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First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders

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Driven by public concern about sex offenses, in recent years Congress has passed numerous bills enhancing penalties for federal sex offenders and increasing supervision for those offenders released from prison.[1] Much of the legislation was passed in the wake of highly publicized crimes, many committed by recidivists.[2] Such congressional action has been largely visceral, often unsupported by data and studies on the future danger of sex offenders and likelihood of recidivism.[3]

For sex offenders convicted in federal court the Federal Sentencing Guidelines provide the applicable penalty provisions.[4] The Federal Guidelines, however, affect only a small number of all offenders since most sex offenses are state rather than federal crimes.[5] Two hundred and thirty-eight sex offenders were sentenced last year in federal court, compared to approximately 30,000 in state courts around the country.[6] Over half of the federal sex offenders are Native Americans, a group usually forgotten by Congress and the general public.[7]

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1. *See, e.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 8, 12, 15, 16, 18, 21, 28, 31, & 42 U.S.C.); Safe Streets for Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1903 (codified in scattered sections of 16, 28, & 42 U.S.C.) (enhancing sentences for select sex offenses); 18 U.S.C. § 2245 (1994); *id.* § 2251; Sex Crimes Against Children Prevention Act of 1995, Pub. L. No. 104-71, § 1, 109 Stat. 774 (amending 18 U.S.C. § 2423 (1994)) (enhancing sentences for select sexual offenses); 18 U.S.C. § 3663 (1994); Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, tit. XVII, 108 Stat. 2038 (1994) (codified at 42 U.S.C. § 14071) (setting forth sex offender registration statute); Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345 (1996); Pam Lacher Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, §§ 3-7, 110 Stat. 3096 (setting forth sex offender notification statute).

2. Among the most widely publicized child rape-murders were the killings of Megan Kanka in New Jersey and Polly Klaas in California. Jesse Timmendequas and Michael Davis, respectively, were convicted of the murders. Both of them had prior criminal convictions for child sexual abuse. In the wake of the killings, Congress passed Megan's Law which requires public notification of sex offenders. *See* PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 196-200 (1998) (recounting the killings of Megan Kanka and Polly Klaas and the subsequent legislative responses).

3. During the last decade Congress passed notification and registration statutes for sexual offenders, criminalized Internet use related to the commission of sexual offenses, and repeatedly asked the Federal Sentencing Commission to enhance penalties for sex offenders. For a discussion of these statutes, see *infra* notes 40-45, 64-65 and accompanying.

4. 18 U.S.C. § 3551; U.S. SENTENCING GUIDELINES MANUAL §§ 2A3.1-2A3.4, 2G1.1-2G3.2.

5. U.S. SENTENCING COMM'N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 12, 14, tbls.3, 4 (2001) [hereinafter 2000 SOURCEBOOK] (noting that of approximately 59,500 federal cases for which sentences were imposed in 1999, about 0.4% consisted of sexual offenses).

6. For the state and federal figures for felony sexual assault convictions in 1996, see U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, JODI BROWN & PATRICK LANGAN, FELONY SENTENCES IN THE UNITED STATES, 1996, tbl.2, at 2 (1999).

7. Of 238 offenders convicted of sexual offenses in federal court in fiscal year 2000, 26.9% were white, 8.8% black, 8.0% Hispanic, and 56.3% "other." While "other" encompasses

So far, the U.S. Sentencing Commission has not used its expertise to help Congress develop a less visceral response to federal sex offenses,[8] one that is based on the current state of knowledge about sex offenders prosecuted in federal courts and their particular characteristics and needs. The Sentencing Commission has a statutory obligation to assist Congress in creating a rational and humane sentencing policy.[9] It serves as a repository of information collected from federal judges across the country and employs an expert research staff.[10] Since its members are appointed by the President and confirmed by Congress,[11] the Commission should be able to develop a relationship with Congress that allows for ongoing expert input on all issues affecting sentencing. The Sentencing Reform Act of 1984, which created the Sentencing Commission, indicates that Congress envisioned such an active, expert involvement.[12] Despite earlier failures in this respect, it is the incumbent Commission's duty to reestablish itself in such a role. This is important because Congress currently does not seem to be considering the impact of penalty enhancements on Native Americans, one of the most underrepresented and disadvantaged groups in American society.[13]

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all racial categories not otherwise listed, almost all, if not all, of the 134 "other" sex offenders sentenced that year were Native American. 2000 SOURCEBOOK, *supra* note 5, at 14, tbl.4. Native Americans continue to constitute the largest single group of non-pornography sex offenders in federal court. However, their number has decreased proportionately, as the federal government has started more Internet-based investigations. Paul J. Hofer & Kevin R. Blackwell, Improving Federal Sentencing Policy for Dangerous Sex Offenders 2 (Nov. 2000) (discussion draft, on file with author). This discussion draft, written by members of the Commission staff, has not been presented to the Commission. For further discussion of the draft, see *infra* note 124.

Native Americans also constitute a disproportionately large percentage of offenders convicted under guidelines that cover crimes usually subject to state law, such as murder, manslaughter, assault, and burglary. 2000 SOURCEBOOK, *supra* note 5, at 14, tbl.4.

8. The U.S. Sentencing Commission is an independent agency within the judicial branch. Congress created it in the Sentencing Reform Act of 1984. Its seven voting members serve six-year staggered terms. At least three of them must be drawn from the federal judiciary while the others may come from the defense bar, prosecution, or academia. Among their duties are the creation and refinement of sentencing guidelines and the collection and analysis of sentencing data from federal courts around the country. 28 U.S.C.A § 991(a) (1993 & Supp. 2001); *see also* U.S. SENTENCING COMM'N, 2000 ANNUAL REPORT 1-2 (2001) [hereinafter 2000 ANNUAL REPORT].

9. 28 U.S.C. § 995(a)(20) (1994); *see also id.* § 994 (outlining standards the Commission should consider in formulating sentencing guidelines, including proportionality and fairness).

10. 28 U.S.C.A. §§ 994(w), 995(a)(12)-(16) (1993 & Supp. 2001); *see, e.g.*, 2000 ANNUAL REPORT, *supra* note 8, at 1-4 (describing data collection and research staff).

11. 28 U.S.C.A. § 991 (1993 & Supp. 2001).

12. *See* 28 U.S.C. § 994(o), (p), (r) (1994); 2000 ANNUAL REPORT, *supra* note 8, at 1 ("to advise and assist Congress and the executive branch in the development of effective and efficient crime policy").

13. While the Commission has shielded opportunistic Native American sex offenders from being covered by the new guideline for "Repeat and Dangerous Sex Offenders," U.S. SENTENCING GUIDELINES MANUAL § 4B1.5 (effective Nov. 1, 2001), it has neither engaged in any broader effort to prevent the imposition of harsh penalties on Native Americans nor has it brought the plight of this offender population to the attention of Congress.

This Article calls upon the Commission to use its expertise and institutional position to help create more equitable and fair sentencing policies for all members of society; to accomplish this goal it should start by addressing the impact of current sentencing practice on Native Americans. This means that the Commission has to develop guidelines that consider the backgrounds and characteristics of offenders rather than base them on an unrepresentative, stereotypical offender. This presents a particular challenge when the federal offender group covered by guideline provisions is diverse, as is the case with sex offenders.[14] In the process of developing a more appropriate sentencing structure, the Commission will have to consider some of the more pressing issues of sentencing today. Among them are whether courts should be allowed to individualize sentences more than currently envisioned in the federal system, whether judges should be permitted to consider comparable state sentences in imposing federal sentences or whether national uniformity should trump, and whether Congress owes particular concern to groups in society that have been historically disregarded and disadvantaged.

Parts I and II of this Article outline factors that have contributed to the increasing severity of sex offender sentences. These factors include the impact and rhetoric of the victims' rights movement—particularly of women's groups—and the influence of the media. The victims' rights movement and the media have helped shape the image of the "sexual predator" who must be incapacitated to protect the public. Part III details the congressional response, which largely consisted of longer sentences and enhanced post-sentence supervision of convicted sex offenders. Part IV highlights the impact of these sentences on Native Americans convicted of sexual offenses committed on reservations. Sentencing of Native American offenders is largely based on guideline provisions that are modeled towards the stereotypical sexual "predator." However, their culpability often differs dramatically from that of non-Native American offenders as they do not fit the pattern of high-risk sex offenders.[15] In addition, the Guidelines do not take into account unique features which may contribute to offenses committed by Native Americans or the impact of incarceration on them. Part V emphasizes how the Commission has a special obligation to play its statutorily envisioned role when enhanced sentences affect disadvantaged groups disproportionately. So far, the Sentencing Commission has played only a limited role in developing appropriate penal responses to offenders from such groups. This is the case even though the Commission's institutional position and competence make it uniquely suited to assist

14. Hofer & Blackwell, *supra* note 7, at 2.

15. *Id.* at 17 (noting that many, albeit not all, Native Americans commit situational rather than predispositional sex offenses; this means that many sexual offenses on Indian reservations are tied to alcohol abuse rather than inherent offender characteristics, such as pedophilia).

Congress in drawing up criminal legislation that impacts sentencing. Therefore, Part VI suggests possible responses for the Commission to pursue in addressing the special situation of the Native American sex offender.

I. VICTIMS' RIGHTS, FEMINISM AND SEX CRIMES

Prior to the introduction of sentencing guidelines, a victims' rights movement arose in the 1970s, partially in response to the federal courts' due process revolution which had enhanced the rights of criminal defendants.[16] Victims demanded a greater role in the criminal justice system, asked for better treatment, and also sought higher penalties for certain categories of offenders.[17] Among the earliest victims' advocates were women's groups, including feminist activists who challenged the treatment of rape victims.[18] Women's advocacy groups believed the criminal justice system treated rape victims in a way which reflected deeply held gender stereotypes about the ways in which men and women act.[19] At approximately the same time, together with incest survivors, they brought the issue of child sexual abuse into the national consciousness.[20] Subsequently, it became "a growing locus of governmental attention and moral panic . . . ."[21] Rape and sexual abuse of

16. *See* Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 528 ("[S]upporters were reacting to the Warren Court's expansion of defendants' rights.").

17. *See* Lynne Henderson, *Co-opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 581, 591 (1998) (describing demands of different victims' groups and arguing that "[i]ndividual victims and victims' groups supporting punitive responses to crime have the public and legislative ear . . . .").

18. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 432 (1993); KENT ROACH, DUE PROCESS AND VICTIMS' RIGHTS: THE NEW LAW AND POLITICS OF CRIMINAL JUSTICE 151, 52 (1999) ("[W]omen have been the most influential group of crime victims and potential crime victims in achieving criminal-law reforms."). Roach argues that success might have come at the expense of gender-based reforms in other areas where changes would have been more expensive for the Canadian government. *Id.* at 152.

19. Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 146-51 (2001) (arguing that rape reforms, which were a response to the argument that rape myths permeated the system and impeded the successful prosecution of rapists, have not achieved their goals).

The movement against drunk driving, spearheaded by Mothers Against Drunk Driving (MADD), followed shortly thereafter. Like the rape victims' advocates, MADD was also dominated by women who demanded that their pain be taken seriously. Henderson, *supra* note 17, at 581 ("On a national level, however, the founding of Mothers Against Drunk Driving by Candy Lightner, in 1981, marked the beginning of successful political and social recognition of victims.").

20. *See* LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE 1, 1 (1988) ("Starting with a wave of concern about child abuse in the 1960s, the concern widened to include wife-beating, *incest*, ... and marital rape, as the women's liberation movement of the 1970s drew those crimes to *public* attention.") (emphasis added).

21. Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 LAW & SOC. INQUIRY 1111, 1135 (2000) (internal sources omitted).

women and children had come to be characterized as national crises.[22] The increasing focus on female and child victims in turn led to a growing influence of their advocacy groups.[23]

The victims' rights movement brought about "changes in the attitudes, practices, and powers of criminal justice actors."[24] It succeeded in altering substantive and procedural law.[25] However, these changes appeared insufficient to some advocates. They, who raised their voice more in "anger . . . than fear,"[26] demanded higher sentences for offenders.[27] The victim became increasingly pitted against the offender, and only long sentences appeared to validate her pain and suffering.[28]

The victims' rights movement, however, is not homogeneous and has not spoken with one voice in its demand for increased sentences. Some of the advocates for female crime victims have decried the focus on penalties as a cheap distraction from more expensive, but victim-focused, alternatives, such as financial compensation and emotional and psychological

22. Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 221 (2001) (exemplifying the national obsession with sexual offenses by describing how the term "child abuse" has come to connote "child *sexual* abuse").

23. *See* Daniel Dodgen, *Public Policy and Intimate Violence: Making the Case for Prevention and Services*, 69 UMKC L. REV. 127, 127-28 (2000) (describing array of witnesses, one quarter of whom were parents of murder victims, at hearings on "child molestation" held by the House Judiciary Committee's Subcommittee on Crime). The United States is not alone in its focus on crimes against women. *See* United Nations Economic and Social Council, Commission on Crime Prevention and Criminal Justice, *Review of Priority Themes: Draft Plan of Action on the Elimination of Violence Against Women*, E/CN.15/11 (Apr. 9, 1996), *at* http://www.uncjin.org/Documents/5comm/11e.htm (last visited Jan. 29, 2001) (on file with the *Iowa Law Review*).

24. Joanne Conaghan, *Reassessing the Feminist Theoretical Project in Law*, 27 J.L. & SOC'Y 351, 365 (2000). Conaghan points to domestic violence as the most poignant example of this development. *Id.*

25. Examples from rape law are: the introduction of rape-shield laws, which bar the introduction of evidence regarding the victim's prior sexual conduct; the abolition of the doctrine that made it legally impossible for husbands to rape their wives; and the relaxation of the standards by which women's resistance to rape would be judged. FRIEDMAN, *supra* note 18, at 432-33. Critics have argued, however, that despite these changes that should have facilitated the prosecution of sexual offenders, coercion and unwanted sex continue. *See generally* STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (1998).

26. Abrahamson, *supra* note 16, at 524.

27. *See* Henderson, *supra* note 17, at 590-92 (discussing how the victims' rights movement has increasingly moved to demand ever harsher sentences for offenders).

Some feminists have argued that women have different needs and interests in responding to harm done to them than the official state-sanctioning system. They have focused on alternative dispute resolution and victim-focused sentences, such as compensation for loss and pain and suffering. *See* Malin Bode, *Wenn Frauen strafen*, STREIT 23 (2001) (on file with author).

28. *See* Henderson, *supra* note 17, at 590 ("[S]ince the original victim's rights movement began, there has been a move towards harsher and longer punishments for convicted offenders."); *id.* at 594-95 (describing how philosophers Jeffrie Murphy and Jean Hampton argue that "the moral value of the victim must be reaffirmed by punishment").

assistance.[29] Nevertheless, it appears that Congress has heard the cry for higher penalties most loudly.

II. CREATING THE "SEXUAL PREDATOR"

Crime and punishment policies are shaped through political discourse.[30] The process of molding and shaping the issues is influenced and driven by those actors who have successfully gained access to political power and the media.[31]

In addition to victims' groups, the media, therefore, helped shape our national response to sex offenders.[32] By nationally publicizing repulsive sexual offenses against children, the media have created a demand and apparent need for increased control over sexual offenders.[33] News accounts of real crime and fictionalized movie and TV stories about sexual offenses have perpetuated a stereotyped view of victims and offenders. The victim is portrayed as a "'blameless,' innocent, usually attractive, middle class, and white" woman or child.[34] The offender, on the other hand, is viewed as unattractive, lower class, compulsively drawn to commit sexual offenses, and often a repeat offender.[35] Accounts of real and fictionalized sex offenses

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29. *See id.* at 604-06 (suggesting programs and ideas to assist victims and criticizing their replacement by increased sentences for offenders).

30. KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 5 (1997) (quoting David Garland, "[I]t is not 'crime' or even criminological knowledge about crime which most affects policy decisions, but rather the ways in which 'the crime problem' is officially perceived and the political positions to which these perceptions give rise.").

31. *Id.* at 5-6 (noting that social actors who vie for public influence use symbols and cultural references to invoke images of crime and ways to combat crime).

32. While the media frequently influences public perception, it has increasingly—but not always—become a conduit of official statements and opinions. *Id.* at 64-65.

33. For a discussion of the construction of social problems and the creation of a moral panic surrounding the sexual abuse of children, see Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 869, 873-76 (2000). Neither the media reports nor the public and legislative responses are unique to the United States. *See generally* Hans-Jörg Albrecht, *Dangerous Criminal Offenders in the German Criminal Justice System*, 10 FED. SENTENCING REP. 69 (1997) (discussing German responses to highly publicized sexually motivated killings of young children); Tatjana Hornle, *Penal Law and Sexuality: Recent Reforms in German Criminal Law*, 3 BUFF. CRIM. L. REV. 639 (2000) (describing penal law changes and sentence increases in the wake of child abductions and killings committed by sex offenders).

34. Henderson, *supra* note 17, at 584. The stories of Megan Kanka and Polly Klaas, both pretty, young girls, who were raped and then killed by repeat offenders, made national headlines for days and weeks.

35. Jesse Timmendequas, the killer of Megan Kanka, and Richard Allen Davis, who killed Polly Klaas, fit this profile, especially since both already had prior sex convictions. *See* Eric Brazil, *Man Questioned in Abduction*, PITTSBURGH POST-GAZETTE, Dec. 2, 1993, at A11; *Sex Offender Charged in Girl's Strangulation*, THE RECORD (N. N.J.), Aug. 1, 1994, at A3.

Race appears to play a lesser role in the depiction of sexual offenders. However, the fear of the African-American rapist remains ever present—epitomized by Willie Horton, the

tend to depict crime "as a family matter, for it invariably pits victims of traditional nuclear families against the harrowing images of criminals as antisocial loners and lunatics preying on women and especially children."[36] Images of horrifying crime have come to dominate the national debate surrounding sex offenders.[37]

Because of the way in which sexual crimes against women and children have captured the national consciousness, they have triggered a strong response by the state.[38] Often the response has involved measures that provide greater control over released sex offenders and sentence enhancements. The emphasis has been on retributive, deterrent and incapacitative sanctions—necessary because sex offenders have become ultra-dangerous sexual *predators* in the eyes of society.[39] Sex offenders have been merged into a single category which permits little individualization but rather encourages wholesale condemnation.

To allow for continued oversight of sex offenders, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act,[40] which was a part of the 1994 Violent Crime Control and Law Enforcement Act.[41] The Registration Act demanded that states establish sex offender registry programs and threatened the denial of federal funding in cases of non-compliance.[42] Only two years later, Congress amended the legislation through Megan's Law,[43] which requires states to release certain information about sex offenders to the public.[44] Registration and notification statutes exemplify the perception that all sex offenders are

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recidivist murderer-rapist.

36. Elayne Rapping, *Television, Melodrama, and the Rise of the Victims' Rights Movement*, 43 N.Y.L. SCH. L. REV. 665, 675-76 (1999-2000) (citing *America's Most Wanted*). Among other successful television dramas that address sexual offenses is the *Law & Order* offshoot, *Special Victims Unit*, which focuses exclusively on sexually motivated crime, largely killings.

37. *See* Adler, *supra* note 22, at 227 ("Child sexual abuse has become the master narrative of our culture.").

38. *See* Kennedy, *supra* note 33, at 881-82 (describing how fears about modern life have centered around children as victims but also taking account of national response to violent crimes committed by children, which has culminated in state action).

39. In the early 1990s the term "predator" came to connote violent, repeat sexual offenders. The metaphor implies "a human being's pursuit and sexual exploitation of another person." JENKINS, *supra* note 2, at 193. For an explanation and critique of the use of the term "predator" in connection with sexual offenders, see *id.* at 193-94.

40. Pub. L. No. 103-322, tit. XVII, 108 Stat. 2038 (1994) (codified at 42 U.S.C. § 14071).

41. Pub. L. No. 103-322, 108 Stat. 1796 (1994).

42. 42 U.S.C. § 14071 (1994).

43. Pub. L. No. 104-145, § 2, 110 Stat. 1345 (1996); *see also* Pam Lacher Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, §§ 3-7, 110 Stat. 3096.

44. For an account of Megan's Law as an example of "governing though crime," see Simon, *supra* note 21, at 1134-35. An account of the ineffectiveness of such notification statutes can be found in Eric Lotke, *Politics and Irrelevance: Community Notification Statutes*, 10 FED. SENTENCING REP. 64 (1997).

dangerous "predators" that must be controlled.[45]

Registration and notification statutes are designed to manage the risk that released sex offenders pose.[46] Long term prison sentences serve a similar purpose as they extend the length of time the general population is shielded from such "predators." In both cases, the goal is to banish and isolate offenders from society since most incarcerative sentences and collateral registration requirements include no therapeutic component.[47]

III. DEMANDING AND GETTING "MORE TIME"

A. INCREASED PRISON SENTENCES FOR SEX OFFENDERS

In recent years, state and federal legislatures have repeatedly increased sentences for sex offenders, often in response to the demands of women's and victim's groups.[48] Although federal and state judges already had long sentences at their disposal throughout the early 1990s,[49] many feminists have continued to demand longer sentences for sex offenders.[50] Even the Federal

45. Simon, *supra* note 21, at 1138 (describing language used to depict sexual offenders in connection with notification and registration statutes).

46. For a discussion of the "risk society," see CRIME AND THE RISK SOCIETY (Pat O'Malley ed., 1998); Malcolm Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 CRIMINOLOGY 449 (1992).

47. *See* Simon, *supra* note 21, at 1139 (analyzing Megan's Law). For a general discussion of collateral sentencing consequences as exclusionary, see Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153 (1999).

48. *See, e.g.*, Roxanne Lieb & Scott Matson, *Sex Offender Sentencing in Washington State*, 10 FED. SENTENCING REP. 85, 88 (1997) (analyzing sentencing changes in Washington); George B. Stevenson, *Federal Antiviolence and Abuse Legislation: Toward Elimination of Disparate Justice for Women and Children*, 33 WILLAMETTE L. REV. 847, 857-58 (1997) (discussing the Safe Streets for Women Act, Pub. L. No. 103-322, 108 Stat. 1903 (1994) (codified in scattered sections of 16, 28, & 42 U.S.C.)); Ann Wall, *Sexual Offenses in Minnesota: Recent Changes to Sentencing and Post-Sentencing Provisions*, 10 FED. SENTENCING REP. 79, 79 (1997); *see also* The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 8, 12, 15, 16, 18, 21, 28, 31, & 42 U.S.C.).

The imposition of more severe penalties on sex offenders in response to high profile offenses is not unique to the United States. *See* Albrecht, *supra* note 33, at 72.

49. See, e.g. U.S. SENTENCING GUIDELINES MANUAL §§ 2A3.1-.4, 2G1.1-2G3.2 (1994); CAL. PENAL CODE § 288.5 (West 2001) (increased penalties for continuous child sexual abuse), *id.* § 667.8 (sentence enhancements for kidnapping for purpose of committing sexual offenses); Wall, *supra* note 48.

50. *See* Wells & Motley, *supra* note 19, at 193 (arguing for abolition of registration and notification statutes; instead, prison sentences should be longer for rapists). Feminist demands for more severe punishment are not limited to sexual offenses. *See* Claire M. Renzetti, *Connecting the Dots: Women, Public Policy, and Social Control*, *in* CRIME CONTROL AND WOMEN: FEMINIST IMPLICATIONS OF CRIMINAL JUSTICE POLICY 181, 188 (Susan L. Miller ed., 1998) (recounting how members of the battered women's movement have criticized the family conferencing model as not holding men sufficiently responsible for their offenses).

Sentencing Guidelines did not escape their criticism.[51] Only enhanced sentences appear able to combat the fear of the sex offender. "The get-tough crime control rhetoric often appeals directly to women, playing on [their] fears and promising . . . safety."[52] The fear of being victimized themselves, or of having their children victimized, led many women to support increased sentences and other restrictions on offenders.[53] Prison, after all, seemed like the most reliable guarantor of public safety.[54] For long-term incarcerative sentences to be appropriate, sex offenders had to be portrayed as not only morally depraved, beyond redemption, rational schemers, but also as biologically driven to offend.[55]

Increased penalties for sex offenders also became symbolic of the state's concern for women and seemed to acknowledge their perceived risk of victimization.[56] Victim surveys indicating a higher likelihood of sexual victimization for certain minority groups contributed to calls for enhanced sentences.[57] Otherwise, so it was argued, the state would display a lesser interest in the safety of minority women.[58] Therefore, crime control, victims' rights, and feminist demands coalesced in the call for higher sentences.[59] Without minimizing the suffering of victims of sexual offenses, it can be argued that the country has fallen prey to a moral panic over sexual

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51. Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1720 n.189 (1991) ("Some women's advocacy groups criticize the guidelines for punishing rape relatively less harshly than other offenses, and then providing for 'enhancements' if an 'abduction' is included.").

52. Renzetti, *supra* note 50, at 186.

53. *Id.* ("The get-tough crime control rhetoric often appeals directly to women, playing on our fears and promising us safety."). However, this does not necessarily imply that women are generally more punitive, even though they are more anxious about the possibility of becoming crime victims. BECKETT, *supra* note 30, at 26.

54. John Pratt, Sex Crime and the New Punitiveness 13 (1999) (describing how a growing sense of insecurity leads to increased punitiveness) (unpublished manuscript, on file with the *Iowa Law Review*).

55. BECKETT, *supra* note 30, at 9 (describing prevailing portrayals of criminal offenders).

56. *See* ROACH, *supra* note 18, at 5 (discussing legislative changes in Canada).

A re-orientation in law-enforcement priorities contributed to the large increase in the number of sex offenders incarcerated. JENKINS, *supra* note 2, at 190.

57. Between 1992 and 1996, 4.3% of all violent crime was made up of rape and sexual assault. For Native Americans the percentage of these violent victimizations, however, reached 5.6%, for African-Americans 4.4%. Lawrence Greenfield & Steven K. Smith, U.S. Dep't of Justice, *American Indians and Crime* (Feb. 1999), tbl.4, *available at* http://www.ujp.usdoj/bjs/publpdf/aic.pdf (last visited Nov. 21, 2001) (on file with the *Iowa Law Review*). Others have argued, however, that the victimization rates for African-Americans are substantially higher than for whites. *See* JOANNE BELKNAP, THE INVISIBLE WOMAN: GENDER, CRIME, AND JUSTICE 227-66 (2001) (citing numerous statistics indicating that black females are at a higher risk of rape).

58. Other voices, however, criticized the increasing criminalization of minority men. *See* Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 579 n.71 (1995) (noting that young minority men are often arrested for minor offenses because of police profiling).

59. ROACH, *supra* note 18, at 5.

offenders. State and federal legislatures have further enhanced this climate by passing highly punitive legislation.[60]

B. THE SENTENCING COMMISSION'S RESPONSE TO SEX OFFENDERS

In the federal arena, the U.S. Sentencing Commission was unable (or unwilling) to stall such demands to allow for a more reasoned debate. Commentators have argued that, in the short term at least, administrative agencies should protect policy-makers from unfiltered and rash reactions.[61] In this respect, however, the Commission has failed. Whether it has done so intentionally or accidentally is open to question.[62] Ultimately, the Commission has not been able to insulate sentencing policy regarding sex offenders even temporarily from political pressures resulting from high profile offenses.[63]

Congress passed legislation creating new categories of sex offenders and mandated the Sentencing Commission to enhance the sentences for rape, sexual assault and exploitation, and pornography.[64] Pedophiles who use the Internet to connect with potential victims have become the latest target of congressional legislation.[65] While sending these sentencing mandates to the Commission, Congress generally has not asked for Commission input prior to passing legislation. This is not surprising. Rather, it represents the all-too-apparent practice of Congress legislating without expert input in the

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60. JENKINS, *supra* note 2, at 190-214.

61. *Cf.* Michael Tonry, *Sentencing Commissions and Their Guidelines*, *in* 17 CRIME AND JUSTICE: A REVIEW OF RESEARCH 137, 175-76 (Michael Tonry ed., 1993) (describing political pressure exerted on state sentencing commissions).

62. *See id.* at 178-79 ("The U.S. commission . . . made no effort to insulate its policies from law-and-order politics and short-term emotions.").

63. There is no guarantee that any sentencing commission, however successful, will be able to keep political pressures from influencing penal policy. *See* Wall, *supra* note 48, at 48 (discussing how the Minnesota Sentencing Commission has also been unsuccessful in withstanding high political pressure resulting from anxieties about select offenses, such as sex crimes).

64. *See Protection of Children from Sexual Predators Act of 1998—Directives to United States Sentencing Commission*, *at* http://www.ussc.gov (last visited Sept. 1, 2001) (asking Commission to increase sentences for select sexual offenses) (on file with the *Iowa Law Review*); *see also* Pamela Montgomery, *Sentencing Federal Sex Crimes*, 10 FED. SENTENCING REP. 98 (1997) (describing some recently passed federal sex crime-related statutes and complementary guideline provisions).

65. *See* The Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, tit. I, § 101(a), 112 Stat. 2975 (codified at 18 U.S.C. § 2425 (Supp. IV 1998)) (criminalizing use of interstate facilities for transfer of information about a minor that serves criminal sexual purposes); The Children's Online Privacy Protection Act, Pub. L. No. 104-104, tit. V., 110 Stat. 56, 133-34 (1998) (describing the prohibition on knowing distribution to minors of materials harmful to them); *see also Protection of Children from Sexual Predators Act of 1998—Directives to United States Sentencing Commission*, *supra* note 64 (asking Commission to increase sentences for select sexual offenses); *The Murphy Commission's First Oversight Hearing*, *reprinted in* 13 FED. SENTENCING REP. 98, 100 (2000) (describing guideline amendments to sex offender provisions based on congressional directives); Adler, *supra* note 22, at 227 ("The Internet has proved to be a particularly rich site for fear of sexual predators.").

criminal justice arena, and often contrary to current knowledge.[66] The Commission should assert its role, according to its statutory mandate,[67] and assure the fair and equitable sentencing of Native American sex offenders.

IV. THE IMPACT OF FEDERAL SENTENCING ON NATIVE AMERICAN SEX OFFENDERS

Canada, Australia, and the United States all have aboriginal populations which suffer from significant economic and social disadvantages.[68] Almost fifty percent of working-age adults are unemployed, on some U.S. reservations the figure reaches seventy percent.[69] Poverty on reservations is starker than in any other part of the country, with thirty percent of the population living beyond the official poverty line.[70] Many of these disadvantages are direct consequences of the way in which the colonizers have treated native populations for centuries.[71] The destruction and segregation of native populations have led in part to the disintegration of established community and family structures.[72] The resulting unstable social fabric has also contributed to high alcoholism and crime rates.[73]

Alcoholism is one of the most widespread social problems on reservations.[74] The death rate from alcoholism among Native Americans is

66. *See* Dodgen, *supra* note 23, at 130 (describing instances in which federal legislation fails to consider or even contradicts prevailing expert knowledge).

67. *See* 28 U.S.C. § 994(h)-(m) (1994) (mandating ways in which the Commission should guarantee the fairness and proportionality of federal sentences).

68. *See* BUREAU OF INDIAN AFFAIRS, 1997 LABOR MARKET REPORT ON THE INDIAN LABOR FORCE [hereinafter 1997 LABOR MARKET REPORT] (listing unemployment rate and the number of people living below the poverty line on Native American reservations).

69. *See id.* at 4.

70. *Id.; see also Hearing on Native American Youth Activities and Initiatives Before the Senate Comm. on Indian Affairs*, 106th Cong. (1999) (statement of Dom Nessi, Acting Director, Office of Economic Development, Bureau of Indian Affairs, Dep't of the Interior), *available at* http://www.doi.gov/ocl/nessi.html (last visited Oct. 18, 2001) (noting that "[O]n reservations poverty and unemployment is the highest in the nation" (on file with the *Iowa Law Review*)); S.D. ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, NATIVE AMERICANS IN SOUTH DAKOTA: AN EROSION OF CONFIDENCE IN THE JUSTICE SYSTEM, chs. 1, 6-7 (2000) (describing the devastating economic and public health conditions on Native American reservations in South Dakota).

71. S.D. ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, *supra* note 70, at chs. 1, 4-5 (giving historical account of the treatment of Native Americans by the U.S. government).

72. *See generally* Russell Hogg, *Penality and Modes of Regulating Indigenous Peoples in Australia*, 3 PUNISHMENT & SOC'Y 365 (2001) (arguing that the history of segregation and coercive governance in Australia accounts for continued disproportionate indigenous incarceration rates despite abolition of overtly racist policies).

73. *See infra* notes 74-84 (providing information on the increase in the rates of alcoholism and crime).

74. While many reservations share the same problems, it should be recognized that tribes often differ dramatically, including in the crime rate and the types of crimes committed on Indian territory.

seventeen times the alcoholism death rate of the white population.[75] Indian and Alaskan Native offenders under the influence of alcohol are responsible for fifty-five percent of all intraracial violent crimes.[76] Their arrest rates for alcohol-related offenses are twice as high as for the rest of the country.[77]

Violent crime rates on reservations are more than twice the number than in the rest of the country.[78] Women suffer disproportionately. They experience one and a half times the rate of violent crime reported by African-American men.[79] Female Native Americans and Alaskan Natives indicate levels of rape almost twice as high as white women.[80] While there is evidence that Native American and Alaskan Native women are at higher risk of physical and sexual violence generally,[81] it is unclear whether higher incident numbers are caused solely by the higher occurrence of rape or whether higher reporting rates are also a contributing factor.[82] In addition, some statistical evidence indicates a high rate of child sexual abuse on reservations.[83] Much of this crime rate appears linked to the high alcoholism

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75. *The Native American Alcohol and Substance Abuse Program Consolidation Act of 1999: Hearing on S. 1507 Before the Senate Comm. on Indian Affairs*, 106th Cong. (1999) (statement of Kevin Gover, Assistant Sec'y for Indian Affairs), *available at* http://www.doi.gov/ocl/s1507.html (last visited Oct. 18, 2001) (on file with the *Iowa Law Review*).

76. *Id.* Victim surveys indicate a slightly lower number—around 45%—but this figure is still substantially higher than for other racial groups. Greenfield & Smith, *supra* note 57, at vi.

77. *Id.* at vii.

78. *Id.* at 4 (reporting the average annual number of violent victimizations per 1000 persons age 12 or older, from 1992-1996: rate for American Indians—124; rate for the U.S. resident population—50).

79. *Id.* at vi.

80. *See* PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 5 (1998) (reporting rape rates: White 17.7%; African-American 18.8%; Asian/Pacific Islander 6.8%; American Native/Alaska Native 34.1%). Canadian rape rates of aboriginal women are also disproportionately high. *See* Sherene Razack, *What Is to Be Gained by Looking White People in the Eye?*, *in* CRIMINOLOGY AT THE CROSSROADS: FEMINIST READINGS IN CRIME AND JUSTICE 225, 237 (Kathleen Daly & Lisa Maher eds., 1998).

81. *See* Greenfield & Smith, *supra* note 57, at vi ("The rate of violent crime experienced by American Indian women is nearly 50% higher than that reported by black males.").

The increase in federal sentences for sex offenders appears to be driven by current law-and-order rhetoric and mainstream society's concern about such offenses rather than by congressional recognition of the harm sexual abuse and rape inflict on women generally, and Native American women specifically. Because of the closeness of Native American communities and the high occurrence of incest, Native American women may suffer harm different from that experienced by other victims of sexual abuse. For example, they are often silenced by the offender's family members. *See* Razack, *supra* note 80, at 230 (indicating that Native American communities often ostracize rape victims).

82. *See* TJADEN & THOENNES, *supra* note 80, at 5-6 (outlining the risk of violence among minority women). Overall, however, Native Americans do not report crime to the police at a higher rate than other racial groups. Greenfield & Smith, *supra* note 57, at vii, 39.

83. *See* U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 1998: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM (2000), *available at* http://www.acf.dhhs.gov/programs/cb/publications/cm99/index.htm (reporting that the

and substance abuse rate among Native Americans.[84]

In the wake of the popular outcry over sexual offenses, Congress passed the Indian Child Protection and Family Violence Prevention Act of 1994, which requires the federal government to examine child abuse or neglect and family violence on Indian reservations.[85] The Act also mandates the creation of a panoply of victim services.[86] To complement its approach to sex crimes, Congress at the same time enhanced federal sentences for sex offenders.[87] The penalty provisions in the 1994 Violent Crime Control and Law Enforcement Act also covered Native Americans under federal jurisdiction, who began to serve ever longer sentences and were often incarcerated in prisons far from their homes and deprived of their cultures.[88]

Because of the small size of many Native American tribes, Native American offenders frequently find themselves without any other tribal members—and sometimes without any other Native Americans—in prison with them. This creates particular difficulties when they are incarcerated far from families and friends, which is often the case, or when they are fluent only in a Native American language. In these cases, for Native Americans federal imprisonment often means separation from their culture and language.[89]

Native American sex offenders find themselves uniquely impacted by such factors since they are frequently sentenced to long-term imprisonment.[90] However, congressional debates about penal changes

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percentage of Native American children who are victims of sexual abuse is double the percentage of all children) (on file with the *Iowa Law Review*).

84. *See, e.g.*, John V. Butcher, *Federal Courts and the Native American Sex Offender*, 13 FED. SENTENCING REP. 85, 85 (2000) ("[A]bject poverty, unemployment and physical isolation, all contribut[e] to distressingly high rates of alcoholism and substance abuse."); Charles B. Kornmann, *Injustices: Applying the Sentencing Guidelines and Other Federal Mandates in Indian Country*, 13 FED. SENTENCING REP. 71, 72 (2000) ("Substance abuse problems are rampant in Indian Country."). The high crime rates account for the fact that "[o]ne in 25 Indians age 18 and older is under the jurisdiction of a criminal justice system." *Hearing on Native American Youth Activities and Initiatives Before the Senate Comm. on Indian Affairs*, *supra* note 70. This means that 4% of all Native Americans are under supervision of the criminal justice system—compared to 2% of adult whites and 10% of blacks. Greenfield & Smith, *supra* note 57, at 26.

85. 25 U.S.C. §§ 3201-3211 (1994).

86. *Id.* §§ 3208-3210.

87. 1994 Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796.

88. Butcher, *supra* note 84, at 87.

89. *Id.* ("For a Native American inmate from a small tribe or pueblo, there is a significant likelihood that the inmate may be the only tribal or pueblo member in the federal institution. Such isolation compounds the normal depression and distress associated with serving time in a federal penitentiary.").

90. The mean number of months served by federal inmates convicted of sexual abuse is 71.8 months (almost six years), with a median of 37.0 months (about three years). 2000 SOURCEBOOK, *supra* note 5, at 30, tbl.14.

rarely, if ever, consider their impact on Native American offenders, albeit serious crimes committed on reservations fall under the jurisdiction of the federal government, and federal sentences generally have to be meted out in accordance with the U.S. Sentencing Guidelines.[91]

Beyond the immediate effect of federal sentencing on the individual offender, who will be treated like all other federal sex offenders—independent of whether his offense measures up to the same level of depravity and risk—Native American communities as a whole are also impacted by long-term sentences for tribal members.[92] Studies indicate that instability, anomie and rising crime rates result when a substantial number of residents are removed to serve prison sentences.[93]

Even though Congress may have ignored the disproportionate impact certain guideline provisions have had on Native American sex offenders, federal district court judges sitting in areas with large Native American reservations have not.[94] They frequently oppose the imposition of relevant guideline provisions because they consider them inappropriately punitive.[95] For that reason, they have attempted to develop creative solutions to avoid the imposition of the directly applicable guideline.[96] However, because the Guidelines explicitly prohibit consideration of certain criteria which would provide a principled basis for downward departures[97] in Indian country—

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91. For an account of federal jurisdiction over Indian territory, see Jon M. Sands, *Indian Crimes and Federal Courts*, 11 FED. SENTENCING REP. 153 (1998).

92. Some Native Americans do not share the concern about excessively high sentences for Native American offenders. *See U.S. Sentencing Comm'n, Public Hearing Transcript, Federal Victims Rights Office, Office of Ms. Pecora, Representative, SD* (June 19, 2001) (statement of Ms. Marlys Pecora). They deem the federal sentences imposed not disproportionate since they are meted out for serious offenses. *Id.*

93. *See* JEREMY TRAVIS ET AL., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISON REENTRY 8 (2001) (discussing trends related to removal).

94. Potential injustices wrought by the imposition of the Federal Sentencing Guidelines have also not escaped the U.S. Civil Rights Commission's South Dakota Advisory Committee. S.D. ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, NATIVE AMERICANS IN SOUTH DAKOTA: AN EROSION OF CONFIDENCE IN THE JUSTICE SYSTEM, *at* http://www.usccr.gov/sdsac/tran.htm (last visited Nov. 13, 2001) (on file with the *Iowa Law Review*).

95. Kornmann, *supra* note 84, at 72 (objecting to consideration of drunk driving convictions to increase criminal history category and criticizing offense level for impeding, obstructing, or resisting a federal officer); Anthony Bottoms, *The Philosophy and Politics of Punishment and Sentencing, in* THE POLITICS OF SENTENCING REFORM 17, 36 (Chris Clarkson & Rod Morgan eds., 1995).

96. *See* Kornmann, *supra* note 84, at 71-72 (interpreting two-level enhancement for selling drugs from a "protected location," which includes public housing, not to apply to Indian Housing Authorities).

97. "Downward departure" is a term of art under the federal Guidelines. It refers to the judge's ability to impose a sentence that is lower than the otherwise applicable sentencing range. To do so, the court must find "that there exists [a] . . . mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (1995) (citing 18 U.S.C. § 3553(b) (1994)). On the

race and culture, lack of guidance as a youth, young age[98]—district court judges have been forced to impose sentences which they consider unfair.[99] In some cases, they have even pressured federal prosecutors to drop charges because they feared that the sentence they would have to impose under the Guidelines would be unfairly stringent.[100] In at least one case, the Eighth Circuit Court of Appeals recognized that the stark influence of unemployment, alcoholism, and socio-economic deprivations on a Native American offender, was not appropriately considered by the Guidelines, and therefore affirmed a downward departure for the defendant who comparatively excelled in this environment.[101]

While individual departures and low-level avoidance of the Guidelines may provide solutions in individual cases, they present systemic problems as they undermine the current guideline structure.[102] Therefore, other approaches have been proposed to prevent the application of the enhanced sex offender guidelines to individual offenders who do not seem to fit the model of the depraved "predator" for whom they were developed. Among the possible alternatives are attempts to allow informal community-oriented fora to solve disputes that would otherwise end in the criminal justice system,[103] and the possibility of turning over more enforcement and

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other hand, the Sentencing Guidelines enumerate a list of factors that are "not relevant in the determination of a sentence," such as race, sex, national origin, creed, religion, and socio-economic status, *id.* § 5H1.10, or "are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range," including physical alcohol dependence or abuse, *id.* § 5H1.4.

98. Kornmann, *supra* note 84, at 72 (discussing potential departure grounds which would allow for fairer sentences for Native Americans but which the Commission has ruled not, or "not ordinarily relevant"). For an account of the Commission's rejection of "lack of youthful guidance" as a departure ground for Native Americans, see Jon M. Sands, *Departure Reform and Indian Crimes: Reading the Commission's Staff Paper with "Reservations,"* 9 FED. SENTENCING REP. 144, 146 (1996).

99. *See* Kornmann, *supra* note 84, at 72 (proposing use of some prohibited departure grounds to create greater equity for Native Americans in the federal criminal system).

100. This strategy avoids the application of guideline provisions without coming to the attention of the Sentencing Commission. For that reason, it undermines the guideline structure rather than attacking it directly. *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1683, 1739 (1992).

101. United States v. Big Crow, 898 F.2d 1326, 1331-32 (8th Cir. 1990) (focusing on defendant's "excellent employment history, solid community ties, and consistent efforts to lead a decent life in a difficult environment," which were sufficiently unusual to constitute extraordinary circumstances). The first Commission chair had, however, rejected the notion of allowing alcoholism as a mitigating factor in cases coming from Indian territory. U.S. SENTENCING COMM'N, PUBLIC HEARING (June 19, 2001) (statement of Ms. Elsie Meeks, Comm'n on Civil Rights), *available at* http://www.ussc.gov/hearings (last visited Nov. 13, 2001) (on file with the *Iowa Law Review*).

102. Freed, *supra* note 100, at 1683, 1739 (arguing that hidden disparities, which occur because of the invisible exercise of discretion on the part of sentencing judges, undermine the guideline system).

103. Bottoms, *supra* note 95, at 37; Donna Coker, *Enhancing Autonomy for Battered Women:*

prosecution functions to Native tribunals.[104] Along the same lines are proposals to abolish the Major Crimes Act,[105] which gives the federal government jurisdiction over offenses that would, if not committed on a reservation, be state crimes.[106] However, since these alternatives are unlikely to succeed in the near future,[107] the Commission should directly address the problem of perceived unfair sentences for Native Americans.[108]

V. CONGRESS AND THE COMMISSION

The disparate impact of federal sex offender sentences are due in part to the Commission's failure to temper congressional punitiveness,[109] as well as to present Congress with information on the likely consequences of such legislation on Native American offenders. The Sentencing Reform Act specifically allows the Commission to "make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy."[110] This implies that the Commission is neither restricted to comment on mere guideline matters nor limit its recommendations to situations in which Congress asks for assistance. Rather, the provision asks the Commission to address matters that pertain to "sentencing, penal and correctional matters," a broad mandate.[111]

Lessons from Navajo Peacemaking, 47 UCLA L. REV. 1 (1999) (discussing Navajo Peacemaking in domestic violence situations and suggesting an informal adjudication method in such cases which draws on the strength of peacemaking while correcting its shortcomings).

104. Kornmann, *supra* note 84, at 73 (suggesting that Congress "adequately fund tribal court systems to establish for the first time an independent judiciary"). Alternatively, federal courts may consider customary sentences in the imposition of penalties. State v. Roberts, 894 P.2d 1340 (Wash. 1995); *see also* Rick Sarre, *Sentencing in Customary or Tribal Settings: An Australian Perspective*, 13 FED. SENTENCING REP. 74 (2000) (recounting limited application of customary sentencing in Australia).

105. 18 U.S.C. § 1153 (1994).

106. *See* U.S. SENTENCING COMM'N PUBLIC HEARING, *supra* note 92.

107. At this point, the expansion of Indian law-enforcement, prosecutorial and judicial functions seems unlikely. The historical relationship between the federal government and Indian tribes as well as the limited number of Native American attorneys and judges make it difficult to envision such a dramatic change. *See* U.S. SENTENCING COMM'N, PUBLIC HEARING, *supra* note 92, at 48-49 (witnesses were not aware of any Native American judges or prosecutors in the federal system).

108. For an account of the impact of federal sentences, see the statements recounted in S.D. ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, *supra* note 70.

The Commission's present call for public comment on the creation of an ad hoc advisory group regarding the operation of the Guidelines on Native Americans is a step in the right direction. 66 Fed. Reg. 35313 (July 3, 2001), *available at* http://www.ussc.gov/FEDREG/fedr901_0A.htm (last visited Nov. 13, 2001) (on file with the *Iowa Law Review*).

109. *Supra* note 13.

110. 28 U.S.C. § 995(a)(20) (1994).

111. *Id.*

The 1995 and 1997 Commission reports, which recommended that Congress change the mandatory sentencing ratio for crack and powder cocaine, fulfilled this broad mandate.[112] After the negative congressional response to its 1995 proposal,[113] the Commission appeared to become dispirited and retreated in the face of congressional criticism.[114]

In congressional hearings addressing sentence enhancements, the Commission is frequently not heard.[115] This is especially the case when the hearings purport to deal with the creation of new offenses or other criminal justice issues not pertaining directly to sentencing issues. Congress's lack of consideration for Commission positions is surprising since the Commission was created in part as a research and policy unit.[116] It receives a data set—including offense of conviction, sentence imposed, prior criminal history, and individual offender characteristics, such as race and gender—on all offenders sentenced in federal court.[117] Moreover, public hearings allow it to gather information from a wide variety of groups,[118] which it can then use to develop thoughtful policies informed by the viewpoints of a variety of constituencies. As the appointment process for commissioners guarantees

112. *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 9-10 (Apr. 1997) [hereinafter U.S.S.C., 1997 CRACK/COCAINE REPORT]; U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY ch. 8 (Feb. 1995). Since the Commission bases guideline sentences on the mandatory minimums, the recommendations in both reports could be understood as addressing guideline matters narrowly rather than sentencing issues in a broader sense. In addition, both reports responded directly to congressional mandates. *Id.*

113. For the first time, Congress passed legislation rejecting a guideline change proposed by the Commission. Pub. L. No. 104-38, 109 Stat. 334 (1995) (refusing amendments drafted by the Commission under 28 U.S. C. § 994(p) (1994)).

114. For a scathing critique of the Commission's second report, see Nkechi Taifa, *Reflections from the Front Lines*, 10 FED. SENTENCING REP. 200, 202 (1998) ("In April 1997, the Sentencing Commission, apparently cowtowing to politics, modified its 1995 call for complete elimination of the crack/cocaine disparity."). In his concurrence to the 1997 Commission report then Vice-Chair Michael Gelacak seemed to imply that in developing its recommendation, the Commission had given in to political pressure. U.S.S.C., 1997 CRACK/COCAINE REPORT, *supra* note 112, at 1 (Vice-Chair Gelacak, concurring opinion).

115. *See* Dodgen, *supra* note 23, at 127-28 (recounting a congressional hearing on "child molestation" where sentence enhancements for certain sexual offenses were discussed with little expert input).

116. *See* 28 U.S.C.A. §§ 994(o), (p), (w), 995(a)(12)-(16) (1993 & Supp. 2001) (outlining the Commission's responsibilities as to data collection and guideline modifications).

117. In 2000, the Commission received documentation on about 60,000 federal sentencings. 2000 ANNUAL REPORT, *supra* note 8, at viii. Staff in the Office of Monitoring enters these data on individual offenders into an automated data collection system. *Id.* at 4.

118. For example, on June 19, 2001, the Commission held a public hearing in Rapid City, South Dakota, on the impact of the Federal Guidelines on Native American offenders and their communities. For a transcript of the public hearing, see U.S. Sentencing Comm'n, *Public Hearing 6/19/2001, at* http://www.ussc.gov/hearings/SD6-19-01.htm (last visited Oct. 15, 2001) (on file with the *Iowa Law Review*).

their political credibility,[119] Congress could be expected to rely more on their opinion than those of interest groups and agenda-based advocates.[120]

Congressional sentencing mandates frequently derive from assumptions about the dangerousness of types of offenders and their likelihood of recidivism.[121] Often these factors emanate from anecdotal evidence and are driven by media accounts and victim pain.[122] When converting congressional mandates into guidelines, offenders continue to be targeted "as an aggregate."[123] Faulty assumptions and anecdotal accounts about the "typical" sex offender led to probabilistic assumptions that are likely to dramatically overestimate the likelihood of recidivism among many federal sex offenders, and particularly for Native Americans.[124] In turn, these accounts have driven legislative changes enhancing sex offender sentences.

High sentence levels are less problematic in a system that allows judges to individualize sentences. This, however, is no longer the case under the Federal Guidelines.[125] Often, judges find themselves stymied by the language of the Guidelines or by narrow appellate rulings that limit their ability to

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119. 28 U.S.C. § 991(a) (1994 & Supp. 1998).

120. *See* Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 65 (1997) (proposing, without much hope, that development of criminal justice policy be reposed in the Commission to insulate such policy-making from political pressure); Frank O. Bowman, *Fear of Law: Thoughts on* Fear of Judging *and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 353-54 (2000) (recommending that the Commission become more "political" to produce a more effective and generally accepted guideline scheme).

121. *See* Bottoms, *supra* note 95, at 32-33 (noting a tendency by Congress to focus on perceived group characteristics of offenders).

122. *See supra* notes 32-37.

123. Bottoms, *supra* note 95, at 28.

124. One of the assumptions driving sex-offender sentencing and the desire for long incarcerative sentences is the perception of high recidivism rates for sexual offenders. Except for a small group of sex offenders, however, recidivism rates are lower than for other categories of offenders. Hans-Jörg Albrecht, *Die Determinanten der Sexualstrafrechtsreform*, 111(4) ZSTW 863, 880-84 (1999) (on file with author); *see also* Kennedy, *supra* note 33, at 888 (criticizing the "tendency to conceive of abstract categories of offense and offender in the worst possible terms" and of prioritizing "the rhetorical supremacy of individual narratives about the suffering of crime victims over statistical arguments about the probabilities of reoffense").

The Commission staff has put together a draft discussion paper on the relative recidivism risk federal sex offenders pose. *See* Hofer & Blackwell, *supra* note 7, at 17 (showing through grouping of federal sex offenders into risk profiles that while Native Americans fall along the entire spectrum, on average, they have the lowest average scores). However, the Commission has neither seen nor used that study, which outlines a risk prediction approach to the sentencing of sex offenders, in developing recent amendments to the sex offender guidelines. Nevertheless, through restrictive framing of the guideline for repeat and dangerous sex offenders, it has removed situational sex offenders—many Native Americans—from an additional sentence enhancement.

125. Unless a judge departs from the given sentencing range—a decision limited by narrow departure factors—she must rely largely on the seriousness of the offense committed and the offender's prior record in fashioning a sentence.

consider certain mitigating factors in imposing sentences.[126]

The danger of numerical guidelines is that legislators can easily demand sentence enhancements by asking either for an increase in the base level of an offense or an enhancement based on a particular offense characteristic. Frequently, they do so because "they believe that the adoption of a 'populist punitive' stance will satisfy a particular electoral constituency."[127] Therefore, specific sentence demands tend to be relatively unpredictable since they often serve only short-term political gain.[128] For that reason it may be difficult, even for an expert body such as the Commission, to be prepared for sudden, heightened penalty demands, especially when they are based on particular offenses. However, the trend toward increased penalties for sex offenders is not a recent phenomenon, but has captured Congress's attention since at least the early-1990s.[129] Therefore, it is incumbent upon the Commission now to fulfill its statutory mandate and live up to its unique position in the federal system, which allows and empowers it to assist Congress in making responsible and factually grounded sentencing decisions.[130] As political campaigns and even legislation become "a battle of images,"[131] it is crucial that the Commission participate in the shaping of these images, basing them on accurate data rather than conjecture.

One may ask why the Commission should not merely follow congressional mandates, as members of Congress, elected by their constituents, represent the will of the people. Why should deference to Congress not merely indicate compliance with the Sentencing Reform Act's demand that the Commission consider "the community view of the gravity of the offense"[132] and "the public concern generated by the offense"?[133]

The 1984 Act limited these considerations by stating that they should be noted only to the extent relevant.[134] They may not be relevant in situations

126. *See* Freed, *supra* note 100, at 1728-40 (criticizing appellate courts' willingness to reject departures, which is based on an incorrect reading of the Sentencing Reform Act); *see also* Paul J. Hofer et al., *Departure Rates and Reasons After* Koon v. United States, 9 FED. SENTENCING REP. 284, 286 (1997) (stating that the U.S. Supreme Court decision giving district courts more room to depart had no dramatic impact on the number of departures one year later).

127. Bottoms, *supra* note 95, at 39-40.

128. *See id.* at 47-48 (discussing how politicians use voters' feelings of insecurity to gain support by promising stricter sentencing).

129. George B. Stevenson, *Federal Antiviolence and Abuse Legislation: Toward Elimination of Disparate Justice for Women and Children*, 33 WILLAMETTE L. REV. 847, 855-71 (1997) (describing numerous pieces of legislation passed throughout the early and mid-1990s which imposed more severe sentences on those committing domestic violence, sexual assault, and child abuse).

130. *See supra* notes 8-12 and accompanying text (describing the role of the U.S. Sentencing Commission).

131. John J. LaFalce, *The Packaging of Public Policy: Government by Euphemism and Slogan*, *in* 48 VITAL SPEECHES OF THE DAY 226, 226 (1982).

132. 28 U.S.C. § 994(c)(4) (1994).

133. *Id.* § 994(c)(5).

134. *See id.* § 994(c) ("The Commission . . . shall take them into account only to the extent

in which skewed accounts of individual offenders create an inaccurate "community view" unrepresentative of the universe of sex offenders. In this situation, it should be the task of an expert body—such as the Commission—to provide accurate and unbiased information to the public so it can form a more realistic impression of an offender group.

Community views might become especially relevant when criminal justice strategies cause widespread and large-scale dissatisfaction with the criminal justice system and the imposition of sentences, as has been the case in Indian country.[135] While Native Americans are not the only societal group critical of federal sentences, and even though not all Native Americans are opposed to the current guideline system, it is incumbent upon the Commission to explore in greater detail this feeling of disenchantment.[136] Because of the historic and ongoing deprivation of Native Americans and the unique political relationship between Congress and Native American nations, the federal government has a special obligation to treat Native Americans with sensitivity and understanding. This applies even more in an area of sentencing that has been driven by partially informed and sensationalized discourse which has created abstract categories portraying all sex offenders in the darkest terms.

VI. A PROPOSED AGENDA FOR THE COMMISSION TO ACHIEVE GREATER FAIRNESS

The Commission's reluctance to tackle the issue of Native American sentencing in more detail may be due to the fact that it challenges the Commission to define a new and more proactive role for itself, and because it raises fundamental questions about the current guideline structure.

The 1984 Act requires the Commission to base sentencing guidelines on "certainty and fairness in sentencing."[137] While that provision is often read as if "certainty" implied "fairness," the term "fairness" raises questions of proportionality. Sentences must be "fair" in light of the harm committed and the individual culpability of the offender. That aspect of "fairness" appears to have been lost in current law-and-order politics which has led to the imposition of increasingly harsher penalties on all sex offenders, independent of culpability and likelihood of re-offending.

Commentators on Native American sentencing have argued that the current penalty levels for sexual offenders, as applied to Native Americans,

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that they do have relevance . . . .").

135. *See* S.D. ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, *supra* note 94, at ch. 3 (documenting widespread complaints about the criminal justice system, including federal sentences).

136. The Commission has made a promising start in this direction with its public hearing in Rapid City, South Dakota in June 2001.

137. 28 U.S.C. § 994(f) (1994).

do not accord with their culpability.[138] Because many Native American sex offenders do not fit the concept of the sexual "predator" based on whose profile the guidelines are frequently modeled, many of the sentences imposed on individual offenders are disproportionate to the wrongdoing and to the future risk these offenders pose. Since it is unlikely that Congress will vote for changes that would lead to lesser penalties, the Commission might have to make less visible changes to compensate for existing legislative demands.[139]

First, contrary to current policy and judicial decisions,[140] the Commission may allow and even encourage trial courts to consider state sentences for comparable offenses when imposing a federal sentence. This is justifiable where only a very small number of all offenses are tried in federal court, as is the case with Native American sex offenders,[141] and where the Native American sex offender resembles more the typical state offender, rather than the stereotypical federal sex offender. State sentencing regimes frequently allow for more flexibility than the federal system.[142]

Even though judicial consideration of comparable state offenses can be justified in the case of Native Americans on narrow grounds, it raises the larger issue of national uniformity. How realistic are national guidelines in a large and regionally diverse country?[143] To what extent is national uniformity desirable, and even if desirable, achievable?

Second, the Commission should allow for more departure opportunities so that district courts can consider the unique situation of Native Americans when sentencing them.[144] The Commission, however, has

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138. *See* Butcher, *supra* note 84, at 86 (noting that Native American sex offenders' actions "are often rooted in substance abuse and dependency, attention deficit and impulse control disorders, and affective disorders, such as depression," thereby tending to be amenable to treatment and presenting a relatively low recidivism risk).

139. For an example, see Andrew von Hirsch, *Proportionality and Parsimony in American Sentencing Guidelines: The Minnesota and Oregon Standards, in* THE POLITICS OF SENTENCING REFORM 149, 166 (Chris Clarkson & Rod Morgan eds., 1995). Such an action, however, might raise problems of democratic legitimacy.

140. *See* United States v. Vilchez, 967 F.2d 1351, 1353-56, *amended by* 1992 U.S. App. LEXIS 15373 (9th Cir. 1992) (holding that disparity between federal and state sentences is not a proper departure ground).

141. Only 241 sexual abuse cases were tried in federal court during fiscal year 2000. 2000 SOURCEBOOK, *supra* note 5, at 12, tbl.3.

142. For an almost extreme example of sentencing disparity between the federal and state systems, see Butcher, *supra* note 84, at 85.

143. *See* United States v. Banuelos-Rodriguez, 173 F.3d 741, *vacated by* 195 F.3d 454 (9th Cir. 1999) (reversing a panel decision that held interdistrict sentencing disparity constitutes legitimate ground for downward departures); Lewis J. Liman, *Should Interdistrict Disparity Be a Permissible Basis for Departure?*, 12 FED. SENTENCING REP. 154, 155-56 (1999) (arguing that interdistrict disparity caused by prosecutorial discretion should not represent basis for downward departure).

144. *See* Kornmann, *supra* note 84, at 72-73 (urging that trial judges be allowed to consider factors, such as lack of guidance as youth, that are "not relevant" in guideline cases).

declared most of the factors that apply to Native Americans irrelevant, or only to be used in extraordinary circumstances.[145]

To prevent race-based sentencing from occurring, the Guidelines prohibit any consideration of race.[146] In considering the background of Native Americans, courts, however, do not have to run afoul of the prohibition in the 1984 Sentencing Act to consider race in sentencing decisions.[147] The spirit of the Guidelines would also reject consideration of cultural factors.[148] In light of the difficulties in understanding such factors, especially in a context where cultural and gender demands clash, such a departure is likely to cause more harm to victims and offenders alike.[149] A judge does not have to consider either race or culture—factors that may be difficult to define and cabin—in imposing a more equitable and fair sentence on Native American sex offenders who live on reservations.[150] Residents of reservations on which socio-economic deprivation is manifest and where alcoholism and violent crime abound should be given the opportunity to show that extreme social and economic conditions contributed to their offense and therefore diminished their culpability.[151] While this can be framed as a narrow departure ground, the Commission has to consider whether other societal groups should benefit from a similar opportunity. This raises the perennial question—how far should individualization of sentencing reach? Sentences proportionate to individual culpability should not be sacrificed on the altar of uniformity.

To achieve fairness for Native American sex offenders, the Commission must act now. It will have the opportunity and challenge to raise fundamental issues of punishment, and to re-open a national debate on appropriate sanctions. To do so successfully, the Commission must begin a

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145. *See id.* at 72 (discussing in detail policy statement 5H1.12—"Lack of Guidance as a Youth and Similar Circumstances").

146. *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (2000) ("[Race is] not relevant in the determination of a sentence."). This is one of the few guideline provisions that appears undisputed. Even though the Guidelines have reduced race disparities, they have not eliminated them. *Special Report: Special Committee on Race and Ethnicity*, 64 GEO. WASH. L. REV. 189, 318-20 (1996) (recounting numerous studies, all of which indicated racial disparity in sentencing even after the institution of the Guidelines).

147. 28 U.S.C. § 994(d) (1997) ("The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race . . . of offenders.").

148. *But see* Sands, *supra* note 98, at 147 (proposing "culture" as departure ground).

149. For a discussion of these problems, see Razack, *supra* note 80.

150. Canadian courts may consider an offenders's aboriginal background and, because of it, impose a lesser prison term than on a nonaboriginal offender. *See* R. v. Gladue, [1999] S.C.R. 688, *available at* http://www.droit.umontreal.ca/doc/csc-scc/en/rec/html/gladue.en.html (last visited Nov. 12, 2001) (on file with the *Iowa Law Review*).

151. *See* United States v. Big Crow, 898 F.2d 1326, 1331-32 (8th Cir. 1990) (affirming downward departure for offender who had a successful employment record and community involvement and no prior convictions despite growing up under extremely difficult conditions on a reservation).

national discourse on the causes of crime and on alternatives to the punitive approaches currently favored.[152] It will be a monumental effort, but it promises greater justice and fairness for all.

152. *Cf.* BECKETT, *supra* note 30, at 106 (arguing that Sentencing Guidelines are based on an ideological framework that favors "replac[ing] social welfare with social control as the principle of state policy").