

Federal Sentencing: A Judge's Personal Sentencing Journey as Told Through Voices of Offenders He Represented and Sentenced

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

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.³

This article tells my journey through the arc of federal sentencing, mostly from the men and woman I have sentenced and the over four hundred I have personally visited in federal prisons while I was a sitting federal district judge.⁴ This is a

¹ The Hon. Mark W. Bennett retired after twenty-four as a U.S. district judge for the Northern District of Iowa on March 2, 2019 and is now the first director of the Drake University Law School's Institute for Justice Reform & Innovation.

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 Mark W. Bennett, *Addicted to Incarceration: A Federal Judge Reveals Shocking Truths About Federal Sentencing and Fleeting Hopes for Reform*, 87 UMKC L. REV. 3 (2018).

⁴ I first wrote about visiting offenders I had sentenced in Mark W. Bennett, *Hard Time: Reflections on Visiting Federal Inmates*, 94 JUDICATURE 304 (2011).

dramatically different approach from the many law review⁵ and other articles and media reports⁶ about my opposition to the War

⁵ Mark W. Bennett, *A Judge's Attempt at Sentencing INCONSISTENCY After Booker: Judge (Ret.) Mark W. Bennett's Guidelines for Sentencing*, 41 CARDOZO L. REV. 243 (2019); Mark W. Bennett, *Addicted to Incarceration: A Federal Judge Reveals Shocking Truths About Federal Sentencing and Fleeting Hopes for Reform*, 87 UMKC L. REV. 3 (2018) (discussing the current sentencing scheme prior to the First Step Act and several proposed reforms); Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745 (2018) (analyzing the history and effects of Afrocentric facial feature bias in the criminal justice system); Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63 (2017) (finding that both federal and state court trial judges have greater anti-Jewish and anti-Asian implicit biases than members of the general public and that the implicit biases affect the length of the sentence in a white-collar sentencing scenario); 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) (sharply criticizing the fraud guideline on numerous grounds); Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J. FORUM 391 (2017) (asserting that Afrocentric facial feature and skin tone biases are the next frontier of racially biased sentencing); 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, 877 (2014) (discussing mass incarceration and the need for more federal judges to express "policy" disagreements with the sentencing Guidelines and urging Congress towards sentencing reform); Mark Osler & Mark W. Bennett, *A "Holocaust in Slow Motion?" America's Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. SOC. JUST. 117 (2014) (discussing the rise of mass incarceration and the role of Congress, the U.S. Sentencing Commission, and federal judges in it and a path for reform); 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) (explaining the powerful cognitive "anchoring" effect of the federal sentencing Guidelines which leads to too overly harsh sentences and suggesting a modest, simple, and practical reform to reduce the anchoring effect).

on Drugs and my many criticisms of the bone-crushing severity of federal sentencing, congressionally mandated mandatory minimums, and the U.S. Sentencing Commission. Jessica Roth recently described my decision to speak out about the unfairness of federal sentencing:

[S]ince at least 2012, Judge Bennett has written extensively about the need to reform sentencing policy in a variety of publications and has granted numerous interviews to journalists. Acknowledging that “[f]ederal judges have a longstanding culture of not speaking out on issues of public concern,” he explained that he was “breaking with this tradition” because the “daily grist” of unjust mandatory minimum sentencing for non-violent drug offenders “compels [him] to.”⁷

⁶ E.g., Mark Bennett & Mark Osler, *The Wrong People Decide Who Goes to Prison*, CNN (Dec. 3, 2013, 7:49 AM), <https://www.cnn.com/2013/12/03/opinion/bennett-osler-sentencing/index.html> [<https://perma.cc/YQL3-67FX>]; Mark W. Bennett, *How Mandatory Minimums Forced Me to Send More Than 1,000 Nonviolent Drug Offenders to Federal Prison*, Nation Nov. 12, 2012, at 4, <https://www.thenation.com/article/how-mandatory-minimums-forced-me-send-more-1000-nonviolent-drug-offenders-federal-pri> [<https://perma.cc/JHK8-GMDW>]; THE HOUSE I LIVE IN (BBC 2012) (directed by Eugene Jarecki, the film was the Official Selection and Winner of the Grand Jury Prize at Sundance Film Festival 2012); Eli Saslow, *Against His Better Judgment*, Wash. Post, June 6, 2015, at A01, 2015 WLNR 16811322.

⁷ Jessica A. Roth, *The ‘New’ District Court Activism in Criminal Justice Reform*, 72 N.Y.U. ANN. SURV. AM. L. 187, 190 (2018). Professor Roth uses the term

Many of my judicial decisions also reflected my strong disagreement with many of the deeply flawed U.S. Sentencing Commission Guidelines.⁸

“new” activism hesitantly because she recognizes the term “activism” has “become little more than an epithet for describing judges and decisions with which the speaker disagrees.” *Id.* at 190 (footnote omitted). She uses the term for two reasons. First, it describes “an active and engaged judicial posture rather than a passive, reactive one.” *Id.* (footnote omitted). “Second, “it taps into important debates about the proper role of the judge in our democracy, debates that have not fully explored the hortatory and other forms of judicial activity described in this Article.” *Id.* (footnote omitted).

⁸ *E.g.*, *United States v. Nawanna*, 321 F. Supp. 3d 943 (N.D. Iowa 2018) (disagreeing with the methamphetamine Guidelines on policy grounds, because they are based on a flawed assumption that methamphetamine purity is a proxy for role in the offense); *United States v. Feauto*, 146 F. Supp. 3d 1022 (N.D. Iowa 2015) (concluding that a direction to disregard or nullify a statutory mandatory minimum sentence when resentencing a defendant pursuant to Amendment 782 and policy statement U.S.S.G. § 1B1.10(c) exceeds the Sentencing Commission’s statutory authority and/or violates the non-delegation doctrine and the separation-of-powers principle; in other words, the authority to nullify mandatory minimums is not a power that the Sentencing Commission could usurp or one that Congress could delegate), *aff’d on other grounds sub nom United States v. Koons*, 850 F.3d 973 (8th Cir. 2017), *aff’d*, 138 S. Ct. 1783 (2018); *United States v. Hayes*, 948 F. Supp. 2d 1009 (N.D. Iowa 2013) (stating a policy disagreement with the methamphetamine quantity guidelines, which systemically overstate defendants’ culpability); *United States v. Newhouse*, 919 F. Supp. 2d 955 (N.D. Iowa 2013) (disagreeing with the Career Offender guideline when applied to a defendant, like Newhouse, who is a nonviolent, recidivist drug addict occupying a low-level role in the drug trade in order to obtain drugs for her addiction, but recognizing that some offenders have earned Career Offender status and should be sentenced within the Career Offender guideline, and, in rare instances, higher); *United States v. Williams*, 788 F. Supp. 2d 847 (N.D. Iowa 2011) (rejecting the Sentencing Guidelines using the “new” 18:1 ratio, for the same reasons as the “old” 100:1 ratio and based on additional concerns that they create a “double whammy” on crack defendants, penalizing them once for the assumed presence of aggravating circumstances in crack cocaine cases and again for the actual presence of such

I am a retired U.S. district judge who spent more than one-third of my life populating the Federal Bureau of Prisons. I sentenced more than 4,000 offenders spanning twenty-four years on the bench. I did this in five different districts from the two districts in Iowa to the near farthest reaches of our federal courts in the District of the Northern Mariana Islands. I imposed sentences from probation (not often enough) to affirming two juries verdicts to impose the federal death penalty. I also reviewed numerous state and federal sentences as a district judge on habeas review. Finally, I sat by designation numerous times on the courts of appeals where I also reviewed federal sentences on direct appeal and federal and state sentences on habeas review. Before that, I was in private practice for 17 years as a civil rights, civil liberties, and criminal defense lawyer, almost exclusively in our federal courts. I retired on March 2, 2019 as a federal judge. I was passionate about judging and loved most of

aggravating circumstances in a particular case); *United States v. Vandebroke*, 771 F. Supp. 2d 961, 1011 (N.D. Iowa 2011) (varying upward from the Sentencing Guidelines based on policy disagreements with the relatively lenient treatment of antitrust violations when compared to fraud sentences), *aff'd*, 679 F.3d 1030 (8th Cir. 2012); *United States v. Golden*, 679 F. Supp. 2d 980, 985 (N.D. Iowa) (reiterating rejection of the 100:1 crack-to-powder ratio in U.S.S.G. § 2D1.1, note 10, categorically, on policy grounds), *aff'd*, 394 F. App'x 347 (8th Cir. 2010); *United States v. Jacob*, 631 F. Supp. 2d 1099, 1112 (N.D. Iowa 2009) (reiterating categorical rejection, on policy grounds, of U.S.S.G. § 2G2.2, concerning sexual exploitation of a minor in the form of interstate transportation of child pornography, because it improperly skews sentences upward); *United States v. Gully*, 619 F. Supp. 2d 633, 640–41 (N.D. Iowa 2009) (rejecting the 100:1 crack-to-powder ratio in the guidelines on policy grounds); *United States v. Beiermann*, 599 F. Supp. 2d 1087 (N.D. Iowa 2009) (rejecting categorically, on policy grounds, the Sentencing Guidelines for child pornography cases).

it. I even thought I was at my very best in sentencing, But I have not missed it for a second, except for the judges I was so exceptionally fortunate to have as colleagues and the folks I worked with at the courthouses in our district.

I found the collective weight of so many sentencings more emotionally draining and soul robbing than the deaths of my son, all my siblings and my parents. My decision to retire freed me from being a cog in the nations' machinery of injustice - driven primarily by nonsensical and politically motivated congressionally mandatory minimum sentences and extraordinary harsh federal sentencing guidelines. One of my friends commented to me recently that he had not seen me so happy since my days of practicing law. I am not asking for sympathy just understanding. Nobody forced me to take what is considered one of finest legal jobs in the country, a job that outsiders will mark as the pinnacle of the arc of my legal career.

This article follows my presentation at the Washington & Lee Journal of Civil Rights and Social Justice **2019 Annual Symposium: *Issues in Federal Sentencing: Privilege, Disparity, and a way Forward.*** I know something of privilege, white privilege, I have been the beneficiary of it - all of my life. I grew up in an upper middle class family in a white neighborhood in St. Paul, Minnesota with few wants. My elementary and junior high school were 100% white. Yet, my parents were strong civil rights proponents and taught me that everyone on life's journey was a son or daughter of a higher being and entitled to be treated with dignity and respect. They fought innumerable battles for my younger brother, David, who was born with severe mental

retardation and cerebral palsy. I saw warriors for justice first-hand. I lived with them and loved them deeply. They have long since passed but they remain my role models and heroes. The title of the panel I was on for the **2019 Annual Symposium** included the phrase “Dignity in the Courtroom” and it was my highest aspiration, not always obtained that offenders be treated with unparalleled dignity.

From the macro lens in addition to the severity of federal sentencing the racial disparity in federal sentencing is also deeply troubling. A recent finding by the United States Sentencing Commission, utilizing sophisticated multivariate regression analysis, found that “Black male offenders continued to receive longer sentences than similarly situated White male offenders.”⁹ The Commission found that “Black male offenders received sentences on average 19.1 percent longer than similarly situated White male offenders”¹⁰ during fiscal years 2012-2016).

The vignettes you are about to read are both real and fictional. Real in the sense that everything you read actually happened. Fictional in the sense that most of the names, places and voices are composites of real events in my nearly quarter century of federal sentencing.

Dashaun Roberts. I met my young lawyer, Mark W. Bennett, several times before my sentencing. The first time was in the Polk County Jail in 1975, immediately after my arrest for delivery of a few small rocks of crack that I had rocked up for a

⁹ United States Sentencing Commission, *Demographic Differences in Sentencing: An Update to the 2012 Booker Report*, p. 2, (2017).

¹⁰ *Id.*

dime bag of cocaine. He seemed so young but knowledgeable and enthusiastic. He was court-appointed and I had no money to hire a more experienced lawyer. He told me he was on the Criminal Justice Act¹¹ list for court appointed lawyers in the Southern District of Iowa. He knew a lot about the judge my case was assigned to and was sure he could spring me at my detention hearing in two days. He told the nice female Magistrate that I grew up in Des Moines, dropped out of North H.S. in the 11th grade to work to help support my mom and younger siblings. Just like he told me the Magistrate released me on my own recognizance bond. In several meeting in his law office we went over the government's evidence, explored potential defenses (there were none that we thought would work) and I decided to plead guilty because Bennett said I would get probation for 2-3 years and no prison time. At my sentencing, I was worried Bennett didn't know what he was talking about but the federal judge came through just like Bennett had predicted.

I got charged again with possession with intent to deliver crack in 1988 and this time I retained Bennett. He explained about the new Sentencing Reform Act of 1984, that had just taken effect and that things would be very different this time. There were now mandatory federal sentencing Guidelines created by the new United States Sentencing Commission. He was right about things being very different. When he explained Acceptance of Responsibility and Obstruction of Justice and if we went to trial and I testified the crack on the seat next to me in my car was not

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mine and I was convicted and if the judge did not believe me which would be likely if the jury didn't and convicted me Bennett explained what he called a "five point swing" – losing three point for Acceptance of Responsibility and getting and addition two points for Obstruction of Justice that would add nearly 60 months onto my sentence. We took the plea bargain and I was sentenced to 38 months in federal prison.

Anthony Jones. I only met Judge Bennett once back in the early 2000s when I was serving a lengthy federal sentence for crack cocaine distribution in the Kansas City area. I was imprisoned at the Federal Bureau of Prisons facility, Terminal Island, in Long Beach, Calif. Yeah, what a terrible name for a prison. It was a routine day just like every other one and early in the afternoon I got a kite from the warden's office to see if I was willing to meet with a fellow who was touring the prison and wanted to talk to a few inmates about life inside this joint. The warden's office said no staff would be present because the guy wanted our straight scoop. I agreed and was taken to a small room where two other inmates from different cell blocks were seated. I recognized both, a Hispanic gang-banger from East LA with prison tats over his entire body and face. I didn't know his real name but his prison gang name was "El Salivotas" (the Drooler) because part of his face was paralyzed in a prison knife fight. The other guy was an Anglo meth dealer who goes by LA Ice. I was the only Black con in the room. The door opens suddenly and this middle-aged casually dressed Anglo walked in and smiled and held out his hand to each of us to shake our hands and said simply "my name is "Mark" and I am here to ask about

your experiences with the federal criminal justice system and your incarceration here at Terminal Island. May I sit down in the empty chair? What are your names?" After we gave him our names he called each of us by our first name and asked that we use his first name "Mark." The he said: "To make full disclosure my name is Mark Bennett and I am a U.S. district judge from the Northern District of Iowa and I am here for the sole purpose of asking each of you if you are willing to help me become a better judge by sharing your criminal justice and personal stories with me." The next 90 minutes were gone in a flash. Question after question by Judge Bennett about our lives growing up; any role models in the community; early criminal activity; how we got caught on our latest federal crime; what we thought of the legal process; our defense lawyers; the prosecutors; the U.S. probation Officers; the sentencing judge; the length of our sentences; safety and programming in Terminal Island; and our hopes for the future. When Judge Bennet said it was time to wrap up and for him to leave, I started sobbing, uncontrollably. Judge Bennett placed his hand on my knee as asked in a soft voice "Tony, did I say something to upset you?" After I caught my breath I was able to mumble; "No, it's just in my wildest dreams I never thought I would be in a small room with a federal judge and he would ask my opinions about things."

As I left Terminal Island my mind was swimming with information from the inmates. That last contact with Tony and his sobbing left an indelible impression on me and was mostly what I was thinking about as I traveled back to Iowa the next day. It was on that plane ride home that I decided visiting

offenders that *I had sentenced* would be an important piece of gleaning a deeper understanding of the federal criminal justice system. It wasn't until many years later, when I watched a YouTube video¹² by Bryan Stephenson, founder and executive director of the Equal Justice Initiative, titled *The Power of Proximity*¹³ that I began to fully appreciate how and what the offenders taught me. It was by being proximate with offenders I had sentenced, in their environments, not mine, where my real education took place.

David Johnson and 30 or so Other Offenders at the Federal Prison in Yankton, South Dakota.

The federal prison camp in Yankton, S.D. was a federal prison I liked to recommend to the Bureau of Prisons, especially for non-violent drug addict offenders serving a sentence of less than 120 months (non-violent and less than 120 months requirements for admission). Not only was it the closest federal prison to Iowa but it had one of the largest 500-hour residential drug treatment program in the BOP. Residential in the sense that all of the offenders going through the drug treatment program lived in the same cellblock for the length of the program. My first visit there was shortly after my visit to Terminal Island. I communicated with the Warden to set up the visit. There were over 30

¹² <https://www.youtube.com/watch?v=1RyAwZIH04Y> (June 28th, 2018).

¹³ *Id.* Bryan Stevenson has defined “the power of proximity this way: “We must get “proximate” to suffering and understand the nuanced experiences of those who suffer from and experience inequality. Stevenson believes that “if you are willing to get closer to people who are suffering, you will find the power to change the world.” <https://www.carnegiefoundation.org/blog/empathy-and-social-justice-the-power-of-proximity-in-improvement-science/>

offenders in the room that I had sentenced. I pride myself in getting anyone, including strangers to tell me about their life stories. As I stood in front of room I could not get any kind of response from the offenders. So I asked point blank: “Why is nobody speaking?” No one initially responded then an offender I recognized because I had recently sentenced him, David Johnson, raised his hand and said: “Judge, ain’t you here to raise our sentences?” That caught me off-guard because I had not anticipated it. I assured the offenders that “I could neither raise nor lower their sentences.” Once that was out of the way, the offenders were incredibly curious and talkative. Curious as to why I was there to meet with them and anxious to ask questions from everything about my expectations for the on supervised release (the relatively new name for what replaced parole) to advice on parenting. After I met with the offenders in a group I then met with anyone individually who wanted to meet with me.

Steven Spears. My name Steve Spears and I was sentenced by Judge Bennett in 2006? For possession with intent to deliver crack cocaine. Judge Bennett announced in my sentencing that he disagreed with the U.S. Sentencing Guideline that created the 100-1 disparity between crack and powder cocaine that treated one gram of crack as equal to 100 grams of powder cocaine. Under this 100-1 ratio the U.S. Probation office determined my original guideline sentencing range was 324 to 405 months. Judge Bennett then rejected the 100-1 ratio and adopted a 20-1 ratio. Judge Bennett indicated that this reduced my guideline range to 210-262 months. Because I also had a twenty year mandatory minimum sentence Judge Bennett sentenced me to

the minimum he could - 240 months. It then gets complicated and this is what I came to understand by reading the various court decisions that followed and explained to me by my new lawyers. My original lawyer was didn't even ask the judge to reduce my sentence, Judge Bennett did that on his own. The Eighth Circuit, en banc, reversed Judge Bennett and remanded for resentencing, holding that there was no authority that authorizes district courts to reject the 100:1 ratio and use a different ratio in sentencing defendants for crack cocaine offenses."¹⁴ My new lawyers appealed to the U.S. Supreme Court and it reversed the 8th Circuit and remanded it back to them.¹⁵ The 8th Circuit again, en banc, reversed Judge Bennett and remanded it back to him to resentence me to the higher guideline range of 324-405.¹⁶ I appealed again to the U.S. Supreme Court and they reversed the 8th Circuit yet again and confirmed that Judge Bennett had the right to disagree with the 100-1 ratio and substitute a 20-1 ratio.¹⁷

Hector Rodriguez. My name is Hector Rodriguez. In 2014, after serving forty-eight months in federal prison I ran into my sentencing judge, Judge Mark W. Bennett, at a local Walmart in Sioux City, Iowa on a busy Saturday afternoon. When I saw him in an aisle I ran up to him asked if he was Judge Bennett, he said "Yes," I introduced myself as a person he had sentenced and

¹⁴ United States v. Spears, 469 F.3d 1166, 1173–1174 (8th Cir. 2006) (en banc) (Spears I).

¹⁵ Spears v. United States, 552 U.S. 1090 (2008).

¹⁶ Spears v. United States, 533 F.3d 715, 716 (2008) (en banc) (Spears II).

¹⁷ Spears v. United States,

reached out my hand to shake his. He warmly shook my hand with both his hands and asked “Hector, what did I sentence you for and for how long, and how long have you been out.” I responded: “You gave me forty-eight months for a drug conspiracy case but the prosecutors had asked for 150 months. I have been out for four years and successfully completed my thirty-six months of supervised release without a problem.” Judge Bennett congratulated me on my success. I told him “It meant a lot to me when you came and visited me in federal prison to see how I was doing and actually sat next to me during the noon meal and asked all about my family. I was shocked to see you.” After you left I knew I was not going to disappoint you when I got out. “Judge Bennett, my wife and two daughters are in the isle looking at pots and pans would you wait here while I get them, I would love for them to meet you.” Judge Bennett: “I would be honored to meet your family, Hector.” He then met my family and gave my wife and daughters big hugs and told them how important their support for me was in my rehabilitation and me becoming a productive member of society. We all parted ways with tears of joy in our eyes. When Judge Bennett had sentenced me years earlier I was stunned when at the end of the sentencing he came off the bench, walked over to where I had been sitting next to my defense counsel and shook my hand. I was in leg and arm irons so it was difficult but he did shake my hand. He said in a soft voice: “Hector, you are a good man, father and husband, who made some very bad choices. I hope you will take advantage of the educational and work skills classes in prison and become the productive member of society that your family and I hope for you.” He then turned to walk

back to his chambers. My defense lawyer told me that he forgot to tell me Judge Bennett usually does this. He wants to say something positive as the last person in the free world I would see for many years, my lawyer explained.

First visit to inmates I sentenced in Yankton

Hugs in the courtroom

Allocution

Child porn case

Violent offender

Victim Allocution

Mandatory minimum