COMMENT

NEGOTIATED FEDERAL SENTENCING GUIDELINES: A CURE FOR THE FEDERAL SENTENCING DEBACLE

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INTRODUCTION

In January of 2005, the Supreme Court in *United States v. Booker*[1] held the Federal Sentencing Guidelines unconstitutional as previously applied because they violated defendants' Sixth Amendment right to a jury trial, and the Court upheld the Sentencing Guidelines as advisory only.[2] While the Federal Sentencing Guidelines are indeed advisory, district court judges continue to use them as a starting point,[3] thereby preserving the Federal Sentencing Guidelines' influence on sentencing and incarceration.[4] Although Congress created the United States Sentencing Commission (USSC or the Commission) to "provide certainty and fairness" in sentencing and to "avoi[d] unwarranted sentencing disparities,"[5] the Federal Sentencing Guidelines have been considered "too harsh . . . and require[e] the imposition of prison sentences too often and for . . . too long."[6]

Indeed, the USSC and the Sentencing Guidelines have since been characterized as a "debacle"[7] and regarded as the "most disliked sentencing

1. 543 U.S. 220 (2005).

2. *Id.* at 245 ("the Sixth Amendment requires juries, not judges, to find facts relevant to sentencing"); *id.* (explaining that "the provision of the [Sentencing Reform Act] that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp. IV 2011), [is] incompatible with [the] . . . holding . . . [and] conclud[ing] that this provision must be severed and excised, as must one other statutory section, § 3742(e) . . . .").

3. *See* Gall v. United States, 552 U.S. 38, 46 (2007) (acknowledging that although the Federal Sentencing Guidelines are advisory, sentencing judges "must give serious consideration to the extent of any departure from the Guidelines and must explain [their] conclusion that an unusually lenient or an unusually harsh sentence is appropriate . . . "); *see also* UNITED STATES SENT'G COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENT'G, iv (2006), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/200603_Booker/Booker_Report.pdf (reporting that post-*Booker*, "the majority of district courts . . . considered the applicable guidelines range first . . . .").

4. *See* Mark T. Doerr, Comment, *Not Guilty? Go to Jail. The Unconstitutionality of Acquitted-Conduct Sentencing*, 41 COLUM. HUM. RTS. L. REV. 235, 236 (2009) (reporting that a consequence of the post-*Booker* advisory guidelines is that "above-Guidelines-range sentences are imposed at a rate double that of the rate before *Booker*") (citation omitted) (emphasis omitted).

5. *See* 28 U.S.C. § 991(b)(1)(B) (2006) (declaring that one of the purposes of the United States Sentencing Commission (USSC or the Commission) is to establish a federal sentencing policy that provides certainty and fairness in sentencing).

6. Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1328 (2005) ("Incarcerative sentences are imposed far more often than they were before the guidelines, and the length of imposed sentences has nearly tripled.").

7. Michael Tonry, *Sentencing Commissions and Their Guidelines*, 17 CRIME & JUST. 137, 138 (1993).

reform initiative in the United States"[8] in the last century. This Comment examines one of the causes of the federal sentencing reform debacle: the notice-and-comment approach to guidelines rulemaking.

Like many other agencies, the Commission engages in notice-and-comment rulemaking procedure,[9] which does not always encourage face-to-face collaboration and the exchange of ideas prior to the initial drafting of the proposed rule.[10] Under negotiated rulemaking, by contrast, government agencies create an inclusive atmosphere where mutually agreeable decisions are created and stakeholder participation is encouraged prior to the drafting of the proposed rule.[11]

"Negotiated rulemaking, sometimes referred to as regulatory negotiation or 'reg-neg,' emerged in the 1980s as an alternative to the traditional"

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8. *Id.* at 138–39 (highlighting that the North Carolina and Texas sentencing commissions, in their infancy, "repudiat[ed] the [F]ederal [G]uidelines as a model for anything they might develop"); *id.* at 139 (stating that the North Carolina Commission actively avoided use of the word "guidelines" in its legislative proposals in order to avoid conflation with the Federal Sentencing Guidelines); *id.* ("At a meeting of state sentencing commissions in Boulder, Colorado, in February 1993, an Ohio representative reported that the Ohio commission early in its work resolved that 'Ohio should not adopt the type of rigid sentencing guidelines exemplified by the Federal Guidelines.'") (citation omitted).

9. *See* 28 U.S.C. § 994(x) (2006) ("The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section."); *see also* UNITED STATES SENT'G COMM'N, RULES OF PRACTICE AND PROCEDURE, (Aug. 2007), *available at* http://www.ussc.gov/Meetings_and_Rulemaking/Practice_Procedure_Rules.pdf ("The Commission . . . is subject to only that provision of the Administrative Procedures Act, section 553 of title 5, United States Code, relating to publication in the *Federal Register* and a public hearing procedure, with regard to proposed sentencing guidelines or amendments thereto." (citing 28 U.S.C. § 994(x)) (italics in original). The USSC's Rules of Practice and Procedure informational publication does not mention the USSC's engagement in Negotiated Rulemaking. *Id.*

10. *See* Matthew J. McKinney, *Negotiated Rulemaking: Involving Citizens in Public Decisions*, 60 MONT. L. REV. 499, 500 (1999) (explaining that agencies that typically engage in traditional rulemaking may or may not engage or consult interested stakeholders).

11. *Id.*; *cf.* Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 18–23, 115 (1982) (providing an analysis of the benefits, drawbacks, and complaints of the traditional notice-and-comment rulemaking approach and proposing that federal agencies adopt negotiated rulemaking as an alternative approach). *But see* Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, Working Paper RWP01-2024, JOHN. F. KENNEDY SCH. OF GOV'T, HARVARD UNIV., FACULTY RESEARCH WORKING PAPER SERIES,, *available at* http://www.hks.harvard.edu/m-rcbg/research/c.coglianese_new.york_assessing.advocacy.pdf (arguing that negotiated rulemaking neither saves time nor reduces litigation); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L. J. 1255, 1259 (1997) (contending there is a lack of evidence demonstrating that negotiated rulemaking produces better results than conventional rulemaking).

rulemaking approach.[12] Government agencies that adopt negotiated rulemaking learn from the people and organizations they seek to regulate by sitting down with them and coming to a consensus on what all parties can live with before the agencies draft and submit new rules for comment.[13]

Despite the federal sentencing system's negative reputation, the idea of sentencing commissions can be successful.[14] The state of Washington is a testament to successful sentencing commissions because of its negotiated rulemaking approach.[15] Similar to the USSC, the Washington State Sentencing Guidelines Commission (WSGC) is a statutorily created administrative body[16] designed to develop sentencing rules that are "presumptive only," allowing for sentencing judges to exercise discretion and impose sentences that depart from the sentencing rules.[17] The WSGC is comprised of twenty voting members and consists of judges, prosecutors, defense attorneys, law enforcement officers, elected officials, a victims' advocate, and ordinary citizens.[18] In addition, instead of drafting the proposed sentencing rules behind closed doors, Washington's commission members visit the communities that are being victimized by crime.[19] Together, the stakeholders engage in town hall meetings to discuss what they think is fair and come up with options where incarceration is a last resort and mandatory prison terms are reserved for the most violent

12. McKinney, *supra* note 10, at 500.

13. *Id.*; *see* Harter, *supra* note 11, at 30–32 (comparing the processes in notice-and-comment rulemaking with negotiated rulemaking, and clarifying that under traditional rulemaking, agencies engage with various stakeholders sequentially and one at a time, while under negotiation rulemaking, interested parties will have the opportunity to sit down and address the issues together).

14. Tonry, *supra* note 7, at 137–39 (asserting that beyond the USSC's failures and reputation, "The sentencing commission idea will survive the federal debacle.").

15. *See* Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 150–51 (2011) (asserting that the Washington State Sentencing Guidelines Commission's (WSGC's) experience has been successful because of Washington's focus on deliberative democracy, where citizen participation is expected and influential in rulemaking).

16. Effective July 1, 2011, the WSGC was eliminated as an independent agency by ESSB 5891. WASHINGTON STATE SENT'G GUIDELINES COMMISSION, WA.GOV, http://www.ofm.wa.gov/sgc/ (last visited Aug. 3, 2013).

17. Taslitz, *supra* note 15, at 150.

18. SENT'G GUIDELINES COMMISSION MEMBERS, WA.GOV, http://www.ofm.wa.gov/sgc/members/default.asp (last visited Aug. 3, 2013).

19. *See* Taslitz, *supra* note 15, at 151 (citing Matthew Jill, *One Small Step: The Past, Present, and Future of the Federal Sentencing System*, 44 CRIM. L. BULL. 90, 107–08 (2008)) (explaining that the WSGC, "including citizen representatives, held statewide public hearings at which 'ordinary people, citizens, voters, and representatives of civil society and professional associations expressed a range of views on crime control and penal sanctioning'").

offenses, such as murder, assault, and rape.[20] Washington's democratic, "deliberative" approach has "diffused social tension, encouraged compromise, maximized viewpoint diversity, and ultimately restrained state harshness."[21]

This Comment contrasts the traditional notice-and-comment rulemaking approach used by the USSC with the negotiated rulemaking model adopted by Washington. Part I discusses the development of the USSC and Sentencing Guidelines, highlights the major criticisms of the Sentencing Guidelines, and presents a real-life example of how the Sentencing Guidelines affect individuals. Part II provides an overview of negotiated rulemaking. Part III highlights the sentencing reform experience in the State of Washington. Part IV recommends that an alternative commission be created and that federal sentencing guidelines be adopted like the State of Washington's by using a deliberative negotiating procedure. Such a reform will not only work toward better policy, but will also address the Federal Sentencing Guidelines' severity and harshness, ultimately moving the Federal Sentencing Guidelines closer to Congress's initial goal of "certainty and fairness" in sentencing.[22] Part IV also addresses potential hurdles inherent in developing an alternative commission and reforming the Federal Sentencing Guidelines. Finally, this Comment concludes by proposing that despite potential short-term hurdles in negotiated rulemaking, scrapping the current federal guidelines system and adopting an alternative rulemaking procedure is the only way for the federal sentencing system to institute reasonable and consistent guidelines that make public participation integral to the rulemaking process.

I. DEVELOPMENT OF THE FEDERAL SENTENCING GUIDELINES

A. Pre-Guidelines Federal Sentencing

Prior to passage of the Sentencing Reform Act of 1984 (SRA), federal sentencing followed an "indeterminate" structure.[23] For the majority of offenses, "Congress proscribed a range of punishment that could be imposed for an individual convicted of a particular offense . . . ."[24] Judges were given wide discretion to impose sentences within the statutory range

20. *Id.* at 150–51.

21. *Id.* at 151.

22. 28 U.S.C. § 991(b)(1)(B) (2006).

23. *See* Brief for Orrin G. Hatch et al. as Amici Curiae Supporting Petitioners, United States v. Booker, 543 U.S. 220 (2005) [hereinafter Brief for Petitioners] (Nos. 04-104, 04-105), 2004 WL 1950640, at *4.

24. *Id.*

based on various mitigating and aggravating factors a court deemed relevant.[25] Congress also placed no limitation "on the information concerning the background, character, and conduct of a person convicted of an offense which a [sentencing] court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[26] Moreover, "so long as the final sentence was within statutory limits, it was essentially unreviewable by a court of appeals."[27]

In the 1970s and 1980s, the federal discretionary sentencing system came to be grossly disfavored by state and federal actors, partly because it produced arbitrary and inconsistent sentences among otherwise similarly situated defendants "within different judicial districts across the country—and even among judges in the same district."[28] Sentencing disparities, in some cases, were also based on judicial deliberation of a defendant's race, sex, and other illegitimate factors.[29] The federal "parole system permitted the release of prisoners based upon inconsistent ideas regarding the potential for rehabilitation, exacerbated [sic] the lack of uniformity."[30]

B. Overview of the Sentencing Reform Act and Sentencing Guidelines

In 1984, Congress enacted the SRA as part of the Comprehensive Crime Control Act of 1984.[31] The SRA was the product of a bipartisan and inter-branch legislative effort to eradicate the crises of sentencing disparities and inequalities that beset the federal system.[32] No longer were judges given

25. *Id.*; *see also* Dorszynski v. United States, 418 U.S. 424, 437 (1974) (characterizing judicial power and discretion in sentencing before the SRA was enacted as virtually "unfettered").

26. 18 U.S.C. § 3661 (2006).

27. Bowman III, *supra* note 6, at 1322.

28. Brief Supporting Petitioners, *supra* note 23, at *4.

29. *Id.*

30. UNITED STATES SENT'G COMM'N, *supra* note 3. Despite judicial discretion in determining sentences, parole boards ultimately determined the length of sentences offenders actually served. *See* Bowman III, *supra* note 6, at 1321 n.23. Each federal prison had its own parole board, which had "discretionary power to release any prisoner who served at least one-third of his original stated sentence if the board was satisfied that 'there [was] a reasonable probability that [the prisoner] [would] live and remain at liberty without violating the laws,' and that release 'is not incompatible with the welfare of society.'" *Id.*

31. Pub. L. No. 98-473, 98 Stat. 1837 (1984); Romano v. Luther, 816 F.2d 832, 835 (2d Cir. 1987).

32. *See* 28 U.S.C. § 991(b)(1)(B) (2006) (establishing the general purpose and objectives of the Commission); *see also* 28 U.S.C. § 994(f) (2006) ("The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentencing disparities."); UNITED STATES SENT'G COMM'N, *supra* note 3, at 2 ("[The SRA] sought to

unfettered discretion to impose sentences based on arbitrary and illegitimate factors.[33] "The SRA transformed federal sentencing into a determinate system,"[34] it abolished parole,[35] and "required [defendants] to serve at least eighty-five percent of the sentence imposed by the court."[36]

The cornerstone of the SRA was the creation of the USSC, an independent agency within the judicial branch[37] charged with promulgating sentencing guidelines for federal sentencing courts.[38] Congress created the Commission for several reasons: first, to bring order to the unorganized federal Criminal Code; second, to ensure that the Sentencing Guidelines would be "monitor[ed], stud[ied] and refin[ed] over time" (while understanding that they would be "imperfect" in their infancy); and finally, to protect the Sentencing Guidelines from political interference.[39]

The USSC consists of seven voting members who are all appointed by the President and confirmed by the Senate.[40] The SRA provides that at least three of the members must be federal judges.[41] The SRA further mandates that no more than four commissioners can be in the same political party.[42] The Attorney General, or his designee, is a nonvoting member of the Commission,[43] but the defense bar is not institutionally represented on the Commission.[44]

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eliminate unwarranted disparity in sentencing and to address the inequalities created by sentencing indeterminacy."); Brief Supporting Petitioners, *supra* note 23, at *4 (expressing that the indeterminate federal sentencing system was a primary cause of the widespread disparities in sentencing both nationally and even within federal districts).

33. *See* 18 U.S.C. § 3553(a)(2) (2006) (outlining that sentencing should be tailored: "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner").

34. Bowman III, *supra* note 6, at 1323.

35. Walden v. U.S. Parole Comm'n, 114 F.3d 1136, 1138 (11th Cir. 1997).

36. *See* Bowman III, *supra* note 6, at 1323. *But see id.* at 1323 n.31 (explaining that the time served by most defendants was higher, with one study reporting that defendants served an average of eighty-seven percent of their initial sentence).

37. 28 U.S.C. § 991(a) (2006); s*ee also* Mistretta v. United States, 488 U.S. 361, 393 (1989) (expressing that the USSC "is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch").

38. *See generally* 28 U.S.C. §§ 991, 994, 995(a)(1) (2006).

39. Bowman III, *supra* note 6, at 1324.

40. 28 U.S.C. § 991(a).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*; *see also* Bowman III, *supra* note 6, at 1324.

Rather than creating an entirely new sentencing system, the USSC developed a guidelines structure based on predetermined sentencing ranges for various offenses, which consisted largely of the mathematical average of the pre-guidelines sentences.[45] "The [F]ederal [S]entencing [G]uidelines are, in a sense, simply a long set of instructions for . . . the sentencing table . . . a two-dimensional grid which measures the seriousness of the current offense on its vertical axis and the defendant's criminal history on its horizontal axis."[46] An initial determination of a particular sentencing range is calculated by the intersection of the offense levels and criminal history categories on the sentencing grid; the sentencing ranges are expressed in months.[47] Sentencing severity levels are distinguished by the sentencing ranges, and mitigating and aggravating factors alter the severity of the sentence for the relevant offense.[48]

C. Criticisms of the Sentencing Guidelines

The Sentencing Guidelines have become rules and regulations that few comprehend and of which even fewer approve.[49] "Many sentencing judges, practitioners, and academics criticized the guidelines system as being too

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45. The Commission Guidelines Manual details how the sentencing ranges were derived:

> In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system . . . . While the Commission has not considered itself bound by pre-guidelines sentencing practice, it has not attempted to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences, in many instances, will approximate average pre-guidelines practice and adherence to the guidelines will help to eliminate wide disparity.

United States Sentencing Comm'n, Guidelines Manual, § 1A4(g) (2011).

46. Bowman III, *supra* note 6, at 1324.

47. *Id.* at 1324–25.

48. William K. Sessions III, *Federal Sentencing Policy: Changes Since The Sentencing Reform Act of 1984 and the Evolving Role of the Sentencing Commission*, 91 WIS. L. REV. 85, 91 (2012).

49. *See generally* Erik S. Siebert, Comment, *The Process is the Problem: Lessons Learned from United States Drug Sentencing Reform*, 44 U. RICH. L. REV. 867, 867–78 (2010) (arguing that the process of federal sentencing reform, particularly related to drug reform, is flawed); Tonry, *supra* note 7, at 138 (summarizing that the Federal Sentencing Guidelines have been "commonly criticized on policy grounds [because] . . . they unduly limit judicial discretion and unduly shift discretion to prosecutors, on process grounds [because] . . . they foreseeably cause judges and prosecutors to devise hypocritical stratagems to circumvent them, on technocratic grounds [because] . . . they are too complex and are hard to apply accurately, on fairness grounds [because] . . . they . . . tak[e] only offense elements and prior criminal history into account, [creating circumstances where] very different defendants receive the same sentence, and on normative grounds [because] . . . they greatly increased the proportion of offenders receiving prison sentences and are generally too harsh").

. . . rigid, . . . harsh,"[50] racially discriminatory,[51] overly complex,[52] and unreasonable.[53] Interestingly, especially given Congress's intent to insulate the Commission from politics,[54] much of the severity in the federal Sentencing Guidelines is attributable to congressional and executive actions, apart from the work of the Commission.[55] For instance, the war on drugs has drowned the U.S. prison system by placing millions of non-violent offenders in prisons for excessively long periods of time,[56] and at

50. Sessions III, *supra* note 48, at 92.

51. *See generally* Kenneth B. Nunn, *Race, Crime, and the Pool of Surplus Criminality: Or Why the "War On Drugs" Was a "War on Blacks"*, 6 J. GENDER RACE & JUST. 381, 396–400 (2002) (arguing that the federal sentencing scheme, particularly related to cocaine sentencing rules, has unreasonably and disproportionately targeted and disenfranchised African-Americans).

52. *See* Sessions III, *supra* note 48, at 92; Matthew Jill, *One Small Step: The Past, Present, and Future of the Federal Sentencing System*, 44 CRIM. L. BULL. 91, 97 (2008) (arguing that the Federal Sentencing Guidelines are "immensely complex, narrowly tailored, [and] restrictive").

53. *See* Letter from The Honorable Myron H. Bright, U.S. Circuit Judge, Eighth Circuit, to The Honorable Patti B. Saris, Chair, United States Sentencing Commission, 3 (Jan. 10, 2012), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_16_Bright.pdf (opposing the USSC's current ideas for reform and pointing out that some guidelines are not reasonable, lack strong underpinnings, and fail to deserve the same quantum of deference on appeal); Adam Lamparello, *Incorporating the Procedural Justice Model Into Federal Sentencing Jurisprudence in the Aftermath of* United States v. Booker: *Establishing United States Sentencing Courts*, 4 N.Y.U. J. L. & LIBERTY 112, 126 (2009) ("[D]espite the fact that pre-Guidelines sentences were often imposed without any explicit purpose or underlying justification, such sentences became an integral, if not indispensable, aspect of the Guidelines' paradigm."). This Comment assumes the validity of the federal sentencing system's criticisms.

54. *See supra* note 39 and accompanying text.

55. *See* Ronald F. Wright, *The United States Sentencing Commission As An Administrative Agency*, 4 FED. SENT'G REP. 134, 136 (1991) ("Congress has consistently undermined the Commission's capacity to coordinate sentencing policy and to respond to the most reliable types of information available" partly because of Congress's common practice of enacting mandatory minimum sentences for crimes, and Congress's directives to the Commission to increase offense levels for particular crimes); Sessions III, *supra* note 48, at 92–95 (highlighting that Congress imposed mandatory minimums for numerous drug-related offenses); *see also* Bowman III, *supra* note 6, at 1341 ("Congress frequently increases and scarcely ever decreases the severity of federal sentences . . . .").

56. *See* John Schmitt et al., CENTER FOR ECONOMIC AND POLICY RESEARCH., THE HIGH BUDGETARY COST OF INCARCERATION, 1 (2010), *available at* http://www.cepr.net/documents/publications/incarceration-2010-06.pdf ("Non-violent offenders make up over 60 percent of the prison and jail population. Non-violent drug offenders now account for about one-fourth of all offenders behind bars . . . ."); Editorial, *Sensible Sentences for Nonviolent Offenders*, N.Y. TIMES, June 24, 2012, at A38 ("The number of inmates in state and federal prisons has doubled in the past 20 years to more than 1.5 million. Annual spending on state and federal corrections systems is more than $57 billion . . . [a] primary cause of rising costs is longer sentences."); *cf. Drug War Statistics*, DRUGPOLICY.ORG, http://www.drugpolicy.org/drug-war-statistics (last visited Aug. 3, 2013) (reporting that 1.53 million individuals in the

huge costs[57] with little benefit to society.[58] According to a recent poll, the American public overwhelmingly believes that the U.S. war on drugs has failed,[59] making the longer, harsher sentencing guidelines in non-violent drug offense cases even more unreasonable.

Furthermore, the federal cocaine-sentencing scheme, in particular, has grossly contributed to racial disparities and unreasonable sentences, with African-Americans being sentenced to serve time in federal prisons at alarmingly higher rates and for longer periods of time than whites.[60] Federal sentencing rules that distinguish between powder and crack cocaine contribute to these disparities.[61] This "difference in crack/powder cocaine sentencing is significant because African-Americans are more likely to use crack, while white drug users are more likely to use powder cocaine,"[62] despite the fact that there is no physiological difference between crack and powder cocaine.[63]

The first crack and powder cocaine sentencing disparities were enacted

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United States were arrested in 2011 on non-violent drug charges).

57. *See* Matt Sledge, *The Drug War and Mass Incarceration By The Numbers*, HUFFINGTON POST (April 8, 2013), http://www.huffingtonpost.com/2013/04/08/drug-war-mass-incarceration_n_3034310.html ("Over four decades . . . American taxpayers have dished out $1 trillion on the drug war.").

58. *See* PEW CENTER ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS, 4 (2012), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/Prison_Time_Served.pdf ("For a substantial number of offenders, there is little or no evidence that keeping them locked up longer prevents additional crime."). *But see* SHOULD INCARCERATION BE SUBSTITUTED FOR WITH TREATMENT FOR DRUG OFFENDERS?, ACLU.ORG, http://aclu.procon.org/view.answers.php?questionID=000732 (last visited June 8, 2013) (highlighting Rachel Hutzel's argument against substituting treatment for incarceration for drug offenders because "[t]he majority of traffic-related deaths are drug or alcohol-related. And personal crimes such as child endangering and domestic violence are usually fueled by drugs or alcohol. . . . Treatment, without punishment, is unfair to victims of drug-motivated crimes . . . . Further, treatment is ineffective to deal with dealers . . . who profit enormously from the addiction of others.") (quoting Rachel Hutzel, *Many Drug Offenders Need Punishment, Not Just Treatment*, DAYTON DAILY NEWS, June 23, 2009)).

59. *See* Lucia Graves, *Drug Wars Poll Shows Americans Believe U.S. Is Losing*, HUFFINGTON POST (Nov. 13, 2012), http://www.huffingtonpost.com/2012/11/13/drug-war-poll-losing_n_2125464.html (reporting that seven percent of the American public believes the war on drugs has been successful; eighty-two percent believe the war on drugs has failed; and twelve percent are not sure).

60. *See* Nunn, *supra* note 51, at 396–99.

61. *See* 21 U.S.C. § 841(b)(1)(A) (Supp. IV 2011) (setting forth penalties for possession of cocaine with intent to distribute); *cf.* Bowman III, *supra* note 6, at 1329 ("No discussion of sentence severity of the [F]ederal [S]entencing [G]uidelines would be complete without consideration of drug sentences.").

62. Nunn, *supra* note 51, at 396–97.

63. *Id*. at 396.

with the passage of the Anti-Drug Abuse Act of 1986 (ADAA).[64] Later, based on the mandatory minimums set forth in the ADAA, the USSC imposed a 100:1 crack-to-cocaine sentencing ratio in the Sentencing Guidelines.[65] Since then, the majority of federal cocaine prosecutions have been disproportionately against African Americans.[66]

Congress heightened its already pervasive role in the sentencing process with the passage of the Violent Crime Control and Law Enforcement Act of 1994,[67] where it required the USSC to provide recommendations to Congress, subject to congressional approval, that address the varying penalties for different forms of cocaine and include recommendations for "retention or modification of such differences in penalty levels."[68] The USSC made a series of recommendations related to unreasonable cocaine sentencing disparities to Congress in 1995,[69] 1997,[70] and 2002,[71] yet

64. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 21 U.S.C. § 841); Nunn, *supra* note 51, at 397. In the 1980s crack cocaine and the violence related to it sparked great public concern. Siebert, *supra* note 49, at 872 (internal citations omitted). Congress responded by introducing crack-to-cocaine sentencing disparity proposals, "ranging from a 20-to-1 proposal introduced by the Reagan Administration, to a 50-to-1 proposal introduced by the House Democrats and a 100-to-1 proposals introduced by the Senate Democrats." *Id.* The House Democrats' proposal was initially adopted. *Id.*

65. *See* Siebert, *supra* note 49, at 872–73 (citing UNITED STATES SENT'G COMM'N, GUIDELINES MANUAL, § 2D1.1 (1987)).

66. *See* Nunn, *supra* note 51, at 397 n.117 (citing United States v. Armstrong, 517 U.S. 456, 479–80 (1996)) (Kennedy, J., dissenting) (pointing out that although whites represent sixty-five percent of crack cocaine users, they comprised of only four percent of federal defendants charged with trafficking crack, while blacks experienced eighty-eight percent of crack cocaine prosecutions).

67. Pub. L. No. 103–322, 108 Stat. 1796 (codified at 42 U.S.C. § 13701); Siebert, *supra* note 49, at 874.

68. *See* Pub. L. No. 103–322, Title XXVIII, § 280006, Sept. 13, 1994, 108 Stat. 2097; Siebert, *supra* note 49, at 874.

69. *See* U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENT'G POLICY, chap. 8, (Feb. 1995), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/199502_RtC_Cocaine_Sentencing_Policy/CHAP8.HTM (recommending to Congress that the 100:1 quantity ratio for crack and powder cocaine be "re-examined and revised"); Siebert, *supra* note 49, at 875.

70. U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENT'G POLICY, 9 (Apr. 1997), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/19970429_RtC_Cocaine_Sentencing_Policy.PDF (recommending to Congress that the triggers for mandatory minimums for crack and powder cocaine be brought to a 5:1 quantity ratio); *see* Siebert, *supra* note 49, at 876.

71. U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENT'G POLICY (May 2002), *available at* http://www.ussc.gov/Legislative_and_

Congress declined to follow the recommendations.[72] The enactment of the Fair Sentencing Act of 2010[73] finally lessened such disparities in sentencing between crack and powder cocaine from 100:1 to 18:1,[74] yet still maintaining the arbitrary and racially discriminatory distinctions between the two forms of cocaine.[75]

In addition to Congress's role in the federal sentencing scheme, the Justice Department's aggressive advocacy of tougher sentencing directed toward Congress, and subsequently on the USSC, has also deeply impacted the severity with which the federal sentencing courts punish individuals.[76] This aggressive sentencing culture has given the United States the distinction of incarcerating its citizens at alarmingly higher rates than many other countries.[77]

This aggressive sentencing system is not only bad for African-Americans and non-violent defendants in the war on drugs[78] but it also presents a major fiscal burden on society at large, especially given the fiscal challenges currently faced by the United States.[79] In 2010, it cost over $25,000 to incarcerate an inmate in the federal system.[80] Moreover, in 2010, over two

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Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/ch1.pdf (recommending to Congress that that 100:1 quantity ratio for crack and powder cocaine be reduced to a 20:1 quantity ratio; *see also* U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENT'G POLICY, 8 (May 2007), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf (recommending to Congress that the crack and powder 100:1 quantity ratio be reduced and insisting that the 100:1 ratio undermines congressional objectives set forth in the Sentencing Reform Act).

72. Siebert, *supra* note 49, at 877.

73. 21 U.S.C. § 841.

74. Lauren Burke, *Retroactivity: Supreme Court Rules on Crack Cocaine Sentences*, POLITIC365.COM (June 21, 2012), http://politic365.com/2012/06/21/supreme-court-rules-some-crack-cocaine-sentences-are-retroactive/.

75. Nunn, *supra* note 51, at 396.

76. *See* Bowman III, *supra* note 6, at 1340 (pointing out the Justice Department's role in creating statutory and guidelines sentencing rules, and criticizing the Department's advocacy of tougher sentencing levels and "unyielding opposition to any mitigation of existing sentencing levels").

77. *See* Roy Walmsley, *World Prison Population List (Ninth ed.)*, INT'L CENTRE FOR PRISON STUDIES, *available at* http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf (highlighting that over 10.1 million individuals are incarcerated in the world, and almost a quarter are in the U.S.).

78. *See supra* notes 58–60.

79. *See* Bright Letter, *supra* note 53, at 4.

80. Annual Determination of Average Cost of Incarceration, 76 Fed. Reg. 57081, 57081 (Sept. 15, 2011) (noting that the average cost of incarceration for an offender in Fiscal Year 2010 was $25,838).

hundred thousand prisoners were in the custody of the federal correctional system;[81] over half were serving time for drug offenses,[82] while only ten percent were serving time for violent offenses.[83]

In addition to the fiscal consequences resulting from the aggressive Sentencing Guidelines, the current federal sentencing system undercuts procedural justice and runs the risk of fostering poor perceptions regarding its "institutional legitimacy, competency, and ability to effectuate fair outcomes."[84] Such poor perceptions can cause criminal defendants and the public to lose faith in the sentencing process and the courts' ability to produce fair and just results.[85] Such distrust in the legal system may increase crime, and may discourage communities from cooperating with police or the judicial process in general.[86]

D. Sentencing Horror Story and Collateral Consequences

So far, this Comment has described some of the broad social effects of the Sentencing Guidelines system.[87] This section highlights one individual impacted by that system and describes several of the collateral consequences associated with the individual's punishment.

Maria, a first time offender, served six years of a minimum five-to-ten-year sentence for selling one vial of crack cocaine.[88] She had sold the drugs to support her own drug use.[89] "At eighteen Maria started using drugs as a way of helping her cope with the severe physical abuse she suffered . . . at the hands of her stepfather."[90] While in prison Maria earned her high school diploma and participated in various vocational classes.[91] Unfortunately, the prison did not provide Maria with treatment or

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81. PAUL GUERINO ET AL., PRISONERS IN 2010, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, 2 (Dec. 2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf.

82. *Id.* at 1.

83. *Id.*

84. Lamparello, *supra* note 53, at 129.

85. *Id.*

86. Jon Hurwitz and Mark Peffley, *Racial Polarization on Criminal Justice Issues: Sources and Political Consequences of Fairness Judgments* 4 (2001), *available at* http://as-houston.ad.uky.edu/archive/as17/as17.as.uky.edu/academics/departments_programs/PoliticalScience/PoliticalScience/FACULTYRESOURCES/Resources/Ulmer/Documents/WP_2004_03.pdf.

87. *See supra*, Part I.C.

88. *Words From Prison: The Collateral Consequences of Incarceration*, ACLU.ORG (June 12, 2006), http://www.aclu.org/womens-rights/words-prison-collateral-consequences-incarceration.

89. *Id.*

90. *Id.*

91. *Id.*

counseling for substance abuse.[92]

After her release from prison Maria sought employment, but was consistently turned down because of her criminal record.[93] Faced with the difficulties of obtaining employment, Maria decided to pursue a college education, but soon learned while completing a federal student loan application that her drug-related conviction prevented her from receiving financial assistance.[94]

Maria moved in with family, but once her stay became too burdensome she attempted to obtain her own housing.[95] Maria applied for a public housing voucher, but to no avail, as her record as a drug offender barred her from receiving public housing assistance.[96] Depressed by her difficulties with securing employment and housing, Maria began to use drugs again.[97] Desperate for shelter, she also began living with an abusive man.[98]

Eventually Maria asked her parole officer about in-patient drug treatment programs.[99] After spending some time in the facility, Maria realized that it did not suit her needs and requested a transfer.[100] "The program emphasized an aggressive, military-style approach to ending drug use, but did not address" the underlying causes of her initial drug use.[101] Despite Maria's concerns, her parole officer directed her to remain in the facility.[102] Maria left anyway, and was arrested and charged with violating parole.[103] Maria "was sentenced to one year in prison for [that] violation."[104] Unable to cope with the sentence, she attempted suicide.[105] In response, Maria was prescribed "anti-depressant drugs, but [was not offered] counseling or treatment for her drug addiction or the violence she

92. *Id.*

93. *Id.* ("Most states allow employers to deny jobs to anyone with a criminal record, regardless of how much time has passed or the individual's work history or personal circumstances.").

94. *Id.* ("The federal Higher Education Act of 1998 makes students convicted of drug-related offenses ineligible for any grant, loan, or work-study assistance."); 20 U.S.C. § 109(r).

95. *Words From Prison: The Collateral Consequences of Incarceration, supra* note 88.

96. *Id.* The Public Housing Administration is charged with overseeing the selection of tenants for public housing. 24 C.F.R. § 960.202(a). A tenant may be excluded for drug-related criminal activity. § 960.204(a).

97. *Words From Prison: The Collateral Consequences of Incarceration, supra* note 88.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

had suffered as a child."[106]

Maria's unfortunate story is not unique, and is attributable, in part, to the unforgiving severity of the Sentencing Guidelines, the United States' war on drugs, and the government's focus on incarceration as a foolproof solution. Under reasonable sentencing guidelines and sentencing policy, individuals like Maria, who are addicted to drugs and have no history of violence, would receive rehabilitative treatment to address the root of his or her substance problem, instead of incarceration which would have no rehabilitative effect. In order to fully address the failings of the USSC and the Sentencing Guidelines, it is important to understand how the USSC engages in sentencing rulemaking and how it imposes amendments to the Sentencing Guidelines.

II. AN OVERVIEW OF NEGOTIATED RULEMAKING

Negotiated rulemaking, unlike the traditional notice-and-comment approach, provides stakeholders with the opportunity to contribute to the development of a regulation *before* "the issuance of [a] notice and the opportunity for the public to comment on a proposed rule."[107] By encouraging collaborative framing of the issues and options for solutions, negotiated rulemaking can "increase citizen participation in public decision making; improve the substance of a proposed rule; shorten the length of time necessary to implement a final rule; increase the level of compliance; and reduce litigation."[108]

Negotiated rulemaking emerged on the federal scene in the early 1980s, when "the Administrative Conference of the United States published a recommended framework for negotiated rulemaking" at federal agencies.[109] The recommendations served as a guideline for agencies that sought to utilize the negotiating approach, by outlining when negotiated rulemaking would be beneficial and offering suggestions on how to appropriately carry out the new rulemaking approach.[110]

In 1983, the Federal Aviation Administration (FAA) was the first agency

106. *Id.*

107. JEFFERY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 45 (3d ed. 1998); *accord* McKinney, *supra* note 10, at 500 (pointing out that negotiated rulemaking offers interested parties the opportunity to contribute to the draft of the proposed rule).

108. McKinney, *supra* note 10, at 500.

109. *Id.* at 501 (citing Administrative Conference of the United States, Recommendation 82–4, in Procedures for Negotiating Proposed Regulations, 1 C.F.R. §§ 305.82–84 (1998)).

110. *Id.* at 501. Philip Harter, the consultant for the Administrative Conference for the United States, and author of the negotiated rulemaking recommendations, cautioned that negotiated rulemaking would not be feasible in all situations. *See* Harter, *supra* note 11, at 7.

to use negotiated rulemaking.[111] Faced with unpopular old rules and an unmanageable number of interpretations of the rules,[112] the FAA decided to convene a committee of airline representatives, pilots, public interest organizations, and other interested individuals to brainstorm a new set of mutually agreeable rules concerning flight and rest time for domestic airline pilots.[113] The FAA's previous attempts to revise the rules with the traditional notice-and-comment process had been met with opposition and were later withdrawn.[114] This time, the FAA's deliberative democratic approach created a final popular rule that avoided legal challenge for over fifteen years.[115]

Following the FAA's successful experience with negotiated rulemaking, other federal agencies have used the approach, including: the Occupational Safety and Health Administration; the Nuclear Regulatory Commission; Farm Credit Administration; Federal Communications Commission; Federal Trade Commission; and the Departments of Agriculture, Education, Health and Human Services, Housing and Urban Development, and Interior.[116] The Environmental Protection Agency, and the Departments of Transportation and Energy have also embraced the negotiated rulemaking process.[117]

Negotiated rulemaking's early successes led to its formalized adoption in 1990 with the enactment of the Negotiated Rulemaking Act (NRA),[118] which was later amended and made permanent in 1996.[119] "The NRA does not require use of [negotiated rulemaking]; rather, it was intended to clarify agency authority and to encourage agency use of the process," and to make its adoption discretionary.[120] According to the NRA, if an agency

111. McKinney, *supra* note 10, at 502.

112. *Id.* (highlighting that the FAA has over 1,000 interpretations of the rules concerning flight and rest time for domestic airline pilots).

113. *Id.*

114. *Id*.

115. *Id.*

116. *Id.* at 502–03.

117. *See DOE Announces Changes to the Energy Conservation Process*, DEPARTMENT OF ENERGY (Nov. 16, 2010, 7:18 pm), http://energy.gov/gc/articles/doe-announces-changes-energy-conservation-standards-process (announcing its transition to negotiated rulemakings and the creation of a standing negotiated rulemaking committee); *see also* Lubbers, *supra* note 107, Appendix (reporting that between 1991 and 2007 the EPA and the Department of Transportation convened nine and thirteen negotiated rulemakings respectively).

118. Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified at 5 U.S.C. §§ 561–70 (2006)); *see also* Lubbers, *supra* note 107, at 989 n.9 (explaining the subsequent history of the Negotiated Rulemaking Act).

119. LUBBERS, *supra* note 107, at 989 n.9.

120. *Id.* at 989 (citing 5 U.S.C. §§ 561, 563 (2006) (describing the purpose and determination process of negotiated rulemaking)).

determines it would like to engage in negotiated rulemaking, it must follow certain protocol.[121] First, interested agencies must determine whether the use of the negotiated rulemaking approach would be in the public interest.[122] Then, the head of the agency must consider the following: whether a rule is actually needed;[123] whether identifiable interests will be affected by the rule;[124] whether it is reasonably likely that a committee can be created and that the stakeholders will act in good faith;[125] whether it is reasonably likely that a consensus will be reached in a certain time frame;[126] whether the negotiated rulemaking process will unreasonably delay notice of the proposed rulemaking and the publication of the final rule;[127] whether the agency has the adequate resources to support the committee;[128] and whether the agency will try its best, consistent with legal obligations, to submit the negotiated consensus for notice and comment.[129] Upon successful consideration of the foregoing factors, agencies must establish a negotiated rulemaking committee.[130] The NRA does not force agencies to publish a proposed or final rule simply because it was the product of negotiated rulemaking.[131]

The NRA also strongly encourages the assistance of "convenors" or neutral facilitators in carrying out negotiation sessions.[132] Convenors' duties include identifying stakeholders and individuals who would be "significantly affected" by issues involved in the proposed rule and identifying their concerns.[133]

Negotiated rulemaking has since drawn both criticism and praise. Criticisms of negotiated rulemaking center around high short-term resource costs, both financial and physical, that could potentially befall both the

121. § 563.
122. § 563(a).
123. § 563(a)(1).
124. § 563(a)(2).
125. § 563(a)(3).
126. § 563(a)(4).
127. § 563(a)(5).
128. § 563(a)(6).
129. § 563(a)(7); *cf.* Lubbers, *supra* note 107, at 993 (explaining that agencies are authorized to accept outside funds to support the negotiated rulemaking process, provided no conflict of interest ensues).
130. 5 U.S.C. §§ 564–65 (2006).
131. *See* LUBBERS, *supra* note 107, at 989 (noting that the language of the Act "is permissive" and that the congressional intent was not to "impair any rights otherwise retained by agencies").
132. 5 U.S.C. § 563(b); *accord* Lubbers, *supra* note 107, at 993 (remarking that agencies may use private facilitators or government employees as facilitators).
133. 5 U.S.C. § 563(b)(1).

agency and negotiation participants.[134] For instance, agencies may have to incur the expense for the convenors or facilitators to manage the negotiation process.[135] All interested parties and individuals may have to spend a considerable amount of time working with the agency to hash out the rule at every stage of the rule's development, including post-development.[136] Moreover, involving more stakeholders in the regulation development process invites more time spent on reviewing proposals, and in engaging in discussion.[137]

Negotiated rulemaking proponents insist that its long-term benefits should not be ignored. They respond that the negotiated approach can increase community involvement in decisionmaking[138] and as a result, lessen the amount of legal challenges to the final rule.[139] Moreover, regulation compliance can be drastically improved with negotiated rulemaking, especially given that rules are developed through open discussion and negotiation.[140] Even President Clinton has openly acknowledged negotiated rulemaking's benefits: in 1993, Clinton issued an Executive Order directing agencies to, "where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking."[141] Clinton later urged agencies to "Negotiate, Don't Dictate," and "to expand substantially . . . efforts to promote consensual rulemaking."[142]

Although negotiated rulemaking has not been broadly adopted by federal agencies, its potential for producing popular, fair, and effective regulations the first time around is great, and it has been successful in various state sentencing commission systems, namely in the State of Washington.

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134. *See generally* LUBBERS, *supra* note 107, at 996–1005 (elucidating various reasons for the waning of negotiated rulemaking at the federal level).

135. *See* McKinney, *supra* note 10, at 500–01 (stating that agencies must spend resources to retain a convenor or facilitator).

136. *See id.* (highlighting the costs associated with negotiated rulemaking).

137. *See id.* (showing the extra step required by all parties during negotiated rulemaking).

138. *See supra* note 107 and accompanying text.

139. *See supra* note 108 and accompanying text.

140. McKinney, *supra* note 10, at 500.

141. *See* Lubbers, *supra* note 107, at 995 (quoting Exec. Order No. 12,866, § 6(a), 58 FED. REG. 51,735, 51,740 (Sept. 30, 1993)).

142. *Id.*

III. SENTENCING IN THE STATE OF WASHINGTON

A. Washington's Sentencing Commission and Sentencing Guidelines

The WSGC was statutorily created in 1981, under the Sentencing Reform Act of 1981 (WSRA).[143] By 1987, Washington's sentencing guidelines were in place, which was not long after the Federal Sentencing Guidelines were enacted.[144] The sentencing guidelines' accountability to the public is inherent in the WSRA.[145] The purpose of the WSRA is to develop a sentencing system for felony offenders that promotes discretionary sentencing and: first, to ensure that the imposed punishment is "proportionate to the seriousness of the offense and the offender's criminal history;" second, to "promote respect for the law by providing punishment which is just;" third, to ensure that punishments are commensurate with similarly situated offenders; fourth, to "protect the public;" fifth, to promote opportunity for rehabilitation; sixth, to efficiently use the states resources; and finally, to reduce recidivism.[146]

A fundamental element of the Washington's sentencing guidelines is its "just desserts" rationale. The WSGC proposed a less restrictive version of the three strikes rule.[147] Now, mandatory minimum prison terms are reserved only for the violent crimes of murder, assault, and rape.[148] In the case of low-level offenders, the guidelines also "heavily emphasize" rehabilitation and alternatives to incarceration, such as "community supervision, community service, and restitution."[149] Moreover, Washington's sentencing guidelines "linked imprisonment to state prison capacity, [and] generously encouraged good time credits and work release."[150] Actively trying to isolate the state from the sentencing disparities in the federal sentencing system, the WSGC worked to ensure that the guidelines "apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime

143. Sentencing Reform Act of 1981, WASH. REV. CODE. ANN. § 9.94A.010 (West 2010).

144. *See* Tonry, *supra* note 7, at 141 (elaborating on the chronological timeline of sentencing commissions and guidelines enactments in various states, including the USSC).

145. *See* § 9.94A.010 ("The purpose of this chapter is to make the criminal justice system accountable to the public . . . .").

146. *Id.*

147. David Boerner & Roxanne Leib, *Sentencing Reform in the Other Washington*, 28 CRIME. & JUST. 71, 105 (2001).

148. *Id.* at 105.

149. Taslitz, *supra* note 15, at 150.

150. *Id.*

or the previous record of the defendant."[151] As such, Washington's guidelines "are presumptive only, permitting departure by sentencing judges for good reasons."[152]

B. Sentencing Rulemaking in the State of Washington

From the beginning, the WSGC provided a platform for several conflicting interests and viewpoints related to sentencing.[153] Unlike the USSC, the WSGC is not judiciary and prosecution heavy. Instead, it goes further to include varied interests such as victims' and citizens' organizations, interested individuals, and "varied representatives of neighborhoods, races, and classes in the process."[154] Typical organizations include the American Civil Liberties Union Prisoners' Right Committee, and the Families and Friends of Missing Persons and Violent Crime Victims.[155] During negotiation meetings, all of the present stakeholders are strongly encouraged to actively and meaningfully participate in the development of issues and options for solutions, and as a result state severity has been restrained.[156]

Sentencing rules related to sex crimes provide a strong example of Washington's negotiated rulemaking approach. In 1983, when the WSGC experienced challenges establishing sentences for sex crimes, it engaged victim advocates and treatment providers.[157] The "victim advocates argued that presumptive prison sentences for intrafamily crimes would be viewed as too harsh . . . and would discourage prosecution."[158] As a result, the victim advocates argued for "an option combining supervision and outpatient treatment."[159] "Treatment providers pointed to the compulsive nature of these crimes and argued that without treatment, sex offenders would likely reoffend after release."[160] In the end, the WSGC drafted a sexual offense sentencing alternative that included the advice of both interest groups and allowed for treatment for sex offenders who lacked prior sex convictions, but excluded sex offenders who were convicted of forcible rape.[161]

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151. *See* Boerner & Leib, *supra* note 147, at 86 (citing §9.94A.340).
152. Taslitz, *supra* note 15, at 150.
153. *Id.* at 150–51.
154. *Id.* at 151.
155. *Id.*
156. *Id.*
157. Boerner & Leib, *supra* note 147, at 94.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*

The WSGC and guidelines experienced success early on: "[b]y the late 1980s, [application of the] guidelines had reduced [Washington's] imprisonment rates by twenty percent,"[162] causing Washington to drop from twenty-fifth in the nation in incarceration rates in 1984 to thirty-ninth in 1988.[163] Washington's success is attributable to its emphasis on community participation in the formulation of sentences.[164]

IV. NEW NEGOTIATED FEDERAL SENTENCING GUIDELINES

The USSC and Congress are currently contemplating federal sentencing reform in light of *Booker* and its progeny.[165] Speaking as the Chair of the USSC, Judge Patti B. Saris has recommended that Congress adopt several reforms such as a heightened appellate review standard that implores appellate courts to apply a reasonableness standard to within-guidelines sentences and a requirement that sentencing judges provide justification for significant variances from the guidelines.[166] Judge Saris also recommended that Congress impose a high standard of review for sentences that are imposed as a result of "policy disagreement" with the guidelines among other recommendations.[167] These recommendations would undercut *Booker* and give the guidelines a mandatory effect.[168]

One of the major assumptions underlying Judge Saris' and the Commission's recommendations is that all of the guidelines are reasonable.[169] However, this Comment's previous discussion concerning the war on drugs and the crack and powder cocaine sentencing disparity undermines the Sentencing Guidelines' reasonableness presumption,[170] as some of the Sentencing Guidelines have been criticized for lacking strong

162. Taslitz, *supra* note 15, at 150.

163. Boerner & Leib, *supra* note 147, at 95.

164. *See* Taslitz, *supra* note 15, at 151 (arguing that the State of Washington's enlightened guidelines resulted from deliberative democracy).

165. *See Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After* U.S. v. Booker*: Hearing Before the H. Subcomm. on Crime, Terrorism, Homeland Security, of the H. Comm. on the Judiciary*, 112th Cong. 12 (2011) (statement of Judge Patty B. Saris, Chair, United States Sentencing Commission).

166. *Id*.

167. *Id.* at 12–13. Judge Saris also recommended that Congress "clarify statutory directives to the sentencing courts and Commission that are currently in tension," require that sentencing judges give substantial weight to the Sentencing Guidelines while deliberating a sentence, and "codify the three-part sentencing process." *Id.*

168. *See* Bright Letter, *supra* note 53, at 1–2 (stating that the Commission's recommendation to overrule Booker gives judges less discretion in sentencing, and reverts back to a mandatory sentencing regime).

169. *Id.* at 3.

170. *See generally supra* Part I.B.

underpinnings and justifications,[171] and have even been challenged by the Commission itself for those inadequacies.[172]

As the Commission and Congress contemplate federal sentencing reform, Washington's success with negotiated rulemaking should be at the forefront of the reform.[173] Washington's legislature had the opportunity to copy the federal approach to sentencing but chose not to. As a result, the state's sentencing guidelines encompass the interests of various stakeholders and advocates, and emphasize treatment and rehabilitation over mass incarceration.[174] In order to experience similar results on the federal level, Congress will have to overhaul the current guidelines.[175]

As explained in the preceding sections, the USSC is faced with a series of structural and procedural dilemmas that have caused undesirable sentencing outcomes in various aspects of the criminal law and drug sentencing in particular.[176] For instance, the Sentencing Guidelines at their core are merely mathematical averages of pre-guidelines sentences,[177] which have been criticized as unreasonable for their disproportionate and disparate sentences imposed by sentencing judges based on race, sex, and other illegitimate factors.[178] Moreover, the USSC is bound by its enabling legislation and is at the mercy of the executive and legislative branches, which have been more interested in incarceration and longer sentences as solutions to crime.[179] This command-and-control approach to sentencing has produced a severely harsh sentencing system and an alarmingly high number of prisoners.[180]

In an effort to not abruptly dismantle and disrupt the current sentencing

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171. *See* Nunn, *supra* note 51, at 396 (discussing the difference in sentencing for crack and powder cocaine, and the lack of physiological difference).

172. *See generally supra* Part I.B (explaining the Commission's numerous recommendations to Congress to eliminate the crack and powder cocaine sentencing quantity ratio).

173. *See* Angie Drobnic Holan, *RomneyCare & ObamaCare: Can You Tell the Difference?*, POLITIFACT.COM, (Mar. 20, 2012, 4:58 PM), http://www.politifact.com/truth-o-meter/article/2012/mar/20/romneycare-and-obamacare-can-you-tell-difference/ (discussing a recent example of Congress adopting a state initiative, namely, the Affordable Care Act).

174. *See supra* Part III.B.

175. *Cf.* Bowman III, *supra* note 6, at 1350 ("Real federal sentencing reform may thus only be possible if the guidelines in anything like their current form are scrapped.").

176. *See supra* note 53 and accompanying text (indicating the various ways in which sentencing guidelines remain flawed).

177. *See supra* note 45 and accompanying text.

178. *See supra* notes 28–29 and accompanying text (showing a history of uncertainty in federal sentencing systems).

179. *See supra* notes 56, 68–76 and accompanying text (highlighting legislative, and executive interference with sentencing guidelines).

180. *See supra* notes 58, 77 and accompanying text.

scheme, steps to comprehensive sentencing reform, based on theoretical, practical and fiscal considerations, and varying public viewpoints should take place in the background. Congress will have to statutorily grant authority to an alternative sentencing rulemaking body. Like the current USSC, the alternative commission should be an independent agency housed within the judicial branch.[181] However, unlike the current USSC, the alternative commission should be comprised of a balanced cohort of criminal experts and community members. For instance, in addition to federal judges and federal prosecutors, the alternative commission should consist of at least twenty representatives from victims' advocacy organizations, innocence projects, civil rights organizations, academia, and the federal public defender service. The initial representatives should be recommended and appointed by the executive and confirmed by the Senate for a term of six years.

The purpose of the alternative commission should be to research, negotiate, and draft entirely new sentencing rules, isolated from the political pressures of Congress and the Justice Department. Where the current USSC is confined to statutory ranges and minimums set by Congress, the alternative commission should have the authority to draft sentencing guidelines that are justified by research and negotiated consensus from various stakeholders. Moving away from the federal government's mass incarceration stance, one of the major goals of the alternative commission should be to develop sentencing guidelines that emphasize rehabilitation and incarceration alternatives where appropriate. In developing every aspect of the sentencing guidelines, the alternative commission should be mandated to actively engage the community, taking advantage of hearings settings, town hall forums, and informal negotiation meetings.

Such reform will probably not come easily, as there may be pushback from members of Congress, federal prosecutors, judges and even current Commission members who would rather not disrupt the current process. Lack of resources may be touted as justification for not taking on this reform. Appreciation for negotiated rulemaking may be small, with opponents arguing that such rulemaking is not appropriate in every setting, especially given that more players being involved in the sentencing rulemaking process early on may slow the process of producing an initial sentencing rule.

Indeed, while political will may be tough to muster, the current sentencing regime and members of Congress must realize that real sentencing reform and truth in sentencing will not happen with Band-Aid reform. We cannot ignore the sentencing disparities and unjustified

181. 28 U.S.C. § 991(a) (2006).

sentencing ranges for various offenses by claiming that all will be rectified if sentencing courts simply treat the guidelines as mandatory, and appellate courts impose a heightened standard of reasonableness. Such reform will never get to the heart of the federal sentencing debacle—unreasonable, harsh, and racially discriminatory sentences. If a new federal sentencing commission following a negotiated rulemaking procedure recommends more sensible guidelines, and if the rulemaking procedure includes diverse public interests as in the State of Washington, that can create political pressure on Congress to endorse the sentencing alternatives and abandon the current statutory structure.

CONCLUSION

While creating a new set of federal sentencing guidelines that adopts an alternative negotiated rulemaking procedure may be met with opposition, its benefits will outweigh the short-term costs in resources and time.[182] The United States leads the world in incarceration rates,[183] but its citizens are not more deserving of imprisonment than citizens of other countries. The United States Government can learn from the State of Washington.[184] When a diverse set of citizens' groups, individuals, and organizations are included in the creation of sentencing guidelines, sanctions are less harsh, less likely to be challenged, and more likely to be commensurate with the underlying offense.[185]

182. *See supra* Part IV.
183. *See supra* note 77 and accompanying text.
184. *See supra* Part III.
185. *Id.*