"HELPING JUDGES TO HELP THE COMMISSION
IN ADDRESSING SEVERITY CONCERNS"

STATEMENT OF

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INTRODUCTION

Judge Hinojosa, Members of the Commission, and distinguished guests:

Thank you for the opportunity to share some thoughts about our federal sentencing system. I would like to spend a few minutes this morning discussing the criticism that the guidelines, in some respects, call for sentences that are overly severe. The criticism has been frequently directed at the treatment of drug offenders. I will begin by briefly describing the origins of the severity objection. I then turn to a suggestion about how the experience of the judiciary might be enlisted to help the Commission to address and achieve an acceptable consensus on severity issues, with reference to three instances of the severity concern, all of which arise in connection with drug offenses and some of which are of more general concern as well.

I. Severity and Related Concerns

The first 25 years of the federal sentencing guidelines does not prove the adage that "timing is everything," but the experience certainly illustrates that timing is something. As has often been noted, the guidelines came into being at about the same time as statutory mandatory-minimum drug sentences triggered by the quantity of drugs involved in the offense. Many actors in the system, including many judges, regarded these mandatory minimums as unduly harsh. The Commission calibrated sentences for drug offenses involving smaller drug quantities to the penalties in the mandatory-minimum statutes. A good reason justified this decision. The Commission hoped to avoid the "cliff" effect. That is, it wanted sanctions on one side of the mandatory-minimum line not to vary too greatly from sentences on the other side. A large discrepancy would generate problematic sentencing disparity between those on opposite sides of the mandatory-minimum lines and would place extraordinary power in the hands of prosecutors who control charging decisions—charging the mandatory-minimum would lead to a much more severe sentence than charging under other provisions.

Although the Commission's instinct was defensible, and perhaps even the best resolution to this problem, it infected the guidelines with the same malady that so many perceived in the mandatory-minimum offenses. At least some of the initial backlash against the guidelines arose from this sense that they were too harsh. And the judges who perceived the guidelines to be too harsh found a large group of academics who shared their viewpoint. Arguments for legalizing use of certain drugs had been prominent in academic circles for many years. Those who were sympathetic to legalizing drugs would understandably be unsympathetic to a federal trend of increasing drug penalties.

But the attack was not confined to the claim of harshness. Indeed, those who believed the guidelines to be overly harsh probably perceived that this argument would have limited appeal—after all, Congress must have thought that voters would approve of the mandatory minimums when it enacted them. And arguments about what penalties are "excessive" for a particular crime are notoriously mushy. People can readily agree in the abstract that offenders should not get more punishment than they deserve, but when we attempt to translate “desert” to “months in prison,” we uncover where we disagree. Professor Richard Frase has argued that

> desert can only define a range of penalties because the very concept of desert is inherently imprecise. In any given case there will be widespread agreement that certain penalties are clearly undeserved (because they are either excessively severe or excessively lenient). But there may be little political or philosophical consensus on the offender's precise deserts, even relative to other offenders committing the same crime.[1]

Focusing entirely on severity was an even more difficult strategy when the guidelines were enacted. If "truth in sentencing" was one of the aims of the guidelines, that goal had been embraced because the past had been an exercise in the opposite, with lengthy sentences publicly proclaimed but rarely served. One might have expected that these public pronouncements would affect what the public viewed as a reasonable sentence, and even if sentencing reform increased actual time served, by greatly limiting early release, much of the public had come to expect that announced sentences would be long.

[1] Richard S. Frase, *Sentencing Purposes*, 58 Stan. L. Rev. 67, 77 (2005).

Criticisms of the guidelines have taken many forms, and once articulated, criticisms tend to take on a life of their own. It would be a mistake to think that each criticism of the guidelines is merely a roundabout attack on severity, but it seems advisable to consider that some of these criticisms might be moderated if severity considerations can be addressed in a satisfactory way.

II. Creating and Tapping Judicial Resources to Address Severity Concerns

It is tempting to hope that, after *Booker,* severity concerns will take care of themselves. Judges will vary from guidelines sentences when they believe variance is warranted. The Commission can examine where the variances occur and adjust the guidelines as information flows in about the sentences that judges on the front lines approve. In getting a handle on the mushy question of what sentence falls within the range that society should regard as "deserved," judges are a wonderful resource. But relying solely on individual sentencing decisions made by judges acting in isolation only partially taps this resource.

The Commission should consider augmenting this work by facilitating meetings of federal judges at which judicial instincts could be tapped in a more focused and systematic way, perhaps teaming with or mirroring the model employed by the Federal Judicial Center for providing continuing education for judges. I know that my own law school would be glad to assist the Commission in staging meetings of this type, and I am sure that many others law schools throughout the country would likewise be willing to participate.

One advantage of this format is that judges could be exposed to data they might lack when making real sentencing decisions in isolation. They would also have the

benefit of hearing the views of a set of their colleagues. The resulting recommendations could be made available to judges not in attendance, hastening progress toward a set of guidelines that judges would more commonly find attractive. The recommendations would also give the Commission a stronger basis than isolated sentencing decisions for supporting changes to the guidelines, increasing the odds of Congressional acquiescence and reducing the risk that Congress will be tempted by some of the methods apparently available to return to a set of mandatory sentencing rules.

Several areas of possible reform might fruitfully be explored in this way. Let me discuss three of them briefly. Because of the significance of drug prosecutions to the federal criminal docket, and because drug cases have been an area in which severity concerns have been especially acute, case studies focusing on these issues as they arise in drug prosecutions might be particularly helpful.

A. Mitigating Offender Characteristics

One criticism of the guidelines is that they pay insufficient attention to characteristics of the offender that might traditionally have mitigated the offender's sentence. In the words of Professor Douglas Berman,

> since the outset of the Federal Sentencing Guidelines era, the U.S. Sentencing Commission has declared through a series of policy statements that many potentially mitigating offender characteristics—such as a defendant's education and vocational skills, mental and emotional conditions, previous employment record, and family and community ties—are either "not ordinarily relevant" or entirely irrelevant to whether a defendant should receive a departure below the Guidelines sentencing range. Moreover, a number of early Sentencing

> Commission amendments declared off-limits certain offender factors that courts had started to rely upon for Guidelines departures; in this way, the Commission essentially overruled some initial judicial efforts to consider particular offender characteristics at sentencing.[2]

Berman hypothesizes that the guidelines' formulaic structure may work against inclusion of offender characteristics that are "difficult to measure systematically and cannot be easily plotted on a sentencing chart."3 One might also add that many of the offender characteristics that one might take into account can apply in widely varying ways. For example, if the offender's "disadvantaged background" could mitigate punishment, then one might rightly wonder how disadvantaged a background would need to be to justify a sentence reduction. Trying to capture that level of disadvantage in a verbal formulation would be a difficult task, as would be attempting to grade levels of disadvantage that exceed the minimum.

Some may have feared that recognizing too many mitigating specific offender characteristics would reintroduce the kind of disparity the guidelines sought to eliminate.[4]

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[2] Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reform*, 58 Stan. L. Rev. 277, 284 (2005). As Berman notes, *id.* at n.33, among the factors excluded from consideration were "[l]ack of guidance as a youth" and other "similar circumstances indicating a disadvantaged upbringing" and "[p]hysical condition or appearance, including physique," that might indicate possible abuse in prison.

[3] *Id.* at 290. Professor Berman observes that, "[T]o some extent, a guidelines sentencing system which is centered around number-driven calculations that map onto a number-driven sentencing grid will necessarily prompt the development of sentencing rules that (over)emphasize certain types of offense conduct. Offense harms in general, and drug and monetary loss amounts in particular, are more readily quantified and calibrated in a sentencing calculus." *Id.*

[4] The Commission expressed concern that including certain factors would run counter to its goal of reducing sentencing disparity:

> The greater the number of decisions required *and the greater their complexity*, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce.

Regardless of whether those concerns were previously compelling, they seem substantially less so in a world of advisory guidelines. It is better for the guidelines to identify the kinds of factors that judges find compelling, with some guidance about the scope of reductions that will usually seem appropriate. The problem of factors that exist in varying degrees could be addressed by formulating guidelines like the current provision for Mitigating Role in an offense, which permits a maximum reduction for those with very small roles and lesser reductions for those whose roles were modest but more significant.[5]

Both questions of the typically sensible reduction for particular mitigating factors as well as the best verbal formulations to address these factors could be fruitfully developed and tested by presentation of sample cases to groups of judges. In response to a sample case, these judges could be asked (1) whether they find the typical guidelines sentence appropriate in the ordinary case, (2) if not, what sentence they believe would be appropriate in the ordinary case, and (3) what sentence they would give if the offender possessed a particular, potentially mitigating characteristic. After answering these questions individually, the judges could then compare their answers, discuss their views, and change their answers as they felt appropriate in light of their discussions.

In addition to the benefits of allowing quick collaboration among judges in reacting to common case files, these meetings would afford the added opportunity to educate a group of judges quickly and efficiently on facts that might enter their decision-

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Federal Sentencing Guidelines ch. 1, pt. A, § 3, at 3 (emphasis added). I have previously speculated that this concern might explain the Commission's initial reluctance to recognize a significant number of specific offender characteristics. *See* Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 Nw. U. L. Rev. 1336, 1338-39 (1997).

[5] Federal Sentencing Guidelines § 3B1.2.

making processes only haphazardly in the course of making individual sentencing decisions in real cases. As to the issue of possibly mitigating offender characteristics, federal judges at a sentencing meeting might benefit from sessions highlighting the approach of various state jurisdictions to a particular potentially mitigating factor,[6] setting forth any diagnostic difficulties or uncertainties associated with the factor, and assessing how common the factor is among the criminal population generally (which might counsel in favor of setting normal sentences to capture the factor, and perhaps counting the absence of the characteristic as an aggravating factor).

The result would be a rich body of especially informed information about fair sentences in a particular set of cases. The Commission could draw on this information in expanding the guidelines to address the severity concerns that many perceive in the absence of more mitigating specific offender characteristics under the guidelines. These guidelines would serve as a resource for all judges who confront similar sentencing questions. Of course, regardless of what starting points were set by these new guidelines, they could be revised and adjusted in light of continuing experience. The Commission could track acceptance of these new guidelines by examining whether judges were varying from them, and revisions could be made as appropriate over time.

B. Nonprison Sentences

Another area that might fruitfully be explored in this format is the suitability of replacing prison sentences in some, less-serious cases, with nonprison sentences, like fines, restitution orders, house arrest, probation, and the like. Dean Nora Demleitner has

[6] The benefits of systematic examination of the practice under state sentencing systems are thoughtfully explored in Marc L. Miller and Ronald F. Wright, "*The Wisdom We Have Lost": Sentencing Information and Its Uses*, 58 Stan. L. Rev. 361 (2005)

thoughtfully explored the possibility that further use of such sanctions could alleviate the resource problems caused by the extensive use of incarceration in this country. It is also at least possible that some of these sanctions, by disrupting less severely the offender's legitimate employment prospects, could have fewer of the negative long-term effects attributable to our heavy use of imprisonment.[7]

The educational benefit of addressing these questions with a group of judges could be significant. Because of certain legal obstacles to use of some of these sanctions in certain kinds of cases, judges may not have a great deal of experience with the sanctions and may not have thought systematically about how all of the possible the sanctions might be employed or combined. Moreover, some nonprison sanctions might currently only be available in certain districts, further underscoring the benefits of education. Judges could be educated about these sanctions—again, information about state systems could be useful—and if sanctions were identified that were particularly attractive to judges, then the Commission could recommend that Congress mandate the availability of the sanctions and remove legal obstacles to their use.

One problem that can arise with increased use of nonprison sanctions is the perception that these sanctions are simply insufficiently serious in comparison to prison. The collective judgment of experienced sentencing judges that particular sanctions are an apt substitute for imprisonment, either singly or in combination, could be extremely valuable in convincing Congress and the public that these sanctions deserve the same acceptance in our federal system that they receive in state systems and abroad.

C. Drug Quantity, Relevant Conduct, and Severity

[7] Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions,* 58 Stan. L. Rev. 339 (2005).

Before *Booker*, the relevant-conduct provision was criticized for adding to the severity of guidelines sentences, particularly in drug cases.[8] Even after *Booker*, the relevant-conduct provision is likely to influence the severity of sentences.[9] Like other aspects of the drug guidelines, the penalties associated with various drug quantities, whether included in the offense of conviction or not, are calibrated to mandatory-minimum amounts, not to pre-guidelines sentencing practice. Accordingly, structured judicial reaction in this area might be especially helpful in arriving at guidelines that will consistently command the respect of sentencing judges. Focusing specifically on drug quantity could also help to tease out the extent to which support for additional mitigating offender characteristics might be motivated by concerns that could be addressed in narrower ways—for example, revisions to the quantity provisions in the drug guidelines, or revisions as they apply to certain categories of drug offenders, rather than promulgation of a more general mitigating offender characteristic that might apply to all offenses.

Judicial reactions to the sentencing impact of drug quantities that are part of the offense of conviction may vary from their reactions to the sentencing impact of drug quantities counted only because of the relevant-conduct provision. The relevant-conduct provision presents what for some was the worst-case version of the procedural concerns

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[8] Berman, *supra* note 1, at 283 ("Especially in drug cases, couriers with a relatively small role in a drug conspiracy may receive a severe sentence based on drug-quantity calculations that are not an appropriate proxy for the relative severity of their crimes. . . . Applicable offense levels within the Guidelines, and in turn applicable sentencing ranges, can often be increased dramatically by uncharged or even acquitted offense conduct that qualifies as relevant conduct.").

[9] David Yellen, *Reforming the Federal Sentencing Guidelines' Misguided Approach to Real-Offense Sentencing*, 58 Stan. L. Rev. 267, 273 (2005) ("The federal system has been more dramatically changed [than many other systems], as the Federal Guidelines are now advisory, at least formally. The real-offense components of the Guidelines remain highly influential, though, since judges are required to continue to calculate the Guidelines range as they had done . . . before and 'consider' the resulting range.")

about the pre-*Booker* era—sentence enhancements based on conduct for which the offender could have been charged but wasn't, or for which the offender was charged but acquitted. Dean David Yellen advocates revision of the guidelines, even in their advisory capacity, to eliminate this possibility.[10]

Basing this argument on the constitution is, in my view, dubious, just as was the decision in *Booker* itself.[11] But there is a normative position that avoids the problem with the constitutional argument. The constitutional argument against judicial fact-finding is difficult to make out as to facts that the legislature is constitutionally free to make irrelevant. If Congress could constitutionally punish at a given level without making a fact relevant, why should it not be constitutionally able to give the defendant a break if the fact is proven to the satisfaction of a judge?

The nonconstitutional argument for jury trial for at least some sentencing facts is easier to make out, because it can be supported by a normative (as distinguished from a constitutional) view that the facts in question are essential to punishing the offender at the level in question—a position that we doubt the Court will take as a constitutional matter. But it also seems likely that judges will not regard every augmentation in sentence, no matter how modest, to exceed the maximum that we regard as normatively permissible based on proof to a jury of the elements of the offense alone. Certainly, judges will feel

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[10] *Id.* at 275 ("One of the most unseemly aspects of the Guidelines is the fact that defendants are sentenced based on other alleged offenses for which they have not been convicted.").

[11] *See* Ronald J. Allen and Ethan A. Hastert, *From* Winship *to* Apprendi *to* Booker*: Constitutional Command or Constitutional Blunder?*, 58 Stan. L. Rev. 195 (2005). Professor Allen's argument against *Booker* was easy to anticipate for those familiar with his previous evisceration of the Court's doctrine regarding burden of proof and presumptions. *See* Ronald J. Allen, Mullaney v. Wilbur*, the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 Tex. L. Rev. 269 (1977); Ronald J. Allen, *Structuring Jury Decision Making in Criminal Cases: A Unified Approach to Evidentiary Devices*, 94 Harv. L. Rev. 321, 355-58 (1980). To my view, no one has yet to make a convincing response to his argument.

justified in making at least some adjustments in an offender's robbery sentence based on the precise nature of the offender's threatening conduct, even though a jury is not asked to make a precise finding on that point.[12]

Because of the complexity of the relevant-conduct issue, it would be wise to seek judicial input first on the role that drug quantity and perhaps other factors directly related to the offense of conviction (but not proven to a jury) should play in sentence severity. It would be interesting also to compare these results with judicial reactions to similar facts not related to the offense of conviction, while remembering that different theoretical perspectives on procedure may make the results harder to interpret.

III. Conclusion

Even in an era of advisory guidelines, the Commission can do much to promote sound sentencing policy, widely embraced by actors within the system as meting out fair punishment. The judiciary can and should be among the Commission's greatest resources.

[12] The normative argument that we should not consider a fact in sentencing whenever it could be made the subject of a separate prosecution is subject to an argument analogous to Professor Allen's—why should it be normatively impermissible for a judge to enhance sentence when the legislature has created a crime based on a fact but not when it hasn't? In either case, the sentence is increased the same amount based on judicial determination of the same fact. In other words, why should it be normatively problematic for a judge to enhance a sentence for a robber's "brandishing" of a firearm if Congress made that a separate offense, but not if it hasn't?