

Testimony of  
**Mr. Ronald Weich**

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Chairman Hatch and Members of the Committee: My name is Ronald Weich and I am a partner in the law firm of Zuckerman Spaeder LLP. I appreciate the opportunity to testify today about the fate of the federal sentencing guidelines in the wake of the Supreme Court's recent decision in *Blakely v. Washington*, 2004 WL 1402697 (June 24, 2004).

I testify today as an individual, not on behalf of any organization. However I have several professional experiences and affiliations that inform my perspective on this issue.

I began my legal career as an Assistant District Attorney in New York City. From 1987 to 1989 I served as Special Counsel to the United States Sentencing Commission. I worked at the Commission as the guidelines took effect in November 1987 and I helped to draft early guideline amendments. I also represented the Commission in a number of lower court arguments that preceded the Supreme Court decision in *Mistretta v. United States*, 488 U.S. 361 (1989), which upheld the constitutionality of the Sentencing Reform Act against separation of powers challenges. From 1989 to 1997 I held various Senate staff positions, first with Senator Specter and ultimately as Chief Counsel to Senator Kennedy on this Committee. During those eight years I played a role in virtually all legislation related to federal sentencing.

Now in private practice, I am an advisor to several organizations concerned about sentencing fairness and rationality. First, I serve as counsel to the Leadership Conference on Civil Rights, the nation's largest coalition of civil and human rights organizations. In 2000 I co-authored a report for LCCR entitled *Justice on Trial*, which examined racial disparities in the criminal justice system, including those in the federal sentencing system. Second, I serve as counsel to the Constitution Project, a nonprofit organization affiliated with Georgetown University's Public Policy Institute which seeks to create bipartisan consensus on controversial legal and governance issues. Last week the Constitution Project announced a new sentencing initiative which will convene experts to develop principles to guide post-*Blakely* reforms in Congress and state legislatures.

Finally, I am a Trustee of the New York-based Vera Institute of Justice, a respected source of objective, non-partisan assistance to federal, state and local government agencies on criminal justice issues. Last week Vera announced an initiative to assist states in dealing with the fallout from *Blakely*. The Vera Institute and the Constitution Project will closely coordinate their separate efforts to harness expert opinion and develop useful recommendations for policy makers.

As a result of my work over the last 17 years at the Commission, here in the Senate, and for my clients, I have become a strong believer in the concept of sentencing guidelines. My experiences have taught me that sentencing policy is developed from a spectrum of options. At one end is the

spectrum is a system of unfettered judicial discretion like the federal sentencing system prior to enactment of the Sentencing Reform Act of 1984. At the other end of the spectrum is a regime of mandatory statutory penalties. In the middle of the spectrum is a flexible sentencing guidelines system in which an expert agency develops general rules to guide judicial discretion toward a presumptive sentencing range; in unusual cases judges may depart from the applicable range after providing a reason which is subject to appellate review.

The two extremes on the policy spectrum are each unacceptable. Judge Marvin Frankel famously labeled a system of unfettered judicial discretion as "lawless." Such a system permits the whims, personal philosophies and biases of individual judges to generate unwarranted disparity among similarly situated defendants. At the other end of the continuum, a system of legislatively mandated penalties is lawless in its own way because it is arbitrary, subject to manipulation by prosecutors and also results in racial and other disparities. A well-constructed guideline system strikes the proper balance between the competing goals of individualized sentencing and standardized sentencing.

Both mandatory minimums and sentencing guidelines limit judicial discretion, but guidelines do so in a more balanced and sophisticated fashion. Guidelines take account of far more sentencing factors than mandatory minimums, which are typically triggered by a single factor like the quantity of drugs sold or the use of a gun. Also the departure mechanism in a guidelines system preserves needed judicial discretion; mandatory minimums, in contrast, can only be avoided by the actions of the prosecutor through charging decisions, plea practices and cooperation agreements. For this reason mandatory sentencing laws, more so than sentencing guidelines, transfer sentencing power from the judge to the prosecutor.

While guidelines are the right policy choice in theory, the federal guideline system has had a troubled history. The federal guidelines are widely viewed by judges and practitioners as mechanical, harsh and unduly complex. Some of the flaws result from the Sentencing Reform Act itself; for example, 28 U.S.C. 994(b)(2) dictates that the top end of a guideline range may not exceed the bottom end by more than 25%. This rule caused the Commission to develop a dense sentencing grid of unhelpfully fine distinctions unlike the simpler grids in most state systems. Other problems stem from Congress' penchant for micromanaging the guidelines through endless directives and its unwillingness to repeal the pre-1987 mandatory minimums.

But even flawed guidelines are preferable to a regime of mandatory minimums. Advocacy against mandatory minimums in Congress and in many states is grounded on the existence of sentencing guidelines as a plausible alternative way to structure judicial discretion. For example, the 1994 safety valve provision, 18 U.S.C. 3553(f), has exempted thousands of low-level drug defendants from harsh mandatory penalties, but those defendants are then sentenced within the guideline system. I can report with confidence that the safety valve would never have been enacted if Congress had not been assured that the guidelines serve as a backstop against excessive judicial discretion.

Blakely vindicates an important constitutional principle, one I will return to later in my testimony. But if the decision is read to render all guideline systems constitutionally invalid, it cuts the middle out of the policy spectrum and leaves Congress and state legislatures with the unhappy choice between the two extremes of unfettered judicial discretion or mandatory

minimums. Like Justice Breyer, "I cannot believe the Constitution forbids the state legislatures and Congress to adopt [guideline] systems and to try to improve them over time." *Blakely v. Washington*, supra (dissent of Breyer, J.) (slip op. at 18). As a supporter of the guideline concept, I hope the Court will eventually allow some version of guidelines - perhaps less rigid standards that can be fairly characterized as a set of court rules rather than legislation.

In any event, *Blakely* presents a golden opportunity for Congress to undertake a top-to-bottom reexamination of the federal sentencing system. The system had deteriorated badly and seemed impervious to reform. Now reform will come -- it only remains to be seen how radical the reform must be to satisfy the Supreme Court's new reading of the Sixth Amendment.

I leave for other witnesses at this hearing any predictions about how the Supreme Court might eventually apply *Blakely* to the federal guidelines. My testimony proceeds from the here-and-now reality that numerous federal courts, including the Seventh Circuit, have already held the Sentencing Reform Act to be unconstitutional in whole or in part. The uncertainty surrounding the validity of the guidelines has prompted Congress to consider (1) short-term legislation to stabilize the federal criminal justice system; and (2) long-term reforms to remedy constitutional flaws and otherwise improve federal sentencing law. In the remainder of my testimony I will offer my thoughts on the short-term "fixes" under discussion and suggest some principles to guide long-term reform.

## I. Short-term Options

*Blakely* has already caused much confusion and unrest in the federal criminal justice system, to say nothing of the situation in affected states. Judge Easterbrook, dissenting from a Seventh Circuit decision holding the guidelines unconstitutional, warned of "bedlam." *Booker v. United States*, \_\_\_ F.3d \_\_\_ (July 9, 2004) (slip. op. at 12). Already a number of judges, including Judge Cassell, have found the guidelines to be unconstitutional as applied to particular defendants, or on their face. Charging and plea bargaining practices are in a state of flux.

At first blush, it seems unacceptable for Congress to allow the system to operate without a clear set of rules to govern sentencing proceedings in federal courts throughout the country. Ferment is a good thing, but chaos in the administration of justice is not. Still, there may be good reasons for Congress to wait.

### Short-Term Option 1: Do Nothing

In the first few days following *Blakely* there was something of a panic-induced assumption among practitioners that Congress would need to step in to calm the waters. But over the last week I sense growing support among sentencing experts for the position that the system can right itself and that any short-term fix might be counter-productive.

The system has already adjusted itself to incorporate *Blakely* in the day-to-day work of the federal courts. The Department of Justice has issued detailed guidance to its prosecutors about how to structure indictments that may satisfy *Blakely*. Some courts have complied with *Blakely* by treating guideline factors as elements of the offense and presenting them to the jury for

adjudication. Prosecutors and defense attorneys are negotiating plea agreements that include a waiver of the defendant's Blakely rights.

Meanwhile the guidelines may yet be constitutional. The Department of Justice has advanced the argument that the federal system is distinguishable from Blakely because the federal guidelines are court rules, not statutes. Judge Easterbrook offered a plausible endorsement of this view in dissent from the Seventh Circuit's Booker opinion last week. It would be ironic and damaging if Congress upended the sentencing system unnecessarily.

In any event there are limits to how much of the current uncertainty Congress can settle. The Ex Post Facto Clause of the Constitution will limit the applicability of any new system to many of the cases already in the pipeline. Certainly every defendant whose crime was committed before enactment of the new law and who believes that he or she might have received a lower sentence under the guideline system as it existed before Blakely (or under the guideline system as affected by Blakely, before the Blakely fix) will make an ex post facto claim. Blakely retroactivity and ex post facto litigation will work its way through the courts for a long time to come, and there is nothing Congress can do now to head it off.

While Congress may seek to stabilize the situation, any "patch" that evades the Sixth Amendment dictates of Blakely will engender its own constitutional challenges and therefore cause a new layer of destabilizing litigation. The more complicated the fix, the more complicated the litigation to incorporate it.

Finally, there is one virtue to the chaos: experimentation. Yale Law School Professor Daniel J. Freed, one of the fathers of the modern sentencing reform movement, has argued that "the creative uncertainty Blakely has introduced into a long flawed system should be viewed as a distinct virtue. Since no model solution seems to be available at the moment, why not let the inventive forces that Blakely has unleashed educate all of us, in and out of government?"

Notwithstanding these considerations, Congress may choose to act, if for no other reason than to set clear rules for cases not yet in the pipeline. I will comment on each of the several options I understand to be under consideration.

#### Short-Term Option 2: Advisory Guidelines

One relatively simple way to address uncertainty about the constitutionality of the sentencing guidelines is to temporarily suspend operation of the statutory provision that makes the guidelines binding, 18 U.S.C. 3553(b). Left intact would be 18 U.S.C. 3553(a) which requires courts to consider the applicable guideline range as one of several factors relevant to the imposition of sentence.

Advisory guidelines are not at all a radical notion. An early version of the Sentencing Reform Act provided for advisory guidelines under 3553(a), reinforced by the reasons requirement and appellate review. The binding language in 3553(b) was added during Senate debate in 1978, several years after the bill was first introduced. See S. Rep. 98-225 at 78, fn. 172 and accompanying text. Since passage of the Act, many states and the District of Columbia have formulated advisory guidelines in direct reaction to the federal experience with overly rigid

binding rules. Indeed, the post-Blakely memos from Deputy Attorney General Comey and Assistant Attorney General Wray recognize that advisory guidelines are a suitable fallback position in cases where 18 U.S.C. 3553(b) has been struck down under Blakely.

Any legislation to make the guidelines advisory should retain a right of appeal for both the defendant and the government based on a trial court's abuse of discretion or misapplication of 3553(a). Under such a scheme, the imposition of a sentence within the guideline range would likely be viewed as presumptively reasonable and insulated from appellate review. Such a "soft" incentive to comply with the guidelines should in no way offend the dictates of Blakely.

Seventeen years of mandatory guidelines have changed the sentencing culture in federal courts forever. I believe that most sentences imposed under an advisory guideline system would fall within the guideline range or be very close to it. Sentencing is a responsibility that judges find daunting. Most judges find (and would continue to find in an advisory system) comfort in knowing that the sentence is consistent with the views of an authority such as the Sentencing Commission. In any event, a temporary suspension of 3553(b) would make for a worthwhile experiment -- the Sentencing Commission could monitor sentencing decisions, compile data, and report to Congress, which would be free to reimpose binding constraints even before the expiration of the temporary period.

Some have suggested that the combination of court decisions and DOJ guidance will have the effect of rendering the guidelines advisory and such legislation unnecessary. But swift congressional action to suspend 3553(b) might calm the waters more authoritatively than a patchwork of court decisions and DOJ memos without in any way prejudicing long-term thinking about needed reforms.

I want to emphasize that this or any other short-term "Blakely fix" should be just that: short-term. I recommend that any legislation along these lines include a one year sunset provision. Congress should require itself to return to this important subject in one year and consider the wealth of experience and recommendations that will have been developed by then. If more time to develop legislation is needed, the one year "fix" could be extended for a short time. Under no circumstances should Congress allow a short-term stabilization measure become the long-term response to Blakely through inaction.

### Short-Term Option 3: Half-Advisory Guidelines (the Bowman Proposal)

Professor Frank Bowman, my fellow panelist at this hearing, has put forward another "Blakely fix" that is receiving serious consideration. Professor Bowman suggests that Congress could enact legislation converting the current maximum point of each guideline range to the statutory maximum instead. Sentences above the "phantom" guideline range, or perhaps above the minimum of the range, would be subject to appellate review on an abuse of discretion standard. Thus, the maximum guideline sentence that triggers Blakely would be removed, but judges would be encouraged to sentence within the range.

I consider the Bowman proposal to be ingenious but imbalanced. In effect it is a half-advisory system. Like the advisory guideline proposal I just discussed (Short-Term Option 2), the Bowman system would retain the guidelines; they would be advisory with respect to upward

departures but binding with respect to downward departures. This solves (or rather evades) the Blakely problem but does so in a manner that upsets the careful balance of the original Sentencing Reform Act. Such a system transforms the guidelines into a web of "soft" minimum sentences, preferable to mandatory minimums of course but lacking the corresponding protection against unjustifiably lengthy sentences.

If Congress chooses to adopt an advisory guideline system in the short-term, I submit that the fair and appropriate way for it to do so is to make the guidelines fully advisory, not half-advisory. And if the Bowman proposal moves forward, I urge that it be revised to establish an abuse of discretion standard of review for downward departures, thus offering a modicum of the balance that characterizes the Sentencing Reform Act itself. And, as noted, the Bowman proposal should be subject to the same one year sunset as any other short-term response to Blakely.

#### Short-Term Option 4: The Kansas Model

The Federal Public Defenders have put forward yet a different idea for short-term legislation. They propose that Congress follow the lead of the Kansas legislature which responded to a Blakely-like Kansas Supreme Court decision by instituting procedures for putting sentencing enhancements before the jury for adjudication following conviction.

In my view the Kansas model warrants serious consideration as a long-term response to Blakely. Unlike either advisory guidelines or the Bowman proposal, it is not an evasion of Blakely but rather an incorporation of Blakely into federal criminal procedure. But I do not see the Kansas model as a practical short-term solution because it transforms a guideline system that was never intended to be applied by juries into a jury-based system. Rather, as I discuss below, the Kansas model should be accompanied by federal criminal code reform and guideline simplification, both longer-term endeavors.

#### Not an Option: New Mandatory Minimums

There is another possible "fix" that I want to note and then reject: the enactment of new mandatory minimum sentencing laws. Opponents of mandatory minimums have argued for years that these laws became obsolete when the federal sentencing guideline system became functional. Now proponents of mandatory sentencing laws will argue that new mandatory minimums are needed to constrain judicial discretion, since guidelines may no longer be up to that task.

Mandatory sentencing laws were ineffective and harmful before Blakely and remain ineffective and harmful in the aftermath of Blakely. While they certainly constrain judicial discretion, mandatory minimums are applied unevenly by prosecutors, fostering unwarranted disparity. When they are applied, mandatory sentencing laws often cause defendants with differing levels of culpability to be sentenced to identically harsh prison terms. Finally, enactment of new mandatory sentencing laws in the wake of Blakely will only add a new layer of complexity to an already stressed federal criminal justice system.

For these reasons, any of the other short-term options discussed above are preferable to the enactment of new mandatory sentencing laws.

## II. Principles for Long Term Reform

Whether or not Congress enacts short-term legislation, it should undertake a long-term review of the federal sentencing system to address the constitutional issue presented by *Blakely* and otherwise to improve the system. I have previously described initiatives by the Constitution Project and the Vera Institute of Justice to harness the views of experts and practitioners in order to formulate recommendations for policy makers. Public and private efforts such as these will inform congressional deliberations.

If *Blakely* means that all guideline systems are invalid, Congress will find itself with few options for reform. If, on the other hand, the Sixth Amendment can accommodate a flexible court-based guideline system that respects the right to jury trial, then Congress has room to legislate. Such a guideline system should be more simple and more flexible than the current system, although it may still include legally enforceable rules.

Any long-term review of federal sentencing should not be limited to the immediate issues raised by *Blakely*. Rather, Congress should seize the opportunity presented by the *Blakely* decision to reconsider various aspects of the current system, address long-standing concerns and develop much-needed improvements.

Toward that end, I respectfully offer a series of principles that might contribute to a comprehensive reform of federal sentencing policies. The first two principles are procedural in nature, the remainder are substantive.

### Principle 1: Provide a Meaning Opportunity for Input to All Participants in the Criminal Justice System

It seems an unremarkable and non-controversial proposition to insist that all voices of criminal justice expertise be heard during the formulation of such profound sentencing reforms. But in fact, federal sentencing policy has too often been characterized by a failure to communicate with - or listen to - key stakeholders.

To begin with, the Sentencing Reform Act itself contains a structural imbalance that has stifled input from an important group of experts: criminal defense lawyers. 28 U.S.C. § 991 designates the Attorney General as a non-voting ex officio member of the Sentencing Commission, but there is no parallel institutional representation of the defense bar. Thus the Justice Department participates in closed-door deliberations of the Commission, while federal public defenders and other members of the defense bar provide only after-the-fact input. Proposals to add a defense representative to the Commission have foundered.

In addition, the sentencing expertise of the federal judiciary has not always been welcomed. During debate on the so-called Feeney Amendment that eventually became Title IV of the PROTECT Act (Pub. L. 108-021), Chief Justice Rehnquist wrote to Congress that the legislation under consideration would "seriously impair the administration of justice" and complained that the views of the judiciary had not adequately been considered. Chairman Hatch improved the legislation partly in response to the Rehnquist letter, but in his next State of the Judiciary report

the Chief Justice made clear the judiciary's disappointment that it did not have a fuller opportunity to be heard on a matter of fundamental importance to federal judges.

A third source of criminal justice expertise deserves an amplified voice in the process of developing long-term post-Blakely reforms: the states. In the criminal justice arena Congress has been quick to create funding programs that encourage states to replicate federal policies such as truth in sentencing. But in the sentencing guidelines arena, states have been more successful than the federal government in creating simple, effective systems. Some states have pioneered the use of prison capacity constraints that the federal government does not utilize. As states work alongside the federal government in coming to grips with Blakely, there should be a two-way dialogue between state and federal policy makers.

### Principle 2. Rely on Empirical Information

One of the key tenets of the Sentencing Reform Act is that sentencing policy should be the product of empirical, scientific evidence. The Sentencing Commission maintains an impressive research capacity, but in my experience sentencing laws are too often written on the back of an envelope in committee markup or during floor debate without drawing on the available evidence about sentencing trends and efficacy. For example, the legislative process that produced the mandatory minimum threshold levels in 1986 was notoriously devoid of scientific analysis. The Commission, in contrast, undertook a rigorous empirical analysis of cocaine penalties in its 1995 and 2002 reports to Congress on that subject, taking into account pharmacological, sociological, economic and other scientific evidence. But the recommendations that resulted from that review were first rejected (1995) and then ignored (2002) by Congress.

In considering post-Blakely reforms, Congress should take seriously the need for sentencing policy to reflect "advancement in knowledge of human behavior as it relates to the criminal justice process." Reforms should emerge from the data and other empirical evidence developed during 17 years of guideline sentencing.

### Principle 3. Retain Judicial Discretion in Whatever Sentencing System Emerges

The problem Congress sought to address in the Sentencing Reform Act was not that judges had too much discretion - it was that federal law provided judges with too little guidance in how to exercise their discretion. But after 17 years of guideline sentencing, it is apparent that even an extensive system of sentencing rules does not result in consistently fair sentences when the court lacks sufficient authority to mold the sentence to fit the offender and the offense.

In sponsoring the legislation that eventually became the mandatory minimum safety valve, 18 U.S.C. § 3553(f), then-Senator Alan Simpson made the astute observation that Congress puts judges through a "grueling" confirmation process but then fails to let them exercise needed discretion on the bench. 139 Cong. Rec. S14537 (daily ed. October 27, 1993). Some measure of judicial discretion is an essential element of sentencing justice. The art of making sentencing policy is to strike the right balance between standardized rules and the imperative of individualized sentences.



Different options for post-Blakely reform will provide for different degrees of judicial discretion. For example, a overly rigid reading of Blakely might result in jury sentencing rather than jury fact-finding. Even after the jury finds facts, the judge should be able to assign the proper weight to the fact, within whatever guidelines may exist. And just as in the short-term, long-term reforms should not include enactment of new mandatory sentencing laws. Mandatory sentencing effectively delegates to the prosecutor the power to determine the penalty, an undesirable result.

#### Principle 4. Respect the Essence of Blakely

In the two weeks since Blakely was decided, there has been much discussion of how to "solve" Blakely. But long-term reforms should not be designed to evade Blakely; rather, they should incorporate the rights enunciated in Blakely in a new, more effective federal sentencing system. Constitutional principles are to be respected, not evaded.

In my view, Blakely goes too far in suggesting that every sentencing factor, including such subjective, intangible factors as the defendant's role in the offense or whether the defendant abused a position of trust must be put before the jury as though they were elements of the offense. But the Sixth Amendment principle in Blakely seems entirely valid as applied to objective facts that contribute significantly to the length of the sentence, such as whether the defendant possessed a gun, or the quantity of drugs sold.

Under the pre-Blakely guideline system, too many of these major facts were never put to a jury and were subject to judicial fact-finding on a preponderance of the evidence standard. The concept of "relevant conduct" in the guidelines, which I consider a useful check on prosecutorial fact bargaining, has been stretched to unhealthy extremes. Separate crimes for which the defendant was never charged, or even conduct of which the defendant was acquitted, can lead to a doubling or tripling of the length of a sentence. See *United States v. Watts*, 519 U.S. 148 (1997) (upholding the use of acquitted conduct to increase a sentence).

One reason why the Kansas model warrants long-term rather than short-term consideration is that the federal criminal code is unduly complicated. Congress began and then abandoned criminal code reform in the late 70's and early 80's but it may be time to resuscitate that effort. Criminal code reform should include drawing more rigorous distinctions between elements of an offense and sentencing factors, assuming that at least one member of the Blakely majority will tolerate such distinctions in a future case. Similarly, the guidelines themselves need to be simplified if the Kansas model is to be implemented at the federal level.

#### Principle 5: Respect the Independent Role of the Sentencing Commission

Will there be a Sentencing Commission in the post-Blakely world? I think there should be. There will always be the need for monitoring and adjustments in a sentencing system. Indeed, according to the Department of Justice and Judge Easterbrook, guidelines that are promulgated by a sentencing commission or other agency may be constitutional even if statutory guidelines are not.

I earlier discussed how congressional micromanagement has hindered the work of the U.S. Sentencing Commission. For example, in the PROTECT Act Congress not only dictated the text

of specific guidelines; it even wrote guideline commentary in the voice of the Sentencing Commission, transforming the commissioners into glorified ventriloquist dummies. That type of interference in the work of the Commission must cease if the guidelines are to be plausibly defended as court rules rather than legislative enactments.

#### Principle 6: Reduce reliance on drug quantity and fraud loss in federal sentencing

Under current statutes and guidelines, drug sentences are largely determined by reference to the quantity of drugs involved in the transaction and fraud sentences are largely determined by reference to the amount of monetary loss. To be sure, both of these factors are relevant to the length of sentence. But undue reliance on these factors prevents the proper consideration of other factors such as the defendant's role in the offense.

Drug quantity is a particularly unsatisfying sentencing factor because it is a variable subject to manipulation by law enforcement officers, especially in undercover drug cases and in observation cases where the police may consciously wait to arrest the defendant, permitting drug sales to accumulate until a triggering quantity of drugs has been sold. Drug quantity is also a poor proxy for culpability in conspiracy cases, because a defendant with relatively less culpability may be legally accountable for a large quantity of drugs.

In the same way, white collar sentences can be affected too dramatically by the calculation of offense loss. Recently a 37 year old mid-level executive at the Dynegy Corporation named Jamie Olis was convicted of accounting fraud and sentenced to 24 years in prison based on the amount of loss calculated for the offense. No matter how much money was involved in the fraud, a 24 year sentence seems too harsh for a non-violent first time offender.

These are the very factors that have fueled the steady increase in prison populations which Justice Kennedy decried in his landmark address to the American Bar Association last year. A more rational sentencing system will recognize that drug quantity and loss amount are relevant sentencing factors but not the end of the inquiry.

#### Principle 7: Address racial disparities in federal sentencing

It is well documented that mandatory sentencing laws and quantity-driven guidelines, exacerbated by the unjustifiably harsh treatment of crack cocaine cases in both the statutes and the guidelines, have resulted in unwarranted racial disparities in federal sentencing. According to Sentencing Commission statistics, minorities comprise over 93% of all federal crack defendants.

In 1995 the Sentencing Commission recommended urgently needed changes to these laws but Congress blocked guideline amendments. The Commission returned to Congress with more modest recommendations in 2002 but the Justice Department declared current cocaine sentences to be proper and Congress failed to act. Last Congress, Chairman Hatch and Senator Sessions introduced a bill acknowledging that the federal cocaine penalty structure is unjustified, yet these rules have still not changed.

The time is long past due to remedy the intolerable disparity between crack and powder cocaine sentences and related racial disparities. Any post-Blakely reform package should include a more

equitable crack-powder ratio and should address more generally the racial disparities that undermine respect for the law in minority communities.

#### Principle 8: Consider End-of-Sentence Reforms as Well

As Congress and expert bodies consider revised systems to ascertain the length of a prison sentence, the time is also ripe to consider what happens at the end of that sentence. As reflected in bipartisan legislation recently introduced in the House (H.R. 4676) and soon to be introduced in the Senate, there is a growing awareness of the importance of prisoner reentry in reducing recidivism. And that trend has led some to question whether unyielding truth-in-sentencing rules should be modified to take account of changed circumstances during the course of a defendant's imprisonment.

For example, the Bureau of Prisoner had traditionally placed prisoners in community corrections facilities toward the end of their sentences to allow for a supervised transition from prison to the community. But in December 2002 the Department of Justice adopted a new policy limiting such placements, in part based on an overly rigid interpretation of truth-in sentencing rules. Similarly, a 1994 provision allowing the Bureau to award a sentence reduction of up to one year for successful completion of a drug treatment program has been narrowly construed and proposals to expand it to other forms of treatment have not advanced. Without revisiting the Sentencing Reform Act provisions abolishing federal parole, there are useful modifications to federal sentencing and corrections rules that would enhance prisoner rehabilitation and reentry without damaging the concept of truth-in-sentencing.

More generally, there is widespread evidence that some federal sentences are "greater than necessary" to achieve the legitimate purposes of punishment. 18 U.S.C. § 3553(a). Earlier I alluded to the 24 year sentence imposed on Jamie Olis. In addition, then-Bureau of Prisons Director Kathy Hawk Sawyer testified before Congress in 2000 that "70-some percent of our female population are low-level, nonviolent offenders. The fact that they even have to come into prison is a question mark for me. I think it has been an unintended consequence of the sentencing guidelines and the mandatory minimums." And in an extraordinary 1997 letter to Congress, 27 federal judges who previously served as United States Attorneys complained that crack cocaine sentences are unjust and do not serve society's interest.

The appropriate length of incarceration and the rigidity of truth-in-sentencing requirements are analytically distinct questions from the sentencing process questions posed by Blakely. But at this unique moment in time when the fundamental structure of the federal sentencing system is under review, these very important related questions deserve scrutiny as well.