

Statement of

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## Introduction

Thank you for inviting me to share my thoughts on federal sentencing as the Commission reflects on the 25<sup>th</sup> anniversary of the Sentencing Reform Act. In this written statement, I focus on five major topics:

*First*, the critical challenge for any system of punishment – guidelines or otherwise – is to account for relevant individual differences to ensure proportional punishment while at the same time avoiding arbitrary and unwarranted distinctions among similarly situated offenders. For most of their history, the Sentencing Guidelines focused almost exclusively on achieving uniformity without paying sufficient attention to the countervailing need for proportionality. Now, however, the Guidelines seem to have achieved a healthy equilibrium because of the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005). Judges continue to comply with the Guidelines in most cases, and departures or variances are occurring where necessary to achieve proportional punishments. With appellate oversight to keep judges within the proper bounds and the Commission keeping track of any area that may need reform, this system seems to have struck the right balance between proportionality and uniformity. It also gives the Commission valuable feedback from judges that was often lacking in the mandatory regime. Thus, based on the empirical evidence so far, there does not appear to a need to engage in wholesale changes to the advisory structure of the Guidelines.

*Second*, the Commission should reconsider the use of acquitted conduct to increase sentences. Even though Congress did not require it, the Commission made the decision at the inception of the Guidelines to require judges to increase sentences on the basis of relevant conduct whether or not it was charged and whether or not a defendant was acquitted of the conduct. Relevant conduct has been so central to the operation of federal sentencing that it may

be difficult to imagine a world where it does not operate as it does today. And yet, every other jurisdiction that has adopted sentencing guidelines since the birth of the federal guidelines in 1987 has looked at the federal approach to acquitted conduct and rejected it outright. The uniform rejection and criticism of the use of acquitted conduct to increase sentences has been based on good reasons. Increasing sentences on the basis of acquitted conduct disrespects the jury system, transfers undue power to prosecutors, and undermines faith in the criminal justice system. If the Commission is serious about taking a fresh look at sentencing, the Guidelines' approach to acquitted conduct deserves closer scrutiny.

*Third*, the Commission should reevaluate its decision to set drug trafficking Guideline ranges around the mandatory minimums set by Congress. The Commission's decision to key its Guidelines sentences to mandatory minimums set by Congress avoids so-called cliffs in punishment. But it conflicts with the goals of sentencing set out in 18 U.S.C. § 3553(a)(2). Congress did not consider the appropriate penalties for quantities other than the ones set out in its statutes. Even for the quantities it did consider, Congress did not rely on the Commission's expertise or empirical evidence. This means that any Guideline that has been set with a mandatory minimum as the benchmark has not been evaluated by the Commission to determine if it comports with the goals of the Sentencing Reform Act. Because these Guidelines are not the product of the Commission's expertise, there is a significant risk that they are disproportionate and inefficient. In the absence of a congressional directive that the Guidelines should be built around mandatory minimums, the Commission should reconsider sentences that have been set on that basis to determine whether empirical evidence supports them. Where it does not, those sentences should be revised, and mandatory minimums should operate as trumps, not as the key benchmarks for quantities and circumstances not considered by Congress.

*Fourth*, as the Commission moves forward, it is critically important that it prioritize empirical research and data analysis in setting the agenda for itself and Congress. The Commission's research reports and data gathering have been superb over the course of its history. Now is the time for the Commission to take that research function to the next level and provide Congress, the courts, and other interested actors with additional information that is just as fundamental to an effective, efficient, just sentencing regime. In particular, the Commission must pay greater attention to the fiscal and racial impact of changes in sentencing law, to evidence-based research about what works and what does not in fighting crime and curbing recidivism, and to the relationship between prosecutorial practices and federal sentencing outcomes.

*Fifth and finally*, the Commission has asked witnesses to provide any statutory changes that should be recommended to Congress. In accordance with that request, I agree with the Commission's previous findings that at least two fundamental changes are advisable. First, as the Commission and just about every other sentencing expert has repeatedly suggested, Congress should eliminate mandatory minimums and allow the Commission to set sentencing ranges on the basis of its empirically-grounded knowledge. Second, and also as suggested by the Commission, Congress should eliminate the disparity in treatment between crack and powder cocaine.

## **I. Guideline Reform**

The Guidelines are the main work product of the Commission under the Sentencing Reform Act, so I would like to begin by discussing what aspects are working well and where the Commission should seek improvements.

**A. Striking the Balance between Individualization and Equal Treatment of the Similarly Situated**

The Commission expressed an interest in receiving testimony about whether “the federal sentencing system strike[s] the appropriate balance between judicial discretion and uniformity and certainty in sentencing.”

As the Commission correctly assumes in this question, a successful sentencing system must seek proportional sentences that correspond to the offender’s individual blameworthiness and circumstances while at the same time avoiding unjust disparity.<sup>1</sup> There is, to say the least, tension between these two goals.<sup>2</sup> But despite the tension, both are accepted bedrocks of any just sentencing scheme.

For most of the last 25 years, however, the federal system has focused almost exclusively on eliminating judicial discretion and largely disregarded the need for individualized proportional punishment. Congress bears primary responsibility for this lopsided approach. For starters, Congress passed what is known as the “25 percent rule,” contained in 28 U.S.C. § 994(b)(2), which provides that the maximum of a sentencing guidelines range for a term of imprisonment “shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months.” The purpose of this law was to curb judicial discretion and promote uniformity by narrowing the band within which judges could sentence offenders.

Congress went still further in cabining judicial discretion by enacting laws that trump the Guidelines. First and foremost, Congress passed a multitude of mandatory minimum laws aimed at curbing judicial discretion. In fact, as the Commission has noted in its report on mandatory

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<sup>1</sup> See 28 U.S.C. § 991(b)(1)(B) (directing the Commission to establish sentencing policies that “provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices”).

<sup>2</sup> “Since the early days of the common law, the legal system has struggled to accommodate these twin objectives.” *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982).

minimum sentencing,<sup>3</sup> these laws have failed to produce uniformity because prosecutors have unreviewable discretion in deciding whether or not to bring charges under them. When prosecutors do elect to use them, they prevent judges from individualizing sentences where appropriate to achieve proportional punishment. Additional enactments, such as the PROTECT Act,<sup>4</sup> likewise aim to cabin judicial discretion and prevent individualization.

When the Guidelines themselves were mandatory, they similarly prevented judges from achieving proportional punishments in many cases because they dramatically limited the grounds on which judges could depart.

The Supreme Court's decision in *Booker* has operated as a counterweight to this historical, almost exclusive focus on limiting judicial discretion. By allowing judges to vary from the Guidelines to achieve the purposes set out in 18 U.S.C. § 3553(a), *Booker* gives judges some room to account for relevant individual differences in setting punishments.

But we are still a long way from the standardless regime that existed in the federal system before the Sentencing Reform Act. Judges now have the benefit of the Commission's data, which means judges now know the sentencing norm for any given offense. Nothing works better at keeping judges consistent with one another like information because judges are trained to respect the decisions of other judges, and they take seriously the views of their colleagues.<sup>5</sup>

This is borne out by guideline compliance rates throughout the country. States with mandatory and advisory guidelines achieve the same basic compliance rates.<sup>6</sup> Federal judges'

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<sup>3</sup> UNITED STATES SENTENCING COMMISSION, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM: A SPECIAL REPORT TO CONGRESS (1991).

<sup>4</sup> Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 10821, 117 Stat. 650 (2003).

<sup>5</sup> See John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235, 238 (2006) (providing reasons why judges would follow voluntary guidelines).

<sup>6</sup> See Professor Robert F. Wright, Statement Before the United States Sentencing Commission, Regional Hearing, at 6-7 (Feb. 11, 2009) (noting that compliance rates for Pennsylvania, North Carolina and Minnesota hovered around

compliance rates after *Booker* are in accord with these numbers. The Commission's most recent quarterly report shows that judges are sentencing outside the guideline range without a government motion in 17% of cases.<sup>7</sup> Moreover, to the extent that federal judges opt to depart or vary from the Guidelines, they must give reasons, and those reasons are reviewed by an appellate court that also has all the Commission's resources at its disposal in evaluating the district court's decision.

To the extent the Commission is worried about disparity under the current federal sentencing regime, the evidence shows that prosecutors, not judges, should be the primary target of concern. Federal prosecutors are the greatest source for disparity in the federal system. The Commission's most recent report shows that government-sponsored motions result in sentences below the Guidelines in 24.7% of all cases, compared with the 15.3% of all cases that have below-Guideline sentences because of a judicial departure or variance.<sup>8</sup>

When representatives from the Department of Justice express concern with the disparity that exists after *Booker*, they often point to the statistics the Commission keeps on sentences imposed within the Guideline range.<sup>9</sup> What they almost invariably overlook is that the vast

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75% despite dramatic differences in their legal force). States with purely advisory guidelines report similar compliance rates. *See, e.g.*, Virginia Sentencing Commission, 2008 Annual Report 16 (2008), *available at* [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD4152008/\\$file/RD415.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD4152008/$file/RD415.pdf) (Virginia's advisory guidelines have a compliance rate of 79.8%); National Association of Sentencing Commissions, The Sentencing Guideline 7 (February 2009), *available at* [http://www.ussc.gov/STATES/NASC\\_2009\\_02.pdf](http://www.ussc.gov/STATES/NASC_2009_02.pdf) (Maryland's advisory guidelines have a compliance rate of approximately 80%, based on data from fiscal year 2008); Missouri Sentencing Advisory Commission, Using the New Sentencing Tools 5 (June 26, 2006), *available at* <http://www.mosac.mo.gov/file/Using%20the%20New%20Sentencing%20Tools%20-%20SAR%20Implementation%20Report%20June%202006.pdf> (Missouri reported a compliance rate of 81.9% with its advisory guidelines in June 2006).

<sup>7</sup> UNITED STATES SENTENCING COMMISSION PRELIMINARY QUARTERLY DATA REPORT THROUGH MARCH 31, 2009, tbl. 1, *available at* [http://www.ussc.gov/sc\\_cases/USSC\\_2009\\_Quarter\\_Report\\_2nd.pdf](http://www.ussc.gov/sc_cases/USSC_2009_Quarter_Report_2nd.pdf).

<sup>8</sup> *Id.*

<sup>9</sup> *See, e.g.*, Attorney General Holder's Remarks for the Charles Hamilton Houston Institute for Race and Justice and Congressional Black Caucus Symposium "Rethinking Federal Sentencing Policy, 25<sup>th</sup> Anniversary of the Sentencing Reform Act" (June 24, 2009) (commenting that the percentage of defendants sentenced within the Guidelines has decreased), *available at* <http://www.usdoj.gov/ag/speeches/2009/ag-speech-0906242.html> (hereinafter "Holder Speech"); Statement of Karin J. Immergut, United States Attorney, District of Oregon, Before

majority of sentences outside the Guideline range are given at the urging of the government – either because of the fast-track policy, because the government files a substantial assistance motion, or for some other reason that the government urges. For example, at the Commission’s recent regional hearing in California, Karin Immergut, the United States Attorney for the District of Oregon, noted that “the data clearly demonstrate that *Booker* and subsequent cases have had an effect.”<sup>10</sup> She then cited the fact that sentences within the Guidelines have dropped to 45% in the Ninth Circuit,<sup>11</sup> leading her to conclude that “the signs point to increasing sentencing disparity – including disparity based on differing judicial philosophies among judges working in the same courthouse.”<sup>12</sup> Her statement then cited various cases where judges departed or varied from the Guidelines.

But to focus only on judges is to miss a much larger and important story behind the statistics on within-Guideline sentences. The most recent data on the Ninth Circuit shows that 43% of the cases in the Ninth Circuit fall outside the Guidelines because of a government-sponsored motion.<sup>13</sup> Thirty-percent of the cases in that Circuit fall outside the Guidelines under the Attorney General’s early disposition program.<sup>14</sup> An additional 8% of cases are outside the Guidelines because of substantial assistance motions, and another 5% are outside the Guidelines because of some other government-sponsored motion.<sup>15</sup> Thus, to the extent there is disparity in the Ninth Circuit, the Commission should be thinking about the 43% of cases that the

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the United States Sentencing Commission, Regional Hearing, at 2 (May 27, 2009) (noting that *Booker* has had an effect because the percentage of defendants sentenced within the Guidelines has dropped).

<sup>10</sup> Immergut Statement, *supra* note 9, at 2.

<sup>11</sup> The Commission’s most recent preliminary data report has that number at 41.5%. PRELIMINARY QUARTERLY DATA REPORT, *supra* note 7, at tbl. 2.

<sup>12</sup> Immergut Statement, *supra* note 9, at 2. The Attorney General echoed this theme in a recent speech. *See* Holder Speech, *supra* note 9 (“[W]e should assess whether current sentencing practices show an increase in unwarranted sentencing disparities based upon regional differences or even differences in judicial philosophy among judges working in the same courthouse.”) But the Attorney General cautioned that “we must also be prepared to accept the fact that not every disparity is an unwelcome one.”

<sup>13</sup> PRELIMINARY QUARTERLY DATA REPORT, *supra* note, 7, at tbl. 2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

government wants outside the Guidelines – not the 15% of cases where the judge departs or varies without such a motion.

These statistics are just the latest demonstration of the undeniable fact that prosecutors have abundant discretion under the Guidelines. Prosecutors have unreviewable authority to select charges, which gives them enormous power over sentencing outcomes.<sup>16</sup> Prosecutors gained additional power under the Guidelines as the gatekeepers of key departure motions. In the national statistics, substantial assistance motions are the most common ground for a sentence outside the Guidelines. Moreover, the extent of a departure for substantial assistance is on average “far greater” than the extent of a departure for other reasons.<sup>17</sup> Thus, whether a prosecutor views someone as sufficiently cooperative remains the number one basis on which a defendant is distinguished from another defendant who committed the same offense and it makes a bigger difference than other departures in terms of the amount. Yet there is no guidance on how prosecutors should assess cooperation. In fact, all the evidence suggests that districts vary widely in how they evaluate this factor and how much of a discount they believe defendants should get for providing substantial assistance. Unfortunately, some evidence also suggests that these decisions may be influenced by irrelevant factors such as race and gender.<sup>18</sup> The fast-track program creates explicit, regional disparity, yet it, too is a common basis for distinguishing among otherwise similarly situated defendants.

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<sup>16</sup> Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1425 (2008); UNITED STATES SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 85-92 (2004).

<sup>17</sup> FIFTEEN YEAR REPORT, *supra* note 16, at 103 (conducting an analysis from sentences imposed in 2001 and noting that “[t]he mean departure length for substantial assistance was 43 months . . . while the mean departure length for other downward departures was just 20 months”).

<sup>18</sup> Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors*, 61 STAN. L. REV. 869, 899-900 (2009); LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 13-14, exhibit 9 (1998). *But see* FIFTEEN YEAR REPORT, *supra* note 16, at 105 (discussing a reevaluation of the Maxfield & Kramer data that calls into question their findings regarding the role of race and gender).

In the post-*Booker* world, it would be anomalous for the Commission to focus on the relatively slight uptick in judicially-prompted departures and variances when the evidence shows that prosecutors are driving most of the outside-Guideline sentences. At the very least, before any action is taken that would affect judges, the Commission should first conduct a wholesale review of how prosecutors are making their decisions in each district and how those decisions are influencing sentencing.<sup>19</sup>

Moreover, to the extent these prosecutor-prompted motions persist, they are an argument for allowing judges to play a role in individualizing punishment as well. While cooperation may be a relevant distinction among offenders and fast-track departures may be administrative necessities, these cannot possibly be the only relevant distinctions among offenders outside the ones established by the Guidelines. The freedom judges now have under *Booker* allows them to consider additional relevant differences that are not accounted for or not sufficiently addressed in the existing Guidelines but that are nonetheless necessary to satisfy Congress's goals in § 3553.

There is an additional benefit to the current post-*Booker* regime. Because judges must explain the basis for their variance or departure, and because the Commission keeps track of when these variances and departures are occurring, the Commission now has valuable data on areas of the law in need of reform. Judges are the best sources of information for the Commission. When a particular area is leading to a large number of variances or departures, that is a sign that something in the current system is not calibrated correctly. The post-*Booker* system

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<sup>19</sup> I discuss the need to collect this data in section II.C of this statement. Although the Commission previously studied substantial assistance practices in the mid-1990s and other studies have also sought to investigate presentencing decisions, *see* FIFTEEN YEAR REPORT, *supra* note 16, at 85-92, it is time for the Commission to revisit this critical topic and assemble updated information, particularly in the post-*Booker* environment. Moreover, in addition to compiling the data, if the Commission finds unwarranted disparity, it should take the additional step of suggesting possible avenues for reform. *See id.* at 104 (noting that “no detailed nationwide policing governing how substantial assistance motions should be used, nor how the extent of the departure should be determined, have been promulgated either by the Department of Justice or the Sentencing Commission”).

therefore allows a valuable feedback loop for the Commission that should improve the operation of the Guidelines over the long term and, ultimately, lead to even more consistency.

The analysis thus far, it must be mentioned, is based on the existing data. If that were to change and federal compliance rates were to diverge dramatically from those seen in other guidelines systems, if there were evidence of racial or other inappropriate disparities entering into judicial decisions, or if deterrence were to suffer, the current framework would need to be reconsidered. But based on the empirical record as it now stands, the current advisory framework of the Guidelines is working well and seems to fall under the old adage “if it ain’t broke, don’t fix it.”

#### **B. Reforming Relevant Conduct to Disallow the Use of Acquitted Conduct**

There are, however, aspects of the Guidelines that need to be fixed or at least receive a tune-up. One of them is the Commission’s approach to relevant conduct, and specifically, its treatment of acquitted conduct. Congress was silent in the Sentencing Reform Act – and everywhere else – about whether the Guidelines should adopt a so-called “real” offense or “charge” offense approach to sentencing. Under a charge offense system, punishments are keyed to the offense for which the defendant was convicted. Under real offense sentencing, in contrast, punishment is not tied directly to the offense for which the defendant was convicted but is based instead on what the defendant “really” did.<sup>20</sup> Despite the absence of a congressional command to use real offense sentencing, the original members of the Sentencing Commission decided on their own that a modified version of real offense sentencing was the best approach for the Guidelines. Under this system, the charged offense is only one factor that can determine the presumptive guideline sentence. Relevant conduct that has not been charged – indeed, relevant

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<sup>20</sup> See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 9 (1988).

conduct that forms the basis of a charge of which the defendant has been acquitted – can also determine the base offense level under the Guidelines and can lead to upward adjustments and upward departures. Relevant conduct in many cases is the primary determinant of the length of a defendant’s sentence and the charged offense plays a minor role.

If the prosecutor proves such conduct by a mere preponderance of the evidence, the Guidelines instruct judges to increase a defendant’s sentence on the basis of that conduct regardless of whether a jury looked at the same evidence and acquitted. This can make a substantial difference in a defendant’s case. For example, in *United States v. Manor*,<sup>21</sup> the defendant was charged with one count of conspiracy to distribute 250 grams of cocaine and other distribution counts involving approximately 19 grams of cocaine. The jury acquitted him on the conspiracy count but convicted him on the intent to distribute 19 grams. At sentencing, the judge treated the conspiracy to distribute 250 grams as relevant conduct, which tripled the defendant’s sentence exposure. The jury’s acquittal was rendered meaningless because the defendant faced the same punishment range he would have faced if he had been convicted of the conspiracy charge.

This treatment of acquitted conduct suffers from several flaws. First and foremost, it disrespects the jury. Our entire constitutional framework rests on the ideal that it is for the jury to decide, beyond a reasonable doubt, what the defendant “really” did. To have judges disregard a jury verdict of acquittal undermines the hard work and effort jurors put into evaluating cases. Thus, even before the Court’s *Apprendi/Booker* line of cases, judges and scholars criticized the Commission’s decision to use acquitted conduct.<sup>22</sup>

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<sup>21</sup> 936 F.2d 1238 (11th Cir. 1991).

<sup>22</sup> Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 94 (2003).

In *Booker*, the Court agreed that, to the extent the Guidelines were mandatory, the Guidelines' use of relevant conduct ran afoul of the Constitution's jury guarantee. Thus, the Court required the Guidelines to become advisory instead of mandatory. But even now that the Guidelines operate on an advisory basis, the problems of using acquitted conduct remain. Telling judges to increase a sentence on the basis of relevant conduct, even when a jury acquitted a defendant of that conduct, may no longer violate the Constitution in fact,<sup>23</sup> but it does so in spirit. As noted, judges continue to comply with the Guidelines in most cases, including its approach to acquitted conduct. As a result, judges continue to sentence defendants even when it disrespects the jury's function and verdict.

There is nothing in the history of the Sentencing Reform Act to suggest that Congress intended the Commission to adopt a system that would create such a conflict with the jury guarantee. This was a discretionary decision by one set of members of the Commission. It can be overruled by another set without running afoul of Congress's intent.

With more than two decades of experience with this framework, however, it may be hard for the Commission to imagine any other way. But, in fact, all the existing evidence demonstrates that sentencing guidelines operate just as well – if not better – when this type of information is not used. The most powerful evidence comes from the actual experience on the ground. More than a third of all states now have some form of guidelines, most of which were passed after the federal guidelines. Yet after looking at the federal approach, not a single state opted to use acquitted conduct. Those states have had all the same successes with guidelines as the federal system has had, but without the intrusion on the jury's function. There is no evidence that crime rates in these states are higher, and many of these states have lowered their

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<sup>23</sup> The Court upheld the use of acquitted conduct in *United States v. Watts*, 519 U.S. 148, 154 (1997) and *Witte v. United States*, 515 U.S. 389, 399 (1995).

incarceration rates. And just like the federal system, they have increased consistency and predictability in sentences.

The states have demonstrated that the use of acquitted conduct is not necessary for a successful sentencing regime. And there is nothing about the federal criminal code that makes the use of acquitted conduct necessary. While the Commission has explained that broadly worded federal criminal laws lack sufficient detail to form the basis for a charge offense system,<sup>24</sup> that rationale supports the use of uncharged conduct in general but does not support the use of acquitted conduct to increase sentences.

The Commission's other rationale for adopting the modified real-offense system also fails to apply to acquitted conduct. The Commission thought relevant conduct was necessary to stop prosecutors from manipulating sentences through their charging decisions and the hiding of relevant facts. But that justification does not account for the use of acquitted conduct because, in cases where acquitted conduct is relevant, prosecutors have brought the relevant charges out into the open already. If anything, the ability to use acquitted conduct increases the power of prosecutors in this framework because it allows them to get sentences increased under a lower standard of proof and without the usual rules of evidence. And the use of acquitted conduct lets prosecutors avoid the restrictions of the Double Jeopardy Clause by essentially getting a second try at punishment for the same offense.

Finally, it is hard to measure just how demoralizing this approach to sentencing is and the disrespect for the law it cultivates. Whenever I have taught this aspect of the Guidelines to my law students, the reaction is overwhelmingly negative. Indeed, there is not a single aspect of criminal justice policy I teach that garners more disbelief and disappointment than the notion that a defendant should have his sentence increased under the Guidelines even if a jury has acquitted

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<sup>24</sup> See, e.g., FIFTEEN YEAR REVIEW, *supra* note 16, at 25.

him of the conduct, as long as a judge finds the same facts by a preponderance of the evidence. The Guidelines are far better than this one aspect of their operation, and it is time the Commission reconsider the use of acquitted conduct. It is hard to imagine any scenario under which the Commission, taking a fresh look at the issue, would require acquitted conduct to form the basis of an increase in a defendant's sentence under the Guidelines.

### **C. The Relationship Between Mandatory Minimum Sentences and the Guidelines**

There is another fundamental aspect of the Guidelines that deserves the Commission's attention. When the Commission developed its initial set of sentencing guideline ranges for drug trafficking, it incorporated statutory mandatory minimum sentences into the grid so that the trafficking guidelines, like mandatory minimum laws, are driven largely by quantity. Moreover, the sentences for all quantities have been set based on the sentences Congress selected for mandatory minimums. Thus, offenses involving five or more grams of crack cocaine, as well as all other drug offenses carrying a five-year mandatory minimum penalty, were assigned a base offense level of 26, corresponding to a guideline range of 63-78 months for a defendant in the lowest criminal history category. Likewise, drug offenses carrying a ten-year mandatory minimum penalty were assigned a base offense level of 32, corresponding to a sentencing guideline range of 121-151 months for a defendant in the lowest criminal history category.

“[N]o other decision of the Commission,” the Commission itself has noted, “has had such a profound impact on the federal prison population.”<sup>25</sup> This decision accounts for much of the rise in the federal prison population and for a large measure of the racial disparities in its composition. Judges have almost universally condemned these Guidelines as too harsh.<sup>26</sup> And

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<sup>25</sup> FIFTEEN YEAR REPORT, *supra* note 16, at 49.

<sup>26</sup> *Id.* at 52 (discussing a 2002 survey of judges finding that 31% of district judges ranked “drug sentencing as the greatest or second greatest challenge for the guidelines in achieving the purposes of sentencing” and finding that

yet, the Commission has offered little in the way of a defense for this choice. The documents released by the Commission at the time this fundamental decision was made are silent about its rationale.

The most likely explanation is that the Commission appears to have done this to avoid “cliffs” in sentencing,<sup>27</sup> where offenders would find themselves with very different penalties, depending on whether they reached the mandatory minimum threshold or fell just below it. The discussion at one of the prior regional hearings this year also suggested that this approach might have been done to comply with 28 U.S.C. § 994, which requires that the Commission issue guidelines consistent with all pertinent provisions of any federal statute, which would include mandatory minimum sentencing statutes.

Whatever the Commission might have thought at the time this approach was adopted, it is clear now that this approach requires serious reconsideration because is inconsistent with the Commission’s statutory directives. The Commission is under a mandate under 28 U.S.C. § 991(b)(1)(A) to establish guidelines that meet the purposes of sentencing set out in 18 U.S.C. § 3553(a)(2), which include providing a punishment that will reflect the seriousness of the offense, promote respect for the law, and provide just punishment.<sup>28</sup> Unless the Commission finds that the sentences associated with each of these drug quantities fulfill those purposes – and, as noted, the record is silent about why the Commission adopted these quantities – the Commission is in violation of this statutory command. Section 994 does not require a different conclusion because it would be perfectly consistent for the Guidelines to establish sentences for

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73.7% of district court judges and 82.7% of circuit court judges rate drug punishments as greater than appropriate to reflect their seriousness).

<sup>27</sup> *Id.* at 50. Another explanation posited in the Fifteen Year Report is that the Commission did this because the quantities are reasonable measures of harm. *Id.* at 49-50. But the Report goes on to note that “[d]rug quantity has been called a particularly poor proxy for the culpability of low-level offenders, who may have contact with significant amounts of drugs, but who do not share in the profits or decision-making.” *Id.* at 50.

<sup>28</sup> 18 U.S.C. § 3553(a)(2)(A).

drug quantities without reference to mandatory minimum statutes and provide that, in the event a mandatory minimum statute is applicable, it trumps the Guidelines. Indeed, that is the only approach that is consistent with § 3553(a)(2) and therefore § 994 as well.

To the extent that a sentence for someone who falls above the threshold for the mandatory minimum is significantly greater than the sentence of someone who falls just below the mandatory minimum threshold, that disparity would be warranted because it would be commanded by statute. And although this would create a cliff in sentencing, these types of cliffs are hardly new. At common law, the line between grand larceny and petit larceny depended on whether the value of the property stolen exceeded twelve pence. If the amount was above this threshold, it was a capital offense. But any amount below the threshold was punishable by forfeiture and whipping, and the offender was not subject to the death penalty.<sup>29</sup> This cliff is obviously much steeper than any that would be created by treating mandatory minimums as trumps instead of incorporating them into the Guidelines. But it reflects the fact that any time the legislature opts to set mandatory penalties on the basis of bright-line thresholds, cliffs are an anticipated byproduct.

More fundamentally, although treating mandatory minimums as trumps would create some disproportionality in federal sentencing, the alternative approach of setting sentences based on mandatory minimums leads to even greater disproportionality. There is no solution to this problem that results in perfect sentencing across the board, so the best the Commission can do is create a regime that is most consistent with its tasks in 28 U.S.C. § 991(b) to “assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)” and to “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice

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<sup>29</sup> ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 335 (3d ed. 1982).

process.” That means sentencing that is based on expertise and expressly designed to achieve the goals in § 3553. The Commission can do that consistently with the mandatory minimum sentencing laws by setting drug quantity guidelines based on empirical research and by allowing the mandatory minimum laws to trump those quantity guidelines where applicable. But the Commission cannot, consistent with the commands of 28 U.S.C. § 991, ignore its statutory mandate to achieve just sentencing based on advanced knowledge and simply accept Congress’s view about the sentence for one particular quantity as the appropriate baseline for every other quantity.

Congress did not consult the Commission in setting the mandatory minimums or otherwise base them on “advancement in knowledge of human behavior.” While those mandatory minimums have the force of law whenever they are triggered, there is nothing in the statutes themselves or the legislative history to suggest that Congress intended that they would undercut the operation of the expert agency in the field to set punishments for all other quantities not specified in the statute. Congress knows how to provide such a directive, and its failure to do so in mandatory minimum laws indicates that it left it to the Commission to set the sentences for other quantities.

There is a good reason for Congress to prefer an approach that treats mandatory minimums separately from Guidelines. Congress obtains valuable information from the Commission. If the Commission’s expert judgment reveals that drug sentencing should vary from where Congress has set it through mandatory minimums, Congress may use that information to revise its own approach to sentencing. Under the Commission’s current approach, Congress does not receive that feedback because its mandatory minimums are

accepted and incorporated wholesale into the Guideline structure without independent analysis by the Commission.

Moreover, now that judges have more freedom after *Booker*, it is likely that they will give more respect to Guidelines that are the product of the Commission's expert evaluation than those that were set based on nothing more than a mandatory minimum. Mandatory minimums, after all, fly in the face of the rest of the Guidelines philosophy and often result in sentences that violate the parsimony principle of § 3553(a), which requires the imposition of sentences that are "sufficient, not greater than necessary, to comply with the purposes" set out in § 3553(a)(2). There is likely to be greater judicial respect for sentences established by the Commission that are grounded in empirical research and that aim to satisfy all the requirements of § 3553 rather than those that are based on congressional decisions that may be based on anecdotal cases instead of a comprehensive review of all relevant facts.

## **II. The Commission as Expert Agency: The Importance of Research and Data**

The Sentencing Commission's data-gathering and analysis have been first-rate throughout its existence. Its analysis of judicial sentencing practices, departures, and now variances is useful to all the participants in the federal criminal justice system. It has prepared excellent reports on issues such as mandatory minimum sentencing laws,<sup>30</sup> the disparity between crack and powder cocaine,<sup>31</sup> alternatives to incarceration,<sup>32</sup> and a host of other topics.<sup>33</sup>

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<sup>30</sup> UNITED STATES SENTENCING COMMISSION, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM: A SPECIAL REPORT TO CONGRESS (1991).

<sup>31</sup> UNITED STATES SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2007).

<sup>32</sup> UNITED STATES SENTENCING COMMISSION, ALTERNATIVE SENTENCING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2009).

<sup>33</sup> *See generally* UNITED STATES SENTENCING COMMISSION, GUIDE TO PUBLICATIONS & RESOURCES (2007-2008).

Although Congress has not fully heeded all of the Commission's advice and recommendations,<sup>34</sup> even reports that Congress and the Executive branch initially ignored have had an influence on the debate. For example, as Congress considers the future of mandatory minimum sentencing and the treatment of crack and powder cocaine, the Commission's reports remain widely cited and relied upon for guidance. The Attorney General recently referred to the Commission's report on crack/powder disparity in his speech reaffirming the Department's commitment to seeking an end to that disparity.<sup>35</sup>

I urge the Commission to employ its top-flight staff of researchers and data analysts to produce additional valuable empirical information for Congress, the courts, the Executive branch, and other interested observers of sentencing. Specifically, the Commission should devote more attention to the fiscal and racial impact of sentencing proposals, evidence-based research on which sentencing policies are most effective, and the relationship between prosecutorial practices and sentencing.

#### **A. The Costs of Sentencing Laws: Fiscal and Racial Impact Statements**

The first category of information that deserves more attention from the Commission is the costs of any new sentencing law proposed by Congress or Guideline proposed by the Commission.<sup>36</sup> Two costs, in particular, merit closer attention: the fiscal costs of sentencing policies and the social costs as measured by their impact on particular racial and ethnic groups.

##### **1. Fiscal Impact Statements**

The Commission should routinely prepare a fiscal impact analysis of any proposed law or rule that affects sentencing prior to the passage of that law or rule so that Congress and the

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<sup>34</sup> Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 767-770 (2005).

<sup>35</sup> Holder Speech, *supra* note 9.

<sup>36</sup> *See generally* Letter from the Center on the Administration of Criminal Law to the United States Sentencing Commission, Aug. 29, 2008 (responding to Notice of Proposed Priorities and Request for Public Comment for the amendment cycle ending May 1, 2009 and advocating greater attention to fiscal impact analysis).

Commission can determine if the proposed law's benefits are worth its costs. Congress has already mandated in 18 U.S.C. § 4047 that prison impact assessments should be prepared whenever the Judicial or Executive branch submits legislation that could increase or decrease the number of incarcerated individuals and it directs the Attorney General, in consultation with the Sentencing Commission, to prepare impact assessments on a yearly basis "reflecting the cumulative effect of all relevant changes in the law taking effect during the preceding calendar year." It is unclear how often or timely this information is currently supplied or how active the Commission is in preparing it,<sup>37</sup> but the Commission should promptly provide a fiscal impact statement whenever Congress proposes new legislation affecting sentencing or the Commission proposes a Guideline amendment, regardless of whether or not Congress requests it.

More fundamentally, the Commission should not just generate this information, but should use it to comply with its obligation under 28 U.S.C. § 994(g) "to minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons." At the very least, that means that the costs of incarceration and the strain it will place on existing resources should be highlighted in any report or recommendation put forth by the Commission, even when the Commission is responding to a request by Congress. Congress should always be told in explicit terms what the costs of its proposals are and if there are less costly, but equally effective options. When the Commission puts forth recommendations on its own, it should likewise explain why its recommendations are the most cost effective in light of sentencing goals. And the Commission should conduct a wholesale review of the current system to assess its fiscal impact and where costs could be reduced without increasing crime rates.

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<sup>37</sup> Lisa A. Rich, *Congress Should Engage in Sentencing Review: Some Ideas for the 111<sup>th</sup> Congress*, 21 FED. SENT. REP. 17, 18 (2008) (advocating for more regular use of the prison impact statement and also noting that, although the Department of Justice is obligated under § 4047(c) to prepare a yearly impact statement, the author "was not aware of this report ever having been filed" during her time at the Sentencing Commission).

The generation of fiscal cost data should become central to everything the Commission does, for that information is essential to determining how best to use federal resources. No proposal can be effectively assessed without knowing both its costs and its benefits. That is why just about every state with a sentencing commission uses a cost projection program and makes it a central part of its mission. Minnesota pioneered this framework, and because of its demonstrated success there in effectively using the state's limited resources to the greatest effect, other states have followed suit.<sup>38</sup> These state sentencing commissions and their respective state legislatures have found that these fiscal impact forecasts are enormously valuable in helping states make the most of their crime fighting resources.<sup>39</sup> State legislators have frequently modified proposed laws in light of expert forecasting by a state sentencing commission. Sometimes states raise sentences in light of cost data, knowing that they have the resources to afford the financial outlay. Other times, states lower sentences for some crimes (particularly nonviolent crimes) in order to reserve scarce prison resources for violent crimes and achieve the same overall reduction in crime, but at a lesser cost. What the data allows is more informed, efficient use of resources to achieve whatever policy goals are set by elected officials.

The experience in the states has also shown that using cost information to help set policy can help achieve lower crime rates or maintain already low rates while saving money. The states that have used these forecasts to maximize their resources have done so without increasing their crime rates. Indeed, during the last twenty years – the period in which most states have made use of these estimates – crime rates have largely declined or stabilized. Beginning in 1992, and by

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<sup>38</sup> See Letter from the Center on the Administration of Criminal Law, *supra* note 36, at 3.

<sup>39</sup> See Barkow, *supra* note 34, at 809 (noting that “[a]lmost every state to adopt a guideline system since the middle of the 1980s has opted to require some version of an impact statement” and that these cost estimates have “proven to be effective in cutting costs by slowing incarceration rates and prison overcrowding”); Letter from the Center on the Administration of Criminal Law, *supra* note 36, at 3-5.

1999, homicide rates had declined to rates not seen since the 1960s.<sup>40</sup> Nationwide, the overall crime rate reached a historic low in 2000.<sup>41</sup> During this entire period of lower crime rates, states used cost projections to make the most of their limited resources by lowering the growth in their incarceration rates and reducing the growth rate of corrections as a percentage of their overall expenditures.<sup>42</sup> Indeed, these forecasts have been so useful that the American Bar Association has included cost forecasts as an integral part of its proposed Model Sentencing Act. That Act requires an impact analysis on the theory that “it is in every state’s interest to coordinate resource and policy decisions.”<sup>43</sup>

These forecasts have also improved the standing of state commissions with their respective legislatures. State commissions that use these forecasts “have found that, over time, as their resource projections have been shown to be accurate and objectively-determined, their legislatures have placed ever-greater stock in their forecasts, affording the commissions a deepening reputation for credibility, and allowing their research to play a more powerful role in legislative deliberations.”<sup>44</sup>

Fiscal forecasting by the Commission could achieve benefits at the federal level similar to those attained in these states. Using cost forecasting, the federal government could realize fiscal rationality and implement better, more cost-effective federal criminal justice policies. And the

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<sup>40</sup> See Alfred Blumstein & Joel Wallman, *The Recent Rise and Fall of American Violence*, published in THE CRIME DROP IN AMERICA, at 3-4 (2000).

<sup>41</sup> See Emma Schwartz, *Crime Rates Shown to Be Falling: Latest figures show a reversal of an upward tick, but the picture remains complicated*, U.S. NEWS AND WORLD REPORT, June 11, 2008, available at <http://www.usnews.com/articles/news/national/2008/06/11/crime-rates-shown-to-be-falling.html>.

<sup>42</sup> See Rachel E. Barkow & Kathleen M. O’Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 2008-09 (2006).

<sup>43</sup> Kevin R. Reitz & Curtis R. Reitz, *Building a Sentencing Reform Agenda: The ABA’s New Sentencing Standards*, 78 JUDICATURE 189, 194 (1995).

<sup>44</sup> Barkow, *supra* note 34, at 810 (quoting Kevin R. Reitz, *A Proposal for Revision on the Sentencing Articles of the Model Penal Code* 31, available at <http://www.ali.org/MPC02Revision.htm>).

Commission could, potentially, improve its standing and influence with Congress by providing valuable information on the costs of any policy under consideration.

Commission-provided information on costs would be particularly valuable because resource management is often otherwise lost in the congressional debates. Many sentencing laws require large capital expenditures – such as the maintenance and construction of prison facilities or the hiring of staff – that are often overlooked. Although the costs of longer terms of imprisonment will, in fact, be worth it for many offenses and offenders, in some situations the money spent on longer prison terms would be better spent on something else, such as incarceration for more serious offenders, alternatives to incarceration for some nonviolent offenders, or resources for policing or education. Because the political process does not, on its own, always provide reasoned consideration of these options,<sup>45</sup> Commission-provided cost data can fill the void and ensure that federal dollars are spent wisely.

Cost forecasting is particularly important in today's strained economic climate. Even though incarceration costs represent only approximately 1% of federal government expenditures,<sup>46</sup> corrections expenditures are rising rapidly. Between 1982 and 2003, the federal government increased expenditures on corrections by 925%, compared to increases of only 241% on police protection during the same period.<sup>47</sup> Between 1995 and 2004, the federal prison population increased at an annual average of 7.8%, compared to an average annual increase of 2.7% in the states.<sup>48</sup> The federal system is now 37% over its capacity<sup>49</sup> and is the largest prison system in the

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<sup>45</sup> See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1291-99 (2005).

<sup>46</sup> See BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES 2003, at 2, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/jeeus03.pdf>.

<sup>47</sup> See *id.* 2, 9.

<sup>48</sup> PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, PRISON & JAIL INMATES AT MIDYEAR 2004 at 2 & tbl. 1 (2005).

<sup>49</sup> U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS IN 2006, at 5, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p06.pdf>

country.<sup>50</sup> Greater attention to costs could therefore assist the Commission and Congress in using these overtaxed resources wisely and to use the money saved for more police protection, other crime-fighting programs, or other congressional priorities.

Such forecasting is consistent with the Commission’s statutory purpose, duties, and authority. As noted, 18 U.S.C. § 4047 already envisions this role for the Commission. So, too, does 28 U.S.C. § 994(g), which charges the Commission in promulgating guidelines to “take into account the nature and capacity of the penal, correctional, and other facilities and services available” and to

“make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons . . . .”<sup>51</sup>

The Commission also has the authority to engage in this analysis of Congress’s proposed laws from its “power to . . . make recommendations to Congress concerning modification or enactment of statutes related to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane, and rational sentencing policy.”<sup>52</sup> Furthermore, this analysis is consistent with the larger mission of the Commission to “develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing.”<sup>53</sup>

Not only does cost forecasting help fulfill the Commission’s specific statutory mandates, it is in step with the government’s practice in other areas. The federal government in recent decades has embraced cost-benefit analysis as a centerpiece of the movement to reinvent government to be

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<sup>50</sup> *Id.* at tbl. 1.

<sup>51</sup> *Id.* § 994(g).

<sup>52</sup> *Id.* §995(a)(20); *see also id.* §§ 995(a)(12)-(16).

<sup>53</sup> 28 U.S.C. § 991(b)(2).

more effective and streamlined. The Office of Management and Budget reviews proposed regulations of agencies before they take effect to ensure that they are justified under a cost-benefit analysis. Although the Commission's proposed amendments are exempt from this requirement, they fall within its spirit. Sentencing policies, like all other government policies, should seek to make government as efficient and effective as possible. It is the very definition of good government to ensure that any proposed policy maximizes welfare at the lowest cost.<sup>54</sup>

## 2. Racial and Ethnic Impact Statements

The costs of any system of mass incarceration are not limited to dollar outlays. There are social costs as well, and one of the most pressing social costs from incarceration in the United States derives from the racial and ethnic disparities in our prison population. Blacks and Hispanics are disproportionately incarcerated relative to their numbers in the general population. As of May 30, 2009, of the 205,289 people incarcerated in federal prisons, 80,817 individuals (39.4% of the total) were black and 65,596 (32%) were Hispanic.<sup>55</sup> In 2008, 71.6% of federal drug offenders were black or Hispanic.<sup>56</sup> Blacks comprise only 12.4% of the American population, and Hispanics make up 14.8%.<sup>57</sup> Eleven and one-half percent of black men under the age of 40 are imprisoned,

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<sup>54</sup> See RICHARD L. REVESZ AND MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 12-13 (2008) (discussing advantages of cost-benefit analysis in government decisionmaking, even regarding government regulation motivated by goals other than efficiency, because it achieves more rational government programs, increases accountability and transparency in government, and structures and channels exercises of discretion by government decisionmakers); STEPHEN HOLMES & CASS SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 228-29 (1999) (noting that public deliberation should be focused on, among other things, how much to spend on a given right and "the optimal package of rights, given that the resources that go to protect one right will no longer be available to protect another right").

<sup>55</sup> See FEDERAL BUREAU OF PRISONS, *QUICK FACTS ABOUT THE BUREAU OF PRISONS, INMATE POPULATION*, available at <http://www.bop.gov/news/quick.jsp#1>.

<sup>56</sup> See UNITED STATES SENTENCING COMMISSION, *SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 2008* tbl. 34, available at <http://www.ussc.gov/ANNRPT/2008/SBTOC08.htm>.

<sup>57</sup> See *2006 American Community Survey*, United States Census Bureau, available at [http://factfinder.census.gov/servlet/DTable?\\_bm=y&-context=dt&-ds\\_name=ACS\\_2006\\_EST\\_G00\\_&-CONTEXT=dt&-mt\\_name=ACS\\_2006\\_EST\\_G2000\\_B02001&-tree\\_id=306&-redoLog=false&-currentselections=ACS\\_2006\\_EST\\_G2000\\_B02001&-currentselections=ACS\\_2006\\_EST\\_G2000\\_B02003&-currentselections=ACS\\_2006\\_EST\\_G2000\\_C02003&-geo\\_id=01000US&-geo\\_id=02000US1&-geo\\_id=02000US2&-geo\\_id=02000US3&-geo\\_id=02000US4&-search\\_results=01000US&-format=&-\\_lang=en](http://factfinder.census.gov/servlet/DTable?_bm=y&-context=dt&-ds_name=ACS_2006_EST_G00_&-CONTEXT=dt&-mt_name=ACS_2006_EST_G2000_B02001&-tree_id=306&-redoLog=false&-currentselections=ACS_2006_EST_G2000_B02001&-currentselections=ACS_2006_EST_G2000_B02003&-currentselections=ACS_2006_EST_G2000_C02003&-geo_id=01000US&-geo_id=02000US1&-geo_id=02000US2&-geo_id=02000US3&-geo_id=02000US4&-search_results=01000US&-format=&-_lang=en).

and more than 20% of black men born since the late 1960s have spent at least a year, and typically two, in jail for a felony conviction.<sup>58</sup> In some cities, more than 40-50% of black men are under the supervision of the criminal justice system.<sup>59</sup> “If brought together in one incorporated region, the black males who are now in prison would instantly become the twelfth-largest urban area in the country.”<sup>60</sup> If current trends continue, almost one-third of black men can expect to be incarcerated during their lifetimes, while only 6% of white men face the same expectation.<sup>61</sup> And black children are more than 7 times more likely to have a parent in prison than are white children.<sup>62</sup>

State prisons have comparable demographics, and they have begun to take action to investigate why the numbers are so disproportionate. Iowa was the first state in the country to pass legislation requiring a “Minority Impact Statement” for any proposed criminal law. The law, which was overwhelmingly endorsed by both parties (the vote in favor was unanimous in the Iowa House and 47-2 in the Iowa Senate), requires examination of the impact upon minorities, including racial and ethnic minorities, of all new criminal laws, including sentencing laws, prior to passage.<sup>63</sup> The Minority Impact Statement Bill provides a means for Iowa legislators to anticipate any unwarranted disparities and enables them to consider alternative policies to accomplish the goals of the proposed legislation without causing undue negative effects on public safety and without creating the same disparities. Connecticut and Illinois have recently passed similar legislation that requires a closer look at the racial and ethnic impact of certain criminal justice legislation.

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<sup>58</sup> See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 19, 26 (2006).

<sup>59</sup> See Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 744 (1993).

<sup>60</sup> DERRICK BELL, SILENT COVENANTS 183 (2004).

<sup>61</sup> BUREAU OF JUSTICE STATISTICS, CRIMINAL OFFENDER STATISTICS, LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON, available at <http://www.ojp.usdoj.gov/bjs/crimoff.htm#lifetime>.

<sup>62</sup> THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN 2 (2009), available at [http://www.sentencingproject.org/Admin/Documents/publications/inc\\_incarceratedparents.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_incarceratedparents.pdf). This problem promises only to become more acute because “[e]thnic and racial minorities will comprise a majority of the nation’s population in a little more than a generation, according to new Census Bureau projections.” Sam Roberts, *In a Generation, Minorities May Be the New U.S. Majority*, N.Y. TIMES, Aug. 13, 2008, at A1.

<sup>63</sup> See Iowa House File No. 2393, available at <https://www.edinfo.state.ia.us/web/legisupdate.asp>.

The Commission should follow the example of these states and also begin analyzing the likely racial and ethnic impact of proposed criminal legislation and Guideline amendments.<sup>64</sup> To the extent such disproportionate effects are not tied to actual differences in the incidence of crime commission, this information would help Congress anticipate and potentially reduce unwarranted disparities posed by pending legislation and to consider alternatives.

Congress has already expressed an interest in this type of information. Last summer, then-Senator Joseph Biden introduced the Justice Integrity Act,<sup>65</sup> which would establish a pilot program in the Justice Department to identify and eliminate unjustified racial and ethnic disparities in the administration of criminal justice. The program calls for an advisory group to gather and examine data regarding the criminal process in 10 federal districts and seek to determine the causes of any racial or ethnic disparity, produce a report on key findings, and recommend a plan to reduce any unwarranted racial and ethnic disparity. The bill is now co-sponsored by Senators Cardin, Specter, Durbin, Kennedy, and Kaufman.<sup>66</sup> Commission examination of racial and ethnic impact of proposed criminal legislation would be consistent with the goals of the Justice Integrity Act and the Commission is well-positioned to provide this information given its extensive staff and expertise.

Examining the racial and ethnic impact of proposed criminal legislation would also complement existing Commission priorities, including its studies and findings related to mandatory minimum penalties and cocaine sentencing. As discussed in more detail below, black and

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<sup>64</sup> Such examination is consistent with the Commission's statutory purpose. "The purposes of the United States Sentencing Commission are to . . . establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, *avoiding unwarranted sentencing disparities* among defendants with similar records who have been found guilty of similar criminal conduct . . ." 28 U.S.C. § 991(b)(1)(B) (emphasis added).

<sup>65</sup> See S. 3245, available at <http://thomas.loc.gov/cgi-bin/query/z?c110:S.3245>. It was reintroduced this year as S. 495 by Senator Cardin.

<sup>66</sup> See <http://thomas.loc.gov/cgi-bin/bdquery/D?d111:2:./temp/~bddzGi:@@L&summ2=m&/bss/d111query.html> A companion bill has been introduced in the House of Representatives. See H.R. 1412, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR01412:@@L&summ2=m&/bss/d111query.html>.

Hispanic offenders make up the overwhelming majority of individuals convicted under mandatory minimum laws. And, as the Commission itself has recognized, the differential penalties for crack cocaine and powder cocaine create great racial disparities. Recognizing the severity of this disparity, the Commission has repeatedly advocated eliminating it, and recently took steps on its own to reduce it.

It is a sad and undeniable fact of criminal justice that imprisonment causes significant adverse socio-economic consequences for the imprisoned individuals, their families, and society generally. When offenders have served their time and are released, they have difficulty succeeding in the labor market. This reduction in wages and employment opportunities creates social welfare costs that must be borne by the rest of society.<sup>67</sup> Incarceration all too often dissolves marriages and relationships with children and other family members, causes post-release domestic violence, and upends community ties.

These costs are the price we pay for having a society that respects individual freedom and seeks to reduce crime. But when such consequences are unwarranted and are not linked to the actual incidence of crime – and thus do not achieve deterrence of criminal conduct – such consequences should be avoided, particularly when they fall disproportionately on certain communities.<sup>68</sup> But the only way we know whether the costs are worth the benefits is if we have data analyzing those costs and benefits. The Commission is the ideal federal body to conduct that research and greater attention to fiscal and racial impact is the first critical step.

## **B. The Benefits of Sentencing Laws: Evidence-Based Research on What Works**

A sound evaluation of sentencing laws must not simply look at their costs but also their benefits. To that end, in addition to producing information on the costs of various sentencing

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<sup>67</sup> See WESTERN, *supra* note 58, at 108-67.

<sup>68</sup> FIFTEEN YEAR REPORT, *supra* note 16, at 114 (discussing the principle “that rules having a disproportionate impact on a particular group be necessary to achieve a legitimate purpose”).

proposals, the Commission should produce the best available evidence and data on the relationship between various sentencing laws and policies and their effect on recidivism and crime rates. Congress has already vested the Commission with this function, instructing the Commission to “develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing”<sup>69</sup> and to “collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process.”<sup>70</sup>

Evidence-based research is critical for formulating rational sentencing policies, and the Commission is well-suited to gather and analyze this data. A helpful model in this regard is the Washington State Institute for Public Policy, which analyzes alternatives to incarceration, measures the effect of sentencing laws on recidivism, and assesses the cost effectiveness of criminal justice programs.<sup>71</sup> The Commission is already doing this to some extent, but it must place more emphasis on the evaluation of policies. For example, as it considers alternatives to incarceration, the Commission should spend more time weeding out programs that do not work and highlighting the ones that do.

### **C. Prosecutorial Practices**

Finally, the Commission is also well positioned to provide more information on the relationship between prosecutors’ policies and practices and sentencing outcomes. There are far more prosecutor-instigated sentencing departures than all other types of departures and variances, and the extent of government-sponsored departures is often larger than departures and variances that are given without a government request.<sup>72</sup> It is time for the Commission to spend

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<sup>69</sup> 28 U.S.C. § 991(b)(2).

<sup>70</sup> 28 U.S.C. § 995(a)(15).

<sup>71</sup> See generally <http://www.wsipp.wa.gov/default.asp>.

<sup>72</sup> See *supra* note 17.

more time generating information about how prosecutors make these choices and, on the basis of that information, providing guidance on the relationship between these motions and the size of an appropriate departure pursuant to them. Specifically, the Commission should begin gathering updated data on each district's policy toward charging under mandatory minimum laws, the sentencing recommendation policies in each district, how each district determines whether to file substantial assistance motions, and each district's policy on whether to weigh in on how much of a departure should be granted and, if so, how much each district recommends in particular cases. Given that prosecutors are responsible for most outside-the-guidelines sentences, it is time for the Commission to begin analyzing how those decisions are made and whether they create unwarranted disparities. If unwarranted disparities are found, the Commission should suggest avenues for reform for the Department of Justice and Congress to consider. Although much of this information is in the hands of federal prosecutors and not as easily obtained as other sentencing data, the Commission should therefore do its best to urge the Department of Justice to cooperate in its data-gathering efforts so that this information can be used to improve sentencing policy.

### **III. Recommendations for Congress**

The Commission's letter to witnesses asked us what, if any, recommendations the Commission should make to Congress. The two most pressing areas in need of reform have already been identified by the Commission: repeal of mandatory minimum sentencing laws and elimination of the disparity in treatment between crack and powder cocaine.

#### **A. Repeal Congressional Mandatory Minimums and Allow the Commission To Set Punishment Ranges on the Basis of Empirical Evidence**

Mandatory minimums are prevalent throughout the federal code. There are at least 171 mandatory minimum provisions in federal criminal statutes. According to the Commission's

data, in fiscal year 2006, 33,636 counts of conviction carried a mandatory minimum term of imprisonment, affecting 20,737 offenders – roughly 10 percent of the federal prison population.<sup>73</sup> Most of these counts of conviction – 82.9% – were for drug offenses. Firearms offenses made up another 11.4%.<sup>74</sup>

Under current law, there are only two statutory mechanisms for avoiding a mandatory minimum sentence. The first, 18 U.S.C. § 3553(e), allows the judge to impose a sentence below the mandatory minimum if the Government files a motion with the Court attesting that the offender has provided substantial assistance to the Government.<sup>75</sup> The second mechanism, 18 U.S.C. § 3553(f), is a limited safety valve available only to offenders who are the least culpable participants in drug trafficking offenses and who do not have more than one criminal history point. A judge must also find that the defendant, “has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.” Unlike the substantial assistance departure mechanism, however, “the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.”

This regime of numerous mandatory minimums and limited carve-outs is unwise for several reasons. First, these sentences are fundamentally inconsistent with the Guidelines regime because they are driven by one or two facts – the quantity of a drug, the presence of a gun – at the exclusion of all other relevant variables. The Guidelines, in contrast, aim to assess all the relevant factors that should play a role in sentencing and to distinguish among offenders

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<sup>73</sup> Ricardo H. Hinojosa, Statement Before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security 2 (June 26, 2007), *reprinted in* 19 FED. SENT. REP. 335.

<sup>74</sup> *Id.*

<sup>75</sup> The Government may also file a motion to amend a sentence that has already been imposed, including a mandatory minimum sentence, based on post-sentencing cooperation. FED. R. CRIM. P. 35(b).

depending on whether those factors are present or absent. Even the Guidelines fail in their efforts to capture all relevant variables – or, on occasion, over- or under-state the significance of certain of them – which is why departures and variances are necessary. But the Guidelines come far closer to achieving a just sentencing regime than mandatory minimums. In too many cases involving mandatory minimum laws, a defendant receives a sentence longer than what he reasonable deserves, and greater than the sentences received by defendants who commit more serious crimes.

Judge Cassell’s discussion of this issue in *United States v. Angelos*<sup>76</sup> is instructive on this score, for it describes how a first-time offender convicted of twice selling approximately \$350 worth of marijuana while armed found himself with a sentence far greater than the sentences for individuals who rape, murder, kidnap, hijack an airplane, or detonate bombs in airplanes.<sup>77</sup>

These mandatory minimum sentences are obviously unfair to the defendant who receives them. But they are harmful in other ways as well. Judge Cassell recently testified on behalf of the Judicial Conference of the United States before the House of Representatives that these sentences harm victims. He noted that “[w]hen the sentence for actual violence inflicted on a victim is dwarfed by a sentence for carrying guns to several drug deals, the implicit message to victims is that their real pain and suffering counts for less than some abstract ‘war on drugs.’”<sup>78</sup>

Second, mandatory minimum sentences and sentences in the Guidelines formulated on the basis of these minimums often result in excess and expensive incarceration. This costs the taxpayers millions of dollars that could be better spent elsewhere, including on prison beds for more serious offenders.

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<sup>76</sup> 345 F. Supp. 2d 1227, 1230 (D. Utah 2004).

<sup>77</sup> *Id.* at 1244-1246.

<sup>78</sup> Judge Paul Cassell, Statement on Behalf of the Judicial Conference of the United States Before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (June 2007), *reprinted in* 19 FED. SENT. REP. 344 (2007).

Third, these laws often result in racially disparate punishments. The Sentencing Commission has concluded that because they are not uniformly applied, mandatory minimums lead to unwarranted disparity and result in unwarranted uniformity among differently situated offenders. As noted above, black and Hispanic offenders make up the overwhelming majority of individuals convicted under a mandatory minimum sentence. Black offenders make up 32.9% of those convicted of a mandatory minimum sentence, and Hispanic offenders make up 38.2%.<sup>79</sup> Black offenders comprise a greater percentage of offenders convicted of a statute carrying a mandatory minimum penalty than their already high percentage (23.8%) of the overall offender population.<sup>80</sup> In addition, excluding immigration offenses, both Hispanic and black offenders comprise a greater percentage of non-immigration offenders convicted of a statute carrying a mandatory minimum penalty than their percentage in the overall fiscal year 2006 offender population.<sup>81</sup> There is, then, no question that mandatory minimum sentences lead to racial disparities in incarceration. As the Commission noted in its Fifteen Year Review, “[t]oday’s sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation.”<sup>82</sup>

Fourth, this approach to sentencing has helped to undermine public confidence in the criminal justice system, particularly in communities with large offender populations. When an offender receives a sentence that is disproportionate to the offense and much harsher than sentences for more serious crimes, the public loses faith in the criminal justice system. Moreover, when the use of these sentences contributes to the racial disparity in incarceration and

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<sup>79</sup> Hinojosa, *supra* note 73, at 336 & tbl. 1.

<sup>80</sup> *Id.* at 336.

<sup>81</sup> *Id.*

<sup>82</sup> FIFTEEN YEAR REPORT, *supra* note 16, at 135.

the fact that one out of eight black men between 25 and 29 are incarcerated on any given day,<sup>83</sup> they create a pressing social problem that demands attention.

Fifth and critically, there is no evidence that mandatory minimum sentences effectively reduce crime. For example, a RAND study has found that mandatory minimum sentences are less effective than discretionary sentencing and drug treatment in reducing drug-related crime.<sup>84</sup>

For these reasons, every leading expert criminal justice organization, including the Commission,<sup>85</sup> has opposed the use of mandatory minimum sentences. This list includes the Judicial Conference, Supreme Court Justices of differing political views,<sup>86</sup> the American Bar Association, and leading criminal justice scholars.<sup>87</sup> The Commission should maintain its opposition to these sentences and urge Congress to allow the Commission to set punishment ranges on the basis of empirical evidence and careful study.

## **B. Eliminate the Disparity Between Crack and Powder Cocaine**

Congress's differential treatment of crack and powder cocaine is the second major area that is in need of reform, as just about every expert in criminal justice, including the Commission, has recognized. The Anti-Drug Abuse Act of 1986 imposes a five-year mandatory minimum penalty for a first-time trafficking offense involving 5 or more grams of crack cocaine

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<sup>83</sup> THE SENTENCING PROJECT, NEW INCARCERATION FIGURES: THIRTY-THREE CONSECUTIVE YEARS OF GROWTH 3 (2005), available at [http://www.sentencingproject.org/Admin/Documents/publications/inc\\_newfigures.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_newfigures.pdf).

<sup>84</sup> JONATHAN P. CAULKINS ET. AL., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY (The RAND Corporation Drug Policy Research Center, 1997).

<sup>85</sup> UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICES SYSTEM (1991).

<sup>86</sup> See, e.g., Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_08-09-03.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html) ("By contrast to the guidelines, I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust."); *Harris v. United States*, 536 U.S. 545, 570 (2002) (Breyer, J., concurring in part and concurring in the judgment) ("During the past two decades, as mandatory minimum sentencing statutes have proliferated in number and importance, judges, legislators, lawyers, and commentators have criticized those statutes, arguing that they negatively affect the fair administration of the criminal law, a matter of concern to judges and to legislators alike."). See also Remarks of Chief Justice William H. Rehnquist, National Symposium on Drugs and Violence in America 9-11 (June 18, 1993).

<sup>87</sup> See, e.g., Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199 (1993).

(the weight of less than two sugar packets and yielding between 10 to 50 doses). To get the same 5 year mandatory minimum for powder cocaine, an offender would need to traffic 500 grams of powder (yielding between 2,500 to 5,000 doses). The 1986 Act also imposes a ten-year mandatory minimum for a first-time trafficking offense involving 50 grams or more of crack cocaine; to get the 10 year mandatory minimum for powder cocaine, an offender would need to traffic 5,000 grams. It therefore takes 100 times more powder cocaine than crack cocaine to trigger the same mandatory minimum penalty. In addition, Congress created a mandatory minimum sentence of five years in prison for simple possession of five grams or more of crack cocaine (even for first-time offenders), whereas simple possession of powder cocaine (or any other controlled substance other than flunitrazepan) by a first-time offender is a misdemeanor punished by a maximum of one year in prison.

There is no basis for this 100-to-1 disparity. The Commission has studied the issue in depth and has issued several extensive and well-documented reports condemning the disparate treatment between crack and powder cocaine. The Commission has shown that the five grams of crack that triggers the five-year mandatory minimum is not a quantity associated with high-level drug dealers. Indeed, it is not a quantity associated with even mid-level traffickers. Instead, this extremely harsh mandatory minimum, according to the Commission, applies “most often to offenders who perform low-level trafficking functions, wield little decision-making authority, and have limited responsibility.”<sup>88</sup> The Commission has also explained that the disparity is based in part on an erroneous belief that crack cocaine is associated with greater amounts of violence than powder cocaine. The Commission has concluded that the violence associated with crack is not tied to effects of its use, but is based primarily on the drug trade itself. Distribution-

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<sup>88</sup> UNITED STATES SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 99-100 (2002).

related violence applies to all drugs, thus there is no reason to single out crack for increased penalties on that basis. Medical experts agree that the physiological and psychotropic effects of crack and powder are the same.

The 100-to-one ratio is particularly pernicious because it results in extreme racial disparities in sentencing. Roughly 80 percent of crack cocaine defendants in 2008 were African American,<sup>89</sup> and African Americans now serve as much time in prison for drug offenses (58.7 months) as whites do for violent offenses (61.7 months).<sup>90</sup> The Sentencing Commission observed in a 2004 report that “[r]evising the crack cocaine thresholds would better reduce the [sentencing] gap than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system.”<sup>91</sup>

The Sentencing Commission has thus repeatedly advocated eliminating the 100-to-1 disparity between crack and powder cocaine. Most recently, the Commission promulgated an amendment to the Sentencing Guidelines to try to minimize some of the disparity under existing law by lowering the base offense levels for crack cocaine. Although this was a welcome change, it does not solve the fundamental disparity that exists under current law. The Commission should therefore continue its efforts to convince Congress to equalize its treatment of crack and powder cocaine. It now appears that the Department of Justice will be a partner in this effort, so change seems more likely than it ever has in the past.

### **Conclusion**

I commend the Commission for using the occasion of the Sentencing Reform Act’s 25<sup>th</sup> anniversary to reconsider fundamental aspects of federal sentencing and to hold public hearings

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<sup>89</sup> UNITED STATES SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 34 (2008).

<sup>90</sup> BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, at 112, tbl.7.16 (2004), available at <http://www.ojp.usdoj.gov/bjs/abstract/cfjs03.htm>.

<sup>91</sup> FIFTEEN YEAR REPORT, *supra* note 16, at 132.

for input. While there is much that should be done to improve federal sentencing, taking a step back and engaging in this kind of dialogue is a promising first step.