

Testimony to the US Sentencing Commission
Regarding Proposed Amendments to Sentencing Guidelines
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Criminal Sentencing, Race and Ethnicity

In 1918, the Bureau of the Census published a report on the “Negro Population” (U.S. Department of Commerce, Bureau of the Census, 1918). The authors of the report noted that in 1910 blacks made up only 11 percent of the population but constituted 22 percent of the inmates of prisons, penitentiaries, jails, reform schools, and workhouses. The authors then posed a question that would generate controversy and spark debate throughout the 20th and into the 21st century:

While these figures . . . will probably be generally accepted as indicating that there is more criminality and lawbreaking among Negroes than among whites and while that conclusion is probably justified by the facts . . . it is a question whether the difference . . . may not be to some extent the result of discrimination in the treatment of white and Negro offenders on the part of the community and the courts (p. 438).

The authors of the report speculated that the racial differences in incarceration rates might reflect the fact that crimes committed by blacks, and especially crimes committed by blacks against whites, were more likely than crimes committed by whites to be punished, as well as the fact that blacks might be less able than whites to pay fines in lieu of incarceration. The authors also posited that black defendants might be more likely than white defendants to appear in court

without attorneys to defend them. As the authors pointed out, it was important to consider these possibilities “before accepting the record of prison commitments as an accurate measure of the differences between the two races in respect to criminality” (p. 438).

The question posed by the Bureau of the Census—whether the disproportionate number of racial minorities incarcerated in state and federal prisons might be “to some extent the result of discrimination”—is a question that is still being asked today. There is clear and convincing evidence that black and Hispanic men face higher odds of incarceration than white men (Bureau of Justice Statistics, 2008, Table 6). In 2007 the incarceration rate for black men (3,138/100,000) was six and a half times greater than the rate for white men (481/100,000); the rate for Hispanic men (1,261) was less than half the rate for black men but two and a half times greater than the rate for white men. Among females, blacks were three times as likely as whites to be incarcerated and the incarceration rate for Hispanics was somewhat higher than the rate for whites.

The question, of course, is whether these racial/ethnic disparities reflect the disproportionate involvement of blacks and Hispanics in serious criminal activity, discrimination against blacks and Hispanics by prosecutors and judges, or some combination of these two possibilities. Researchers have used a variety of strategies to examine this issue and to untangle the complex relationship between race and sentence severity. One approach compares the racial disparity in arrest rates for serious crimes with the racial disparity in incarceration rates for these crimes. According to the author of the most frequently cited work using this approach, if there is no discrimination after arrest, then “one would expect to find the racial distribution of prisoners who were sentenced for any particular crime to be the same as the racial distribution of persons arrested for that crime” (Blumstein, 1982, p. 1264).

To determine the overall portion of the racial disproportionality in prison populations that could be attributed to differential involvement in crime, Blumstein calculated the proportion of the prison population that, based on arrest rates, was expected to be black for 12 separate violent, property, and drug offenses. He then compared these expected rates with the actual rates of incarceration for blacks. Using 1991 data, he found that 76 percent of the racial disproportionality in incarceration rates could be attributed to racial differences in arrest rates (Blumstein, 1993, p. 751). However, Blumstein stressed that these results did not mean that racial discrimination did not exist. Rather, his findings implied that “the bulk of the racial disproportionality in prison is attributable to differential involvement in arrest, and probably in crime, in those most serious offenses that tend to lead to imprisonment” (Blumstein, 1993, p. 750).

Blumstein’s estimate that 76 percent of the racial disproportionality in imprisonment could be explained by racial differences in arrest rates, which did not go unchallenged (Crutchfield, Bridges and Pitchford, 1994; Hawkins and Hardy, 1987; Keen and Jacobs, 2009; Mauer, 2006; Sabol, 1989), did not apply to each of the crimes he examined. For some crimes (e.g., murder) arrest explained more than 80 percent of the disparity, but for others (e.g., burglary and drug offenses), arrest accounted for substantially less than 80 percent. Most notably, racial differences in arrest rates for drug offenses explained only half of the racial disproportionality in imprisonment for drug offenses, a finding exacerbated by the fact that racial minorities face higher odds of arrest for drug offenses than do whites (Tonry, 1995). As Blumstein (1993, p. 752) himself pointed out, “arrests for drug offenses are far less likely to be a good proxy for offending patterns than they are for aggravated assault, murder, and robbery” and the black arrest rate for drug offenses grew “dramatically in the late 1980s.” In other words, the fact that drug

offenders make up an increasing share of the prison population coupled with the fact that blacks are increasingly likely to be arrested for drug offenses means that “a declining proportion of the prison population can be explained by higher rates of crime” (Mauer, 2006, p. 128).

A recent study focusing on racial and ethnic disproportionality between arrest and incarceration using data from Pennsylvania highlighted the importance of taking ethnicity, as well as race, into account (Harris, Steffensmeier, Ulmer & Painter-Davis, 2009). Although Harris and his colleagues found that the proportions of blacks, whites, and Hispanics among offenders admitted to state prison corresponded to each group’s representation in arrest statistics, there was unexplained disparity for blacks and, especially, Hispanics. Hispanics were overrepresented in state prison admissions and the prison population for more offenses than were whites or blacks. The authors of the study concluded (p. 198) that “the sources of black and (to a lesser extent) Hispanic disproportionality in imprisonment appear to reside mostly outside the purview of the criminal justice system, and have more to do with societal disadvantages that place minorities peoples, especially African Americans, at much greater risk of being both offenders and victims of violent crime.” These results suggest that the proposed amendments may include factors that address these disparities.

In summary, research reveals that Blacks and Hispanics are incarcerated at disproportionately high rates and that at least some of this disproportionality cannot be explained by higher rates of Black and Hispanic crime.

Prisoner Reentry

Recent data reveal more than 600,000 former prisoners in the United States are released from correctional facilities each year¹ (Hughes & Wilson, 2003; Petersilia, 2003; Sabol, Couture,

¹ A majority of individuals released from prison are either African American or Hispanic (Hughes & Wilson, 2003), but we know little about the role that race and ethnicity play in the prisoner reentry process (see O’Connell, 2006;

Harrison, 2007; Travis & Visher, 2005). The number and rate of individuals released from incarceration facilities and those on various types of community supervision are at their highest in our country's history (Glaze & Bonczar, 2007; Hughes & Wilson, 2003). This scale of reentry into communities gives researchers and policy makers a sense of urgency to develop programs and policies that will facilitate successful transitions from prisons to communities (National Research Council 2008; Petersilia 2003). Indeed, a host of national and local efforts in the United States—such as the U.S. Department of Justice Serious and Violent Offender Reentry Initiative, the U.S. Department of Labor's Prisoner Reentry Initiative, the Council of State Government's (2005) Reentry Policy Council, and passage of the Second Chance Act—are aimed at identifying the needs of prisoners released to the community, implementing model programs, and ultimately enhancing public safety by reducing recidivism. As a result, there have been, and continue to be, significant scholarly interest and programmatic responses and recommendations for assessing, assisting, and monitoring individuals who have been released from correctional facilities (American Correctional Association, 2005; Burke, 2008; Bushway, Stoll, & Weiman, 2007; Council of State Governments, 2005; La Vigne, Davies, Palmer, & Halberstadt, 2008; Thompson, 2008; Travis, 2005; Travis & Visher, 2005). Part of the motivation for reentry efforts is to reduce corrections costs (National Conference of State Legislatures, 2009).

Nearly 800,000 individuals were on parole nationally at the end of 2006 (Glaze & Bonczar, 2007). These individuals must follow numerous formal and informal guidelines. Most

Swisher & Waller, 2008). Similarly, there is relatively little research examining the gendered aspects of reentry. Studies demonstrate that returning women need gender-specific substance abuse treatment and family reunification assistance (Richie, 2001; Robbin, Martin, & Surratt, 2009; Sultan & Long, 2005), as well assistance with parenting and negotiating family dynamics (Arditti & Few, 2006; Brown & Bloom, 2009; Bui & Morash, 2010; Dodge & Pogrebin, 2001; O'Brien, 2001). A recent study by Huebner, DeJong, and Cobbina (2010) found that women who were addicted to drugs, undereducated, and who had extensive criminal backgrounds had an increased likelihood of recidivating; these relationships varied by race.

who have been released into the community encounter challenges that can contribute to the commission of a crime and return to imprisonment (Petersilia, 2003). In addition, released prisoners are disproportionately affected and harmed by physical and mental illness, substance abuse, HIV/AIDS, and a range of other health-related problems (Hammett, Roberts, & Kennedy, 2001; Lurigio, 2001). In response, there have been programmatic efforts to address addiction, mental illness, housing, and job training and employment (Visher & Travis, 2003), and former prisoners themselves place a high priority on such needs (Visher & Lattimore, 2007).

Individuals released from prison encounter a number of obstacles in their search for employment, including the reluctance of potential employers to hire ex-prisoners. Holzer, Raphael, and Stoll (2002a), for example, found that employers view ex-offenders as the least desirable applicants, in part because of concerns about the legal ramifications if ex-offenders deal inappropriately with the public or mishandle the public's property (Holzer & Stoll, 2001). Further, research suggests that employers who do not conduct background checks are likely to avoid specific groups—namely, undereducated African American men—because they stereotype them as ex-offenders without evidence to the contrary (Holzer & Stoll, 2001; Holzer, Raphael, & Stoll, 2002b; Pager, 2003). One study found that relatively few ex-offenders found jobs on their own because they were uneducated about the job search process or encountered employers unwilling to hire them because of their status; as a result, many relied on family and friends to find employment and for financial assistance (Visher, Debus, & Yahner, 2008). Visher and Kachnowski (2007) reported that although ex-offenders knew employment was important for their success and were optimistic about their prospects, their employment rates post-release remained low. Other studies (Petit & Lyons, 2007; Sabol, 2007) showed that offenders'

employment is higher immediately after release from prison—a finding attributed to post-release supervision—than it is after 18 months.

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The recent economic downturn coupled with the dramatic increase in the number of prisoners incarcerated and the cost of incarceration has led many jurisdictions to consider reductions in sentence length, conditions of release, or whether to use the penal sanction at all. The proposed changes to the Sentencing Guidelines reflect fundamental questions about the purpose of punishment, questions that have been posed as long as there has been an American polity. The proposed revisions in the Sentencing Guidelines go right to the core of debates about the use, limits and impact of punishment. Whether we punish as retribution, for deterrence or to rehabilitate are issues that affect the responses to the proposed modifications.

Alternatives to Incarceration

The first proposed change concerns the study of alternatives to incarceration. Part A would increase the ability of federal courts to provide alternatives to incarceration for drug offenders. There is strong evidence in the research literature that coerced treatment of offenders is successful; that is, it produces reductions in drug use and criminal behavior (Farrabee, Pendergast and Anglin, 1998; Taxman, 2008). The proposed treatment is in residential treatment facilities, which has enjoyed greater success than has outpatient treatment. This change is supported by the research literature.

Part B proposes to add additional levels of Criminal History in Zone B and Zone C of the sentencing grid. This change would also expand access to drug treatment, and recommendations from the research (Taxman, 2008; Anglin Research Group

<http://www.uclaisap.org/profiles/anglin.html>) support the use residential treatment for categories of offenders who fall into the selected Zones.

Offender Characteristics

An additional set of questions for specific comment were raised about offender characteristics. The Commission has requested comment regarding the consideration of five categories of individual attributes and whether they should be used in determining downward departures from the guidelines. These characteristics are proposed with regard to three specific considerations: (1) the in/out decision for prison versus probation, (2) for those to be sentenced to prison, the length of incarceration, and (3) for probation cases, the length of probation. These three considerations and the five personal characteristics are cross-tabulated in Table 1 below. Each of the personal characteristics is discussed below.

Table 1.

	In/out prison versus probation p. 22	Length of Incarceration p. 22	Length of Probation p. 22
Age			
Mental/Emotional			
Physical Condition			
Prior Good Works			
Lack of guidance			

Age

One of the best established empirical facts in criminology concerns the age-crime curve. The age-crime curve is a phrase used to describe the consistent finding that involvement in crime peaks roughly at age twenty, and declines precipitously after ward. This curve has been described as “invariant”; it is true across crime types, race, gender, individuals, historical periods and different countries. By age twenty-five the age-crime curve declines to half of its peak, and to one-third of its peak by age thirty. By age fifty, the age-crime curve is less than two percent of

its peak. Put differently (Maruna 2001), eighty-five percent of offenders desist by age twenty-eight. The process of aging out of crime was known to criminologists as early as the 1930's and was underscored by the Gluecks (1937). With the exception of some offense categories (sex offenses) and some characteristics of offenders (heavy alcohol consumption) the decline in criminal involvement across the life course is quite dramatic.

Were the Commission to provide downward departures in the guidelines for younger offenders, they would be reducing sentences (which may or may not be a good idea for other reasons) for the group most likely to be most heavily involved in crime. Serious consideration should be given to downward reductions for offenders who are past the age of thirty as they are well past the peak offending age.

Mental and emotional conditions

The criminological literature shows a correlation between involvement in crime and mental and emotional conditions. However, much research shows that relationship to be spurious.

Mental or emotional conditions that make an offender a danger to the community provide important context for considering departures for this group. Anecdotal evidence about veterans using physical abuse against loved ones, suggests that treatment of the underlying causes (i.e., post-traumatic stress disorder, substance abuse) are the most appropriate responses to such behavior.

Physical conditions, including drug dependence

The criminological literature clearly shows a correlation between drug abuse and involvement in crime at the individual level. The nexus between these two behaviors, however, is less well understood.

The Commission also proposes to examine addiction, whether drug, alcohol, or other forms of addiction (gambling). Consistent with principles such as reducing the reach of the criminal law and minimizing harm associated with penal sanction, punishment ought to occur in the least restrictive environment consistent with its effectiveness. Where drug, alcohol and gambling addictions are strongly linked to the causes of criminal behavior and can be treated in a less restrictive environment, particularly if that treatment is more effective, the Commission should encourage treatment in non-correctional settings. Residential substance abuse treatment, as noted above, is an excellent example of the alternative to incarceration being a more effective response to criminal wrongdoing.

Military, civic, charitable or public serve, employment related contributions, record of prior good works

There is little in criminological research to guide this decision.

The subjective judgment of what constitutes “good works” complicates its assessment. One of the longstanding virtues of the Sentencing Guidelines has been their clarity and (for the most part) objectivity. The original intent of the guidelines was to limit the excesses of discretion and promote greater rationality in sentencing outcomes. These are compromised when a category as broad, ill-defined and subjective as “prior good works” is introduced into calculations about the appropriate length of time to serve for a crime. That said, several important societal goals are advanced by recognizing past, and presumed future good works in sentencing considerations. Certainly an honorable discharge from any of the branches of military service connotes commendable service, as does working in a hospice clinic, serving the needs of HIV patients, volunteering for Humanity for Habitat, or any one of dozens of other laudable services. It would be reasonable to expect that such experiences would create a certain level of preventive capital in

reducing the chances of involvement in criminal activity. Individuals who have an accomplished record of prior good works should have accumulated a significant number of positive contacts, opportunities and activities that should have insulated them to some degree from criminal involvement. Overcoming those positive features of good works would require more criminal involvement than individuals without such good works. This is not a consideration of deterrence or rehabilitation but of retribution and the degree to which retribution should be mitigated by positive acts of citizenship.

Lack of guidance as a youth

The criminological research literature generally concludes that youth whose involvement in crime begins at an earlier age end up being more heavily involved in crime. Just as illicit drug abuse, unprotected sex, smoking and other forms of risk taking, early onset of these behaviors generally portends poorly for the future. Put simply, the onset of involvement in crime at a young age has many negative consequences. Similarly, youth who receive a “disadvantaged upbringing” generally have fewer opportunities and higher probabilities of criminal or delinquent involvement than youth who don’t face such challenges. Criminologists would understand “disadvantaged upbringing” to refer to growing up in conditions of “concentrated disadvantage” (high rates of single mothers who live below the poverty level, high unemployment, and low school achievement) or to being victims of any number of forms of abuse (emotional, physical, sexual). While social disadvantage is strongly linked to future criminal involvement, individual experiences of abuse are less strongly so. These are not directly linked to criminal involvement.

Summary

The Commission faces a difficult job in reviewing and revising the guidelines to be consistent with equity and equality. The Commission is also challenged with ensuring that the

guidelines reflect changes in society. The proposed addition of five new considerations (age, physical condition, emotional condition, prior good works and lack of guidance as a youth) that reflect the Commission's attempt to maintain guidelines that are flexible enough to include relevant behavioral and physical considerations. Taken together, these five characteristics represent an effort to reduce the use of penal sanction when effective alternatives **matched to individual characteristics** are available. The consideration of these characteristics represent a positive step forward in reducing the reliance on prison and increasing the use of more effective community placements.

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