for two decades, with very little if any thought to the possibility that the end

²⁰⁶ See generally CAMPBELL, *supra* note 22 (summarizing state legislators' efforts at reform); WILHELM & TURNER, *supra* note 22, at 1–2 (describing how some lawmakers "have revisited . . . sentencing policies and instituted limited reforms (e.g. reducing sentencing ranges and repealing mandatory minimums)" as part of an effort to control correctional budgets); O'Hear, *supra* note 22, at 3 (describing reform of mandatory minimum laws in Connecticut and Wisconsin).

²⁰⁷ See, e.g., Inciardi, *supra* note 204, at 280 ("Largely as a consequence of this emphasis on drug enforcement on the nation's streets, approximately 6.3 million adults—some 3.1% of the nation's adult population—were under correctional supervision (prison, probation, or parole) at the end of the 1990s.").

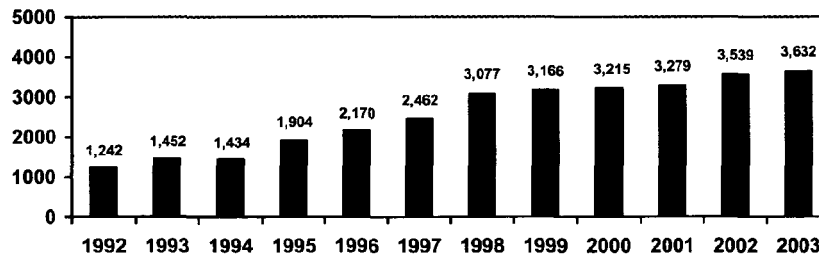
²⁰⁸ Gottschalk, *supra* note 19, at 201.

²⁰⁹ The Sentencing Project, *Impact of Drug Policy*, at http://www.sentencing-project.org/issues_09.cfm (Sept. 23, 2004).

product might be a “bloated prison system with little impact on substance abuse.”²¹⁰

The Kentucky experience with the drug problem seems to closely resemble the national experience, although historical data for comparison purposes is harder to find. The state definitely got tougher on drug offenders (as discussed below) and as a result had to provide for incarceration of more inmates for longer periods of imprisonment in already crowded facilities. The impact of this initiative on the corrections system was immediate, has become clearer and substantially more burdensome in recent years, and remains as the most prominent component of the state’s overall growth of incarceration. Figure 8 is drawn from data showing the number of drug offenders held by Kentucky each year from 1992 to 2003:

Figure 8
Drug Offenders in Kentucky Facilities



Source: Kentucky Department of Corrections²¹¹

In several respects, the statistics of this chart are disconcerting. The number of drug offenders held in Kentucky’s corrections system in the year 2003 (totaling 3632) exceeds the number of prisoners of *all* categories held in custody by the state just 30 years ago (before the tough-on-crime-movement) by 600 inmates.²¹² More importantly

²¹⁰ JENNI GAINSBOROUGH & MARC MAUER, DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990s 27 (The Sentencing Project 2000).

²¹¹ See KY. DEP’T OF CORR., INSTITUTIONAL PROFILE BY CRIME TYPE ON JANUARY 1, 1989–2001, at http://www.corrections.ky.gov/Facts_n_Figures/profile.htm (last visited Sept. 22, 2004); KY. DEP’T OF CORR., INMATE PROFILE JANUARY 2002, at http://www.corrections.ky.gov/Facts_n_Figures/profile 2002.pdf (last visited Sept. 22, 2004); KY. DEP’T OF CORR., INMATE PROFILE JANUARY 2003, at http://www.corrections.ky.gov/Facts_n_Figures/profile 2003.pdf (last visited Sept. 22, 2004) [hereinafter collectively referred to as DEP’T OF CORR., INMATE PROFILES].

²¹² As shown by Figure 3 in Part III, *supra*, the total number of inmates in Kentucky’s prisons in the early 1970s ranged from 2838 in 1970 to 3120 in 1972, and averaged for the first five years of the decade only 3015. See Dep’t of Corr., Population Projections, *supra* note 84.

perhaps, the numbers in the chart show a growth in the incarceration of drug offenders that paints an especially troublesome picture for the future. The growth of drug inmates from 1242 to 3632 in only twelve years (an increase of almost 2400 inmates) is staggering, and the rate of growth for the period in comparison to growth rates for other major categories of crime is no more comforting—almost 200% for drug inmates in comparison to 59% for violent offenders²¹³ and only 29% for property crime offenders.²¹⁴ In these numbers, however staggering they are, there is no mystery and no surprise, for they result directly from the obsession with incarceration that has dominated Kentucky's war on drugs.

Kentucky signaled fairly early a determination to use imprisonment as the first and most important weapon against the drug epidemic. In the late 1960s and early 1970s, the state had two initiatives for drug law reform unfolding at the same time—one that was part of the state's comprehensive criminal law reform effort (as recommended by drafters of the state's new penal code)²¹⁵ and one that was part of an initiative by the Kentucky Department of Health to deal only with the state's drug problems.²¹⁶ The two initiatives culminated in the formulation of separate recommendations for reform of the state's drug laws that arrived in the hands of the General Assembly well in advance of its legislative session for 1972. The fate of the two initiatives in the 1972 session sent a crystal clear message as to how the General Assembly intended to attack the drug problem.

The two sets of recommendations were highly similar in their overall approaches to criminalizing illegal drug activities. They both recommended a set of crimes to cover trafficking in drugs, that is, activities related to commercial exploitation of the illegal drug market, and a separate set of crimes to cover the possession of illegal drugs for personal use. They both grouped illegal drugs into five schedules according to their potential for abuse (and other factors),²¹⁷ and used those schedules for purposes of distinguishing the more serious from the

²¹³ The state held 5023 violent offenders in custody in 1992 and 8000 in 2003, an increase of 2977, or fifty-nine percent. See DEP'T OF CORR., INMATE PROFILES, *supra* note 211.

²¹⁴ The state held 2648 property crime offenders in custody in 1992 and 3437 in 2003, an increase of 789, or twenty-nine percent. See *id.*

²¹⁵ See PENAL CODE: FINAL DRAFT, *supra* note 24, at 287–300.

²¹⁶ For a fuller discussion of these two initiatives, see Dale H. Farabee, *The Evolution of Drug Legislation in Kentucky*, 61 KY. L.J. 641 (1973).

²¹⁷ The schedules relied upon for both sets of recommendations were derived from schedules contained in an earlier enacted federal drug law that had been enacted in 1970. See The Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 95-513, 84 Stat. 1236 (1970).

less serious offenses.²¹⁸ In modest respects, they both encouraged the use of treatment and rehabilitation in lieu of imprisonment for offenders convicted of possession for personal use.²¹⁹ They were not carbon copies of each other but were enough alike to have been drawn from the same model, except for one crucial difference. The two were miles apart in their recommendations on punishment of drug offenders.

The drafters of the new penal code recommended penalties for drug crimes that were at the bottom end of the proposed penal code's penalty structure. The penalties for possessing illegal drugs for personal use were at the misdemeanor level (maximum of twelve months in jail) except for possession of narcotic drugs listed in the two highest schedules (Schedules I and II), which was punished as a class D felony (with a penalty range of one to five years).²²⁰ The penalties for trafficking in illegal drugs were fixed at the misdemeanor level for the least dangerous drugs (listed in Schedules IV and V), at the class D felony range for more serious drugs (non-narcotic drugs listed in Schedules I and II), and at the class C felony range (from five to ten years) for the most serious drugs (narcotic drugs in Schedules I and II).²²¹ The penalties for these offenses were in line with penalties for other crimes in the proposed new code and stopped far short of sending a message that the state was about to wage a war on the drug epidemic.

The drafters of the second set of reform recommendations by the Kentucky Department of Health set penalties for drug crimes that were substantially identical to the penalties recommended by drafters of the proposed penal code, and then proceeded to push those penalties literally off the chart by recommending an enhancement provision for repeat offenders. They ignored (or overlooked) the fact that penalty ranges allow for harsher treatment of more serious offenders (such as those who repeat earlier crimes) and recommended an across-the-board "two strikes" law for drug offenders that doubled the potential penalties for most drug offenses (elevating one to five ranges to five to ten, five to ten ranges to ten to twenty). The proposal had the additional effect in some instances of elevating misdemeanor penalties (maximum twelve months

²¹⁸ The drugs most likely to produce criminal charges and conviction (such as heroin, cocaine, LSD, and marijuana) were included in the two highest schedules (Schedule I and Schedule II) while drugs with less potential for abuse (and more potential for accepted medical use) were included in the other three schedules (Schedules III, IV, and V). For a fuller description of the schedules and the drugs specifically included therein, see Act of Mar. 25, 1972, ch. 226, §§ 5-14, 1972 Ky. Acts 942-49; PENAL CODE: FINAL DRAFT, *supra* note 24, at 296-300.

²¹⁹ See Act of Mar. 25, 1972, ch. 226, §§ 5-14, 1972 Ky. Acts 942-49; Farabee, *supra* note 213, at 650-52.

²²⁰ PENAL CODE: FINAL DRAFT, *supra* note 24, §§ 2910-2911, at 291-93.

²²¹ *Id.* §§ 2905-2907, at 289.

in jail) to felony penalties (one to five years in prison). The “two strikes” penalties were incredibly high in comparison to penalties for other crimes in the proposed new penal code, and were surely calculated by the sponsors of this legislation to announce in no uncertain terms that toughness, rather than tolerance, is the correct response to the drug problem.

The General Assembly concurred with this latter view, rejected the more tolerant views and penalties of the proposed new penal code,²²² enacted the above described “two strikes” law for drug offenses,²²³ and set out to fight the war on illegal drug use with very heavy reliance on incarceration. In the more than three decades since this beginning, the General Assembly has not retreated in the slightest from its aggressive stance and, in fact, has become tougher on drug offenders. The “two strikes” law remains intact, applies almost across the board (with the exception of a second offense of marijuana possession²²⁴), elevates some misdemeanor offenses to felonies,²²⁵ doubles, or more than doubles, the penalties for most felony drug crimes,²²⁶ and continues to push penalties in this area to very high levels both in the abstract and in relationship to other crimes on the books. But there is much more to the toughness of this law than is found in the “two strikes” provisions. In at least the following ways, the General Assembly, with some important help from the Kentucky Supreme Court, has heaped added misery on drug offenders.

First, the legislature created the offense of selling controlled substances to a minor and gave it the same penalties that are imposed on the most serious of all drug offenses (trafficking in the first degree), namely five to ten years in prison for a first offense and ten to twenty for a repeat of the offense.²²⁷ The offense extends to all types of controlled

²²² The 1972 General Assembly enacted the new penal code in 1972 (although giving it a deferred effective date to July 1, 1974) without any provisions on drug crimes. *See* Act of Mar. 27, 1972, ch. 385, 1972 Ky. Acts 1653–1783. The 1974 General Assembly reenacted the new penal code again without any provisions on drug crimes. *See* Act of Apr. 2, 1974, ch. 406, 1974 Ky. Acts 831–889.

²²³ *See* Act of Mar. 25, 1972, ch. 226, 1972 Ky. Acts 938–966.

²²⁴ *See* K.R.S. § 218A.1422 (Banks–Baldwin 2004).

²²⁵ *See, e.g.*, § 218A.1414 (trafficking in controlled substances in third degree); § 218A.1416 (possession of controlled substances in second degree); § 218A.1417 (possession of controlled substances in third degree); § 218A.1421(2) (trafficking in marijuana).

²²⁶ *See, e.g.*, § 218A.1412 (elevating first degree trafficking from a Class C felony to a Class B felony); § 218A.1413 (elevating second degree trafficking from a Class D felony to a Class C felony); § 218A.1415 (elevating first degree possession from a Class D felony to a Class C felony); § 218A.1421(3) (elevating trafficking in marijuana from a Class D felony to a Class C felony).

²²⁷ § 218A.1401.

substances (even those in Schedules IV and V), to any quantity of such a substance (including small amounts of marijuana), and to any kind of transfer (including transfers without consideration). Its coverage is disconcerting to say the least. Should an eighteen-year-old give to a seventeen-year-old friend a half joint of marijuana, the crime would be committed and the penalty would be no less than five nor more than ten years in prison, unless the transfer was a second drug offense in which case the penalty would be no less than ten nor more than twenty years. Should the eighteen-year-old have possessed a weapon at the time or have an additional prior conviction for theft, the penalties would be even more unconscionable, as described below.

Second, in the legislative act that created the offense described in the preceding paragraph,²²⁸ the General Assembly also created the offense of trafficking in a controlled substance within one thousand yards of a school, classifying this as a D felony.²²⁹ At least in urban areas, the requirement that trafficking occur within one thousand yards of a school is largely cosmetic; because schools are so numerous in such areas, a very high percentage of illegal drug sales will bring the offense into play. The offense extends to all controlled substances (Schedules I through IV) and therefore works to convert drug crimes that would normally be classified as misdemeanors into felonies.²³⁰ And because this offense and the one described in the preceding paragraph each have an element not required by the other,²³¹ a sale of drugs to a minor within one thousand yards of a school would support convictions of both crimes²³² and potentially higher penalties as a result of court-ordered consecutive service of sentences.

Third, the relationship between the repeat offender provisions of the drug laws (the "two strikes" law) and the repeat offender provision of the Penal Code (the persistent felony offender or "three strikes" law) can have a dramatic effect on the penalties for drug offenders under certain circumstances. The Kentucky Supreme Court has ruled that these statutes operate independently of each other and thus can support a double

²²⁸ See Act of Apr. 13, 1992, ch. 441, § 21, 1992 Ky. Acts 1327.

²²⁹ See *id.* § 11, at 1325.

²³⁰ Specifically, it would elevate to felony status the misdemeanor crime of trafficking in the third degree (which covers drugs in Schedules IV and V) and the misdemeanor crime of trafficking in small quantities of marijuana. See K.R.S. §§ 218A.1414, 218A.1421(2) (Banks-Baldwin 2004).

²³¹ One offense but not the other requires that the transaction involve a minor, and one but not the other requires that the transaction occur within one thousand yards of a school.

²³² Overruling earlier, more restrictive controls over multiple convictions from a single act, the Kentucky Supreme Court held in 1997 that a single criminal act can support multiple convictions when there is in each charged crime an element not required by the other. See *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1997).

enhancement of penalties for a second drug offense,²³³ although it has also ruled that a single prior conviction may not be used for both enhancements.²³⁴ For instance, a defendant who is convicted of trafficking in small amounts of marijuana (a misdemeanor punishable by no more than twelve months in jail) could face enhancement on the basis of a prior marijuana trafficking offense (elevating his status to that of a class D felon with a penalty range of one to five years in prison), and a second enhancement on the basis of a prior felony conviction for theft (further elevating his status to that of a class C felon with a penalty range of five to ten years). On the other hand, if the charged offense involved sale to a minor (a class C felony in its own right), enhancement under the drug laws for an earlier drug conviction would elevate the charged offense to class B status (ten to twenty years in prison), and a second enhancement for the prior theft would further elevate the charged offense to class A status (not less than twenty nor more than fifty years or life imprisonment).

Fourth, once again ignoring the fact that penalty ranges for drug and other offenses allow greater penalties for more serious offenders, such as those who possess firearms when committing crime, the General Assembly acted in 1994 to add to Kentucky's drug laws yet another enhancement provision.²³⁵ The provision elevates all drug offenses by one level if committed while the offender was in possession of a firearm,²³⁶ meaning that offenses classified as misdemeanors are elevated to class D felonies, offenses classified as class D felonies are elevated to class C felonies, et cetera. The defining statute requires that the firearm be *possessed* at the time of the offense (not that it be *used* in the offense), and seems to permit the enhancement to occur alongside other enhancements that are applicable to a given drug offense (e.g., the persistent felony offender enhancement), although with respect to the latter point the Kentucky Supreme Court has not yet so ruled.²³⁷

There is nothing in the content or history of these provisions (or in some others of lesser importance²³⁸) to indicate that they derive from

²³³ See *Commonwealth v. Grimes*, 698 S.W.2d 836, 837 (Ky. 1985) (“[A] conviction of a second offense of trafficking in a Schedule III controlled substance under KRS 218A.990(2), may be further enhanced by a persistent felony offender second degree charge pursuant to the general PFO statute . . .”).

²³⁴ For example, a prior drug conviction could not be used to enhance a drug conviction under the drug laws and then be used again for an enhancement under the persistent felony offender laws. See *id.*

²³⁵ Act of Apr. 11, 1994, ch. 396, § 5, 1994 Ky. Acts 1193.

²³⁶ See K.R.S. § 218A.992 (Banks–Baldwin 2004).

²³⁷ See ROBERT G. LAWSON & WILLIAM H. FORTUNE, KENTUCKY CRIMINAL LAW 633 (1998).

²³⁸ See, e.g., K.R.S. § 218A.1402 (providing higher penalties for criminal conspiracy when the conspiracy is to commit the offense of trafficking in controlled substances); §

some kind of carefully calculated effort to develop a rational penalty structure for drug crimes. They were enacted one by one over a period of about twenty-five years and appear to be related one to another only by a common motive—a firm belief that the best way to control the drug epidemic is to put more people in prison for longer periods of time. They have put huge numbers of people in prison (as the data in Figure 8 shows), and beyond that have done nothing but raise serious doubts as to whether incarceration is the ultimate solution to the drug problem. They have generated some discussion about alternatives to incarceration (e.g., drug courts, increased spending for treatment, etc.) but continue to produce an ever-increasing flow of inmates for the prison system, an exceedingly costly condition that cannot be rectified without a major reversal of public policy and an equally major overhaul of the state's drug laws.

E. Miscellaneous Matters

1. Violent Offenders

In 1984, Congress abandoned rehabilitation of offenders as a significant goal of punishment, eliminated indeterminate sentencing, and abandoned the idea of release on parole in the federal system.²³⁹ In 1994, it pushed states in the same direction by providing billions of federal dollars for construction of prisons on the condition that recipients require violent offenders to serve no less than eighty-five percent of their sentences of imprisonment (without credit for good time served).²⁴⁰ In 1998, influenced by this law, the Kentucky General Assembly added to the state's parole laws a provision providing that "a violent offender shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed."²⁴¹ It defined "violent offender" to include all persons committing capital offenses, class A felonies, class B felonies that involve death or serious physical injury to a victim, and the crimes of rape and sodomy in the first degree.²⁴²

218A.1418 (providing for substantially greater penalties for the offense of theft when the theft involves controlled substances); § 218A.1432 (providing for higher than normal penalties for manufacturing and trafficking in methamphetamines).

²³⁹ See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1988 (1984).

²⁴⁰ See 42 U.S.C. §§ 13701–13709 (1994).

²⁴¹ See Act of Apr. 14, 1998, ch. 606, § 77, 1998 Ky. Acts 3643 (codified at K.R.S. § 439.3401(3)).

²⁴² K.R.S. § 439.3401(1).

The effect of this provision is essentially to eliminate the possibility of parole for a substantial group of offenses—all murders and first degree manslaughters,²⁴³ some but not all kidnappings,²⁴⁴ all assaults in the first degree,²⁴⁵ all rapes and sodomies in the first degree,²⁴⁶ burglaries and robberies in the first degree where serious injury occurs,²⁴⁷ and arson in the first degree.²⁴⁸ It has had no effect on the state's inmate population problem to date, since very few if any of the offenders covered by the provision would have qualified for parole release in the absence of the provision. But in due course (a decade or so down the road), the provision will have a tremendous impact on this problem by producing a substantial and steady flow of prisoners with very long sentences that must be served out. In addition to elevating the inmate population, the provision will impose an extraordinary burden on the state's corrections budget because of the unusual costs of caring for an older prison population; "one report estimates that the cost of incarcerating a geriatric prisoner is three times that of maintaining a regular inmate."²⁴⁹

2. *Limits on Probation*

The 1974 Penal Code was enacted into law without a single restriction on the authority of sentencing judges to use probation or conditional discharge in lieu of imprisonment.²⁵⁰ Probation, of course, was a crucial piece of the rehabilitation model of sentencing and an early target of the tough-on-crime movement. In 1976, just one year after the new penal code took effect, the General Assembly enacted its first and probably most important prohibition against the use of probation in lieu of imprisonment, categorically denying that alternative to persons convicted of felonies involving the use of firearms (except for those classified as class D felonies or certain domestic disputes).²⁵¹ This same legislation eliminated the possibility of probation or conditional discharge for persons convicted of additional crimes committed while on

²⁴³ See §§ 507.020, 507.030.

²⁴⁴ See § 509.040.

²⁴⁵ See § 508.010.

²⁴⁶ See §§ 510.040, 510.070.

²⁴⁷ See § 511.020.

²⁴⁸ See § 513.020.

²⁴⁹ Vitiello, *Three Strikes*, *supra* note 181, at 437.

²⁵⁰ See K.R.S. § 533.010. As discussed earlier, the 1974 Code authorized judges to grant probation in all cases (except where a death penalty was imposed) and strongly encouraged its use by providing that it "shall be granted unless the court is of the opinion that imprisonment is necessary for protection of the public." *Id.*

²⁵¹ See Act of Mar. 19, 1976, ch. 180, § 2, 1976 Ky. Acts 426 (codified at K.R.S. § 533.060(1)).

parole or probation for earlier crimes.²⁵² From this beginning, the General Assembly has curtailed the authority of courts to use probation in lieu of imprisonment in a variety of ways:

One: Probation is statutorily denied to persons who commit a variety of sexual offenses against youthful victims, including rape, sodomy, prostitution, incest, using minors in sexual performances, and others.²⁵³ The defining statute fixes "criteria" for such a denial (so-called aggravating circumstances), leaving little room for probation after conviction of a qualifying offense.²⁵⁴

Two: Repeat offenders are denied probation in most instances by the persistent felony offender laws.²⁵⁵ They may be considered for this alternative only when all of their convictions (priors and present) are for offenses classified as class D felonies that have not involved "a violent act against a person."²⁵⁶

Three: Probation has also been categorically denied to offenders who engage in crimes while armed with deadly weapons and wearing body armor.²⁵⁷

While the impact of these restrictions on the state's inmate population problem is difficult if not impossible to measure, because some of the offenders to whom the restrictions apply are not good candidates for probation in any event, they are each designed to guarantee greater use of imprisonment and undoubtedly have had that effect.

3. *Concurrent and Consecutive Sentences*

The 1974 Penal Code gave sentencing judges unrestricted discretion to run multiple sentences concurrently, but gave them limited authority to run multiple sentences consecutively. The code provided in the latter situation that multiple sentences could not be accumulated to produce imprisonment beyond the maximum that would have been produced by a prosecution of the defendant under the persistent felony offender law for the most serious of his or her crimes.²⁵⁸ The objectives were 1) to give sentencing judges maximum flexibility in providing for the disposition of offenders and 2) to provide some minimal protection against abusive and irrational sentencing practices.

²⁵² See *id.* (codified at K.R.S. § 533.060(2)).

²⁵³ See K.R.S. § 532.045.

²⁵⁴ See § 532.045(2).

²⁵⁵ See §§ 532.080(5), (7).

²⁵⁶ *Id.*

²⁵⁷ See § 533.065.

²⁵⁸ See Act of Apr. 2, 1974, ch. 406, § 283, 1974 Ky. Acts 874 (codified at K.R.S. § 532.110).

In one of its earliest efforts to get tougher on criminals, the General Assembly modified both branches of the law on concurrent and consecutive sentencing, and in so doing opened the door to substantially harsher treatment of defendants facing sentences for multiple crimes. It modified the persistent felony offender provision that had been used to control consecutive sentencing²⁵⁹ and, perhaps without intending to do so, lost much of the law's protection against abusive aggregation of consecutive sentences for multiple offenses.²⁶⁰ It reduced the authority of judges to use concurrent sentencing by prohibiting concurrent sentences for felonies committed by offenders during periods of probation or parole²⁶¹ and for all offenses committed by persons while awaiting trial on other charges.²⁶² These changes had the immediate effect of producing longer sentences for repeat offenders, and a longer range effect of producing higher levels of occupancy in the state's prison facilities.²⁶³

4. Others

It is next to impossible to describe all of the ways in which the General Assembly has contributed to the state's inmate population by toughening provisions of the 1974 Penal Code. It has created new crimes for which it has fixed unusually high penalties,²⁶⁴ has regularly

²⁵⁹ See *supra* Part IV.B for a full discussion of changes in the persistent felony offender law.

²⁶⁰ Decisions construing the applicable statute seem to suggest that there remains little protection against consecutive aggregation of sentences. See, e.g., *Violett v. Commonwealth*, 907 S.W.2d 773 (Ky. 1995) (affirming an aggregate sentence of 754 years); *Hampton v. Commonwealth*, 666 S.W.2d 737 (Ky. 1984) (finding no fault with a sentence of 105 years); *Devore v. Commonwealth*, 662 S.W.2d 829 (Ky. 1984) (sustaining an aggregate sentence of eighty years generated by consecutive sentencing for relatively minor crimes).

²⁶¹ See Act of Mar. 29, 1976, ch. 180, § 2, 1976 Ky. Acts 426 (codified at K.R.S. § 533.060(2)).

²⁶² See *id.* (codified at K.R.S. § 533.060(3)).

²⁶³ In later legislation, the General Assembly added modestly to these effects by prohibiting the use of concurrent sentences when one of the sentences was being imposed for commission of either escape or attempted escape. See Act of Apr. 2, 1982, ch. 405, § 3, 1982 Ky. Acts 1371 (codified at K.R.S. § 532.110(3)).

²⁶⁴ The following are illustrative: In 1978, the General Assembly created the new offense of engaging in organized crime and fixed its penalty range at ten to twenty years in prison. See Act of Mar. 30, 1978, ch. 321, § 1, 1978 Ky. Acts 920 (codified at K.R.S. § 506.120). In that same year, it created the offense of using minors in sexual performances, setting the penalty range at five to ten years for offenses involving any minor, and at ten to twenty years for offenses involving a minor under sixteen, and at twenty to life if any physical injury occurred to the minor. See *id.* Act of Mar. 30, 1978, ch. 321, § 3, 1978 Ky. Acts 920. In 1982, it created the offense of criminal abuse and fixed penalties for this offense that in some instances have a penalty range of five to ten

toughened penalties on existing crimes,²⁶⁵ and on more occasions than can be mentioned has taken action to convert misdemeanors into felonies.²⁶⁶ It has also used the "two strikes" and "three strikes" concepts in several areas to raise relatively minor crimes from misdemeanors to felonies.²⁶⁷ None of these toughening measures on its own has added significantly to the state's inmate population. However, there is no room to doubt the extent to which they have cumulatively affected the flow of prisoners into the state's corrections system, especially those provisions that converted misdemeanors into felonies and brought into the state's prison population relatively minor offenders who would have been incarcerated in local jails without the conversions.

V. LOOKING AHEAD

A. Inmate and Cost Projections

Since 1980, the number of citizens held in custody in Kentucky has increased every year except one.²⁶⁸ The inmate population increased almost 450% from 1970 to 2000 and stood at 17,330 prisoners in 2003.²⁶⁹ The laws, policies, and sentencing practices that produced these results

years in prison, which is much higher than the penalties for assault and wanton endangerment that had earlier covered the conduct. *See* Act of Mar. 31, 1982, ch. 168, §§ 1-4, 1982 Ky. Acts. 412.

²⁶⁵ *See, e.g.*, Act of Mar. 9, 1982, ch. 56, §§ 2-3, 1982 Ky. Acts 89 (elevating second-degree arson from a Class C to a Class B felony and first-degree arson from a Class B to a Class A felony); Act of Feb. 28, 1992, ch. 16, §1, 1992 Ky. Acts 26 (elevating tampering with public records from a Class A misdemeanor to a Class D felony).

²⁶⁶ The following are illustrative: In 1976, the General Assembly elevated the crime of nonsupport from misdemeanor to felony by creating a new offense called flagrant nonsupport. *See* Act of Mar. 30, 1976, ch. 361, § 1, 1976 Ky. Acts 744 (codified at K.R.S. § 530.050(2)). In 1982, it elevated certain assaults and even attempted assaults from misdemeanors to felonies when the victim happens to be a peace officer, and since that time has done the same for certain assaults and attempted assaults when the victim happens to be either an employee of a detention facility or certain social workers. *See* Act of Apr. 2, 1982, ch. 429, § 1, 1982 Ky. Acts 1442 (codified at K.R.S. § 508.025). In 1984, the General Assembly elevated custodial interference from misdemeanor to felony by eliminating special treatment earlier given to defendants who interfered with legal custody of their own relatives (e.g., parent interfering with custody of own child). *See* Act of Mar. 9, 1984, ch. 79, § 1, 1984 Ky. Acts 113 (codified at K.R.S. § 509.070).

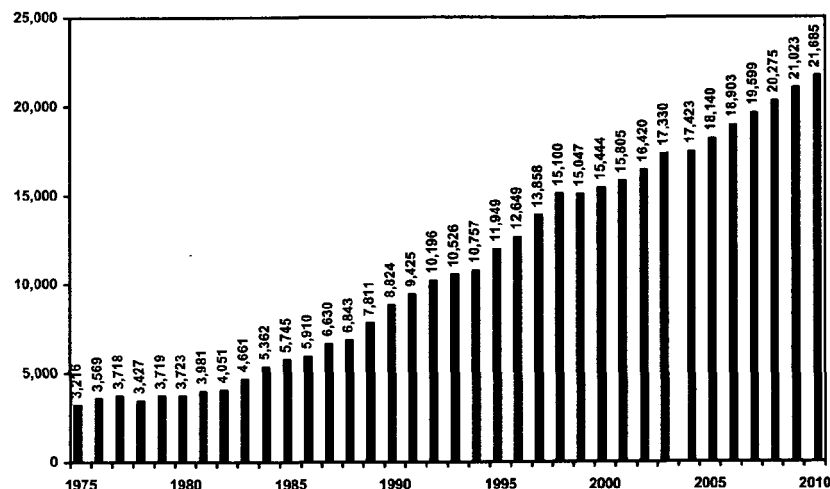
²⁶⁷ *See, e.g.*, K.R.S. § 510.015 (elevating minor sex crimes such as sexual misconduct to felonies upon the commission of a third offense); *id.* § 514.100 (elevating the crime of unauthorized use of automobiles from misdemeanor to felony upon commission of a second offense).

²⁶⁸ *See* Dep't of Corr., Population Projections, *supra* note 84.

²⁶⁹ *Id.*

are still intact and still delivering to the corrections system an ever-increasing number of inmates for incarceration in the state's prisons and jails. The Department of Corrections recently reported current and historical figures on new commitments from the court system, clearly indicating that the state's inmate flood is not even close to a crest—3088 new inmates in 1989, 5167 in 1995, and 7511 in 2003 (an increase of almost 150% from the beginning to the end of this period).²⁷⁰ In light of these critical numbers (and especially the trend), it is no surprise that the projections on inmate populations (as charted in Figure 9 below) show a corrections system continuing to reel in convicted felons at unprecedented rates:

Figure 9
Kentucky Department of Corrections
Inmate Population Projections



Source: Kentucky Department of Corrections²⁷¹

The ramifications of the projections are far-reaching to say the very least, especially the prediction that the corrections system will hold 4350 more inmates in 2010 than it held at the end of 2003. This increase of more than twenty-five percent is astonishing in such a brief period of time. If perspective is needed, it might be remembered that it took the

²⁷⁰ See KY. DEP'T OF CORR., ADMISSIONS & RELEASES—FREQUENCY OF INCOMING ACTIONS, at http://www.corrections.ky.gov/Facts_n_Figures/admissions.htm (last updated Sept. 21, 2004) [hereinafter DEP'T OF CORR., ADMISSIONS & RELEASES].

²⁷¹ See Dep't of Corr., Population Projections, *supra* note 84.

state almost two full centuries to reach a grand total of 3000 inmates in its prison facilities.²⁷²

Cost projections for elevated levels of inmate populations are harder to estimate and find, although no one can reasonably doubt that incarceration comes at a very heavy cost under the best of circumstances. The state reported in 2003 that the annual cost of incarcerating a single inmate had reached an average of \$17,193 (and was substantially more than that average in some institutions),²⁷³ and in that same year reported a total corrections budget of more than \$310 million.²⁷⁴ These numbers suggest that the corrections budget is quickly headed toward \$400 million, not counting funds that will be needed for construction of new facilities. The state will need the equivalent of one new prison every biennium for the housing of 4350 new inmates by 2010 (unless it chooses to house huge numbers in local jails), at a projected cost of \$100 million each if recent experiences are indicative of future construction costs.²⁷⁵

B. Inmate Flows

The tougher laws and tougher attitudes described above do more than generate greater numbers of inmates for incarceration. They push the corrections system to the limits of its capacity, create a need to find room for new commitments, and ultimately produce very high numbers of inmates for release back into the community. Too little consideration has been given to the latter of these numbers and to the fact that tough-on-crime policies and practices have produced for most corrections systems a kind of revolving door—relatively short periods of incarceration for huge numbers of citizens, release and supervision within the community, and all too often a return to custody for violation of release conditions. Facts and figures leave no room to doubt the existence of such a phenomenon in the Kentucky system.

The state has kept and reported data on flows of inmates into and out of prison facilities for at least fifteen years.²⁷⁶ The raw numbers have

²⁷² See *id.*

²⁷³ Dep't of Corr., Cost to Incarcerate, *supra* note 132.

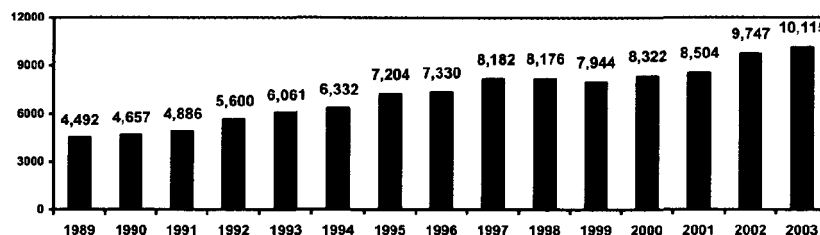
²⁷⁴ Dep't of Corr., Appropriations History, *supra* note 92.

²⁷⁵ The agency responsible for state construction projects recently reported that the state's most recent prison construction (the facility in Elliott County) cost \$123,000,000. See Capital Planning Board, Improvements Plan, *supra* note 134. The agency made the following statement about future costs: "[T]he DOC is also proposing design of another new medium security facility in 2006–08 at a cost of \$6,560,000. The actual construction, as proposed for 2008–10, has a cost of \$91,950,000 and an anticipated completion in FY 2010/11." *Id.*

²⁷⁶ See DEP'T OF CORR., ADMISSIONS & RELEASES, *supra* note 270.

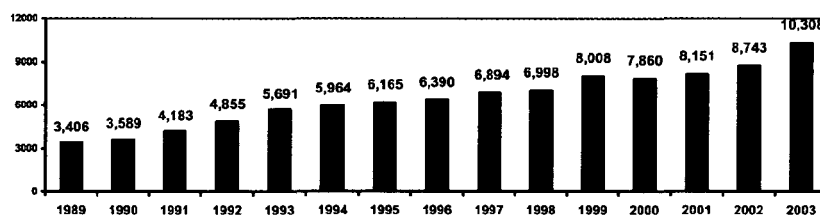
more than doubled during the reporting period, as one would expect in light of the total population growth that has occurred, and the figures at both the entry and exit ends of the cycle are staggering in comparison to historical standards and truly extraordinary by any measurement:

Figure 10
Inmate Admissions, Years 1989–2003



Source: Kentucky Department of Corrections

Figure 11
Inmate Releases Years 1989–2003



Source: Kentucky Department of Corrections

There is much to be seen in these numbers: 1) the obvious correlation between admissions and releases; 2) an indication from that correlation that prison capacity plays a pivotal role; and 3) a growth rate, especially in admissions, that is disconcerting, if not outright scary, to corrections authorities. But above all else is the remarkable picture of more than 10,000 people entering and leaving the state's prison facilities in a single year, a massive rotation of inmates into and out of the system that could cause even hard-core tough-on-crime advocates to wonder if the net effects of such incarceration might be more negative than positive.

Incarceration incapacitates offenders, and hopefully deters them from committing additional crimes. The extent to which it serves the first of these penal objectives is diminished by the never-ending need to find room for new commitments from the court system, as evidenced by the fact that a typical Kentucky inmate will serve no more than fifteen

months or so before being released back into the community.²⁷⁷ The extent to which it serves the second of these objectives is unclear, as indicated by the fact that a substantial portion of the offenders released from custody find themselves returned to custody within two years.²⁷⁸ Whether or not there is enough in these two benefits to justify the levels of incarceration described above (more than 10,000 citizens rotating into prison for periods of about 15 months) is anything but certain, once account is fairly taken of the damaging and destructive effects of imprisonment.

Incarceration disrupts every aspect of an offender's life, and in return offers tiny contributions toward a successful reintegration of that offender back into the community as a law-abiding citizen. The prison environment is perpetually overcrowded, dominated by aggressive behavior and resulting fear, a breeding ground for racial tension and strife, and totally destructive to the many who arrive there with serious mental and emotional shortcomings. The prison population, it is to be remembered, consists of moral deviants and not model citizens, and is far more capable of providing instruction on the commission of crime than on the worth and qualities of good citizenship. The following statement about the potential effects of imprisonment on drug offenders is almost surely applicable to the full spectrum of inmates:

Unfortunately, prison may also provide low-level drug offenders an education in "advanced drug-trafficking." These offenders, embittered by the system, develop relationships with high-level offenders. "The overuse of incarceration may strengthen the links between street and prison, and help cement users' and dealers' identity as members of an operational drug culture, while simultaneously shutting them off from

²⁷⁷ The Department of Corrections has charted the time actually served by inmates for at least fifteen years and shows in its charts that typical offenders served about a year in prison in the late 1980s and early 1990s, and presently serve slightly more than fifteen months before being released from custody. See KENTUCKY DEPARTMENT OF CORRECTIONS, TIME SERVED, at http://www.corrections.ky.gov/Facts_n_Figures/time_served.htm. (Feb. 5, 2004).

²⁷⁸ For example, 27.5% of all inmates released from custody in year 1999–2000 returned to prison within the first two years of their release. See Dep't of Corr., Recidivism, *supra* note 14. In earlier years, the recidivism rate was substantially higher—34.7% in 1994, 33.1% in 1995, and 34.2% in 1996. See *id.* Some authorities report much higher rates of recidivism: "More than half a million people will leave America's prisons and jails this year, beginning a difficult transition that many will fail. Sixty-two percent of them are expected to be arrested at least once within the next three years, and 41 percent to wind up back in jail or prison." MARTA NELSON & JENNIFER TRONE, STATE SENTENCING AND CORRECTIONS PROGRAM: WHY PLANNING FOR RELEASE MATTERS 1 (Vera Inst. of Justice 2000).

the prospect of successfully participating in the economy outside the prison when they get out.”²⁷⁹

The prison setting is designed to change attitudes, but is at least as conducive to negative as to positive change. It is more likely to enhance than to diminish the mental, emotional, and social deterioration of inmates, and even under the best of circumstances offers no more than an even chance of correcting the situation and conditions that led to incarceration in the first place.

C. Nonessential Programs

Corrections systems are rarely capable these days of providing more than a small part of what inmates need for a successful return to their communities. Certainly that is so with respect to the Kentucky system, in no small measure because of an annual inmate flood that has now reached 10,000. Huge numbers of inmates commit crimes under the influence of drugs or alcohol, arrive in the corrections system in need of treatment, and return to their communities months or years later in exactly the same condition.²⁸⁰ Corrections professionals were brutally honest in a recent assessment of the problem:

Testimony presented by Justice Cabinet officials to [the Capital Planning Advisory Board] on July 31 indicated that . . . 60 percent of the felon population, both incarcerated and supervised, meet the clinical definition for substance dependency. *Less than 20 percent of the incarcerated population that is in need of treatment receives it, and less than 10 percent of the supervised population receives needed treatment*
²⁸¹

Incarceration may offer a unique opportunity for addressing substance abuse problems,²⁸² but drug treatment is a nonessential program that has no chance to flourish in periods of tight budgets and extraordinary inmate flows. Inmates have to be fed, clothed, housed, given minimal medical care, and guarded; they don’t have to be given substance abuse treatment. Thus, without some reduction in inmate flows and a

²⁷⁹ Spencer, *supra* note 201, at 370–71 (citations omitted).

²⁸⁰ Capital Planning Board, Improvements Plan, *supra* note 134.

²⁸¹ *Id.* (emphasis added).

²⁸² “Overall, drug-involved offenders who receive a full complement of treatment and aftercare in a correctional setting are three times more likely to remain drug-free and arrest-free than those who receive no treatment at all. With this comes reduced crime, safer communities, and reduced costs for police activity, court processing, and incarceration.” Inciardi, *supra* note 204, at 287.

reallocation of resources from incarceration costs to drug treatment, no one should expect corrections professionals to prepare inmates for a drug-free and crime-free life on the streets.

Drug treatment is not the only needed but nonessential corrections program likely to suffer under the strain of bloated prison populations. Most of the 10,000 who entered the state's prison facilities in 2003 were poorly educated, poorly trained, unemployed or underemployed, and unprepared for even the most basic of challenges in the work place.

Corrections programs aimed at these deficiencies qualify as the best experiences offered during incarceration. However, they have never been adequately funded, and in more recent times have been under even greater budgetary stress (both in Kentucky²⁸³ and elsewhere²⁸⁴). Even under the best of circumstances, such programs offer no certain solution to the huge and in many instances insurmountable obstacles to successful reentries into the work force. The following statement on the subject is totally unsurprising:

Research has yet to reveal the precise effects of incarceration on future employment, although several studies show that former inmates have more difficulty than other people finding and keeping a job. While neither the federal government nor most states track the number of inmates employed after release, the few available statistics continue to reveal high rates of joblessness among this group. In New York, for example, sixty percent of former prisoners were unemployed last year, down just slightly from . . . [sixty-five] percent six years ago.²⁸⁵

Most inmates enter prison from "hard to employ" categories (because of low educational achievement and poor work experience) and

²⁸³ Tentative actions to slash education and training programs in the corrections budget drew substantial media attention during 2003 budget considerations and even some objection from inmates: "The program that offers prisoners classes in basic academic skills and trades, like masonry, plumbing and carpentry has been cut from the state budgets passed by both the House and the Senate. I am scared to death, and I'm angry," [inmate Ronald] Huggins said. "If you take this away from me, what will I do?" Karla Ward, *Budget Cuts Would End Most Prison Education; What Will Convicts Do Without Training?*, LEXINGTON HERALD-LEADER, Mar. 2, 2003, at A1; see also Keeling, *supra* note 8 (noting that, after budget cuts, "[f]elons will be back on the streets earlier . . . but will be less likely to have received any education in prison except the kind of education that enhances their criminal behavior").

²⁸⁴ "The third way many state corrections departments are reacting to budget pressures is by cutting so-called nonessential programs. These cuts primarily have affected educational, substance-abuse treatment, and vocational programs." WILHELM & TURNER, *supra* note 22, at 3.

²⁸⁵ NELSON & TRONE, *supra* note 278, at 2.

are more likely than not to leave in the same category, although now more handicapped than ever by the fact that they search for work as persons who served time in prison (“ex-convicts”). Some, perhaps most, are destined for second-class citizenship and the difficulties that invariably accompany such a status—underemployment or unemployment, inadequate housing or homelessness, resurrection of old habits and old relationships, and very high risks of recidivism. Nothing less than an all out war on this problem (and a huge infusion of additional resources) has any chance of changing this reality; and no such war will ever be waged so long as the state remains obsessed with incarceration policies and practices that generate an ever-expanding prison population and rob corrections managers of all but the faintest hope of assisting inmates in a successful return to their communities.

D. Parole and Parole Services

The idea behind the concept of parole is that appropriate punishment cannot be fixed at the time of sentencing since it “depends considerably on an offender’s response to conditions of imprisonment and on his perceived capacity to refrain from criminal acts at the time he is to be released.”²⁸⁶ The retention of this idea and of parole as a crucial component of the criminal justice system ranks as one of the really important decisions made in Kentucky during the tough-on-crime movement, one that is now being rapidly undermined by an inmate population that has pushed the parole caseload completely off the charts. Without some relief from inmate flows that have now reached stratospheric levels (see Figures 10 and 11 above), parole is destined to become less of a process for determining proper punishments and more of a relief valve for a prison population that always exceeds capacity.

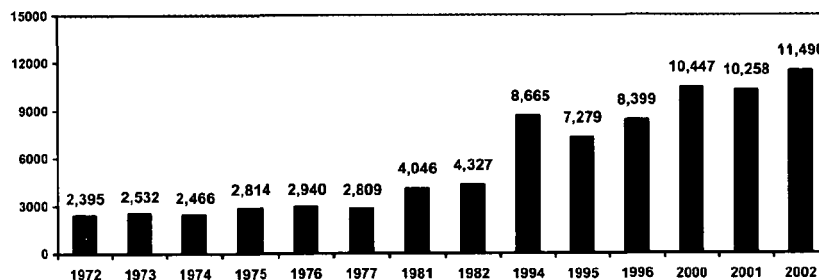
The Parole Board is obligated by law to fix parole eligibility requirements²⁸⁷ and to provide hearings for inmates who meet those requirements.²⁸⁸ The effect of the state’s inmate population explosion on the Board and on the parole process is indicated by a set of numbers showing the tremendous growth in hearings required of the Board to meet the second of these obligations (as charted in Figure 12 below):

²⁸⁶ MODEL PENAL CODE arts. 6 & 7 introductory cmt. at 4 (1985).

²⁸⁷ See K.R.S. § 439.340(3) (Banks–Baldwin 2004).

²⁸⁸ See § 439.340(2).

Figure 12
Parole Board Hearings 1972–2002



Source: Annual Reports of Parole Board

The Board had five full-time members in 1972,²⁸⁹ and conducted 2395 hearings. In 2002, the Board had seven full-time and two part-time members²⁹⁰ and conducted 11,490 hearings, little more than a fifty percent increase in decision makers but a 380% increase in the number of hearings held. The caseload per member (which by raw numbers now exceeds 1500 for every full-time member) is made even worse by a requirement that hearings be held before Board panels of three members,²⁹¹ and a further requirement that decisions be either unanimous or reviewed and reconsidered by panels consisting of four members.²⁹² A decision granting or denying parole is no less important than the sentencing decision made at trial, and no less difficult. It deserves to be deliberate and calculated rather than routine and hurried. These decisions are jeopardized when conditions produce caseloads that number in the thousands rather than the hundreds and exceed by a wide margin anything that could be described as reasonable. The Board is asked to do the impossible, another legacy of the tough-on-crime movement that continues to produce more prisoners than the state can possibly accommodate.

The policies and practices that have overwhelmed the Parole Board have had the same effect on parole services. The number of offenders doing their time on the streets is larger than it has ever been and heading higher while the number of parole officers in the system has failed miserably to keep pace, producing for parole officer caseloads that are several times what they were before the prison population explosion and far in excess of levels that would give inmates the kind of assistance they

²⁸⁹ See Act of Mar. 27, 1972, ch. 291, § 1, 1972 Ky. Acts 1352–54.

²⁹⁰ See K.R.S. § 439.320(1).

²⁹¹ See § 439.320(4)(a).

²⁹² See § 439.320(4)(b).

need for reconnection to their communities after incarceration. Many if not most newly released inmates need intensive, time-consuming help with very difficult problems (housing, family issues, drug and substance abuse, employment, and others) and many if not most parole officers are stretched too thin to provide that help, conditions that are blamed for a return of huge numbers of inmates to prison to resume their incarceration.²⁹³ Parole services is another nonessential program (like drug treatment and job training) that has fallen prey to the inmate population explosion, although its costs are modest in comparison to the costs of incarceration²⁹⁴ and its crucial importance to a successful reintegration of inmates into their communities is undeniable.²⁹⁵

E. State Inmates in Local Jails

The state's escalating reliance on local jails for the incarceration of state inmates easily ranks as the most questionable decision of the tough-on-crime movement, although some might say that it does not deserve to be called a "decision" since it came into being without any consideration of policy implications for the justice system and solely because the state had more inmates that it could house in its own facilities. The state reported in 2003 that it had more than 5000 state inmates in local jails,²⁹⁶ and has since reported that it has such inmates housed in seventy-one different jail facilities.²⁹⁷ These inmates are all serving indeterminate terms of imprisonment (for as long as ten years) in physical facilities that were once thought to be suitable only for inmates serving fixed terms of imprisonment of substantially shorter duration (no more than one year and typically much less). The raw numbers are enough to create nightmares for corrections officials and professionals—5000 inmates for whom the state is constitutionally responsible scattered across the landscape in seventy-one different facilities for which it is not responsible.

²⁹³ The Department of Corrections reports on its webpage that it admitted more than 1800 inmates to prison for parole violations in 2003, more than 1700 in 2002, more than 1600 in 2001 and more than 1400 in 2000. See DEP'T OF CORR., ADMISSIONS & RELEASES, *supra* note 270.

²⁹⁴ The Department of Corrections reported in 2003 that the cost to incarcerate inmates averaged \$17,193 per inmate and much more in some institutions, while the cost of maintaining offenders on probation and parole average \$1255 per inmate. See DEP't of Corr., Cost to Incarcerate, *supra* note 132.

²⁹⁵ See NELSON & TRONE, *supra* note 278, at 2 (describing the difficulties inmates face upon seeking a job after their release and the corresponding importance of vocational training); Schiraldi & Greene, *supra* note 129, at 332.

²⁹⁶ DEP't of Corr., Felons in Jails, *supra* note 87.

²⁹⁷ KY. DEP'T OF CORR., LOCAL FACILITIES, at <http://www.corrections.ky.gov/LocFac.htm>.

Incarceration in these facilities could be expected to vary from place to place and inmate to inmate, although published data concerning the nature of such incarceration is not plentiful. Some inmates are permitted to leave the facilities periodically to perform community service work, while others are denied the privilege out of concern for public safety.²⁹⁸ Although better than confinement in tight and sometimes overcrowded quarters, the service work does not add significantly to the employment skills needed by inmates for reentry into their communities. It is extremely difficult to provide helpful programs for inmates in a few well-staffed state prisons, and it is virtually impossible to duplicate that feat in a large number of facilities (in this instance seventy-one) that are not well-staffed and that are designed to serve primarily as places of confinement above all else. The state's jail program had no objective other than confinement in the beginning and has no realistic objective other than confinement today, a condition that is rendered especially unfortunate by the fact that the state's jail population is probably far more susceptible to rehabilitation than the state's prison population, since it includes most of the state's nonviolent and drug offenders.

In 1988, when considering the constitutionality of imprisoning state inmates in local jails, the Kentucky Supreme Court made a statement about then-existing conditions that still rings true today:

The Corrections Cabinet concedes there are certain facilities available within the state penal system which are not available in county jails: recreation, education, work opportunities, and rehabilitation programs. Some county jails make efforts in this direction, but these efforts are far short of the programs available in state facilities.²⁹⁹

The court stopped short of saying that local confinement had to be duplicative of state confinement in order to meet constitutional requirements (although such a statement was made in a concurring opinion³⁰⁰), but stated very clearly that the state remains responsible for such confinement and that such confinement must "meet minimum standards for the care of state prisoners."³⁰¹ If this means local confinement that is roughly equivalent to state confinement, the jail program is clearly vulnerable to constitutional challenge, for there can be no doubt that the state cannot provide programs in local jails (especially

²⁹⁸ See K.R.S. § 441.125 (Banks-Baldwin 2004) (defining the rules for community service work).

²⁹⁹ *Campbell County v. Kentucky Corr. Cabinet*, 762 S.W.2d 6, 13 (Ky. 1988).

³⁰⁰ "The prisoners involved do not have a right to be incarcerated in a specific state penal building but rather, I believe they have only a right to be imprisoned in the equivalent of a state penal institution." *Id.* at 17 (Wintersheimer, J., concurring).

³⁰¹ *Id.* at 15.

all seventy-one local jails) that are equivalent to the programs it provides to inmates in state prison facilities (even under the stress of tight budgets). The simple truth is that the state's jail program is a confinement program and little else. It is a warehousing of inmates that reflects a total abandonment of any efforts to facilitate the ultimate return of offenders to the streets as law-abiding citizens.

VI. CONCLUSIONS

The tough-on-crime movement promised relief from high crime rates, unsafe streets and communities, and a drug epidemic. It has produced twenty-five years of explosive growth in the nation's prison population and a rate of incarceration that is disgraceful in comparison to the rates of other countries. It has lost some of its steam (mostly because of its enormous cost) but very few of the tougher laws, policies, and practices that it engendered. Whether or not it has delivered on its promises of lower crime rates and safer streets remains open for debate, although comprehensive studies and highly respected authorities raise serious doubts:

Finally, there is the one 1970s argument—that tougher penalties will reduce crime rates—that is still heard, but mostly from campaigning conservative politicians and virtually never from crime-control researchers or from authoritative nonpartisan bodies. Political scientist James Q. Wilson, for example, for two decades America's leading conservative scholar of crime and punishment, in 1994 acknowledged, "Many (probably most) criminologists think we use prison too much and at too great cost and that this excessive use has had little beneficial effect on the crime rate."

No one doubts that having some penalties is better than having none. What is widely doubted is the proposition that changes in penalties have any significant effect on behavior. Most crime-control scholars are doubtful because that proposition is refuted by the clear weight of research evidence and because every nonpartisan expert body in the United States, Canada, and England that has examined the evidence has reached the same conclusion. In 1993, the National Academy of Sciences Panel on Understanding and Control of Violent Behavior . . . noted that the average prison time per violent crime had *tripled* between 1975 and 1989 and asked, "What effect has increasing the prison population had on levels of violent crime?" The answer, "Apparently, very little."

Similar bodies in other English-speaking countries have reached the same conclusion. The English Home Office . . . conducted a three-year review of evidence on the crime-control effects of penalties and concluded that the penalties' effects were so uncertain that they

should have only minor influence on sentencing policy

. . . .

In 1993, the judiciary committee of Canada's parliament . . . recommended that Canada shift from an American-style law enforcement approach to crime to a European-style preventive approach. The report observed, "The United States affords a glaring example of the limited impact that criminal justice responses may have on crime. . . . If locking up those who violate the law contributed to safer societies than the United States should be the safest country in the world." There is overwhelming additional evidence to support the conclusions of the government sponsored panels in Canada, England, and the United States³⁰²

In the face of such doubts and the huge economic costs of mass incarceration, it is not extravagant to expect law and policy makers to engage in some new thinking about the human costs of imprisonment (to which we have been blinded by our recent obsession with incarceration), and about the real impact on crime of rotating thousands of citizens into and out of a prison system that is at least as likely to cultivate criminal behavior as law-abiding citizenship.

It is not hard upon reflection to see how we have created the mess we have in corrections in this state and elsewhere. We have chosen to punish offenders rather than to try to convert them into better citizens, to incarcerate them for extended periods rather than to run some risk that they might commit additional crimes if left in or returned to their communities, and to invest resources in the construction of prisons rather than in programs that are designed to reduce the need for prisons. We have demonized criminals in mass, have lost sight of the importance of distinguishing between dangerous offenders who must be imprisoned for protection of the public and nondangerous offenders who might be required to pay their debts to society in other ways, and have laid a foundation for a new citizen underclass made up of parolees, ex-

³⁰² TONRY, SENTENCING MATTERS, *supra* note 23, at 7-9 (citations omitted); see also Spencer, *supra* note 201, at 381: "As the preceding sections indicate, federal statutes prescribe increasingly harsh penalties for drug offenders. . . . Despite the severity of these new laws, however, drug crimes continue and policy makers demand more severe penalties. . . . The response to more drug crimes is more incarceration, and the response to more incarceration is more crime. The cycle is closed; we ignore all alternatives and no one questions the practice of using imprisonment to solve the drug problem." *Id.*; Beres & Griffith, *Deterrence*, *supra* note 172, at 59 ("Unfortunately, studies of the impact of actual changes in criminal or law enforcement methods suggest that it is difficult to change the behavior of potential offenders. Most research has found that increasing either the severity of punishment or the certainty of apprehension has only a modest deterrent effect.").

convicts, and their families. We have acted under a belief that no price is too high to pay for protecting the public from crime and have generated incarceration costs that now consume huge proportions of corrections budgets, all to the detriment of programs that corrections professionals know to be crucial to any hope of converting offenders into law-abiding citizens. And, most fundamentally perhaps, we have abandoned the notion that imprisonment should be the last rather than the first response to the commission of crime, and in so doing we have opened the door to the mass incarceration of citizens that we have experienced.

Where to go from here is not as easy to see. There is some renewed interest in alternatives to imprisonment and some visible signs that the tide may have turned against irrational reliance on incarceration. Corrections professionals have urged lawmakers to look for alternatives to imprisonment.³⁰³ The Kentucky Supreme Court has taken some initiative to do just that through the adoption of a drug court program specifically designed to empty some prison cells now occupied by drug offenders.³⁰⁴ Lawmakers have put in place some innovative alternatives to imprisonment (home incarceration, community service, electronic monitoring, monetary penalties and restitution, and others), while retaining the most important of the traditional alternatives (probation and parole, halfway houses, mandatory drug treatment, etc.). But the incarceration numbers (especially the trends and projections) remain ominous to say the least and leave no doubt that meaningful reform has yet to take root.

With the politics of crime still tilting strongly toward tougher laws and tougher attitudes toward criminals, it will not be easy for lawmakers to embrace the reforms that are needed to slow the flow of inmates that has flooded the prison system and put the state's corrections budget at risk of bankruptcy. It would be unrealistic to expect a sudden and wholesale retreat from a twenty-five year obsession with incarceration but not to expect some reform of laws and policies that are now very widely viewed as symptomatic of the worst of all excesses of the tough-on-crime movement. The most obvious excesses of the tough-on-crime movement in Kentucky are the state's law on persistent felony offenders (the so-called "three-strikes" law) and the provisions that have created for Kentucky a totally irrational penalty structure for drug crimes. A move to eliminate these excesses would lay the cornerstone for some meaningful reduction in the prison population, would free up some

³⁰³ See e.g., Capital Planning Board, *Improvements Plan*, *supra* note 134 (recommending that the legislature identify and implement new alternatives to incarceration, and improve treatment options for inmates).

³⁰⁴ See Kentucky Court of Justice, *Drug Court*, at http://www.kycourts.net/AOC/DrugCourt/AOC_DrugCourt_text.shtml (last visited Sept. 28, 2004).

resources for enhancement of programs directed at rehabilitation of offenders, and would begin to restore some needed balance between the seriousness of crimes and the punishments that are inflicted upon offenders. More importantly perhaps, it would begin to sound a necessary warning that there are limits beyond which the state should not and will not go in its efforts to protect the public against the commission of crime.