

ADDICTED TO INCARCERATION: A FEDERAL JUDGE REVEALS SHOCKING TRUTHS ABOUT FEDERAL SENTENCING AND FLEETING HOPES FOR REFORM

Mark W. Bennett*

ad·dic·tion –
uh-**dik**-shuh n

noun

1. the state of being enslaved to a habit or practice or to something that is psychologically or physically habit-forming....¹

I. INTRODUCTION

Federal sentencing is a tragic mess. Thirty years of conflicting legislative experiments began with high hopes but resulted in mass incarceration.²

I am a small-town Iowa-country federal judge, but I have sentenced more than 4000 offenders to federal prison.³ Federal sentences, especially in drug cases, are all too often bone-crushingly severe. That is especially true for most of the endless drug offenders I see: non-violent, low-level, long-term and severe drug addicts. These folks stand before me for sentencing in sharp contrast to the super violent drug cartel kingpins we read about and see on television, Netflix, and in the movies. I can count on one hand the number of kingpins I have sentenced, and each received a very severe sentence, including affirming a sentence of death imposed by a jury after a three-month trial.⁴ In contrast, ninety-five percent or more of those I sentence in drug cases can't afford to hire counsel, pay their rent or mortgage, or adequately provide for their children because of their severe addiction. Their sole focus in life becomes snorting, smoking, or injecting drugs.

* Mark W. Bennett is in his 24th year as a U.S. District Judge in the N.D. of Iowa, with chambers in Sioux City, a small, heavily blue collar mid-western city of about 85,000.

¹ *Addiction*, DICTIONARY.COM, <http://www.dictionary.com/browse/addiction> (last visited April 16, 2018).

² Paul Hofer, *After Ten Years of Advisory Guidelines, and Thirty Years of Mandatory Minimums, Federal Sentencing Still Needs Reform*, 47 U. TOL. L. REV. 649, 649 (2016).

³ This includes sentencing in four districts spanning the two in Iowa to the District of Arizona and the District of the Northern Mariana Islands. Additionally, I have reviewed and ruled on dozens of sentencing issues while sitting by designation on the U.S. Court of Appeals for the Ninth Circuit.

⁴ *United States v. Honken*, 381 F. Supp. 2d 936 (N.D. Iowa 2005), *aff'd*, 541 F.3d 1146, 1175 (8th Cir. 2008), *cert. denied*, 558 U.S. 1091 (2009). Uber rare federal death penalty cases are the only time the jury decides a sentence in a federal criminal case – their choice is binary – death or life in prison. In all other cases, the length of the sentence is the responsibility of a federal district judge.

Their prior station in life is irrelevant to them. Their prior productive lives are a distant, hazy, and foggy memory. They are the grist of the federal sentencing mill and federal mass incarceration. Of those who come before me for an addiction to crack cocaine, they are almost always Black. If it is methamphetamine, they are usually White or Hispanic, and are often employed in blue collar industrial jobs like meat packing.

Not all illegal drugs are treated alike in federal sentencing. Drug quantity sentencing guidelines for crack cocaine (mostly Black offenders) now use an 18:1 crack-to-powder (mostly White and Hispanic offenders) drug quantity ratio.⁵ However, it is a whopping improvement from the former 100:1 crack-to-powder ratio.⁶

There are two other issues that have also led to the mass incarceration of federal drug offenders: 1) Congressionally mandated mandatory minimum sentences; and 2) Congressionally mandated sentencing enhancements that often result in low level, non-violent, addict drug offenders having their already harsh mandatory minimum sentence doubled or even enhanced to a life sentence with no release except with a Presidential pardon or commutation. My favorite target for criticism of these unfair and arbitrarily and capriciously applied sentencing enhancements is known as a § 851 enhancement.⁷

The nation's federal prisons are bursting at the seams with the offenders that I just described. The simple truth is that Congress, the United States Sentencing Commission, and federal trial and appellate judges are addicted to incarceration.

The United States of America leads the world in mass incarceration. We incarcerate more people per capita than China, Saudi Arabia, Russia, and even North Korea. In fact, we incarcerate a higher percentage of our population than

⁵ United States v. Williams, 788 F. Supp. 2d 847, 849 (N.D. Iowa 2011) (rejecting the new 18:1 crack powder ratio from the Fair Sentencing Act and continuing with a variance of 1:1).

⁶ United States v. Gully, 619 F. Supp. 2d 633, 646 (N.D. Iowa 2009) (rejecting the guideline ratio of 100:1 for crack versus powder cocaine stating, “[t]he court finds that it has the discretion to impose a 1:1 crack/powder ratio in sentencing and that a 1:1 ratio is appropriate not only in this case, but in all ‘crack’ cases, while other factors for which higher ratios have been used as a proxy are properly addressed in the consideration of the 18 U.S.C. § 3553(a) factors.”); For a more detailed discussion of my longstanding judicial policy disagreements with the crack cocaine guidelines and my vindication by the U.S. Supreme Court, see Mark W. Bennett, *A Slow Motion Lynching? The War on Drugs, Mass Incarceration, Doing Kimbrough Justice, and a Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873, 873 (2014) [hereinafter Bennett, *A Slow Motion Lynching*].

⁷ See United States v. Young, 960 F. Supp. 2d 881, 882 (N.D. Iowa 2013) (giving a detailed explanation of how § 851 sentencing enhancements work and my blistering empirical study of how they are arbitrarily and capriciously applied by the Department of Justice).

any nation on Earth.⁸ The majority of those incarcerated are poor and people of color. Sections of most major metropolitan cities have been ravaged by the many effects of mass incarceration: families being ripped apart, a generational cycle of incarceration, inadequate housing, and diminished employment opportunities for felons. The list goes on and on. This mantra has become well known. Less has been written, however, about why federal judges seem to be addicted to incarceration. As the above dictionary definition provides, do federal judges incarcerate such a high percentage of defendants because they are in “the state of being enslaved to habit or practice” or because of a strong and harmful need to regularly do something?

In a prior article on mass incarceration and the role of discretion, my co-author (a former federal prosecutor and one of the nation’s leading critics of federal sentencing and mass incarceration) and I started the piece with this:

“Speaking to the camera in Eugene Jarecki’s film, *The House I Live In*, David Simon said, “The drug war is a holocaust in slow motion.” Simon, who created the seminal television series about narcotics, *The Wire*, did not use the word “holocaust” casually.

Like most provocative allusions, applying the word “holocaust” to the drug war is part truth and part gross exaggeration. The drug war clearly differs from a holocaust in terms of out-come, certainly: It primarily seeks the imprisonment of millions rather than death. The drug war and a holocaust, though, do share one crucial commonality. Both occur when thousands who work within the system are complicit in something they should know is wrong. Both represent a failure of the moral compass, not only of society as a whole, but of those who exercise their discretion to build and maintain the mechanism of injustice. We write this not only as a societal critique, but also as a confession. As a former federal prosecutor and a sitting federal judge, respectively, we have been among those pulling the levers that operate this cruel machine of mass incarceration.”⁹

While I will comment on sentencing in areas other than drugs, I focus on methamphetamine and crack because, in the most recent years, over eighty-five percent of the drug sentences I impose are in methamphetamine cases, with most of the rest fifteen percent being crack cases. I started populating the Federal Bureau of Prisons in 1994, the year I was appointed a federal district judge. The number

⁸ *Id.* at 880.

⁹ Mark Osler & Mark W. Bennett, A “Holocaust in Slow Motion?”: *America’s Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. SOC. JUSTICE 117, 118-119 (2014) (footnotes omitted).

one factor that Congress and the United States Sentencing Commission, and therefore, the sentencing guidelines, use to determine a drug offender's "guidelines sentencing range" is drug quantity. The second factor is drug type—with the harshest sentences reserved not for heroin, but rather for methamphetamine and crack. This is true, for example, even if the offender does not know the quantity or even the kind of drugs she is transporting in her vehicle. In my view, based on my experience, drug quantity and drug type are often very misleading proxies for criminal responsibility, and thus the length of federal sentences, especially when the case involves a mandatory minimum.¹⁰ How many readers realize, as explained later in this article, that a person with no prior felony convictions of any kind, but instead with two 40-year-old aggravated marijuana misdemeanor state convictions, incurred at the age of eighteen, with no sentence of jail time but only a small fine, can be sentenced in federal court for possessing 50 grams of methamphetamine (the weight of 10 packages of sugar on the table at your favorite coffee shop) to mandatory life?

The guiding principle of federal sentencing is that a "court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of federal sentencing.¹¹ This simple Congressional mandate has had a very tortured history and is much more complex than at first blush. For instance, this so-called parsimony clause applies only after a federal district judge correctly computes the now-"advisory" guidelines range. There also remains a pervasive myth, especially among federal trial judges, thirty years after the Guidelines have been in effect, that the Guidelines are empirically based.

These themes—the sheer brutality of federal sentencing and the addiction of judges to harsh sentences (especially in drug cases); racial disparity in the type and quantity of drugs; mandatory minimums and § 851 sentencing enhancements; and the lack of empirical bases for most guidelines (especially the drug guidelines)—are explored in this article. The final section discusses my increasingly fleeting hope for real, significant federal sentencing reform. Before turning to these issues, however, a brief history of federal sentencing is presented to provide context for where we have been, where we are, and perhaps where we are headed.

¹⁰ *United States v. Hayes*, 948 F. Supp. 2d 1009, 1016 (N.D. Iowa 2013) (Policy disagreement with the methamphetamine guideline, in part because drug quantity is often a poor proxy for criminal responsibility, resulting in an across-the-board reduction of one-third in most methamphetamine cases).

¹¹ 18 U.S.C. §3553(a) (2018).

II. A BRIEF HISTORY OF FEDERAL SENTENCING

A. Federal Sentencing Before the Guidelines: The Long History of Unfettered Sentencing Discretion

Before the guidelines . . . federal judges had virtually unlimited discretion to sentence a convicted defendant anywhere within the range created by the statutory maximum and minimum penalties for an offense.¹²

A conversation between a drug defendant and counsel, pre-Guidelines:

Defendant: What would my sentence likely be if I cop a plea?

Counsel: We have a good judge and he will be sympathetic to the fact that you are an addict, have never benefited from drug treatment, are employed, have no prior criminal record, and provided for your family and served in the military. Based on my experience with this judge, I think it likely you will get probation.

Defendant: How soon can I plead?

From the inception of the federal judiciary, federal judges were entrusted by Congress with wide discretion in sentencing.¹³ Federal judges, in most cases, could sentence anywhere from probation to the statutory maximum sentence and there was little appellate review of the judge's discretion in imposing a sentence.¹⁴ However, criticism of such wide judicial discretion in sentencing, on both sides of the political spectrum, increased by the 1950's.¹⁵ "Liberal reformers argued that indeterminate sentencing was unsuccessful in terms of rehabilitation, created

¹² Frank O Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1321 (2005).

¹³ Osler & Bennett, *supra* note 9, at 121; Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993); *Mistretta v. United States*, 488 U.S. 361, 363 (1989).

¹⁴ Anjelica Cappellino & John Meringolo, *The Federal Sentencing Guidelines and the Pursuit of Fair and Just Sentences*, 77 ALB. L. REV. 771, 774 (2014).

¹⁵ *Id.* at 775 (footnote omitted).

anxiety and uncertainty among prisoners due to disparities in sentences for the same crimes, ‘and was fundamentally at odds with ideals of equality and the rule of law.’”¹⁶ Alternatively, the right argued that sentences were too lenient.¹⁷

Often cited as a spearhead in the sentencing reform movement to restrain unfettered sentencing discretion, Judge Marvin Frankel, of the Southern District of New York, and a former Columbia law professor, published a book: *Criminal Sentences: Law without Order*.¹⁸ Judge Frankel wrote, “the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.”¹⁹ Judge Frankel argued in his book for an unprecedented administrative agency, a “Commission on Sentencing,” with the authority to enact “binding guides” on sentencing courts.²⁰

In 1975, Senator Edward M. Kennedy, after hosting a dinner with Judge Frankel and other scholars, decided to sponsor legislation on sentencing reform.²¹ It took nearly a decade for a bill to pass, but when it did it had “overwhelmingly strong bipartisan support and marked a new era for federal sentencing.”²²

B. The Sentencing Reform Act of 1984: The Mandatory Guidelines Era

At or near the root of virtually every serious criticism of the guidelines is the concern that they are too harsh, that federal law requires imposition of prison sentences too often and for terms that are too long.²³

A conversation between a drug defendant and counsel, mandatory Guidelines era:

Defendant: What would my sentence likely be if I cop a plea?

Counsel: Your mandatory sentencing guidelines range is 70-87 months.

Defendant: What??? I have no prior criminal record, I have never been sentenced to even one day in jail. I am an addict and have never benefitted from drug treatment. I have maintained my employment

¹⁶ *Id.* (footnote omitted).

¹⁷ *Id.*

¹⁸ MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1972).

¹⁹ *Id.* at 5.

²⁰ Stith & Koh, *supra* note 13, at 228.

²¹ *Id.* at 230; For a detailed account of federal sentencing legislative efforts in both the 70’s and 80’s leading up to the final passage of the Sentencing Reform Act of 1984, *see id.* at 230-281.

²² Cappellino & Meringolo, *supra* note 14, at 777.

²³ Bowman, *supra* note 12, at 1328.

despite my addiction and fed and clothed my family. I served our country in two tours of duty in Afghanistan in Operation Enduring Freedom. With all this the judge will give me probation, don't you think?

Counsel: While these factors used to matter, the Guidelines no longer usually consider them, and the judge will not consider them, But, we have a good judge, so based on my experience with him there is good news - he will sentence you to the bottom of the guidelines range of 70 months and likely not go higher.

Defendant: Good news??? You're fuc*ed!!! I want a real lawyer.

The historically virtually unfettered discretion of federal sentencing judges changed dramatically with the passage of the far-reaching Sentencing Reform Act (SRA) in 1984.²⁴ The SRA established the United States Sentencing Commission and the creation of mandatory Sentencing Guidelines. Their purpose was to provide alleged “certainty” and “fairness” in sentencing and reduce what Congress believed was “shameful” unwarranted sentencing disparity.²⁵

The mandatory Guidelines, effective November 1, 1987, created 258 cells of “grid and bear it” sentencing ranges, which are still in effect and known as the Sentencing Table.²⁶ Professor Frank O. Bowman III, a widely recognized leading expert and frequently cited scholar of federal sentencing, insightfully observed: “The federal sentencing guidelines are, in a sense, simply a long set of instructions for one chart: the sentencing table.”²⁷ This Sentencing Table is the culmination of an extremely complicated, several hundred-page guideline manual turned into a two dimensional grid with forty-three offense levels for criminal conduct down a vertical axis, and six categories of criminal history across a horizontal axis.²⁸ Each of the 258 cells is formed by the intersection of the two axes and creates 258 sentencing range boxes expressed in months, *e.g.* 262-327.²⁹

In the quest for uniformity in federal sentencing, the Guidelines also brought untold complexity:

The United States Sentencing Commission's response to Congress' mandate to eliminate sentence disparity is, of course, the sentencing

²⁴ Osler & Bennett, *supra* note 9, at 121.

²⁵ *Id.*

²⁶ U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2017) [hereinafter GUIDELINES MANUAL].

²⁷ Bowman, *supra* note 12, at 1324.

²⁸ Brenda L. Tofte, *Booker at Seven: Looking Behind Sentencing Decisions: What is Motivating Judges?* 65 ARK L. REV. 529, 541 (2012).

²⁹ GUIDELINES MANUAL, *supra* note 26, at 262-327, 420.

guidelines. Undoubtedly, the commission's attempt to anticipate every nuance of criminal conduct for every crime named in the United States Code and elsewhere and to quantify every shade of criminal culpability has brought greater uniformity to criminal sentencing in the federal courts. Whether the complex matrix of presumptions, rules, regulations, and arithmetical formulae that comprise the sentencing guidelines have enhanced or diminished substantial justice in federal court sentencing is another matter.³⁰

Over a quarter-century ago, Professor Albert W. Alschuler observed that the symbol of the 70's and 80's sentencing reform movement "was the 258-box federal sentencing grid, which now should be relegated to a place near the Edsel in a museum of twentieth-century bad ideas."³¹

C. The Booker Revolution (2005) and Advisory Guidelines

A conversation between a drug defendant and counsel, advisory Guidelines era:

Defendant: What would my sentence likely be if I cop a plea?

Counsel: Your advisory sentencing guidelines range is 70-87 months.

Defendant: What??? I have no prior criminal record, I have never been sentenced to even one day in jail. I am an addict, and have never benefitted from drug treatment. I have maintained my employment despite my addiction and fed and clothed my family. I served our country in two tours of duty in Afghanistan in Operation Enduring Freedom. With all this the judge will give me probation, don't you think?

Counsel: We will present evidence on all the mitigating factors you just mentioned – we have been able to do this since the *Booker* decision in 2005. The mitigating factors are very strong. We have a good judge, so based on my experience with him there is good news – he likely will grant our motion for a downward variance.

Defendant: What does that mean? A fancy way of saying probation, I hope.

³⁰ United States v. Barnes, 910 F.2d 1342, 1346 (6th Cir. 1990) (Ryan, J., concurring).

³¹ Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 850 (1991).

Counsel: No, it means he can consider all the mitigating factors you just listed and go below the bottom of the guidelines range. I think he will do a large downward variance, but probation is very unlikely.

Defendant: What if you are wrong and he doesn't vary downward?

Counsel: You're fuc*ed.

In 2005, the U.S. Supreme Court decided the landmark case of *United States v. Booker*.³² *Booker* was revolutionary in declaring the mandatory Guidelines unconstitutional because they allowed federal judges to enhance sentences using facts not reviewed by juries, in violation of the Sixth Amendment right to trial by jury.³³ However, by excising the mandatory nature of the Guidelines and rendering them “effectively advisory,” the Sixth Amendment was not implicated.³⁴

The focus was now broadened to include statutory sentencing factors contained within 18 U.S.C. § 3553(a), which include, *inter alia*: “the nature and circumstances of the offense and the history and characteristics of the defendant”; “the need for the sentence imposed,” including “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense”; “to afford adequate deterrence to criminal conduct”; “to protect the public from further crimes of the defendant”; and “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”

Thus, as I have previously written, “in the arc of just twenty years, federal sentencing has gone from virtually unlimited sentencing discretion, to virtually no sentencing discretion, back to sentencing discretion that emphasizes the ‘reasonableness of the sentence imposed.’”³⁵

Yet, the post-*Booker* sentencing catastrophe remains in full force. *Booker* did nothing to alleviate the major cause of federal mass incarceration: mandatory minimums and their first cousin, § 851 drug sentencing enhancements.

³² 543 U.S. 220 (2005).

³³ *Id.* at 231-32.

³⁴ *Id.* at 233.

³⁵ Bennett, *A Slow Motion Lynching*, *supra* note 6, at 878.

II. MANDATORY MINIMUMS AND § 851 SENTENCING ENHANCEMENTS

[M]andatory minimum sentences in drug cases distort the sentencing process and mandate unjust sentences. In the substantial percentage of cases in which they apply, they produce a sentencing regime that is worse than the one the Sentencing Reform Act of 1984 was enacted to replace....

Most importantly, too many nonviolent, low-level, substance-abusing defendants... “lose their claim to a future”—to borrow a phrase from Attorney General Eric H. Holder, Jr.—because lengthy mandatory prison terms sweep reasonable, innovative, and promising alternatives to incarceration off the table at sentencing.³⁶

A. A Brief History of Federal Mandatory Minimum Penalties in Drug Cases

It is true that mandatory minimum penalties have been part of the Nation’s federal criminal law since the original passage of the first federal series of criminal offenses in the 1790 Crimes Act.³⁷ The 1790 Crimes Act, which created only twenty-three crimes, imposed mandatory death for seven offenses: “treason, murder, three offenses relating to piracy, forgery of a public security of the United States, and the rescue of a person convicted of a capital crime.”³⁸ However, they looked nothing like the most commonly used mandatory minimums in today’s federal criminal law.³⁹

It was not until 1951 that Congress imposed a two-year mandatory minimum sentence in drug crimes for violating the Narcotic Drugs Import and Export Act.⁴⁰ This “revers[ed] its prior policy of disfavoring mandatory minimum penalties.”⁴¹ However, this shift in policy was short-lived, as mandatory minimum penalties for drug crimes became widely unpopular and the Nixon administration proposed—and Congress enacted in 1970—sweeping new drug legislation “which repealed nearly all mandatory minimum penalties for drug offenses.”⁴²

³⁶ U.S. v. Dossie, 851 F. Supp. 2d 478 (E.D.N.Y. 2012).

³⁷ Act of Apr. 30, 1790, ch. IX, 1 Stat. 112.

³⁸ *Id.*

³⁹ For a more detailed discussion of the history on mandatory minimum penalties in the United States, see U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, CH. 2, 7-36 (2011) [hereinafter REPORT (2011)].

⁴⁰ See Pub. L. No. 82-255, 42 Stat. 596, 767 (1951).

⁴¹ U.S. SENT’G COMM’N AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 11 (2017) [hereinafter REPORT (2017)].

⁴² REPORT (2011), *supra* note 39, at 22.

This Congressional dislike of mandatory minimum penalties for drug crimes was, again, short-lived. With lightning speed, Congress passed the Anti-Drug Abuse Act of 1986 (“ADAA”), establishing the comprehensive mandatory minimum penalties that are still with us today.⁴³

B. The Latest U.S. Sentencing Commission Data

As bone-crushingly severe as federal guidelines drug sentences are, I find that § 851 sentencing enhancements and mandatory minimum sentences are equally perverse culprits of unfair sentencing and federal mass incarceration. As of September 30, 2016, 49.1% of federal inmates were incarcerated for drug offenses.⁴⁴ As of the same date, 72.3% of drug offenders in federal prisons “were convicted of an offense carrying a mandatory minimum penalty, and more than half (50.4%) remained subject to that penalty at sentencing.”⁴⁵ Indeed, in fiscal year 2016, 52.8% of offenders convicted of federal drug offenses carrying mandatory minimums faced a mandatory minimum of ten years or more.⁴⁶ This jumped to nearly 60% for offenders convicted of methamphetamine offenses.⁴⁷

From 1995 to 2016, Black offenders in federal prisons were convicted of offenses carrying mandatory minimum penalties more frequently than any other race.⁴⁸ As of fiscal year 2016, 62.7% of Black offenders were convicted of an offense carrying mandatory minimum penalties.⁴⁹ There has been a slight but steady decline in this statistic since 2010 when it reached 69.4%.⁵⁰

C. Mandatory Minimum Sentencing in Federal Drug Crimes

⁴³ REPORT (2017), *supra* note 41, at 11 (Congress expanded the reach of these drug mandatory minimum penalties to drug conspiracies “thereby broadening the scope of mandatory minimum penalties to include virtually all offenders in drug trafficking organizations.”).

⁴⁴ U.S. SENT’G COMM’N MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 4 (2017).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at Appendix G, 136 (recognizing that 54.6% of methamphetamine offenders were convicted of an offense carrying a drug mandatory minimum penalty in fiscal year 2016).

⁴⁸ REPORT (2017), *supra* note 41, at 52.

⁴⁹ *Id.* at 52-53.

⁵⁰ *Id.* at 53.

The missing piece in the post-*Booker* analysis is the handcuffing role of mandatory minimum sentencing laws.⁵¹

1. The Current Status of Mandatory Minimum Penalties

After the passage of the SRA in 1984 (creating the U.S. Sentencing Commission and mandating sentencing guidelines), but before the guidelines were promulgated by the newly formed Commission and went into effect in 1987, Congress stamped through its chambers and onto President Reagan's desk for signing, the Anti-Drug Abuse Act of 1986 ("ADAA").⁵² The ADAA created mandatory minimum sentences based solely on drug quantity and the type of drug.⁵³ Professor Bowman has written that the ADAA—even more than the guidelines—was responsible for the “mushrooming number of federal prisoners and the increased severity of their sentences.”⁵⁴ After nearly a quarter century of sentencing more than 1000 low level, non-violent drug addicts to lengthy mandatory minimum sentences, many for possession of very small amounts of methamphetamine or crack cocaine (five grams is the approximant equivalent of a package of sugar), I have come to believe that the ADAA is the worst, most arbitrary piece of legislation ever passed by Congress. It has inflicted more damage on the poor, people of color, our Nation's inner cities, and has destroyed untold numbers of families and helped perpetuate the school-to-prison pipeline, than any other single event.

The ADAA is arbitrary because, before it passed, Congress did not have a single shred of scientific, pharmacological, or other evidence to support any of the drug quantities for any of the various drug mandatory minimums. While there is a plethora of examples, here is just one: under the ADDA, it takes only five grams of pure methamphetamine to trigger a five-year mandatory minimum, yet it takes 100 grams of heroin to trigger the same mandatory minimum.⁵⁵ How dare Congress engage in such arbitrary legislative nonsense.

As shocking as these numbers are from the U.S. Sentencing Commission, they are the lowest in recent history due to the significant charging policy changes

⁵¹ Jelani Jefferson Exum, *A Commentary on Judicial Discretion, Mandatory Minimums, and Sentencing Reform*, 28 FED. SEN. R. 209, 209 (2018).

⁵² Alan Dahl, *Eric Holder's Recent Curtailment of Mandatory Minimum Sentencing, Its Implications, and Prospects for Effective Reform*, 29 BYU J. PUB. L. 271, 273 (2014) (“The crack epidemic and the shocking death of Len Bias led to the expedited passage of the Anti-Drug Abuse Act of 1986.”).

⁵³ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified at 21 U.S.C. §§ 801-802, 841).

⁵⁴ Bowman, *supra* note 12 at 1329.

⁵⁵ REPORT (2017), *supra* note 41, at 11 (citing 18 U.S.C. § 841).

first initiated in 2010 by President Obama’s then-Attorney General Eric Holder.⁵⁶ The “Holder Memorandum,” as it became known, allowed federal prosecutors to make individualized decisions to “ensure that the charges fit the specific circumstances of the case,” and no longer required them to charge a mandatory minimum.⁵⁷ The Holder Memorandum was further refined on August 12, 2013, when Attorney General Holder “announced that it was time to ‘refine our charging policy regarding mandatory minimums for certain nonviolent, low-level drug offenders.’”⁵⁸ The 2013 Holder Memorandum provided that federal prosecutors “should decline to charge the quantity necessary to trigger a mandatory minimum sentence if the defendant meets” the four requirements of the Memorandum.⁵⁹

Unfortunately, these modest changes in charging federal mandatory minimums did not last long. On May 10, 2017, President Trump’s Attorney General, Jeffery Beauregard Sessions III, rolled back the reforms in the Holder Memorandum in his own Sessions Memorandum noting the “core principle that prosecutors should charge and pursue the most serious, readily provable offense . . . [and] [b]y definition, the most serious offenses are those that carry the most substantial guideline sentences, including mandatory minimums.”⁶⁰

The Session Memorandum specifically stated that the Holder Memorandum’s positions on charging mandatory minimums and § 851 sentencing enhancements were immediately rescinded.⁶¹ Former Attorney General Holder quickly responded that Attorney General Session’s new policy was “unwise and ill-informed” and “this reversal is driven by voices who have not only been discredited but until now have been relegated to the fringes of this debate.”⁶²

⁵⁶ *Id.*, at 23-24.

⁵⁷ *Id.*

⁵⁸ Dahl, *supra* note 52, at 271.

⁵⁹ U.S. DEPT. OF JUSTICE, Attorney General Eric Holder, Memorandum, Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (August 12, 2013) (the four requirements were: 1) no violence or threat of violence, no serious physical injury or death, use of a weapon or trafficking to minors; 2) no significant ties to large-scale drug trafficking; 3) the defendant was not an organizer, leader, manager or supervisor in drug activity; and 4) the defendant did not have a significant criminal history.); *Id.*

⁶⁰ U.S. DEP’T. OF JUSTICE, Attorney General Jeff Sessions, Memorandum: Department Charging and Sentencing Policy (May 10, 2017), *available at*: <https://www.justice.gov/opa/press-release/file/965896/download>.

⁶¹ *Id.* at note 1.

⁶² Rebecca R. Ruiz, *Attorney General Orders Tougher Sentences, Rolling Back Obama Policy*, N.Y. TIMES, May 12, 2017, <https://www.nytimes.com/2017/05/12/us/politics/attorney-general-jeff-sessions-drug-offenses-penalties.html>

2. Relief from Mandatory Minimum Penalties in Drug Sentencing

No discussion of mandatory minimums would be complete without mentioning the two ways an offender subject to a drug mandatory minimum penalty may avoid it: 1) the so-called “safety valve”; and/or 2) cooperating with the prosecution by providing “substantial assistance.”

The safety valve was created by 18 U.S.C. § 3553(f). It provides that defendants who meet the following requirements may be sentenced without regard to the mandatory minimum: no more than one criminal history point, no violence or threat of violence in the offense, no possession of a firearm or dangerous weapon, the offense did not involve serious injury or death, the defendant was not an organizer, leader, manager, or supervisor in the offense, and prior to sentencing truthfully provided the prosecution with all information related to the offense or offenses.⁶³ Practically speaking, Black offenders are less likely to qualify for the safety valve than White or Hispanic offenders because Black offenders are less likely to be in Criminal History I.⁶⁴

The second way to obtain relief from a mandatory minimum sentence is for a defendant to cooperate with the prosecution in the investigation or prosecution of another and hope the prosecution moves the court for a “substantial assistance” reduction. However, a substantial assistance motion can only be made by the prosecution, with neither the sentencing judge nor the defense lawyer having any ability to make the motion.⁶⁵

In fiscal year 2016, 61.3% of offenders who were subject to mandatory minimum penalties at sentencing did not obtain relief from them.⁶⁶ Of those that did, 18.8% obtained a substantial assistance departure, 14.3% received the safety valve, and 5.5% received both.⁶⁷ In fiscal year 2016, offenders sentenced pursuant to a mandatory minimum penalty received an average sentence of 138 months,

⁶³ 18 U.S.C. § 3553(f) (2010) (Defendants who are safety-valve-eligible also receive a two-level decrease in their guidelines calculation, pursuant to USSG § 2D1.1).

⁶⁴ REPORT (2017), *supra* note 41, at 40-41.

⁶⁵ 18 U.S.C. § 3553(e) (2010) (enacted as part of the ADAA); FED. R. CRIM. P. 35(b) (2009) (under specific requirements in the rule, provides a motion can also be made, only by the prosecution, post-sentencing, to allow the sentencing judge to reduce the sentence without regard to the mandatory minimum. The guidelines, USSG § 5K1.1, also allow for a substantial assistance motion made in the sole discretion of the prosecution so that the sentencing judge can sentence below the bottom of the guidelines range, but without the additional § 3553(e) motion, may not go below the mandatory minimum).

⁶⁶ REPORT (2017), *supra* note 41, at 39.

⁶⁷ *Id.*

more than twice the average of sixty-seven months for offenders who received relief from a mandatory minimum penalty.⁶⁸

D. The Current Status of § 851 Sentencing Enhancements in Federal Drug Crimes

I reserve my harshest criticisms for the arbitrary and capricious infliction of the grossly excessive drug punishments created by § 851 sentencing enhancements.⁶⁹ Pursuant to the federal drug penalty mandatory minimums set forth in 21 U.S.C. § 841(b)(1)(A), if a defendant is subject to a ten-year mandatory minimum sentence but has a prior “felony drug conviction,” the mandatory minimum is doubled to twenty years, and if there are two prior “felony drug convictions,” the mandatory minimum is life.⁷⁰ In the federal system, life means life because there is no parole. Even more alarming is that the definition of the term “felony drug conviction” adopted by Congress is a sham. In effect and under the congressional definition, the drug sentencing enhancements apply to a defendant who does not actually have a prior felony drug conviction. This is because definition applies to state court misdemeanor convictions where the defendant could have been sentenced to at least a year and a day but actually received probation, never spending a day in jail, rather simply paying a small fine.⁷¹

Moreover, unlike criminal history scoring for guidelines purposes, it does not matter how old the conviction is—it could be 40 or more years old. Here is an example I used in *United States v. Young* that unequivocally demonstrates just one of the many arbitrary and capricious features of § 851 sentencing enhancements:

For example, take two low-level drug addict co-defendants who...pled guilty to and were sentenced for the same conspiracy to manufacture a small amount (as little as five grams) of homemade methamphetamine, made from cough medication purchased at a local drug store. One was non-violent; the other had a long history of violence. They were both fifty years old and lived next to each other, and both worked the night shift at a local manufacturing plant. Bob had a thirty-year-old prior aggravated misdemeanor conviction in

⁶⁸ *Id.* at 44.

⁶⁹ 21 U.S.C. § 851 (1970).

⁷⁰ 21 U.S.C. § 841(b)(1)(B) (1970) (Lower drug quantity cases charged under 21 U.S.C. § 841(b)(1)(B) that trigger a five-year mandatory minimum are doubled to ten years by § 851 sentencing enhancements).

⁷¹ *United States v. Young*, 960 F. Supp. 2d 881, 885 (N.D. 2013) (Bennett, J.).

Iowa for possession of a small amount of marijuana. In 1993, he paid a \$100 fine, was given probation, never served a day in jail, and successfully completed his short term of probation. He had no other prior convictions. His co-defendant, John, had one prior armed robbery conviction in 2000, served an eight-year prison sentence, and violated his parole on several occasions before he was discharged in 2011. John also had four assault convictions before his armed robbery conviction. John would likely have received a mandatory minimum five-year sentence, but because Bob's prior misdemeanor drug conviction is a predicate to a § 851 enhancement, and John's prior robbery and assault convictions are not, Bob would likely have received, at a minimum, the mandatory minimum sentence of ten years in a district where § 851 enhancements were routine. This was justice? Indeed, a major drug trafficker in federal court would not receive a recidivist enhancement with a prior state court murder conviction, but a low-level drug addict would receive such an enhancement with a prior qualifying state court misdemeanor drug conviction. This was justice?⁷²

Additionally, the exclusive and unreviewable decision to drop the hammer of § 851 sentencing enhancements lies with federal prosecutors. And, as I wrote in *Young*, “[t]hese decisions are shrouded in such complete secrecy they make the proceedings of the former English Court of Star Chamber appear to be a model of criminal justice transparency.”⁷³ Federal prosecutors are never required to disclose to the offender, defense counsel, the sentencing judge, the appellate courts, or the public, why they did or did not seek a § 851 sentencing enhancement. In my nearly quarter century of sentencing federal drug offenders, neither I nor our district's career probation officers nor the criminal defense counsel that appear before me have ever been able to determine any consistent pattern or policy as to why § 851 sentencing enhancements are sought or not.⁷⁴ I suggest this is because the Department of Justice lacks not only an important objective national policy on the application of such enhancements, but also an oversight and review method, let alone empirical analysis, to ensure even modest consistency in the application of § 851 sentencing enhancements.

The only available data on § 851 sentencing enhancements comes from the U.S. Sentencing Commission's 2011 report to Congress on mandatory

⁷² *Id.* at 891–92 (footnote omitted).

⁷³ *Id.* at 883.

⁷⁴ *Id.* at 887–88.

minimum penalties.⁷⁵ Because this report did not contain the raw data, I requested it from the Commission. They quickly supplied it and “I then re-analyzed and reformatted the raw data in several significant ways that go far beyond the Commission’s analysis.”⁷⁶ This revealed shocking truths about the bizarre, irrational, and unwarranted application of § 851 sentencing enhancements nationwide.

I found shocking and massive disparities in the application of these enhancements between districts in the same states, in neighboring districts across state lines, in intra-circuit districts, and in districts across the circuits.⁷⁷ I labeled this the “Wheel of Misfortune” after the popular game show *Wheel of Fortune*.⁷⁸ For example, a defendant eligible for a § 851 sentencing enhancement in the Northern District of Iowa was 2,531.95% more likely to have their sentence enhanced than a defendant in the District of Nebraska (which I can see out the window of my chambers in the Northern District of Iowa.)⁷⁹ This is not an anomaly. A defendant eligible for a §851 sentencing enhancement in the Northern District of Iowa was 1,981.25% more likely to have their sentence enhanced than a defendant in the District of South Dakota,⁸⁰ which is less than two miles from my chambers in the Northern District of Iowa.

Other examples of gross disparities are abundant. A defendant in the Eastern District of Tennessee was 3,994% more likely to have their sentence at least doubled with a § 851 sentencing enhancement than in their sister district in the Western District of Tennessee.⁸¹ A defendant in the Northern District of Georgia was 2,470% more likely to have their sentence at least doubled with a sentencing enhancement under § 851 than in their sister district in the Middle District of Georgia.⁸² Additional examples of this massive disparity from the Commission data are boundless.⁸³ But it’s not just Draconian mandatory minimums and §851 enhancements that have lead us down the path of mass incarceration. It’s also the pervasive myth of empirically-based federal sentencing guidelines.

IV. The Myth of Empirical Sentencing Guidelines

⁷⁵ REPORT (2011), *supra* note 39, at 252-261.

⁷⁶ Young, 960 F. Supp. 2d at 893.

⁷⁷ *Id.* at 893-932.

⁷⁸ *Id.* at 889-90.

⁷⁹ *Id.* at 899.

⁸⁰ *Id.*

⁸¹ *Id.* at 902.

⁸² *Id.*

⁸³ *Id.* at 884-902, 910-30.

Perhaps the greatest contemporary myth in the criminal justice system is that the federal sentencing guidelines are empirically based. This myth has been carefully and continuously perpetrated by the U.S. Sentencing Commission in official and unofficial public statements, training materials for new federal judges (including in my own in 1994), and statements in official Commission reports and in numerous annual Guideline Manuals.⁸⁴ This mantra of empirical basis for the guidelines is repeated so often by so many that it is no wonder that, with respect, I am willing to bet that most of my colleagues on the federal trial bench actually believe it. In my opinion, even the Supreme Court has been duped by the myth, writing: “In the main, the Commission developed Guidelines sentences using an empirical approach based on data about past sentencing practices, including 10,000 presentence investigation reports.”⁸⁵ The only authority the Supreme Court cites for this proposition is, not surprisingly, the Commission itself.⁸⁶

But the original guidelines *cannot* be empirically based because while the commission’s staff farmed the data necessary for an empirical approach, nearly 50% of the sentences in those 10,000 cases received probation, and the Commission ignored this critical fact and has never explained why it did so, thus hijacking any notion that any such empirical basis exists for the original guidelines.⁸⁷ As U.S. District Judge Lynn Adelman, a noted expert on federal sentencing, and his co-author have written: “[I]n determining preguideline sentencing practice, the Commission arbitrarily excluded sentences of probation. This decision significantly skewed the data relating to past practices because approximately fifty percent of the defendants in the preguideline era received sentences of probation.”⁸⁸

In my view, the myth of empirical guidelines is a major reason for sentences that are too long, too guideline-centric, and why the guidelines have a much stronger gravitational pull for most judges than they should have.⁸⁹

⁸⁴ Osler & Bennett, *supra* note 9, at 137-45 (numerous citations therein. In *Kimbrough v. United States* 552 U.S. 85, 96 (2007), the Supreme Court recognized that none of the drug guidelines originally drafted by the Commission were based on an empirical approach).

⁸⁵ *Kimrough*, 552 U.S. at 96.

⁸⁶ *Id.*

⁸⁷ Osler & Bennett, *supra* note 9, at 141.

⁸⁸ Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important New role for District Courts*, 57 *DRAKE L. REV.* 575, 578 (2009) (footnotes omitted).

⁸⁹ See Bennett, *A Slow Motion Lynching*, *supra* note 6, at 904-08. Another important reason that judges unwittingly give too much weight to the guidelines is the universally powerful effect of the cognitive anchoring bias. For a detailed discussion of the cognitive anchoring bias in guideline federal sentencing see Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 *J. CRIM. L. & CRIMINOLOGY* 489 (2014).

The existence and pervasiveness of this myth makes federal sentencing reform imperative. As former federal judge and renowned sentencing expert, John Gleeson, wrote in *United States v. Diaz*, empirical data was gathered but “had no role in the formulation of the Guidelines ranges for drug trafficking offenses.”⁹⁰ So not only were the guideline ranges in drug cases substantially ratcheted up from prior sentencing, but they were also tied to the mandatory minimum sentences in the ADAA.⁹¹ This resulted in treating low-level, non-violent, addict drug offenders as if they were kingpins, leaders, or managers of large-scale drug enterprises. As retired Judge Gleeson has written, in fiscal year 2011 roughly seven percent of drug offenders in federal court were kingpins, leaders, or managers. Yet “the vast majority of federal drug offenders who are neither managers nor leaders are subjected to the harsh sentencing scheme that Congress intended only for those who occupy such roles.”⁹²

The lack of empirical basis for the guidelines is not just reflected in drug cases but in virtually all areas of federal sentencing. I have published nearly a dozen sentencing opinions with policy disagreements with the federal guidelines, and in virtually every case, prior to disagreeing with the guideline in question, and largely for lack of empirical basis, I invited the Department of Justice to offer empirical evidence in support of the specific guideline at issue.⁹³ Not once has the government chosen to do so. This is true for crack, methamphetamine, cocaine, child pornography, firearm, anti-trust, and fraud offenses, to name a few.

Perhaps the greatest consensus among federal trial judges about the lack of empirical data to support a guideline is the fraud guideline.⁹⁴ The fraud

⁹⁰ *United States v. Diaz*, No. 11-CR-00821-2 (JG), 2013 WL 322243, at *4 (E.D.N.Y. Jan. 28, 2013).

⁹¹ *Id.* at 6.

⁹² *Id.*

⁹³ *See, e.g., United States v. Nawanna*, 2018 WL 2021350, at *5 (N.D. Iowa, May 1, 2018) (Varying downward based upon Sentencing Guideline differing treatment between methamphetamine mixture and actual (pure) methamphetamine or “ice”) (“In an email prior to setting the briefing schedule on the drug purity issue, I gave the prosecution the opportunity to present any evidence that it wanted to support an empirical basis for the difference in treatment between ice and a methamphetamine mixture in the Guidelines. The prosecution chose not to do so.”).

⁹⁴ *See generally*, Mark W. Bennett, Justin D. Levinson, & Koichi Hioki, *Judging Federal White-Collar Fraud Sentencing; An Empirical Study Revealing the Need for Further Reform*, 102 IOWA L. REV. 939 (2017).

guideline, 2B1.1, can result in a guideline range, in a fairly typical high-end loss case, “equal to first-degree murder and three times longer than ‘second-degree murder.’”⁹⁵ There is simply no empirical basis to justify this ridiculous result, or for that matter, any of the other thousands of fraud sentences informed by the fraud guideline each year.⁹⁶ I have never been able to find an empirical basis for even *one* of the dozens of specific offense characteristics contained in the fraud guideline.⁹⁷ As Judge Jed S. Rakoff has written, the fraud guideline reflects “an ever more draconian approach to white collar crime, unsupported by any empirical data.”⁹⁸ Judge Rakoff describes a “hypothetical but typical case described by Professor Kate Stith of Yale Law School, involving a typical securities fraud defendant” who in 1987 would have faced a guideline range of 30-37 months now faces a range of 151-188 months, a more than 500% increase.⁹⁹ Judge Rakoff wisely asks: “Was such a crime really 500% worse in 2003 than it was in 1987? Had any of the factors that underlie rational sentencing so radically changed as to warrant such a huge increase?”¹⁰⁰

The same criticism is true for most of the other guidelines offenses. While I fault the Sentencing Commission for drafting guidelines with no empirical basis, they had had a long-term partner and co-conspirator: Congress. Many of the specific offense characteristics added to the guidelines that act as a one-way ratchet dramatically increasing a guideline range across a wide range of offenses are the result of mandated Congressional directives.¹⁰¹

V. Reforms

⁹⁵ *Id.* at 974 (footnote omitted).

⁹⁶ *Id.* at 958 (“In fiscal year 2014, 8,216 offenders were sentenced under the basic economic offenses U.S. Sentencing Guideline section 2B1.1 (‘fraud guideline’). This accounted for 12.1% of all offenders sentenced under the guidelines in federal court that year.”).

⁹⁷ *Id.* (Neither has my esteemed and highly respected colleague, Judge Jed Judge Jed S. Rakoff, who sits in the epicenter of fraud cases (the Southern District of New York), and is a leading expert on the fraud guidelines. In a high-profile securities fraud sentencing opinion he noted “the numbers assigned by the Sentencing Commission to various sentencing factors appear to be more the product of speculation, whim, or abstract number-crunching than of any rigorous methodology—thus maximizing the risk of injustice.”).

⁹⁸ *United States v. Gupta*, 904 F. Supp. 2d 349, 351 (S.D.N.Y. 2012).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ For an exhaustive 225-page list of Congressional directives to the guidelines from 1988 to 2016 see Sentencing Resource Counsel Project, *Congressional Directives to the Sentencing Commission 1988-2016*, Defender Services Office Training Division (Nov. 2009).

The engine of federal mass incarceration has been running on all cylinders, turbo-charged by overly harsh drug guidelines that are not empirically based, uber harsh mandatory minimum penalties based on arbitrary drug quantities rather than actual criminal culpability, and draconian § 851 enhancements that can lead to life sentences for low-level drug addicts that have never served a day in jail or prison.¹⁰²

Various Congressional sentencing reforms have been introduced over the past decade without success.¹⁰³ In 2014, Professor Mark Osler and I wrote about sentencing reform; “If there is an arc to history, we are perched upon it at a cresting point”¹⁰⁴ We were very optimistic. Later that year I wrote the “long term prospects for reducing federal mass incarceration will depend on the ability of congress to repeal the mandatory minimums or at least reduce their harsh impact on so many offenders.”¹⁰⁵ The Sentencing Commission, through the unsurpassed leadership of then-Chair Judge Patti B. Saris, on August 10th, 2014, unanimously approved the so-called All Drugs Minus Two amendment that lowered the guideline ranges by two points in drug cases. But why did it take the Commission so long to do this—it could have done the identical thing prior to the guidelines taking effect on November 1st, 1987, or at any time after that.¹⁰⁶ Instead, it waited nearly three decades until the federal prison population was bursting at the seams at thirty-two percent overcapacity, and many times what it was when the SRA was passed.¹⁰⁷

My proposals for reform are simple and contained in these eight bullet points:

¹⁰² Other contributors to this Symposium examine what they consider to be two important “root causes” of sentencing inequities: misuse of plea agreements and informants. See Peter A. Joy & Rodney J. Uphoff, *Sentencing Reform: Fixing Root Problems*, 87 U.M.K.C. L. Rev. (forthcoming 2018); and why long sentences are counterproductive for public safety, see Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. Rev. (forthcoming 2018).

¹⁰³ See generally, Bennett, *A Slow Motion Lynching*, *supra* note 6, at 913-18.

¹⁰⁴ Osler & Bennett, *supra* note 9, at 175.

¹⁰⁵ Bennett, *A Slow Motion Lynching*, *supra*, note 6, at 914.

¹⁰⁶ *Id.* I commend my colleague and friend, Judge Patti B. Saris who chaired the Commission from 2011-2017 and appreciate her retrospective of the years she chaired the Commission. Patti B. Saris, *So Much Accomplished, So Much Left to Do A Retrospective on Six Years as Chair of the United States Sentencing Commission*, 87 U.M.K.C. L. REV. (forthcoming 2018). Important progress was made during her tenure. But what she does not give sufficient weight to is that it’s the very Commission and Congress prior to her being Chair, that created mass incarceration for federal prisoners and the federal sentencing mess we are now in. The Commission needs to take responsibility for their part in creating the country that Judge Saris writes is “the world’s largest jailer.” *Id.* at _.

¹⁰⁷ *Id.*

- Repeal virtually all mandatory minimums.¹⁰⁸ Federal trial judges know when an offender deserves a long sentence. And if they err, all sentencing decisions are now reviewed by the courts of appeals for reasonableness, either because the original sentence was too lenient or too harsh.
- Move away from quantity, for example in drug, firearm, fraud, and child pornography guidelines to the role in the offense and degree of culpability, and harm caused. These are more accurate proxies for the length of punishment than quantity.
- Dramatically expand the so-called “safety valve” in two major ways. First, apply it to virtually all crimes, not just its current application to only drug crimes. Secondly, reasonably expand it to broader criminal history categories, including at least Criminal History II and III, perhaps to even IV if the offender has no crimes of violence.
- Substantially restrict § 851 predicate offense to crimes where the offender served more than one year in jail or prison rather than the punishment for the crime allowing for that length. Add an age restriction for when a prior offense can be a predicate §851 enhancement to match how crimes are computed for criminal history.
- Give federal judges the right not to apply § 851 enhancements if “exceptional circumstances” apply – a standard federal judges are familiar with in many other contexts.
- Re-examine the guidelines’ criminal history scoring so that violent offenses receive more weight than non-violent ones. As it is, an overdrawn check offense can receive the same three-point score as an armed bank robbery, rape, or murder conviction. This would rightly increase the guideline range for offenders with a history of violence.
- I strongly encourage federal sentencing judges to be more skeptical of any guideline where the Department of Justice cannot establish an empirical basis for it. There is hardly a guideline that I cannot come up with a policy disagreement with. Often, I believe a guideline is too harsh (e.g. drugs, child pornography); sometimes too lenient (anti-trust) and sometimes both (the fraud guideline is often too lenient at the low-end but too harsh at the high-end). Whether a federal sentencing judge varies from a guideline sentence based on a policy

¹⁰⁸ Reasonable minds would likely have a consensus for mandatory minimums where offenders’ actions proximately caused a death, crimes of treason, and production of and hands-on child pornography.

disagreement is not actually the point. It's the invaluable process of thinking through the basis for a guideline that's important.

- I strongly encourage federal sentencing judges to regularly visit in federal prison inmates they have sentenced. I have done this for well over a decade.¹⁰⁹ This is perhaps short of major changes in mandatory minimums and § 851 enhancements the singular most important sentencing reform. This gives sentencing judges great insight into how sentences they impose effect offenders and promote or detract from the statutory purposes of sentencing contained in title 18 U.S.C. § 3553(a). I know for Judge Stephen R. Bough, the mastermind for this Symposium, and I, a small-town country judge, visiting inmates we have sentenced has a deeply profound impact on our sentencing philosophies and practice that no other activity or course of study could replicate.¹¹⁰ As Judge Bough so eloquently wrote “each interaction reminds me that felons share more similarities than differences with non-felons. The sentences I impose are more informed because of my determination to get to know people-their struggles, addictions, family life, triggers, motivations and goals.”¹¹¹

VI. Conclusion

In the arc of just two decades, federal sentencing has evolved from total judicial discretion, to virtually none with mandatory guidelines, and back to advisory guidelines with discretion for variances and policy disagreements with the guidelines. I think the current system, with the changes I suggest, provides the best hope for sentencing that avoids unwarranted sentencing disparity but achieves a sound measure of justice and fairness in sentencing.

Each of the sentencing schemes discussed above have some measure of discretion. The mandatory guideline regime shifted that discretion from extremely well-vetted federal district judges confirmed by the U.S. Senate to assistant U.S. attorneys, many of them barely out of law school and in their twenties. The current

¹⁰⁹ Mark W. Bennett, *Hard Time: Reflections on Visiting Federal Inmates*, 94 JUDICATURE 304 (2011); Osler & Bennett, *supra* note 9, at 174-75.

¹¹⁰ Stephen R. Bough, *Getting to Know a Felon: One Judge's Attempt at Imposing Sentences that are Sufficient. But Not Greater Than Necessary*, 87 U.M.K.C. L. REV. (forthcoming 2018).

¹¹¹ *Id.* (manuscript at 10). For a powerful and moving discussion of a methamphetamine offender's journey through federal court and federal prison by a symposium author, see Elizabeth Walker, *My Felonious Journey*, 87 U.M.K.C. L. Rev. (forthcoming 2018). Another symposium author, a former armed bank robber and now law professor, discusses his journey and recommendations for sentencing reform, see Shon Hopwood, *Improving Federal Sentencing*, 87 U.M.K.C. L. REV. (forthcoming 2018).

system with the additional suggestions for reform fairly distribute sentencing discretion among Congress, the U.S. Sentencing Commission, the Department of Justice, and federal sentencing judges.¹¹²

As Martin Luther King Jr. so poetically and powerfully reminded us: “The arc of the moral universe is long, but it bends towards justice.”¹¹³ But it does not bend on its own. Adopting the suggestions in this article go a long way towards bending the arc towards greater justice.

¹¹² My friend, former colleague and now Professor at Harvard Law School, the Hon. Nancy Gertner (Ret.), may be correct that better approach is to scratch the Commission and the Sentencing Guidelines and start over. Nancy Gertner, *Against These Guidelines*, 87 U.M.K.C. L. REV. (forthcoming 2018). That is certainly a reform option worth exploring. Her many ground-breaking sentencing opinions helped shape my sentencing philosophy.

¹¹³ See TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63, 197 (1988) (noting Rev. King’s use of the phrase originated with the abolitionist preacher, Theodore Parker).