A SLOW MOTION LYNCHING? THE WAR ON DRUGS, MASS INCARCERATION, DOING *KIMBROUGH* JUSTICE, AND A RESPONSE TO TWO THIRD CIRCUIT JUDGES

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Abstract

A federal district court judge who has sentenced more than 4000 defendants reflects on federal sentencing and its role in mass incarceration. The focus of the article is on federal sentencing in crack cocaine cases and policy disagreements with the United States Sentencing Guidelines (Guidelines) in drug trafficking cases. The article explores the U.S. Supreme Court cases in Kimbrough v. United States, United States v. Spears, and Pepper v. United States, the only U.S. Supreme Court cases that address sentencing judges' policy disagreements with the guidelines. Ironically, or perhaps serendipitously, the author was the sentencing judge in both Spears and Pepper, where he was reversed a whopping 5 times by the U.S. Court of Appeals for the Eighth Circuit (twice by an en banc court) before both defendants' sentencing positions were vindicated by the U.S. Supreme Court. The article takes exception to two Third Circuit judges who have argued in law review articles that federal sentencing judges should be concerned about "legislative backlash" if they sentence outside the now advisory guidelines. In the arc of the history of federal sentencing and its impact on mass incarceration, we are perched at a cresting point where the gravity of reason and our Nation's experience with mass incarceration hopefully will pull towards greater justice in sentencing.

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I. INTRODUCTION

The 2014 Best Picture Oscar winner, 12 Years a Slave, is based on the 1853 autobiography by Solomon Northup.[1] Northrup, a black freeman in New York, was kidnapped and sold into Southern slavery.[2] There is an eternally haunting, prolonged, and grueling scene in the movie where Northup has a noose around his neck and strains for breath by tiptoeing on the ground to keep from being lynched.[3] Other slaves on the planation are paralyzed by fear and ignore him. Like a ballerina *en pointe*, Northup spends long hours in this slow motion lynching dance until he is rescued by his owner.

Unable to suppress this image and, indeed, repulsed, but compelled by it, I wrote this sequel to an earlier article, *"A Holocaust in Slow Motion?" Mass Incarceration in America and the Role of Discretion*.[4] In *A Holocaust in Slow Motion*, my co-author and I

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1. The film is based on Solomon Northrup's autobiography. SOLOMON NORTHUP, TWELVE YEARS A SLAVE: NARRATIVE OF SOLOMON NORTHUP, CITIZEN OF NEW YORK, KIDNAPPED IN WASHINGTON CITY IN 1841, AND RESCUED IN 1853, FROM A COTTON PLANTATION NEAR THE RED RIVER IN LOUISIANA (Dover Publ'n 1970) (1853). Northrup describes his life as follows:

> Having been born a freeman, and for more than thirty years enjoyed the blessings of liberty in a free State—and having at the end of that time been kidnapped and sold into Slavery, where I remained, until happily rescued in the month of January, 1853, after a bondage of twelve years—it has been suggested that an account of my life and fortunes would not be uninteresting to the public.

Id. at 17. So starts the book.

2. *Id.*

3. 12 YEARS A SLAVE (River Road Entertainment, Regency Enterprises, Plan B Entertainment, New Regency Pictures, Film4 2013).

4. Mark Osler & Mark W. Bennett, *"A Holocaust in Slow Motion?" Mass Incarceration in America and the Role of Discretion*, 7 DEPAUL J. SOC. JUST. 117 (2014).

highlighted the myth in drug sentencing of an independent U.S. Sentencing Commission (Commission) dedicated to fair and just sentencing through empirical research, specialized expertise, and independent judgment.[5] We catalogued Congress's pandering 1980's "[t]ough on crime" politics and their passing of the Anti-Drug Abuse Act of 1986 (ADAA)[6] with lightning speed, dispensing with hearings, fact finding, and exploiting Len Bias's death by a cocaine overdose (not crack as originally reported)—the number two player in the nation selected in the June 1986 NBA Draft by the Boston Celtics, who died two days after being drafted.[7] The ADAA promulgated the most far reaching and harsh mandatory minimum federal sentencing scheme in U.S. history, propelling America into the world leadership of mass incarceration.[8] Our article looked at Congress, the Commission, the Department of Justice, and federal judges to articulate how the exercise of their discretion fueled the mass incarceration movement in America.[9] Finally, we ended on a hopeful and optimistic note:

> If there is an arc to history, we are perched upon it at a cresting point as the gravity of reason pulls us toward justice. It has been a long and painful trip for our nation, with prisons filled, families divided and destroyed, urban communities devastated, narcotics proliferated and all of these tragedies abetted by the inaction of those with the power to change things—Congress, the DOJ, the Sentencing Commission, and federal judges.
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> That inaction, however, seems to have ended. This last year has seen conscience move judges to reject harsh sentences and speak more publicly about what they see, the Sentencing Commission consider backing down from the too-strict measures of the narcotics guidelines, Congress ponder major and retroactive changes and even the DOJ, the most intractable of all, become a powerful force for change.[10]

Turning from optimistic to a dark and brutal period in our nation's history for black Americans—3,446 blacks were lynched in the United States from 1882 to 1968.[11] "Lynching has been called

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5. *Id*.
6. *Id*. at 129-137, 163.
7. *Id*. at 132-33.
8. *Id*. at 130-31, 142-54.
9. *Id*. at 129-56.
10. *Id*. at 175.
11. Univ. of Mo.-Kan. City Sch. of Law, *Lynchings: By State and Race, 1882-1968*, LAW2.UMKC.EDU, http://law2.umkc.edu/faculty/projects/ftrials/shipp/lynchingsstate.html (last visited Oct. 10, 2014); *see also Lynching, Whites & Negroes, 1882-1968*, TUSKEGEE UNIV. ARCHIVES ONLINE REPOSITORY, http://192.203.127.197/archive/handle/123456789/511, (follow "Lynching 1882 1968.pdf" hyperlink located under "Files in this item").

'America's national crime.'"[12] "[S]tate actors play[] a unique and key role in" holocausts and lynchings.[13] Both also require the "tacit approval or passive acceptance . . . by police officers, prosecutors, judges, and elected officials . . . to flourish . . . ."[14] Lynching had become so established in our Nation that, in 1934, the Texas Law Review published a book review on a book proposing model anti-lynching legislation noting: "While it is doubtful if any legislation can be an effective panacea under present sociological conditions . . . any legislation however wisely conceived is doomed to failure in those jurisdictions where the lynching spirit is strong . . . ."[15] Acclaimed civil rights historian, Phillip Dray, in describing the anonymous way in which lynchings were carried out notes: "The coroner's inevitable verdict, 'Death at the hands of person unknown,' affirmed the public's tacit complicity: no *persons* had committed a crime, because the lynching had been an expression of the community's will . . . . [E]yewitnesses, even law officers, invariably swore they hadn't recognized any of the mob's individual members."[16] Like the anonymous lynchers described by Dray, we do not see many taking responsibility for today's mass incarceration epidemic. To put the figures in perspective, the average number of blacks incarcerated by federal judges for crack cocaine offenses in *each* of the past five years, singularly, approximates the total number of blacks lynched in the United States from 1895 to 1968.[17]

This Article does not suggest that incarcerating almost exclusively black men for unprecedented lengthy terms of incarceration, for crack cocaine offenses they illegally committed, is the equivalent of lynching innocent blacks. It does, however, suggest both actions have strong racial overtones; both share a lack of public outcry; both share tacit public complicity; both share governmental complicity; both share devastating effects on families, children, and neighborhoods; and both have been accomplished largely at the hands of those unknown—at least to the general public.

This Article explores the rise of mass incarceration and federal

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12. Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQ. 263, 263 (2003).

13. *Id*. at 268.

14. *Id*.

15. Jesse Andrews Raymond, Book Review, 12 TEX. L. REV. 378, 380 (1934) (reviewing J.H. CHADBOURN, LYNCHING AND THE LAW (1933)).

16. PHILLIP DRAY, AT THE HANDS OF PERSON UNKNOWN: THE LYNCHING OF BLACK AMERICA, at ix (2003).

17. *See* U.S. SENTENCING COMM'N,

Quick Facts on Crack Cocaine Trafficking Offenses, USSC.GOV,

http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Crack_Cocaine.pdf (last visited Sept. 6, 2014); *Lynchings: By State and Race, 1882-1968*, *supra* note 11.

judges' role in it, including my own. It focuses on so-called "policy disagreements" with the now advisory guidelines, especially in drug trafficking cases in general and crack cocaine cases in particular. By "*Kimbrough* justice," I mean judges using the analysis in the 2007 U.S. Supreme Court decision in *Kimbrough v. United States* to vary from the guidelines based on policy disagreements with them.[18] Like Solomon Northup, I chronicle these events in the hope that it "would not be uninteresting to the public" and the legal profession.[19]

This Article has a secondary, but important purpose. It responds to law review articles by two Third Circuit judges that suggest that federal sentencing judges should be concerned about Congress's next move as we sentence defendants.[20] Judge Fisher refers to this as a "legislative backlash."[21] Judge Hardiman warns that "Congress might impose new, detailed statutory penalties that will leave district [court] judges with even less discretion than they possessed in the mandatory Guidelines era."[22] While I have heard these refrains before, I find them both odd and at odds with fundamental notions of separation of powers and federal sentencing judges' overarching command to impose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of federal sentencing.[23]

Before going further, a mini-recap of the upheaval in federal sentencing is essential. From the effective dates of the ADAA of 1986 and the Sentencing Reform Act of 1984 (SRA) on November 1, 1987[24]—which created the Commission—the federal sentencing

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18. Kimbrough v. United States, 552 U.S. 85, 101 (2007) (permitting judges to vary from sentencing guidelines based on policy disagreements); *see, e.g.,* United States v. Lychock, 578 F.3d 214, 217-21 (3d Cir. 2009), *and* United States v. Rodriguez, 527 F.3d 221, 224-31 (1st Cir. 2008) (judges straying from the sentencing guidelines because of policy disagreements). See also Scott Michelman & Jay Rorty, *Doing* Kimbrough *Justice: Implementing Policy Disagreements with the Federal Sentencing Guidelines*, 45 SUFFOLK U. L. REV. 1083 (2012), for the most far reaching and comprehensive analysis of policy disagreements with the guidelines.

19. NORTHUP, *supra* note 1, at 17.

20. D. Michael Fisher, *Striking a Balance: The Need to Temper Judicial Discretion Against a Background of Legislative Interest in Federal Sentencing*, 46 DUQ. L. REV. 65 (2007); Thomas M. Hardiman & Richard L. Heppner Jr., *Policy Disagreements with the United States Sentencing Guidelines: A Welcome Expansion of Judicial Discretion or the Beginning of the End of the Sentencing Guidelines?*, 50 DUQ. L. REV. 5 (2012).

21. Fisher, *supra* note 20, at 87, 98.

22. Hardiman & Heppner, *supra* note 20, at 34.

23. 18 U.S.C. § 3553(a) (2012); *see also* United States v. Booker, 543 U.S. 220, 249 (2005).

24. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (current version at 18 U.S.C. § 3551 (2012)); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (current version at 21 U.S.C. § 841 (2012)). The SRA created the Commission and authorized it to create federal sentencing guidelines which went into effect on November 1, 1987. *Id.* § 3552(b).

scheme went from a lengthy period of total, unlimited, and unreviewable judicial sentencing discretion to inflexible and mandatory guidelines, which severely truncated judicial discretion. In the 2005 landmark decision in *United States v. Booker*, the U.S. Supreme Court held that the mandatory guidelines, by imposing on judges, rather than juries, fact finding in sentencing that often increases an offender's sentence, violated the Sixth Amendment to the U.S. Constitution.[25] "The *Booker* remedial opinion determined that the appropriate cure was to sever and excise the provision of the statute that rendered the Guidelines mandatory. This modification of the federal sentencing statute, we explained, 'makes the Guidelines effectively advisory.'"[26] The guidelines, now advisory, "are finally just guidelines."[27] So, 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.[28] The overarching principle of federal sentencing is now to achieve an individualized sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing contained in 18 U.S.C. § 3553(a).[29] District court judges "must make an

25. 543 U.S. at 226-227.

26. Kimbrough v. United States, 552 U.S. 85, 100-01 (2007) (footnote and citations omitted).

27. John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 HOFSTRA L. REV. 639, 660 (2008).

28. *See Kimbrough*, 552 U.S. at 111 ("The ultimate question in Kimbrough's case is 'whether the sentence was reasonable—*i.e.*, whether the District Judge abused his discretion in determining that the § 3553(a) factors supported a sentence of [15 years] and justified a substantial deviation from the Guidelines range.'").

29. 18 U.S.C. § 3553(a) states:

> (a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed—
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;
> (4) the kinds of sentence and the sentencing range established for—
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be

individualized assessment based on the facts presented."[30] The Court in *Gall v. United States* cited with approval the following passage from the Brief for Federal Public and Community Defenders et al. as Amici Curiae: "The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record."[31] Indeed, the U.S. Supreme Court has long recognized that "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[32]

Part II of this Article fuses mass incarceration with a tutorial on federal mandatory minimum sentencing and the interplay with the now advisory guidelines. It concludes with a flow chart that graphically demonstrates the many steps of a federal sentencing, using as an example a typical, but hypothetical, crack cocaine case. Part III explores the new "policy disagreement" approach to the advisory guidelines including two U.S. Supreme Court cases where I was the sentencing judge. Part IV examines my sentencing journey in attempting to do "*Kimbrough* justice" through a series of sentencing opinions articulating "policy disagreements" with the drug trafficking guidelines. Part V disagrees with two Third Circuit

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incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

30. Gall v. United States, 552 U.S. 38, 50 (2007).

31. *Id.* at 51 (internal quotation marks omitted).

32. Koon v. United States, 518 U.S. 81, 113 (1996).

judges who advocate that district court judges should curb discretion in exercising "*Kimbrough* justice" because of concerns about what Congress will do. Finally, Part VI, the final portion of this Article, suggests we are at a cresting or tipping point in our recent history of mass incarceration and discusses some of the recent develops that could dramatically reduce mass incarceration.

II. MASS INCARCERATION, DRUG SENTENCING, MANDATORY MINIMUMS, AND THE DRUG GUIDELINES

A. Mass Incarceration

As we noted in *"A Holocaust in Slow Motion?"*: "Largely due to the war on drugs, the United States, with less than 5% of the world's population, has nearly 25% of the world's incarcerated population."[33] As Professor Dorothy E. Roberts has written, "The War on Drugs became its own prisoner-generating machine, producing incarceration rates that 'defy gravity and continue to grow even as crime rates are dropping.'"[34] The United States leads the world in mass incarceration because we incarcerate a greater percentage of our population than any country on Earth.[35] More than Russia, China, Syria, Saudi Arabia, and North Korea, to name a few likely surprises.[36] Additionally, there are more individuals in our state and federal prisons serving time for drug offenses than any other crime.[37] In 2012, over 72%, or 18,239 of the 25,298 defendants in federal court sentenced for drug trafficking offenses were black or Hispanic.[38] One author recently observed that mass incarceration today is "*the* fundamental fact" of our nation "as slavery was the fundamental fact of 1850."[39] There are now "more black men in the grip of the

33. Osler & Bennett, *supra* note 4, at 124.

34. Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1275 (2004) (quoting Franklin E. Zimring, *Imprisonment Rates and the New Politics of Criminal Punishment*, *in* MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 145, 146 (David Garland ed., 2001)).

35. *See* Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 428 (2013). The incarceration rate of the United States is "roughly seven times the rate in Western Europe." *Id*.

36. *See id.*

37. *See* Deborah Peterson Small, *Eliminating Racial Disparities in the Criminal Justice System*, 37 CHAMPION 55, 55-56 (2013).

38. U.S. SENTENCING COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.34 (2012), *available at* http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2012/sourcebook-2012 [hereinafter 2012 SOURCEBOOK].

39. Adam Gopnik, *The Caging of America*, THE NEW YORKER, Jan. 30, 2012, at 2, *available at* http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik?currentPage=all.

criminal-justice system—in prison, on probation, or on parole—than were in slavery then. Over all, there are now more people under 'correctional supervision' in America—more than six million—than were in the Gulag Archipelago under Stalin at its height."[40]

Michelle Alexander has written that white youths engage in drug crimes more than people of color.[41] Yet "[i]n some states, black men have been admitted to prison on drug charges at rates twenty to fifty times greater than those of white men."[42] Alexander ends her book with an indictment of mass incarceration, including a seething refrain from James Baldwin's 1962 classic, *The Fire Next Time*:

> [W]hen a young man who was born in the ghetto and who knows little of life beyond the walls of his prison cell and the invisible cage that has become his life, turns to us in bewilderment and rage, we should do nothing more than look him in the eye and tell him the truth. We should tell him the same truth the great African American writer James Baldwin told his nephew in a letter published in 1962, in one of the most extraordinary books ever written, *The Fire Next Time*. With great passion and searing conviction, Baldwin had this to say to his young nephew:
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> > This is the crime of which I accuse my country and my countrymen, and for which neither I nor time nor history will ever forgive them, that they have destroyed and are destroying hundreds of thousands of lives and do not know it and do not want to know it . . . . It is their innocence which constitutes the crime . . . . This innocent country set you down in a ghetto in which, in fact, it intended that you should perish. The limits of your ambition were, thus, expected to be set forever. You were born into a society which spelled out with brutal clarity, and in as many ways as possible, that you were a worthless human being.[43]

It is a sad commentary that Baldwin's indictment is probably truer today than it was over fifty years ago in 1962. One need look no further than today's federal crack cocaine guideline to understand this.

Because the crack cocaine guideline is a core example of an unduly harsh federal sentencing practice[44] that contributes to mass

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40. *Id*.

41. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 7 (2010).

42. *Id*.

43. *Id*. at 247-48.

44. Judge John Gleeson, a highly respected judge of the U.S. District Court for the Eastern District of New York (Brooklyn), and a former federal prosecutor of great renown for prosecuting organized crime defendants, including John Gotti, has written: "Guideline sentences have always been too severe, especially for the non-violent drug trafficking offenders that account for a large segment of the federal criminal docket." Gleeson, *supra* note 27, at 640, 658.

incarceration, the demographics of crack cocaine defendants in federal court are telling and worth analyzing. Nearly 83% of the more than 3500 crack defendants sentenced in 2012 were black, almost 10% were Hispanic, while less than 7% were white.[45] Nearly 92% of the crack defendants were male, higher than for any other drug type.[46] Nearly 98% of the crack defendants were U.S. citizens, higher than any other drug type and almost double the rate of marijuana defendants.[47] The number of non-U.S. citizens for crack defendants, 78, was nearly 1/25th the number of non-U.S. citizens for powder cocaine defendants, 1,925, and nearly 1/44th the number of non-U.S. citizen marijuana defendants.[48] Crack defendants receive a role adjustment (aggravating or mitigating) in their sentencing less often than for any other drug type.[49] They receive an aggravating role adjustment in just 6% of cases compared to 8.2% in powder cocaine cases and a mitigating role in just 5% of the cases compared to 18% for powder cocaine cases.[50] When crack defendants are eligible for a mandatory minimum sentence, they are less likely to receive the benefit of the safety valve than any other drug type.[51] Indeed, powder cocaine defendants eligible for a mandatory minimum sentence and the safety valve receive the safety valve four times more often than crack defendants.[52] Finally, the length of the average crack sentence is substantially longer than for any other drug type including heroin traffickers.[53]

Almost a decade after the ADAA was passed, the *L.A. Times*, in 1995, reported that not a single "Caucasian defendant had been charged with crack cocaine offenses in federal courts in Los Angeles, Boston, Denver, Chicago, Miami, Dallas, or in seventeen state courts."[54] Indeed, in my over twenty years of sentencing defendants in four different federal courts, spanning the two districts in Iowa,

45. 2012 SOURCEBOOK, *supra* note 38, at tbl.34.

46. *Id*. at tbl.35.

47. *Id*. at tbl.36.

48. *Id*.

49. *Id*. at tbl.40.

50. *Id*.

51. *Id*. at tbl.44.

52. *Id*.

53. *Id*. at fig.J. The average crack sentence in 2012 was 97 months; powder cocaine—83 months; heroin—73 months; marijuana—36 months; methamphetamine—92 months; and "other"—59 months. *Id*. Of course, this is after the Fair Sentencing Act of 2010 reduced the crack/powder disparity to 18:1. United States v. Williams, 788 F. Supp. 2d 847, 853 (N.D. Iowa 2011). Prior to the passage of the FSA, the length of crack sentences was substantially higher. *Id*.

54. Alyssa L. Beaver, Note, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 FORDHAM L. REV. 2531, 2549 (2010) (citing Dan Weikel, *War on Crack Targets Minorities over Whites*, L.A. TIMES, May 21, 1995, at A1, A26).

the district of Arizona, and the Northern Mariana Islands, I do not recall sentencing a single white defendant on a crack cocaine case.

Thus, in a very real sense the phrase "mass incarceration" is a misnomer. It "wrongly implies a problem affecting the masses, that is, that it affects large swaths of citizenry, across social and physical space, in broad and indiscriminate ways."[55] Mass incarceration clearly does not indiscriminately affect the entire cross section of America. "[I]ncarceration growth rates have 'been finely targeted,' by class, race, and geography."[56] Indeed, whatever we label this problem, it likely would have come to a screeching halt if white youths using crack cocaine in the suburbs would have been prosecuted at anywhere near the same rate as blacks in the inner city—the low hanging fruit of the War on Drugs. I now turn to an overview of the federal sentencing process and the interplay between the guidelines and mandatory minimums.

B. Drug Sentencing in Federal Court

1. The Statutory Scheme and Mandatory Minimums

The most commonly used federal drug statutes in pursuing the War on Drugs are:

21 U.S.C. § 841:	Prohibits the manufacture and distribution of, and possession "with intent to distribute," controlled substances[57]
21 U.S.C. § 846:	Prohibits attempts and conspiracies to manufacture, distribute or possess with intent to distribute controlled substances[58]
21 U.S.C. § 952:	Prohibits the importation of controlled substances[59]
21 U.S.C. § 953:	Prohibits the exportation of controlled substances[60]
21 U.S.C. § 963:	Prohibits attempts and conspiracies to import/export controlled substances[61]

55. Traum, *supra* note 35, at 427 (citing Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 DAEDALUS 74, 78 (2010)).

56. *Id*.

57. 21 U.S.C. § 841 (2012).

58. 21 U.S.C. § 846 (2012).

59. 21 U.S.C. § 952 (2012).

60. 21 U.S.C. § 953 (2012).

61. 21 U.S.C. § 963 (2012).

The statutory penalty range for these and other drug crimes are set forth in 21 U.S.C. §§ 841(b) and 960(b). Pursuant to these sections, a mandatory minimum ten year to a maximum of life sentence apples as follows:

> 1 kilogram of heroin
>
> 5 kilograms of cocaine (powder)
>
> 1,000 kilograms of marijuana or 1000 plants
>
> 280 grams of cocaine base
>
> 50 grams of actual methamphetamine or 500 grams of a mixture[62]
>
> A mandatory minimum of 5 years to 40 years applies as follows:
>
> 100 grams of heroin
>
> 500 grams of cocaine (powder)
>
> 100 kilograms of marijuana or 100 plants
>
> 28 grams of cocaine base
>
> 5 grams of actual methamphetamine or 50 grams of a mixture[63]
>
> Offenses involving lesser quantities of drugs have a statutory range of zero to 20 years with no mandatory minimum.[64]

There is also a statutory provision for enhanced mandatory minimum drug penalties based on a defendant's prior record of drug convictions.[65] 21 U.S.C. §§ 841(b) and 960(b) increase a 5 to 40 range to 10 years to life with one qualifying prior conviction. One qualifying prior conviction increases a 10 year mandatory minimum to 20 years and a second qualifying prior conviction increases the 10 year mandatory minimum to mandatory life. These enhanced provisions are only applicable if the prosecution provides notice to the defendant pursuant to section 851.[66] The only exceptions to these mandatory minimums are the "safety valve"[67] and "substantial assistance"

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62. 21 U.S.C. §§ 841(b)(1)(A), 960(b)(1) (2012).

63. §§ 841(b)(1)(B), 960(b)(2).

64. *See, e.g.,* § 841(b).

65. *Id.*

66. § 851(a)(1).

67. A defendant is safety valve eligible and receives relief from the mandatory minimum sentence in a drug case if the defendant can establish by a preponderance of the evidence the following five factors under 18 U.S.C. § 3553(f) (2012):

> (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
>
> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
>
> (3) the offense did not result in death or serious bodily injury to any person;
>
> (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of

motions.[68] Substantial assistance motions for cooperation are made at the sole discretion of federal prosecutors.[69] There are two types of substantial assistance motions. The statutory type authorized by section 3553(e) permits courts to go below statutory mandatory minimums. The other type, formally known as a "departure," permits a court to go below the bottom of the advisory guideline range—but not below a mandatory minimum. This motion is authorized by USSG § 5K1.1.[70] Federal prosecutors have virtually total discretion to make one or both motions.[71] Even when defendants sign a "cooperation plea agreement," a well drafted one reserves total discretion for the federal prosecutors to make the motion.[72] The most

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the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

68. Title 18 U.S.C. § 3553(e) provides:

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

69. *See id.*; U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2013) [hereinafter 2013 SENTENCING GUIDELINES].

70. Section 5K1.1 of the United States Sentencing Guidelines states:

§ 5K1.1 Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a)The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1)the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2)the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3)the nature and extent of the defendant's assistance;

(4)any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5)the timeliness of the defendant's assistance.

71. *See* 18 U.S.C. § 3553(e); 2013 SENTENCING GUIDELINES, *supra* note 69, at § 5K1.1.

72. *See* 2013 SENTENCING GUIDELINES, *supra* note 70, at § 5K1.1.

frequent reason for not making either substantial assistance motion is when federal prosecutors have not been able to use the information, or, if used, it is deemed by them, in their sole discretion, to be insubstantial.[73]

As the following chart from the Commission demonstrates, crack defendants received mandatory minimum sentences more often than any other drug type.[74] They also received the safety valve at a rate substantially lower than any other drug type including almost four times lower than heroin defendants. In the arcane and complex world of federal sentencing, mandatory minimums are sometimes higher than the guideline range for a particular defendant and sometimes lower. However, absent a "safety valve" or a substantial assistance departure, the mandatory minimum always sets the bottom floor for a defendant's sentence.[75]

Table 44
DRUG OFFENDERS RECEIVING SAFTEY VALVE AND MANDATORY MINIMUMS IN EACH DRUG TYPE

		No Drug Mandatory Minimum/No Safety Valve		No Drug Mandatory Minimum/Received Safety Valve[2]		Drug Mandatory Minimum/No Safety Valve		Drug Mandatory Minimum/ Received Safety Valve[3]	
DRUG TYPE	TOTAL	N	%	N	%	N	%	N	%
TOTAL	24,547	6,033	24.6	3,602	14.7	9,069	36.9	5,843	23.8
Powder Cocaine	5,949	1,048	17.6	327	5.5	2,654	44.6	1,920	32.3
Crack Cocaine	3,407	1,098	32.2	112	3.3	1,937	56.9	260	7.6
Heroin	2,135	563	26.4	176	8.2	822	38.5	574	26.9
Marijuana	6,786	1,775	26.2	2,332	34.4	1,267	18.7	1,412	20.8
Methamphetamine	4,750	632	13.3	151	3.2	2,315	48.7	1,652	34.8
Other (+)	1,520	917	60.3	504	33.2	74	4.9	25	1.6

2. The Advisory Sentencing Guidelines

At sentencing, federal judges are required to accurately compute the advisory sentencing guideline range; indeed, the U.S. Supreme Court has indicated "a district court should begin by correctly calculating the applicable Guidelines range."[76] The federal advisory guidelines, as Professor Frank Bowman, III, a leading academic expert on federal sentencing, has written, "are, in a sense, simply a

73. *See id.* at § 5K1.1 cmt. 3.

74. 2012 SOURCEBOOK, *supra* note 38, at tbl.44.

75. *See supra* text accompanying notes 57-64.

76. Gall v. United States, 552 U.S. 38, 39 (2007).

long set of instructions for one chart: the sentencing table."[77] The sentencing table forms a sentencing grid that contains forty-three offense levels on a vertical axis that intersects with six criminal history categories on a horizontal axis.[78] This creates a sentencing grid with 258 cells that each contain an advisory guideline sentencing range in terms of months.[79] The one exception is "the 6 cells for offense level 43 [the highest end] that have a single sentence: life."[80] The "instructions" in the form of the Guidelines Manual constitute a mere 590 pages![81] An abridged version of the sentencing table[82] is set forth below:

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
		(Portion of Sentencing Table not reproduced)					
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
Zone D	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

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77. Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1324 (2005).

78. Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587, 588 (1992); United States v. Newhouse, 919 F. Supp. 2d 955, 957 n.1 (N.D. Iowa 2013) (Bennett, J.); 2013 SENTENCING GUIDELINES, *supra* note 69, ch. 5, pt. A - Sentencing Table (2013).

79. Miller, *supra* note 78, at 588; *Newhouse*, 919 F. Supp. 2d at 957 n.1; 2013 SENTENCING GUIDELINES, *supra* note 69, ch. 5, pt. A.

80. *Newhouse*, 919 F. Supp. 2d at 957 n.1; *see* Miller, *supra* note 78, at 588.

81. *See* 2013 SENTENCING GUIDELINES, *supra* note 69,.

82. *Id.* ch. 5, pt. A.

To fully explain the complexity of the current federal sentencing regime, including how judges compute the guideline ranges and vary or depart from them, would require an incredibly detailed analysis, which is beyond the scope of this Article. However, the following flow chart displays, in graph format, the steps of a federal drug sentencing using a hypothetical, but typical, crack cocaine case:[83]

Diagram Of A Federal Drug Sentencing:
United States v. Jamal Johnson

Example: Defendant Jamal Johnson is a 28-year-old African-American who has pled guilty "straight up" (without a plea agreement or proffer) to a charge of conspiracy to distribute 280 grams or more of crack cocaine.

Step 1: Determine the crime or crimes Johnson pled guilty to or was convicted of. *E.g.*, 21 U.S.C. §§ 841(b)(1)(A) and 846 (conspiracy to distribute 280 grams or more of crack cocaine).

↓

Step 2: Determine the Guideline applicable to the offense conduct: § 2D1.1.

↓

Step 3: Determine the quantity of drugs Johnson will be sentenced for. Use the Drug Quantity Table in § 2D1.1:

- Johnson personally distributed 172 grams of crack cocaine in furtherance of the conspiracy. § 1B1.3(a)(1)(A)
- Johnson's co-defendants distributed another 311 grams, as reasonably foreseeable acts in furtherance of the conspiracy. § 1B1.3 (a)(1)(B)
- Total quantity: 483 grams of crack cocaine
- Base Offense Level: 32

↓

Step 4: Determine the applicability of any specific offense characteristics.

- Johnson maintained a premises for the purpose of distributing crack. § 2D1.1(b)(12) (increase 2 levels)
- Total Offense Level: 34

↓

Step 5: Determine all Guideline adjustments. Chapter 3.

- *E.g.*, Johnson did not receive either an aggravating or mitigating role adjustment. §§ 3B1.1 and 3B1.2
- Johnson did accept responsibility. § 3E1.1(a) and (b) (decrease by 3 levels)
- Offense Level: 31

↓

83. This is an original chart created by the author.

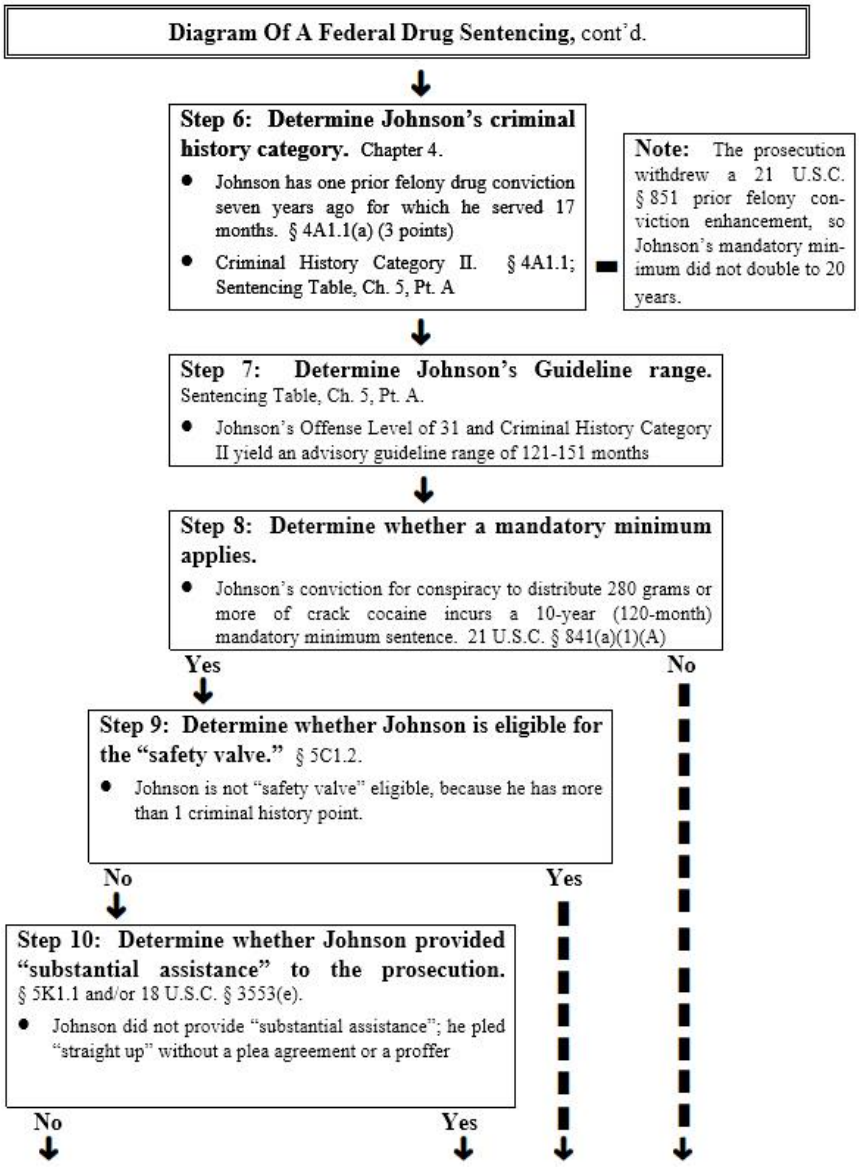


Diagram Of A Federal Drug Sentencing, cont'd.
Step 6: Determine Johnson's criminal history category. Chapter 4.
Johnson has one prior felony drug conviction seven years ago for which he served 17 months. § 4A1.1(a) (3 points)
Criminal History Category II. § 4A1.1; Sentencing Table, Ch. 5, Pt. A
Note: The prosecution withdrew a 21 U.S.C. § 851 prior felony conviction enhancement, so Johnson's mandatory minimum did not double to 20 years.
Step 7: Determine Johnson's Guideline range. Sentencing Table, Ch. 5, Pt. A.
Johnson's Offense Level of 31 and Criminal History Category II yield an advisory guideline range of 121-151 months
Step 8: Determine whether a mandatory minimum applies.
Johnson's conviction for conspiracy to distribute 280 grams or more of crack cocaine incurs a 10-year (120-month) mandatory minimum sentence. 21 U.S.C. § 841(a)(1)(A)
Yes
No
Step 9: Determine whether Johnson is eligible for the "safety valve." § 5C1.2.
Johnson is not "safety valve" eligible, because he has more than 1 criminal history point.
No
Yes
Step 10: Determine whether Johnson provided "substantial assistance" to the prosecution. § 5K1.1 and/or 18 U.S.C. § 3553(e).
Johnson did not provide "substantial assistance"; he pled "straight up" without a plea agreement or a proffer
No
Yes

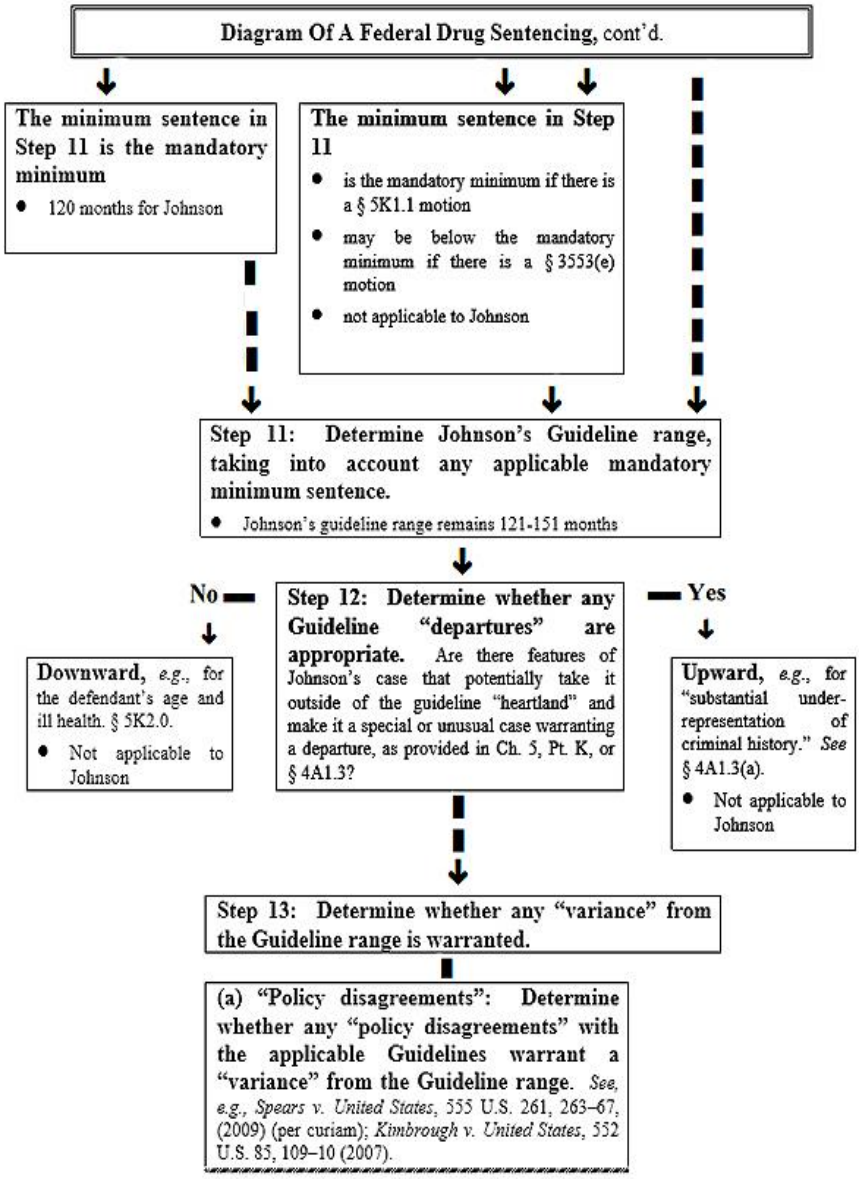
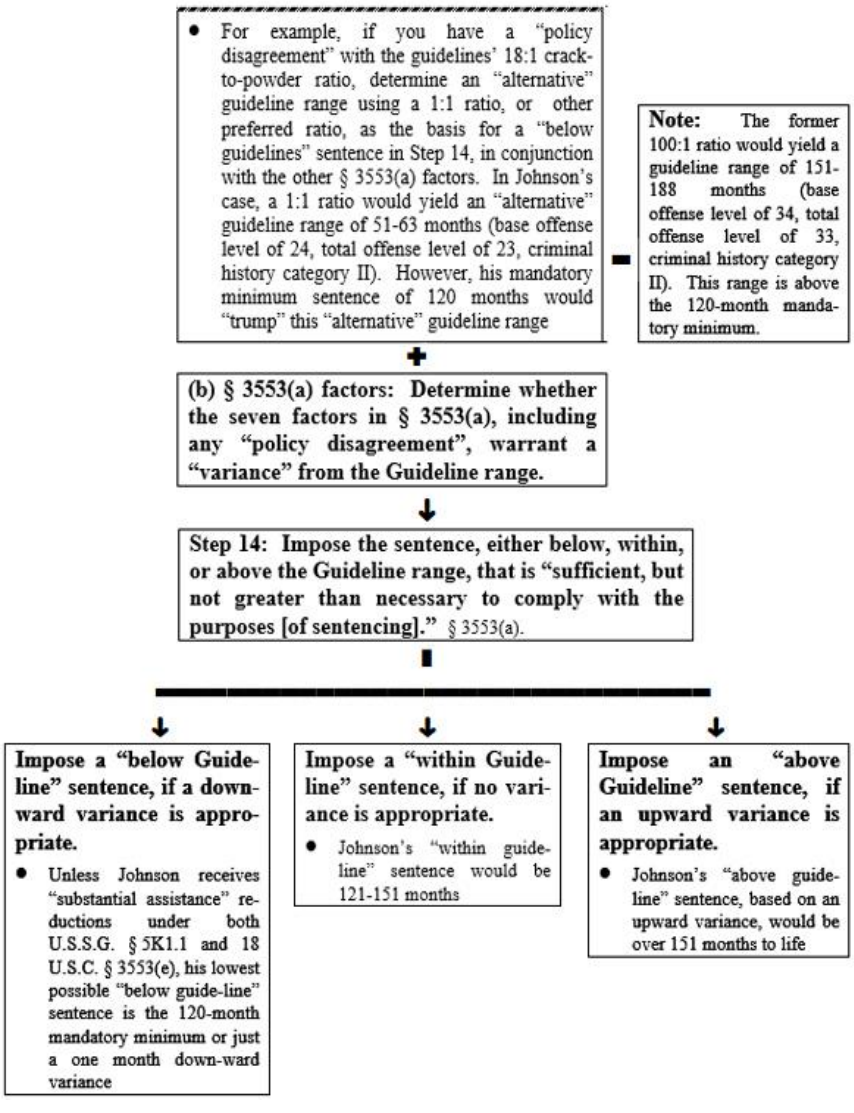


Diagram Of A Federal Drug Sentencing, cont'd.
The minimum sentence in Step 11 is the mandatory minimum
• 120 months for Johnson
The minimum sentence in Step 11
• is the mandatory minimum if there is a § 5K1.1 motion
• may be below the mandatory minimum if there is a § 3553(e) motion
• not applicable to Johnson
Step 11: Determine Johnson's Guideline range, taking into account any applicable mandatory minimum sentence.
• Johnson's guideline range remains 121-151 months
No
Step 12: Determine whether any Guideline "departures" are appropriate. Are there features of Johnson's case that potentially take it outside of the guideline "heartland" and make it a special or unusual case warranting a departure, as provided in Ch. 5, Pt. K, or § 4A1.3?
Yes
Downward, e.g., for the defendant's age and ill health. § 5K2.0.
• Not applicable to Johnson
Upward, e.g., for "substantial under-representation of criminal history." See § 4A1.3(a).
• Not applicable to Johnson
Step 13: Determine whether any "variance" from the Guideline range is warranted.
(a) "Policy disagreements": Determine whether any "policy disagreements" with the applicable Guidelines warrant a "variance" from the Guideline range. See, e.g., Spears v. United States, 555 U.S. 261, 263–67, (2009) (per curiam); Kimbrough v. United States, 552 U.S. 85, 109–10 (2007).

Diagram Of A Federal Drug Sentencing, cont'd.



It is important to remember some basic first principles of federal sentencing: 1) a sentencing judge has an important obligation to accurately compute the advisory guideline range at sentencing;[84] 2) Congressionally mandated mandatory minimum sentences—created by Congress, not federal judges—always trump the advisory guideline range;[85] 3) there are only two exceptions to mandatory minimum sentences: the safety valve and substantial assistance motions;[86] 4) unless the safety valve or substantial assistance applies, the mandatory minimum is the lowest sentence, not the highest, the judge may impose;[87] 5) for almost all drug-related sentences, quantity is the single most important consideration for the guideline range;[88] and 6) a drug defendant is not only responsible for his or her own drug quantity, but may also be held responsible for the "reasonably foreseeable acts and omissions of others" including any "criminal plan, scheme, endeavor or enterprise undertaken by the defendant in concert with others."[89] This may be true even where the particular defendant did not actually know the others.

Armed with this cursory knowledge of federal drug sentencing, I now turn to the U.S. Supreme Court's approval of evolving "policy disagreements" with the now advisory federal sentencing guidelines.

III. POLICY DISAGREEMENTS WITH THE GUIDELINES: *KIMBROUGH*, *SPEARS*, *PEPPER*, AND BEYOND

For nearly a decade, federal sentencing law has been in "a period of profound change."[90] On December 10, 2007, the same day the U.S. Supreme Court decided *Gall*, it also decided *Kimbrough*.[91] *Kimbrough* generated a tsunami to the ongoing sea change in federal sentencing. For the first time, the U.S. Supreme Court authorized, but did not mandate, that federal district court sentencing judges could express "policy disagreements" with the now "advisory" crack/powder sentencing guidelines, which then had a 100:1 crack v. powder ratio in terms of drug quantity.[92] This was critical, because, as previously mentioned, drug quantity is the single most important

84. 2013 SENTENCING GUIDELINES, *supra* note 69, ch. 1, pt. A, subpt. 2.

85. *Id.* § 5G1.1(a)-(b).

86. *See id.* § 5D1.2 cmt. 2-3.

87. *See id.* § 2D1.1 cmt. 23.

88. OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM'N, DRUG PRIMER 4-5 (2013), *available at* http://www.ussc.gov/sites/default/files/pdf/training/primers/Primer_Drug.pdf [hereinafter DRUG PRIMER].

89. 2013 SENTENCING GUIDELINES, *supra* note 69, at § 1B1.3(a)(1)(B); *see, e.g.*, United States v. Laboy, 351 F.3d 578, 582 (1st Cir. 2003).

90. Michelman & Rorty, *supra* note 18, at 1083.

91. Gall v. United States, 552 U.S. 38 (2007); Kimbrough v. United States, 552 U.S. 85 (2007).

92. *Kimbrough*, 552 U.S. at 100-11.

factor driving federal guideline calculations in drug trafficking cases both pre and post-*Booker*.[93] "The Commission did not use [an] empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act's [ADAA] weight-driven scheme."[94] Thus, because the drug trafficking guidelines are weight-driven and the crack/powder cocaine ratio is so dramatic, the Court observed in *Kimbrough* that a major powder cocaine supplier may, and in my view often does, "receive a shorter sentence than" the low-level crack street dealer who got the powder cocaine for the supplier and "then converts it to crack"[95]— unless a sentencing judge grants a crack cocaine defendant relief from the crack cocaine guideline.

Derrick Kimbrough was sentenced in the U.S. District Court for the Eastern District of Virginia on a variety of drug trafficking charges (e.g., possessing with intent to distribute crack and powder cocaine) and for possessing a firearm in furtherance of a drug trafficking offense just three months after the *Booker* decision.[96] His advisory guideline range was 228-270 months.[97] The district court judge stated at sentencing that Kimbrough's guideline range was "'greater than necessary' to accomplish the purposes of sentencing" pursuant to the § 3553(a) factors and that the case was an example of the "disproportionate and unjust effect that crack cocaine guidelines have in sentencing."[98] The sentencing judge contrasted Kimbrough's sentence by noting that his guideline range of 228-270 months would have been 97-106 months for an equivalent amount of powder cocaine.[99] He sentenced Kimbrough to the mandatory minimum sentence of 180 months.[100] The U.S. Court of Appeals for the Fourth Circuit reversed in a per curiam opinion because, in their view, "a sentence 'outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses.'"[101] The U.S. Supreme Court reversed.[102]

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93. *See* DRUG PRIMER, *supra* note 88, at 4-5.

94. *Kimbrough*, 552 U.S. at 96.

95. *Id*. at 95.

96. *Id*. at 91, 93 n.2.

97. *Id*. at 92. Kimbrough acknowledged he was accountable for 56 grams of crack cocaine that carried a mandatory minimum sentence of 120 months and a maximum of life. He also acknowledged he was accountable for 92.1 grams of powder cocaine which carried a statutory range of 0 to 20 years. His gun offense carried a 5 year to life sentence that must run consecutive to the drug offense. *Id*. at 91-92.

98. *Id*. at 92-93.

99. *Id*. at 93.

100. *Id.* 120 months on the crack cocaine and other drug counts to run concurrent with each other and 60 months consecutive on the gun charge. *Id*. at 93 n.3.

101. *Id*. at 93.

102. *Id*. at 111-12.

The Court in *Kimbrough* held that sentencing judges had discretion to disagree with the 100:1 crack/powder sentencing ratio based on a policy disagreement with it, holding "it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case."[103] In doing so, the Court resolved a major circuit split that leaned strongly towards preventing sentencing judges from reducing a crack sentence based on a policy disagreement.[104]

Some of the amicus briefs filed in *Kimbrough* are illuminating on the length of sentences under the guidelines, the racial disparity created by the guidelines, especially the crack guideline, and the effect of the guidelines on mass incarceration. In 1986, prior to the adoption of the guidelines and the 100:1 ratio "the average federal drug sentence for African Americans was 11% higher than for whites. Four years later, and after the institution of the Guidelines, the average federal drug sentence for African Americans was 49% higher."[105] Also, citing U.S. Department of Justice statistics, "between 1994 and 2003, the average time served by an African American for a drug-related offense increased by 77%, whereas the average sentence of white offenders increased by only 28%."[106] Looking at the average sentence of low-level crack offenders versus high level powder cocaine importers, one amicus curiae brief noted that "[v]iewed on a gram-by-gram basis, street level crack dealers are punished 300 times more severely than high-level cocaine powder importers."[107]

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103. *Id*. at 110.

104. At the time certiorari was granted in Kimbrough, there was a significant circuit split. *Id.* at 93 n.4. The U.S. Courts of Appeals for the D.C. and Third Circuits maintained that a district court may take the sentencing disparity into account when imposing a non-guideline sentence. *See* United States v. Pickett, 475 F.3d 1347, 1355-56 (D.C. Cir. 2007) ("District Court erred when it concluded that it had no discretion to consider the crack/powder disparity in imposing a sentence"); United States v. Gunter, 462 F.3d 237, 248-49 (3d Cir. 2006) (same conclusion as *Pickett*). The U.S. Courts of Appeals for the First, Second, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits had held that a sentencing court may not impose a sentence outside the guideline range based on its disapproval of the crack/powder disparity. *See* United States v. Leatch, 482 F.3d 790, 791 (5th Cir. 2007); United States v. Johnson, 474 F.3d 515, 522 (8th Cir. 2007); United States v. Castillo, 460 F.3d 337, 361 (2d Cir. 2006); United States v. Williams, 456 F.3d 1353, 1369 (11th Cir. 2006); United States v. Miller, 450 F.3d 270, 275-76 (7th Cir. 2006); United States v. Eura, 440 F.3d 625, 633-34 (4th Cir. 2006); United States v. Pho, 433 F.3d 53, 62-63 (1st Cir. 2006).

105. Brief for the NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae Supporting Petitioner at 5-6, Kimbrough v. United States, 552 U.S. 85 (2007) (No. 06-6330), 2007 WL 2155556, at *5-6.

106. *Id*. at 6.

107. Brief for the Sentencing Project and for the Center for the Study of Race and

The NAACP Legal Defense & Educational Fund, Inc. amicus curiae brief, in noting that the "results of these disparities for African Americans have been devastating," outlined their effect on dilution of voting rights, impaired capacity for re-entry, and other harms to the community, including "the breakdown of community social structures like churches and schools that face a shortage of male leaders."[108] Finally, quoting several prominent trial and appellate federal judges,[109] the amicus brief hammers home the point that the crack/powder disparity "has engendered near universal criticism, causing widespread disrespect for the law and undermining the goals of the Sentencing Reform Act."[110] The amicus brief concludes its section on crack disparity promoting disrespect for the law by observing "the crack Guidelines represent a stain on the criminal justice system, disproportionately affecting African Americans without any legitimate penological justification and engendering a disrespect for the law that undermines the criminal justice system itself."[111]

The decision in *Kimbrough* was a major impetus for my drug sentencing journey along the sentencing road less travelled. The rationale of *Kimbrough* clearly exposed the irrefutable fact that the drug guideline was not based on the 10,000 prior empirical sentencings that the Commission so frequently touted nor on the national experience in drug sentencing.[112]

Kimbrough was followed, two years later, by *Spears v. United States,*[113] a case I am intimately familiar with because I was the sentencing judge. I was reversed twice by the Eighth Circuit Court of Appeals with the additional distinction of both reversals coming from an en banc court. Additionally, lead counsel in the U.S. Supreme

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Law at the University of Virginia Law School as Amici Curiae Supporting Petitioner at 11, Kimbrough v. United States, 552 U.S. 85 (2007) (No. 06-6330), 2007 WL 2155555, at *11.

108. Brief for the NAACP Legal Defense & Educational Fund, *supra* note 105, at *6-8.

109. *Id.* at *10 ("27 federal judges, all of whom had previously served as U.S. Attorneys, sent a letter to the U.S. Senate and House Judiciary Committees stating that '[i]t is our strongly held view that the current disparity between powder cocaine and crack cocaine, in . . . the guidelines can not be justified and results in sentences that are unjust and do not serve society's interest.' Letter from Judge John S. Martin, Jr. to Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, and Congressman Henry Hyde, Chairman of the House Judiciary Committee (Sept. 16, 1997), *reprinted in* 10 FED. SENT'G REP. 195 (1998). 'More recently, U.S. Circuit Judge Michael McConnell of the Tenth Circuit has called the crack Guidelines "virtually indefensible,"' United States v. Pruitt, 487 F.3d 1298, 1315 n.3 (10th Cir. 2007) (McConnell, J., concurring) . . . .").

110. *Id.* at *8.

111. *Id.* at *13.

112. *See* Kimbrough v. United States, 552 U.S. 85, 96 (2007).

113. 555 U.S. 261 (2009).

Court appeal was my co-author in *"A Holocaust in Slow Motion?" Mass Incarceration in America and the Role of Discretion*, Professor Mark Osler, who I did not know at the time of the *Spears* appeal. On December 19, 2005, following a jury verdict finding Steven Spears guilty of both crack and powder cocaine trafficking, Spears came before me for sentencing. Remember, this was just one week shy of two years *prior* to the U.S. Supreme Court opinion in *Kimbrough*.[114] Spears's guideline range was 324-405 months.[115] Believing I had the authority to disagree on policy grounds with the 100:1 guideline crack/powder cocaine ratio, based on the holding in *Booker* and the fact that the guidelines were now advisory, I adopted a 20:1 ratio—which lowered Spears's guideline range to 210-262 months. Because Spears had a 240 month statutory mandatory minimum, I sentenced him to 240 months.[116] The U.S. Court of Appeals for the Eighth Circuit, in an en banc ruling, reversed in a 10-2 opinion.[117] The court held: "based on the district court's categorical rejection of congressional policy, the court impermissibly varied by replacing the 100:1 quantity ratio inherent in the advisory Guidelines range with a 20:1 quantity ratio."[118] The lengthy dissent would have only affirmed the "reasonable sentence imposed by the district court."[119] Judge Bye also noted that "[s]entencing black offenders more severely than similarly-situated white offenders, with no reasoned basis for doing so, promotes disrespect for the law and the system rather than respect, and creates unwarranted and discriminatory sentencing disparities."[120]

On January 7, 2008, the U.S. Supreme Court granted certiorari, vacated the judgment of the en banc panel, and remanded "for further consideration in light of *Kimbrough v. United States*."[121]

On remand, the Eighth Circuit Court of Appeals, again en banc, but this time by a vote of 6-5, and over another vigorous dissent, again reversed my sentencing decision and noted quite erroneously, "[n]othing in *Kimbrough* suggests the district court may substitute its own ratio for the ratio set forth in the Guidelines."[122]

In a per curiam opinion, the U.S. Supreme Court again reversed the en banc decision of the Eighth Circuit Court of Appeals.[123] The

114. *Kimbrough* was decided on December 10, 2007. *Kimbrough*, 552 U.S. at 85.

115. *Spears*, 555 U.S. at 840.

116. *Id*. at 242.

117. United States v. Spears (*Spears I*), 469 F.3d 1166, 1178 (8th Cir. 2006) (en banc).

118. *Id*.

119. *Id*. at 1191 (Bye, J., dissenting).

120. *Id*. at 1190.

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

122. United States v. Spears (*Spears II*), 533 F.3d 715, 717 (8th Cir. 2008) (en banc).

123. Spears v. United States, 555 U.S. 261, 268 (2009) (per curiam).

court held that "*Kimbrough* considered and rejected the position taken by the Eighth Circuit below."[124] The Court also stated: "That was indeed the point of *Kimbrough*: a recognition of district courts' authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case."[125] Finally, the Court also observed what seemed rather obvious after *Kimbrough*:

> As a logical matter, of course, rejection of the 100:1 ratio, explicitly approved by *Kimbrough*, necessarily implies adoption of some other ratio to govern the mine-run case. A sentencing judge who is given the power to reject the disparity created by the crack-to-powder ratio must also possess the power to apply a different ratio which, in his judgment, corrects the disparity. Put simply, the ability to reduce a mine-run defendant's sentence necessarily permits adoption of a replacement ratio.[126]

Thus, Steven Spears's long and undoubtedly painful trip through two en banc circuit rulings and two U.S. Supreme Court decisions, aided by Professor Osler as lead counsel, resulted in a clear holding that sentencing judges could indeed disagree with the 100:1 crack/powder ratio on policy grounds and impose a lower sentence than that called for by the guidelines.[127]

Two years after *Spears*, the U.S. Supreme Court decided *Pepper v. United States*.[128] I was also the sentencing judge in *Pepper*. Like *Spears*, I was reversed by the Eighth Circuit Court of Appeals multiple times, breaking my *Spears* record with a total of three reversals in *Pepper*[129] and five in total in *Spears* and *Pepper*. While the procedural history of *Pepper* is fascinating and worthy of a law review article in its own right, it will not be discussed here. Suffice it to say, the Eighth Circuit Court of Appeals did not agree with my sentence of twenty-four months (Pepper's guideline range was 97-121

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124. *Id*. at 264.

125. *Id*.

126. *Id*. at 265.

127. *See id*. at 265-66 ("[D]istrict courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines.").

128. 131 S. Ct. 1229 (2011).

129. *Pepper*, 131 S. Ct. at 1236, 1237-38; *see* United States v. Pepper (*Pepper I*), 412 F.3d 995, 999 (8th Cir. 2005); United States v. Pepper (*Pepper II*), 486 F.3d 408, 413 (8th Cir. 2007); United States v. Pepper (*Pepper III*), 518 F.3d 949, 953 (8th Cir. 2008). By the time *Pepper IV*, United States v. Pepper, 570 F.3d 958, 964-65 (8th Cir. 2009), rolled around, I had been removed from the case by the Eighth Circuit Court of Appeals. *Pepper*, 131 S. Ct. at 1238. The court indicated my removal was due to my "expressed a reluctance to resentence Pepper again should the case be remanded." *Pepper III*, 518 F.3d at 953.

months)[130] each time I gave it because they thought it way too lenient.[131]

At its core, the *Pepper* case addressed whether I could consider Pepper's amazing post-offense rehabilitation in his first of many resentencings.[132] For purposes of this Article, *Pepper* is important because it reaffirmed the *Kimbrough* holding that district court judges have the power to reject guidelines on policy grounds and extended *Kimbrough*'s holding beyond the crack/powder ratio.[133] The Court acknowledged that a disagreement with the unequivocal policy statement in USSG § 5K2.19, which bars consideration of post-sentencing rehabilitative efforts, was appropriate.[134] The Court held this "is particularly true where, as here, the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted."[135]

I turn now to my professional journey through authored opinions on "policy disagreements" with various aspects of the drug trafficking guidelines. This includes decisions both pre and post FSA of 2010 which substantially reduce the disparity between crack and powder cocaine sentences in federal court.

IV. DOING *KIMBROUGH* JUSTICE POST *SPEARS* AND *PEPPER*

A. United States v. Gully

One day shy of two months following the U.S. Supreme Court's decision in *Spears*, affirming my 20:1 crack/powder cocaine ratio, I entered an order for the parties to brief whether I had discretion to reduce the *Spears* ratio from 20:1 to 1:1 and whether that was appropriate in Demetrius Gully's case.[136] I determined the Commission did not base its original crack/powder cocaine ratio on empirical evidence.[137] The Commission itself came to acknowledge, years later, that the harm of crack, the violence allegedly associated with it, and the seriousness of crack offenses were all seriously overstated and that the crack/powder disparity was inconsistent with the goal of the ADAA of 1986 to punish major drug traffickers more harshly than low-level dealers.[138] After years, the Commission had

130. *Pepper I*, 412 F. 3d at 996-97.

131. *Id.* at 997; *Pepper II*, 486 F. 3d at 410; *Pepper III*, 518 F. 3d at 950.

132. *Pepper*, 131 S. Ct. at 1249-50.

133. *See id.* at 1241, 1247, 1254.

134. *Id.* at 1247 ("[D]ecisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views.").

135. *Id.* at 1247.

136. United States v. Gully, 619 F. Supp. 2d 633, 635 (N.D. Iowa 2009).

137. *Id.* at 638.

138. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL

finally come to understand that the crack/powder disparity promoted disrespect for and lack of confidence in the criminal justice system.[139] These and many other reasons, convinced me I should adopt a 1:1 ratio, not only for Mr. Gully, but across-the-board in all crack cases.[140] My analysis did not end there, however. Due to my expressed across-the-board policy disagreement with the crack/powder disparity, I reduced Gully's advisory guideline range of 108-135 months to 30-37 months.[141] In the end, numerous other factors caused me to raise his sentence to more than twice the upper range of his 1:1 ratio guideline range.[142] Ultimately, I imposed a sentence of 84 months—24 months less than the 100:1 ratio advisory guideline range.[143]

The United States did not appeal and, to my knowledge, has never appealed any of my 1:1 ratio crack sentencing rulings. "'Crack cocaine' is after all, just cocaine powder 'cooked' with water and baking soda."[144] More importantly, the then existing crack ratio was an extremely poor proxy for criminal culpability.[145] Not only is the ratio a poor proxy for the length of a sentence, so too, as I have stated in my opinion and decisions, is the weight of the drugs involved.[146] This theme pervades my evolving drug sentencing philosophy.

SENTENCING POLICY 7-8, 14 (2007), *available at* www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf.

139. *Id.*

140. *Gully*, 619 F. Supp. 2d at 638-45.

141. *Id.* at 645-46.

142. I found the following factors aggravating under the § 3553(a) analysis:

> [T]he defendant's history of assaultive conduct, including assaultive conduct toward women; his continued drug dealing while on pretrial release; the court's finding that he was not merely a street dealer of crack, but a larger supplier of crack cocaine in Fort Dodge, Iowa; his irresponsible behavior in fathering six children by four women while having no employment history; his lack of employment history itself suggesting that he was making a living dealing drugs; evidence that he had gotten his sister to try to "take the rap" for his assault on another woman; and his repeated criminal offenses suggesting recidivism and the likelihood that he would reoffend unless incarcerated . . . .

Id. at 645.

143. *Id.* at 645-46.

144. *Id.* at 636 n.3. Just a year after the *Gully* decision was filed, Congressman Keith Ellison (D-Minn.) would note: "The fact is, the chemical difference between crack and [powder] cocaine is the difference[] between water and ice. It is the same thing, and you cannot explain to a people that for doing the same thing that they should get 100-to-1 more severe treatment. It doesn't make sense." United States v. Williams, 788 F. Supp. 2d 847, 849 (N.D. Iowa 2011) (Bennett, J.).

145. *See Gully*, 619 F. Supp. 2d at 638.

146. *See, e.g.*, *id.*

B. The Fair Sentencing Act of 2010 and United States v. Williams

Just a little more than one year after I decided *Gully*, on August 3, 2010 the FSA of 2010 became law.[147] The purpose of the Act, *inter alia*, was to partially ameliorate the unjustness of the crack/powder disparity, as I explained in *Williams*:

> The 2010 FSA altered the quantity thresholds triggering mandatory minimum punishments for crack cocaine offenses, replacing the 5–and 50–gram thresholds with 28–and 280–gram thresholds, while leaving the triggering thresholds for powder cocaine at 500 and 5,000 grams (5 kilograms), respectively. *See* 21 U.S.C. § 841(b)(1)(A)(ii) (powder cocaine), (b)(1)(A)(iii) (crack cocaine), (b)(1)(B)(ii) (powder cocaine), (b)(1)(B)(iii) (crack cocaine) (as amended in 2010). As a result, Congress replaced the old 100:1 ratio with a new roughly 18:1 ratio (18 x 28 grams = 504 grams; 18 x 280 grams = 5,040 grams or 5.04 kilograms). At Congress's direction, the Sentencing Commission followed suit by adopting a similar disparate punishment scheme for crack and powder cocaine offenses, employing roughly the same 18:1 ratio.[148]

As I indicated in the *Williams* decision, "[w]hen I first learned that the 2010 FSA was about to be passed, I just assumed that I would change . . . from a 1:1 ratio to the new 18:1 ratio . . . I assumed that Congress would have had persuasive evidence—or at least some empirical or other evidence—before it as the basis for the new ratio."[149] I also assumed that the Commission "would have brought its institutional expertise and empirical evidence to bear, both in advising Congress and in adopting crack cocaine Sentencing Guidelines based on the 18:1 ratio."[150] Finally, in the *Williams* presentencing hearing, "I assumed that the prosecution would present . . . some evidence supporting the 18:1 ratio."[151] None of these assumptions about the new 18:1 ratio were accurate. As I wrote in *Williams*, "the 'new' 18:1 ratio, like the old 100:1 ratio, was ultimately the result of political expediency, not Congress's usual deliberative process."[152] I went on to find that "[w]hile there is nothing wrong with political expediency in the legislative process or the legislative branch, it cannot be the basis for the exercise of appropriate judicial discretion in individual sentencings."[153] That the FSA of 2010 was a "political compromise" not based on empirical

147. *Williams*, 788 F. Supp. 2d at 853.
148. *Id*..
149. *Id*. at 849.
150. *Id*. at 849-50.
151. *Id*. at 850.
152. *Id*. at 866.
153. *Id*. at 867.

evidence is beyond dispute.[154]

In rejecting the new 18:1 ratio, while finding it an improvement over the prior 100:1 ratio, I noted that the new ratio suffers from most or all of the injustice in the prior ratio plus some new ones.[155] Thus, I rejected the 18:1 ratio, based on a categorical policy disagreement with it—even in a mine-run case.[156] In reaching this conclusion, I set out the following factors:

> Congress's adoption of the 18:1 ratio was the result of political compromise and expediency, not the result of reasoned analysis of new empirical data or social science research;
>
> The 18:1 ratio does not exemplify the Sentencing Commission's exercise of its characteristic institutional role of employing an empirical approach based on data about past sentencing practices to develop sentencing guidelines, but is the result of congressional mandates that still interfere with and undermine the work of the Sentencing Commission;
>
> The assumptions about the relative harmfulness of crack cocaine compared to powder cocaine and the relative harms that come with trafficking in those controlled substances are not supported by research and data in the decades since passage of the 1986 Act and no effort has been made to demonstrate that the 18:1 ratio is more proportional to any additional harms of crack cocaine trafficking, if any, that are borne out by recent research;
>
> The 18:1 ratio is still inconsistent with the goals of the 1986 Act and is also inconsistent with the 2010 FSA's goal of restoring "fairness" to federal cocaine sentencing, because it tends to have the anomalous effect of punishing low-level crack traffickers more severely than major traffickers in powder cocaine;
>
> As a corollary to the prior point, the 18:1 ratio fails to recognize the ready convertibility of crack and powder cocaine or that such convertibility is part of the usual course of cocaine trafficking, from producers to retail purchasers;
>
> The 18:1 ratio still will have a disproportionate impact on black offenders, which will continue to foster disrespect for and lack of confidence in the criminal justice system;
>
> The 18:1 ratio, as a "proxy" for the assumed risks and harms of crack cocaine, remains a remarkably blunt instrument to address those assumed risks and harms;
>
> Addition of enhancements for certain aggravating circumstances, including enhancements for violence, in specific cases, will operate as a "double whammy" on crack cocaine defendants, whom the 18:1 ratio already punishes for the assumed presence of such

154. *Id*. at 870-79. This section of the *Williams* decision details the overwhelming evidence of a purely political compromise.

155. *Id*. at 885-86.

156. *Id*. at 886.

circumstances.[157]

I found it extremely important to note in *Williams* that a policy disagreement with a guideline, as former U.S. District Court Judge Nancy Gertner observed, "is not because I simply disagree with them and seek to substitute my own philosophy of sentencing. It is because the Guideline at issue is wholly inconsistent to the purposes of sentencing under 18 U.S.C. § 3553(a)."[158] Finally, I noted in *Williams* that policy disagreements with the guidelines do not promote unwarranted sentencing disparity.[159] Indeed, the failure to vary on policy grounds can promote: "[w]hat the prosecution is actually arguing for here is unwarranted uniformity, which is just as offensive to the sentencing scheme as unwarranted disparity."[160]

C. United States v. Hayes

Two years after *Williams*, I decided *United States v. Hayes*, which extended my policy disagreement with the crack guideline to the methamphetamine (meth) guideline.[161] After an extensive discussion of the history of the meth guideline, the undisputable fact that neither the current nor former meth guideline was or is based on empirical evidence of any kind, that a whopping 83.1% of the meth defendants in federal court faced a mandatory minimum sentence even though the vast majority were not kingpins, and since quantity is a poor proxy for most meth defendants' criminal culpability, I expressed an across-the-board policy disagreement with the harshness of the meth guideline because it is so deeply flawed.[162] I decided to reduce meth guideline ranges by one-third before factoring in the other § 3553(a) factors that can raise or lower a meth defendant's sentence.[163] In reaching this decision, I was heavily influenced by prior decisions by Judge John Gleeson,[164] former Judge Nancy Gertner,[165] and Judge Joseph Bataillion.[166]

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157. *Id.*

158. *Id.* at 889 (citing United States v. Whigham, 754 F. Supp. 2d 239, 242-43 (D. Mass. 2010) (Gertner, J.)).

159. *Williams*, 788 F. Supp. 2d at 887-90.

160. *Id.* at 889.

161. 948 F. Supp. 2d 1009, 1014 (N.D. Iowa 2013) (Bennett, J.).

162. *Id.* at 1014-31.

163. *Id.* at 1031-33.

164. United States v. Diaz, No. 11-CR-00821-2 (JG), 2013 WL 322243 (E.D.N.Y. Jan. 28, 2013) (discussed at length in *Hayes*, 948 F. Supp. 2d at 1017-18).

165. United States v. Cabrera, 567 F. Supp. 2d 271 (D. Mass. 2008).

166. United States v. Woody, No. 8:09CR382, 2010 WL 2884918 (D. Neb. July 20, 2010); United States v. Ortega, No. 8:09CR400, 2010 WL 1994870 (D. Neb. May 17, 2010); United States v. Nincehelser, No. 8:08CR249, 2009 WL 872441 (D. Neb. Mar. 30, 2009).

D. United States v. Young

Judges, even those who want to, can only do so much "*Kimbrough* justice." One weapon only federal prosecutors have the power to unleash is doubling of drug mandatory minimum sentences potentially to a mandatory life sentence by filing the feared 21 U.S.C. § 851 enhancement.[167] I started my opinion in *United States v. Young* as follows:

> This case presents a deeply disturbing, yet often replayed, shocking, dirty little secret of federal sentencing: the stunningly arbitrary application by the Department of Justice (DOJ) of § 851 drug sentencing enhancements. These enhancements, at a minimum, double a drug defendant's mandatory minimum sentence and may also raise the maximum possible sentence, for example, from forty years to life. They are possible any time a drug defendant, facing a mandatory minimum sentence in federal court, has a prior qualifying drug conviction in state or federal court (even some state court misdemeanor convictions count), no matter how old that conviction is.[168]

After obtaining the raw data file from the Commission, the only known source of § 851 data, I was the first judge or legal scholar to analyze and publish such shocking facts.[169] I was deeply concerned that "in the N.D. of Iowa, there was no discernible local policy or even a whiff of an identifiable pattern. I have never been able to discern a pattern or policy of when or why a defendant receives a § 851 enhancement in my nearly 20 years as a U.S. district court judge . . . ."[170] Neither the defense lawyers nor the Assistant U.S. Attorneys who appear before me, nor our myriad of U.S. probation officers, could articulate a pattern either.[171] What the data revealed was shocking, and I likened it to a "Wheel of Misfortune."[172] A defendant in the Northern District of Iowa who was eligible for a § 851 enhancement was 2531.95% more likely to receive a § 851 enhancement than a defendant in the District of Nebraska[173]—a district I can see out the window of the courtroom I use. For the District of South Dakota, which I can drive to in less than 5 minutes, the percentage was 1981.25%.[174] Disparities like these exist everywhere in the nation:

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167. *See* United States v. Young, 960 F. Supp. 2d 881, 882 (N.D. Iowa 2013) (Bennett, J.).

168. *Id*. (footnotes omitted).

169. *Id*.

170. *Id*. at 887.

171. *Id*. 887-88.

172. *Id*. at 889-90.

173. *Id*. at 918.

174. *Id*.

> Tennessee offers the largest intra-state disparity in application. In the E.D. of Tennessee, offenders are 3,994% more likely to receive a § 851 enhancement than in the W.D. of Tennessee. Offenders with a qualifying prior drug conviction in the W.D. of Texas were 2,585% more likely to have the Wheel of Misfortune land on a § 851 enhancement than their counterparts in the N.D. of Texas. Georgia offenders unfortunate enough to be charged in the N.D. faced a 2,470% greater likelihood of a § 851 enhancement than their brothers or sisters in the M.D. and 680% worse odds of a prosecutor not waiving the § 851 enhancement than eligible defendants in the S.D. Apparently, Assistant U.S. Attorneys in the N.D. of Georgia are less persuaded by the state motto: Wisdom, Justice, and Moderation. Flying back to the East Coast, the birthplace and signing place of the Declaration of Independence, Pennsylvanians have not seemed to benefit in equality from their noble heritage. The 2,257% increased opportunity for defendants in the E.D. of Pennsylvania to enjoy at least twice the amount of time in a federal penitentiary, compared to the unfortunately shortchanged offenders in the M.D. of Pennsylvania, where eligible defendants are stingily bequeathed § 851 enhancements only 2.5 % of the time, is another prime example of gross disparity.[175]

Fortunately, on August 12, 2013, in the now famous Holder Memorandum, Attorney General Eric Holder announced a national policy on the appropriate use of § 851 enhancements by local U.S. Attorneys.[176] In the relatively brief time this new policy has been in existence, I have observed significant changes. Formerly filed § 851 enhancements have frequently been withdrawn and, in new cases, the U.S. Attorney's Office has used considerable restraint in filing them. Because filing § 851 enhancements double a drug defendant's mandatory minimum, this will have a substantial impact on mass incarceration by the federal courts.

*E. The Surprising Lack of Judges Doing "*Kimbrough *Justice"*

Since the *Booker* & *Gall* sentencing revolution in 2005 and 2007, I have been surprised by the very small number of judges invoking *Kimbrough* and *Spears* type policy disagreements with the guidelines and policy statements to help ameliorate the harshness of the guidelines in general, especially in drug cases, and particularly in crack cases. The same is also true for the basic *Booker*-type downward variances using the 18 U.S.C § 3553(a) factors. Indeed, recent data from the Commission indicates that, in fiscal year 2013, judges sentenced below the guideline range without non-government motions in all federal sentencings just 18.7 % of the time.[177] This

175. *Id*. at 902.

176. *Id*. at 888.

177. U.S. SENTENCING COMM'N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.N (2014), http://www.ussc.gov/research-and-publications/annual-

includes all reasons for going lower than the guidelines: departures, variances, and policy disagreements.[178] So, the vast majority of federal judges are sentencing within the guidelines in the vast majority of cases unless the United States requests otherwise.[179] Indeed, focusing on crack sentencings, the Commission's data indicates that, in the five year period from 2009-2013, there was only a 1.8% increase in "the rate of non-government sponsored below range sentences for crack cocaine traffickers."[180]

Until an empirical study is done, no one knows what all the various reasons and explanations are for why some judges vary from the guidelines much more often than others; why some judges almost never vary from the guidelines; and why some judges often do "*Kimbrough* justice" while others see it as "*Kimbrough* injustice." I do think some important insights can be drawn from the recent Sixth Circuit Court of Appeals's decision in *United States v. Kamper*.[181]

Kamper involved the district court's decision not to vary from the "MDMA-to-marijuana equivalency ratio contained in the Sentencing Guidelines . . . ."[182] In the district court, "Kamper filed a motion ('the Ratio Motion') requesting that the district court select a new MDMA-to-marijuana equivalency ratio to compute a more appropriate sentence, or at least vary from the Guidelines range calculated using the flawed ratio."[183] In the Ratio Motion, Kamper specifically asked the sentencing judge "to categorically reject the current 1:500 MDMA-to-marijuana ratio under the Guidelines and replace it with a lower one."[184] The district court, "[a]lthough sympathetic to Kamper's underlying claim that the scientific support justifying the current 1:500 MDMA-to-marijuana ratio has eroded significantly since the Commission adopted it in 2001, the Court declined his invitation" to reject the ratio and adopt a new one.[185]

The district court expressed several concerns that supported the decision not to reject the ratio and adopt a new one.[186] First, the court found a separation of powers issue that prevented courts from

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reports-sourcebooks/2013/sourcebook-2013 [hereinafter 2013 SOURCEBOOK].

178. *Id*.

179. *Id.*

180. *Quick Facts on Crack Cocaine Trafficking Offenses*, *supra* note 17, at 2.

181. 748 F.3d 728 (6th Cir. 2014).

182. *Id.* at 735.

183. *Id*.

184. United States v. Kamper, 860 F. Supp. 2d 596, 599 (E.D. Tenn. 2012). In a thorough recitation of the history of the MDMA guideline, the district court noted that the MDMA ratio in the guidelines started at one gram of MDMA to thirty-five grams of marijuana then escalated to 500:1, less than the heroin guideline (1000:1), but more than the powder cocaine guideline (200:1). *Id*. at 598-599.

185. *Id*. at 603.

186. *Id.* at 603-07.

exercising "a freestanding power to legislate sentencing policy or promulgate amendments to the Guidelines."[187] Second, the court was concerned that 677 different federal district court judges would come up with different MDMA ratios.[188] "There could then theoretically be 677 different MDMA-to-marijuana ratios . . . ."[189] The court thought that "[t]his approach would almost certainly produce the kind of unwarranted sentencing disparities § 3553 attempts to avoid. *See* § 3553(a)(7)."[190] Finally, the court expressed its belief that both Congress and the Commission "are better placed to determine the appropriate MDMA-to-marijuana ratio not only because such an inquiry involves empirical questions of national magnitude, but also because such a determination requires value judgments concerning the relative harm of a controlled substance."[191]

The Sixth Circuit Court of Appeals found each of these reasons erroneous.[192] Not only erroneous, but "the very constitutional and institutional objections rejected by the Supreme Court in *Kimbrough*."[193] The Sixth Circuit Court of Appeals noted that "the district courts 'are not free to cede their discretion by concluding that their courtrooms are the wrong forum for setting a [new] ratio.'"[194] The court cautioned that "[t]he district court 'must not rely on the Guidelines for reasons that *Kimbrough* rejected, such as institutional competence, deference to Congress, or the risk that other judges will set different ratio[].'"[195] The Sixth Circuit Court of Appeals did not reverse and remand, because it determined that the district court would have given the same sentence even if it had not relied on erroneous reasons.[196] The court noted that, even when a district court judge has a policy disagreement with the guidelines, the judge may, but never is required to, reject a guideline he disagrees with.[197]

So what lessons can be drawn from *Kamper*? First, I would not be surprised if the district court's rationale for declining a *Kimbrough* policy disagreement in *Kamper* is likely widely held by many judges—they just are not as candid on the record as the district court judge in *Kamper*. Every district court judge knows that if he does not want to get reversed by the circuit court, he can simply recognize the authority to vary on policy grounds and decline to do

187. *Id*. at 603-04 (citation omitted).
188. *Id*. at 605.
189. *Id*.
190. *Id*.
191. *Id*. at 607.
192. United States v. Kamper, 748 F.3d 728, 739-40 (6th Cir. 2014).
193. *Id*. at 743.
194. *Id*. at 742 (citation omitted).
195. *Id*.
196. *Id*. at 743-44.
197. *Id*. at 742.

so—and leave it at that. Second, in my view, many judges give the Commission far too much credit for adopting guidelines, especially the drug guidelines, based on empirical research and prior national experience. That is simply not the case.[198] Third, judges have concerns about balancing national uniformity, which is eroded, when one does "*Kimbrough* justice." I have wrestled with this for years and ultimately concluded, only for myself, that, while I do create disparity when doing "*Kimbrough* justice," it is not unwarranted disparity. Fourth, the guidelines, while an anchor[199] in the sense of the starting point for determining an appropriate sentence, likely have a strong cognitive anchoring effect that acts as a strong subconscious gravitational pull towards a guideline sentence. Fifth, some of my colleagues do not often see, if ever, a guideline sentence as harsh, or, if they do, they are willing to defer to the Commission for a host of various reasons. The wondrous beauty of the federal judiciary is its independence. I sleep well at night knowing I have done more "*Kimbrough* justice" than many of my colleagues and thus, for me, I have been faithful to my oath of office. However, I fully recognize that other judges who see it very differently sleep just as well at night and have been just as faithful to their oath of office. The independence of the federal judiciary requires no less. Finally, the reasons why some judges often vary, including policy disagreements with various guidelines, and others seldom do, is ripe for empirical

198. *See* Osler & Bennett, *supra* note 4, at 137-45, for an extensive discussion of the myth surrounding the drug guidelines. *See also* United States v. Diaz, No. 11-CR-00821-2 (JG), 2013 WL 322243, at *3-7 (E.D.N.Y. Jan. 28, 2013) (discussing difficulties the Commission had when creating the Guidelines that led to uneven punishment ranges within the sentencing landscape); Lynn Adelman, *What the Sentencing Commission Ought to be Doing: Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295, 302 (2013) ("[T]he severity of the guidelines was not based on past sentencing practice[s]."); Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important Role for District Courts*, 57 DRAKE L. REV. 575, 578 (2009) ("The problem is that few guidelines can be shown to be based on actual preguideline sentencing practice or on Commission research and expertise."); Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1660 (2012) ("The first Commission also created unnecessarily severe rules . . . . The effect was to more than double the average time served by federal drug offenders and to massively expand the federal prison population over the next twenty years.").

199. "The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines . . . ." Peugh v. United States, 133 S. Ct. 2072, 2083 (2013). However, as Judge Calabresi noted just four days after *Peugh*, "[i]t is important to distinguish the guidelines' intended, salutary effect—promoting consistency and proportionality in sentencing—from the unintended anchoring effect that the guidelines can exert." Unites States v. Ingram, 721 F.3d 35, 40 n.2 (2d Cir. 2013) (Calabresi, J., concurring). For a detailed discussion and analysis of the potential for the anchoring effect and blind spot biases in 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).

study. One trusted federal judge, long-time friend and confidant, with a much different sentencing philosophy from my own, responded when I recently asked why so many judges, including him, sentence so often within the guidelines. He instantly answered, "It's what we grew up with as judges and it's what we know and are comfortable with." Anecdotally, I suspect that may be the response of most judges who seldom vary from a guideline sentence. They came of age as lawyers and judges in a mandatory guideline era.

One social science scholar recently invited "federal court practitioners to consider partnering with social science researchers as we endeavor to examine and assess the sentencing process in the post-*Booker* era."[200] She concluded her article, "And, as federal sentencing gets transformed by a shift of discretionary power back to judges, there is no better time to undertake more contextualized, qualitatively rich examinations."[201] More empirical information would greatly assist federal judges in reexamining their own views of the exercise of their sentencing discretion, especially using the § 3553(a) factors and deciding when to do or not do "*Kimbrough* justice."

The next portion of this Article is a response to two Third Circuit judges who, five years apart, wrote law review articles in the Duquesne Law Review. Both urge district court judges to use caution in doing "*Kimbrough* justice."

V. A RESPONSE TO TWO THIRD CIRCUIT JUDGES' LAW REVIEW ARTICLES

Post-*Booker*, should the potential for legislative backlash be at the forefront of the exercise of district court sentencing discretion and be a powerful brake on district court judges doing "*Kimbrough* justice" or granting downward variances under § 3553(a)? That is the thesis of Third Circuit Judge D. Michael Fisher.[202] I suggest there are serious analytical flaws in Judge Fisher's position. First, Judge Fisher continues to perpetuate the myth that each guideline is based on empirical evidence and the prior national experience based on the Commission's early work in gathering and analyzing 10,000 pre-sentence reports. Judge Fisher claims,

> district courts must recognize that the advisory Guidelines range for each offense reflects the learned opinion of a commission of sentencing experts. Each advisory Guidelines range is the result of a process of careful deliberation by the Sentencing Commission, a process that takes into consideration the goals of sentencing set forth by Congress, pertinent policy statements, and years of federal

200. Mona Lynch, *Expanding the Empirical Picture of Federal Sentencing: An Invitation*, 23 FED. SENT'G REP. 313, 313 (2011).

201. *Id*. at 316.

202. Fisher, *supra* note 20, at 66.

sentencing practice.[203]

Again, this is not only inaccurate, but false. While there are many offshoots of this guidelines myth, the best is the leading cause of the federal contribution to mass incarceration: the drug trafficking guidelines, which incarcerate more individuals for longer sentences that any other area of federal law.[204] Second, Judge Fisher warns district court judges not to "use this newfound discretion to blaze new sentencing trails" because to do so could "result in disparate sentences and, ultimately, legislative backlash that would strip the federal judiciary of its newly retrieved discretion."[205] Further, Judge Fisher asserts that "[t]o completely disregard such educated advice [of the Guidelines] would clearly be an act of the most inappropriate of judicial activism."[206] As for the "legislative backlash,"[207] I suggest that it would be a serious separation of powers problem for Article III sentencing judges to let concerns of what Congress might do affect either directly or implicitly their judgment about how long a sentence should be to reflect a "sentence [that is] sufficient, but not greater than necessary, to comply with the purposes" of sentencing[208]—the overarching principle of federal sentencing in the post-*Booker* era. As for slamming judges that dare to express policy disagreements as "judicial activists,"[209] the same could be said for judges who never or almost never vary and blindly apply the guidelines without truly, meaningfully, and independently using the § 3553(a) factors as required by *Booker* and its progeny. Finally, Judge Fisher's view of the role of district court judges in sentencing is completely at odds with the subsequent U.S. Supreme Court decision in *Kimbrough*. Judge Fisher proclaims "allowing full judicial discretion would put policy decisions, which are best made by the legislature, into the wrong hands."[210] Of course, nothing in *Kimbrough*, *Spears*, or *Pepper* compels a district court judge to adopt a policy disagreement with any guideline or policy statement. We would, however, shirk our constitutional obligation and our oath of office if we did not in good faith undertake a careful and thoughtful review when a policy

203. *Id*. at 94.

204. *See* 2013 SOURCEBOOK, *supra* note 177, at tbl.13.

205. Fisher, *supra* note 20, at 98.

206. *Id*. at 94.

207. Judge Fisher is certainly not alone with this view. Anecdotally, I have often heard my federal colleagues express similar views. Some have even suggested they stretch to do departures, rather than variances, because departures are not reported to the Commission as an out-of-guideline sentence.

208. 18 U.S.C. § 3553(a) (2006).

209. For a thorough discussion of the origin and historical use of the phrase "judicial activism" see generally Keenan D. Kmiec, *The Origin and Current Meaning of "Judicial Activism,"* 92 CALIF. L. REV. 1441 (2004).

210. Fisher, *supra* note 20, at 87.

disagreement is raised. The same is true of variance requests by the prosecution and defense pursuant to the § 3553(a) factors. Indeed, we have an independent obligation, *sua sponte*, to carefully and thoughtfully review potential upward or downward variances pursuant to the § 3553(a) factors. We assume this obligation, in part, because the U.S. Supreme Court has clearly mandated "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply."[211] Moreover, Judge Fisher urging sentencing judges to give greater deference to the Commission and Congress than *Booker* and its progeny suggest, runs afoul of Justice Souter's concerns that the "now-discretionary Guidelines" will have too strong of a "gravitational pull" towards them and raise the same constitutional problems that caused the Court to find the mandatory guidelines unconstitutional.[212]

In contrast, Judge Thomas M. Hardiman's law review article benefited from the intervening U.S. Supreme Court decisions in both *Kimbrough* and *Spears* and several courts of appeals's decisions offering divergent views on the scope and standards for policy variances in contexts other than the crack/powder disparity.[213] Judge Hardiman suggests that courts examining policy disagreements with specific guidelines look at the following questions:

> In making this inquiry, courts must consider the Guideline's origin and its subsequent history. When was it adopted? Did the Commission extrapolate the Guideline from statutes and, if it did, was there sound reason for doing so (as the Court found there was not in *Kimbrough*)? Or did the Commission model the Guideline on findings from empirical study? What was the role of Congress? How specifically did Congress direct or guide the Commission's creation of the Guideline? Did Congress change the Guideline itself? What was the Commission's reaction to congressional input?[214]

After listing these questions Judge Hardiman concluded, "It bears noting that although the Commission need not have expressed reservations about a Guideline for a court to find it objectionable on policy grounds, courts of appeals and the Supreme Court have upheld categorical variances more often when the Commission has done so."[215] I do not believe this is accurate regarding the U.S. Supreme Court. The only authority for the U.S. Supreme Court cited by Judge Hardiman is *Kimbrough*, where he is correct.[216] I know of no case where the U.S. Supreme Court has addressed the question of a policy disagreement with a specific guideline and rejected it, even in part,

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211. Rita v. United States, 551 U.S. 338, 351 (2007).

212. *Id*. at 390 (Souter, J., dissenting).

213. Hardiman & Heppner, *supra* note 20, at 14-34.

214. *Id*. at 33.

215. *Id*.

216. *Id*. at 33 n.185.

because the Commission had not expressed reservations about the guideline. Indeed, in *Pepper*, the Commission had never expressed reservations about its policy statement prohibiting consideration of post-sentencing rehabilitation in USSG § 5K2.19—yet the U.S. Supreme Court affirmed my right and the right of judges in the future to vary on that ground.[217] It was simply enough for the Court that "the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted."[218] Judge Hardiman also wondered if policy disagreements with the guidelines would be extended by the U.S. Supreme Court beyond the crack/powder guidelines in *Kimbrough* and *Spears*. While the U.S Supreme Court's decision in *Pepper* suggests that question is answered in the affirmative, the courts of appeals also tend to support the view that sentencing judges are free to assert policy disagreements with a broad array of guidelines.[219]

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217. Pepper v. United States, 131 S. Ct. 1229, 1247-48 (2011).

218. *Id*. at 1247.

219. *See, e.g.*, United States v. Engle, 592 F.3d 495, 502 (4th Cir. 2010) (noting in a tax evasion case: "We recognize that in the post-*Booker* sentencing world, district courts must give due consideration to relevant policy statements, but those policy statements are no more binding than any other part of the Guidelines. Accordingly, district courts may 'vary from Guidelines ranges based solely on policy considerations, including disagreements with the Guidelines.'" (quoting Kimbrough v. United States, 552 U.S. 85, 101 (2007))); United States v. Lychock, 578 F.3d 214, 219 (3d Cir. 2009) (implicitly recognizing that district courts may have policy disagreements with child pornography guidelines, but reversing a below-guidelines sentence and remanding the case because the district court failed to "offer a reasoned explanation for its apparent disagreement with the policy judgments of Congress regarding the appropriate sentences for child pornography offenses"); United States v. Cavera, 550 F.3d 180, 191 (2d Cir. 2008) (en banc) (noting in a federal gun trafficking case: "As the Supreme Court strongly suggested in *Kimbrough*, a district court may vary from the Guidelines range based solely on a policy disagreement with the Guidelines, even where that disagreement applies to a wide class of offenders or offenses."); United States v. Rodriguez, 527 F.3d 221, 227 (1st Cir. 2008) (noting in a case about fast-track disparity: "[T]he *Kimbrough* Court's enlargement of a sentencing court's capacity to factor into the sentencing calculus its policy disagreements with the guidelines . . . makes plain that a sentencing court can deviate from the guidelines based on general policy considerations." (citation omitted)); *id*. at 231 ("*Kimbrough* makes manifest that sentencing courts possess sufficient discretion under section 3553(a) to consider requests for variant sentences premised on disagreements with the manner in which the sentencing guidelines operate."); *see also* United States v. Gonzalez-Mendez, 545 F. App'x 848, 850 (11th Cir. 2013) (noting in an illegal reentry case: "[Defendant] correctly argues that the district court could categorically disagree with the Sentencing Guidelines" related to illegal reentry); United States v. Youngblood, 542 F. App'x 841, 843-44 (11th Cir. 2013) (per curiam) (noting in a crack cocaine case: "Although *Kimbrough* and *Spears* held, at most, that a district court may vary from a guidelines range where it disagrees with a particular guideline, application of this principle necessarily requires that the district court actually disagree with the guideline at issue."); United States v. Jackman, 512 F. App'x 750, 753 (10th Cir. 2013) (citing with approval United States v. Henderson, 649 F.3d 955 (9th Cir. 2011)) (noting in a child pornography case: "In *Kimbrough v. United States*, the Supreme Court held

a district court has the discretion to vary from the recommended guideline range where the court determines such range is greater than necessary to achieve the sentencing objectives of § 3553(a). Such a decision to vary may be based on a categorical disagreement with the applicable guideline apart from individualized consideration of § 3553(a)'s sentencing factors. A district court that fails to recognize its discretion to vary from the guideline range based on such disagreement with a guideline may commit procedural error." (citations omitted)); United States v. Lopez-Macias, 661 F.3d 485, 491 (10th Cir. 2011) (noting in an illegal reentry case: "[W]e conclude that *Kimbrough's* holding extends to a policy disagreement with Guideline § 5K3.1 . . . ."); United States v. Boneshirt, 662 F.3d 509, 518 (8th Cir. 2011) (noting in murder case involving an Indian reservation: "We have recognized that, under the Supreme Court's decision in *Spears v. United States*, 555 U.S. 261, 129 S. Ct. 840, 843–44, 172 L.Ed.2d 596 (2009), a district court may reject a particular Guideline based on a policy disagreement with that Guideline.") (citing United States v. Talamantes, 620 F.3d 901, 902 (8th Cir. 2010) (per curiam)); United States v. Henderson, 649 F.3d 955, 960 (9th Cir. 2011) (noting that "*Kimbrough's* rationale is not limited to the crack-cocaine Guidelines" in finding that district courts could have policy disagreements with child pornography guidelines); United States v. Evanouskas, 386 F. App'x 882, 885 n.1 (11th Cir. 2010) (per curiam) ("Assuming *arguendo* that the child pornography provisions are not based on empirical data, *Kimbrough v. United States*, 552 U.S. 85, 109–10, 128 S. Ct. 558, 575, 169 L.Ed.2d 481 (2007), supports the proposition that a district court may consider a lack of empirical basis as a reason to exercise its discretion to categorically disagree with a Guidelines provision . . . ."); United States v. Corner, 598 F.3d 411, 415 (7th Cir. 2010) (noting that "[w]e understand *Kimbrough* and *Spears* to mean that district judges are at liberty to reject *any* Guideline on policy grounds—though they must act reasonably when using that power" in finding that district courts may categorically disagree with career offender guidelines); United States v. Mitchell, 624 F.3d 1023, 1030 (9th Cir. 2010) ("As the Supreme Court through *Booker*, *Kimbrough*, and *Spears* has instructed, and as other circuits that have confronted the crack/powder variance in the sentence of a career offender have accepted and clarified in their circuit law, sentencing judges can reject *any* Sentencing Guideline, provided that the sentence imposed is reasonable."); United States v. Herrera-Zuniga, 571 F.3d 568, 583-84 (6th Cir. 2009) ("The question we confront here is whether the authority recognized in *Spears* to reject on policy grounds an otherwise-applicable aspect of the Sentencing Guidelines is limited to the crack cocaine context. We hold that it is not.") (footnote omitted); United States v. Simmons, 568 F.3d 564, 569 (5th Cir. 2009) ("*Kimbrough* does not limit the relevance of a district court's policy disagreement with the Guidelines to the situations such as the cocaine disparity and whatever might be considered similar."); United States v. Lente, 323 F. App'x 698, 712-13 (10th Cir. 2009) (Holmes, J., concurring) ("Although *Kimbrough* arose in the crack-powder cocaine context, we have not questioned that its holding concerning policy disagreements extends beyond that context . . . . And I see no principled basis for such a restriction.") (internal citation omitted), *abrogated on other grounds by* United States v. Story, 635 F.3d 1241 (10th Cir. 2011); United States v. Vandewege, 561 F.3d 608, 610 (6th Cir. 2009) (noting in a crack disparity case: "The Supreme Court has made it clear that where a sentencing judge 'varies from the Guidelines . . . in a mine-run case' based on a policy disagreement or consideration of § 3553 standards, 'closer review may be in order.'" (quoting *Kimbrough*, 552 U.S. at 109)). *But see Vandewege*, 561 F.3d at 610 (Gibbons, J., concurring in the judgment) ("Neither *Kimbrough* nor *Spears* authorized district courts to categorically reject the policy judgments of the Sentencing Commission in areas outside of crack-cocaine offenses, as the majority suggests."); *id.* at 611 (Gibbons, J., concurring in the judgment) ("*Kimbrough* has thus not 'made it clear' that district courts may vary from the Guidelines based solely upon any policy disagreement."); United States v.

Judge Hardiman observed that defense lawyers will increasingly raise policy disagreements to "every policy underlying every challenged Guideline."[220] He then writes: "This enterprise runs the risk of asking district judges to opine on broad policy questions as they seek to impose just sentences . . . ."[221] Judge Hardiman then warns, as did his colleague, Judge Fisher before, that if policy disagreements with the crack/powder and other guidelines become the "norm" then "Congress might impose new, detailed statutory penalties that will leave district judges with even less discretion than they possessed in the mandatory Guidelines era."[222] While there may be some truth to his declaration, I assert that this is exactly the type of impermissible consideration for sentencing judges that deeply troubled the Sixth Circuit in *Kamper*.[223] In my view, district court judges should sentence as the U.S. Supreme Court has commanded: "hear arguments by [the] prosecution or defense that the Guidelines sentence should not apply . . . because . . . the Guidelines sentence itself fails properly to reflect § 3553(a) considerations."[224] No more or less.

VI. THE CRESTING POINT

Predicting a cresting point for the arc of federal mass incarceration is no easy task. But it will not likely come from federal judges through significantly greater "*Kimbrough* justice." While more judges may find "policy disagreements" with the drug guidelines, most judges seem far too wedded to the guidelines for this to have any significant effect on federal mass incarceration. The more recent appointees, even if they did federal criminal justice work in their careers, likely know nothing *but* the guidelines. More critically, even for federal judges trying to do more "*Kimbrough* justice," downward variances are frequently trumped by mandatory minimum drug

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Wellman, 716 F. Supp. 2d 447, 451 (S.D. W. Va. 2010) ("[N]o authority binding on this Court has determined that a district court may vary from any other guideline [besides the crack cocaine Guidelines] based solely on policy disagreements with them."); *id*. at 451 n.7 (recognizing that "[t]hough no case decided by the Supreme Court has determined that sentencing courts may vary from Guidelines other than crack cocaine Guidelines based on categorical, policy-based disagreements with the Guidelines, the Fourth Circuit has implied that they may."). Research did not disclose an applicable case from the D.C. Circuit.

220. Hardiman & Heppner, *supra* note 20, at 34.

221. *Id.*

222. *Id*.

223. *See* United States v. Kamper, 748 F.3d. 728, 743 (6th Cir. 2014) ("We have held that, when a district judge explicitly acknowledges his authority to vary but also makes 'remarks about the proper role of courts [that] reveal his belief that a policy disagreement is not a proper basis for a judge to vary,' the resulting sentence is procedurally unreasonable." (quoting United States v. Johnson, 407 Fed. App'x 8, 10 (6th Cir. 2010))).

224. Rita v. United States, 551 U.S. 338, 351 (2007).

sentences.

Thus, long term prospects of reducing federal mass incarceration likely will depend on the ability of Congress to repeal the mandatory minimums or at least reduce their harsh impact on so many offenders. It will also depend on the ability of the Commission to lessen the harsh impact of the drug trafficking guidelines. Strong winds of change are undeniably blowing in Washington, D.C. Whether it is more hot air in the nation's capital or a harbinger of real significant change is yet unknown. On April 10, 2014, the Commission voted unanimously to approve an amendment to the guidelines "to lower the base offense levels in the Drug Quantity Table across drug types."[225] "If Congress does not act to disapprove" this amendment, it "will go into effect November 1, 2014."[226] The so-called All Drugs Minus Two amendment "drew more than 20,000 letters during a public comment period, including letters from members of Congress, judges, advocacy organizations, and individuals."[227] Chief Judge Patti B. Saris, Chair of the Commission, and one of the most influential individuals on federal sentencing in the nation, noted in her published remarks for the Commission public meeting on April 10:

> Reducing the federal prison population has become urgent, with that population almost three times where it was in 1991. Federal prisons are 32% overcapacity, and federal prison spending exceeds $6 billion a year, making up more than a quarter of the budget of the entire Department of Justice and reducing the resources available for federal prosecutors and law enforcement, aid to state and local law enforcement, crime victim services, and crime prevention programs – all of which promote public safety.[228]

Why did it take the Commission so long? The Commission could have accomplished the identical reduction in the All Drugs Minus Two amendment on the day the original drug guidelines became law on November 1, 1987, or at any time after that. It took the Commission nearly 30 years to do this.

Moving from the Commission to Congress—there is even greater hope for more significant changes, especially to the brutal mandatory minimum regime that has fueled mass incarceration since the

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225. Press Release, U.S. Sentencing Comm'n, U.S. Sentencing Comm'n Votes to Reduce Drug Trafficking Sentences (Apr. 10, 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140410_Press_Release.pdf.

226. *Id*.

227. *Id*.

228. Chief Judge Patti B. Saris, Chair, U.S. Sentencing Comm'n, Remarks for Public Meeting (April 10, 2014), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140410/Chairs-Remarks.pdf.

passage of the ADAA of 1986. On August 1, 2013, U.S. Senators Dick Durbin and Mike Lee introduced the bi-partisan Smarter Sentencing Act of 2013.[229] Senator Lee declared: "Our current scheme of mandatory minimum sentences is irrational and wasteful."[230] Senator Durbin stated:

> Mandatory minimum sentences for non-violent drug offenses have played a huge role in the explosion of the U.S. prison population. Once seen as a strong deterrent, these mandatory sentences have too often been unfair, fiscally irresponsible and a threat to public safety. Given tight budgets and overcrowded prison cells, judges should be given the authority to conduct an individualized review in sentencing certain drug offenders and not be bound to outdated laws that have proven not to work and cost taxpayers billions.[231]

The Smarter Sentencing Act (S.1410) passed the Senate Judiciary Committee on January 30, 2014.[232] It would expand the "safety valve" in 18 U.S.C § 3553(f); allow 8,800 federal prisoners convicted of crack cocaine offenses, 87% of whom are black, to seek retroactive application of the FSA; reduce drug mandatory minimum sentences from 20, 10, and 5 years to 10, 5, and 2 years—saving billions of dollars on incarcerating non-violent drug offenders; and, to protect public safety, impose new mandatory minimum sentences for sexual abuse and terrorism offenses.[233] When highly regarded lawyer-Senators like Durbin and Lee, both on the Senate Judiciary Committee, with widely acknowledged incredibly diverging philosophies on most issues of U.S. Senate concern, come together to sponsor The Smarter Sentencing Act of 2013—hopes are raised for significant reform.

Several other important mass incarceration reform bills have also been introduced in Congress. There is a House companion bill to The Smarter Sentencing Act, H.R. 3382, which was introduced by Representatives Raul Labrador (R-ID) and Bobby Scott, (D-VA)).[234]

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229. Press Release, Durbin and Lee Introduce Smarter Sentencing Act, Bill Modernizes Drug Sentencing Policy, Focuses Resources on Violent Offenders and Public Safety Risks, Promotes Consistency with Fair Sentencing Act (Aug. 1, 2013), http://durbin.senate.gov/public/index.cfm/pressreleases (use "Jump to month" application for press releases from August 2013; then follow "Durbin and Lee Introduce Smarter Sentencing Act" hyperlink).

230. *Id*.

231. *Id*.

232. The Smarter Sentencing Act of 2013, S.1410, 113th Cong. (2013); *S.1410 – Smarter Sentencing Act of 2014*, CONGRESS.GOV, https://beta.congress.gov/bill/113th-congress/senate-bill/1410/all-actions (last visited Oct. 14, 2014).

233. The Smarter Sentencing Act of 2013, S.1410, 113th Cong. (2013); *S.1410, The Smarter Sentencing Act*, FAMM, http://famm.org/s-1410-the-smarter-sentencing-act/ (last visited Sept. 10, 2014)..

234. The Smarter Sentencing Act of 2013, H.R. 3382, 113th Cong. (2013).

The Justice Safety Valve Act of 2013,[235] S. 619, 113th Cong. (2013–2014), bipartisan legislation, was introduced by Senator Rand Paul (R-KY) and Senate Judiciary Committee Chairman Patrick Leahy (D-VT) and, in the House, a companion bill was introduced by Representatives Robert C. "Bobby" Scott (D-VA) and Thomas Massie (R- KY).[236] These bills propose a broad "safety valve" that applies to all federal crimes carrying mandatory minimum sentences. If passed, the Justice Safety Valve Act would allow judges to sentence federal offenders below the mandatory minimum sentence whenever the mandatory minimum does not promote the goals of punishment and other sentencing criteria listed at 18 U.S.C. § 3553(a).[237]

The Recidivism Reduction and Public Safety Act of 2013, is bipartisan legislation introduced by Senators Portman (R-OH) and Whitehouse (D-RI) which allows federal inmates to earn seven days more "good time credit" each year for good behavior and obeying prison rules.[238] This is a technical fix to 18 U.S.C. § 3624(b), which the U.S. Supreme Court has interpreted to limit good time credit to 47 days per year, not the 54 days of credit most believe Congress intended.[239] The Act also allows federal inmates to earn up to 60 days off their sentences for each year they participate in recidivism reduction or recovery programs, in addition to their good time credits.[240] Finally, the Act gives the Bureau of Prisons 3 years to ensure that all prisoners in need of the Residential Drug Abuse Program enter the program in sufficient time to finish it and receive the full one-year sentence credit off their sentence for completion of the program.[241]

Perhaps the strongest national force for reversing and reducing this nation's mass incarceration crisis has been the chief law enforcement officer in the country—U.S. Attorney General Eric H. Holder, Jr. In written comments to the Commission submitted on March 6, 2014, the U.S. Department of Justice made clear in supporting the All Drugs Minus Two amendment:

> That "such extensive use of imprisonment as our first line of defense against crime is unsustainable."[242]

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235. The Justice Safety Valve Act of 2013, S. 619, 113th Cong. (2013-2014).

236. The Justice Safety Valve Act of 2013, H.R. 1695, 113th Cong. (2013-2014).

237. S. 619; H.R. 1695.

238. Recidivism Reduction and Public Safety Act of 2013, S. 1675, 113th Cong. (2013-2014).

239. *See* Barber v. Thomas, 560 U.S. 474, 480-83 (2010) (agreeing with the Bureau of Prison's method of calculating good time credit based on time served rather than time sentenced).

240. S. 1675, 113th Cong. § 2 (2013-2014).

241. *Id.* at §§ 3, 5.

242. Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, U.S. Dep't of Justice, to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm'n 16 (Mar.

> That "[s]tate and federal governments spent a combined $80 billion on incarceration in 2010 alone." [243]
>
> That "[p]rison overcrowding and insufficient investment in effective reentry programming must both change if we are to continue to push crime rates lower."[244]
>
> "Of the more than 216,000 federal inmates currently behind bars, almost half are serving time for drug-related crimes."[245]
>
> That "strategically revising the ways in which we address this particular group of offenders—maintaining strong penalties but reserving the longest ones for repeat and dangerous drug offenders—will measurably improve our overburdened system."[246]
>
> That "socioeconomic realities of life after prison have had particularly devastating effects on disadvantaged populations and communities of color. This has only helped to perpetuate the cycle of poverty, criminality, and incarceration that has isolated such individuals from the prospects of upward mobility."[247]
>
> That in August of 2013 Attorney General Holder "announced his 'Smart on Crime' initiative, which among other things changed the Department's charging policies to ensure people accused of certain low-level federal drug crimes will face sentences appropriate to their individual conduct while reserving more stringent mandatory minimum sentences for the most serious offenders."[248]

A week later, following the above written comments to the Commission, Attorney General Holder's testimony before the Commission on March 13, 2014, expressed his view that the Department of Justice strongly supported the All Drugs Minus Two proposed amendment to the drug guidelines.[249] Attorney General Holder indicated that this amendment would "send a strong message about fairness of our criminal justice system;" would "help to reign [sic] in federal prison spending;" would "further our ongoing effort to advance common sense criminal justice reforms;" and "would deepen the Department's work to make the federal criminal justice system both more effective and more efficient."[250]

6, 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140326/public-comment-DOJ.pdf.

243. *Id*.

244. *Id*.

245. *Id*. at 17.

246. *Id*.

247. *Id*.

248. *Id*.

249. Eric H. Holder, Attorney General, Transcript of Public Hearing before the U.S. Sentencing Comm'n on Proposed Amendments to the Federal Sentencing Guidelines at 12-13 (Mar. 13, 2014), *available at* http:/www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearing-and-meetings/20140313/transcript.pdf.

250. *Id*. at 13-14.

Attorney General Holder also testified that drug cases "result in too many Americans going to prison for too long, and at times, for no truly good law enforcement reason."[251] He reiterated that while "the United States comprises just [five] percent of the world's population, we incarcerate almost a [quarter] of the world's prisoners" and that "[o]ne in twenty-eight American children currently has a parent behind bars."[252]

Attorney General Holder also endorsed moving forward with other reforms to reduce mass incarceration. These include supporting pending legislation to give federal judges more discretion to determine appropriate sentences, evidence based diversion programs, and reducing "unnecessary collateral consequences for formerly incarcerated individuals seeking to rejoin their communities."[253]

Attorney General Holder also reinforced his commitment to changing charging policies in drug trafficking cases, a key component of his August 2013 announcement of his new Smart on Crime Initiative.[254] Attorney General Holder testified that:

> Now, among the key changes that I mandated as part of this initiative is a modification of the Justice Department's charging policies to ensure that people convicted of certain low-level, non-violent, federal drug crimes will face sentences appropriate to their individual conduct, rather than stringent mandatory minimums, which will now be applied only to the most serious criminals.[255]

The change in the Department of Justice charging policies in drug trafficking cases, although recent, has the potential to do more to reduce mass incarceration by the federal courts than any other single current action. However, there has been no transparency as to its implementation, public disclosure of implementing policies or guidelines, or methods used to uniformly apply the charging policies.[256] Will this reform suffer the same fate of irrational application as the Department's Section 851 enhancements? More importantly, because it can change at the whim of the Attorney General or a new Attorney General, will it have significant long term staying power? Short of Congress modifying the harsh impact of the current mandatory minimum regime that has reigned since the passage of the ADAA of 1986, will this charging change have a significant and lasting impact on reducing federal mass incarceration?

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251. *Id*. at 14.
252. *Id*. at 14 -15.
253. *Id*. at 19.
254. *Id*. at 16-17.
255. *Id*. at 17.
256. *See* Osler & Bennett, *supra* note 4, at 163-77.

VII. CONCLUSION

There is no conclusion. There are no conclusions. There are only questions. Are we truly at a cresting point in the nation's quest for mass incarceration? Will the growing public forces against mass incarceration influence the decision makers? Will the rising cost of mass incarceration lead to its reduction? Will Congress act to reduce mass incarceration? Will Congress reduce the harshness of our current mandatory minimum regime? Will Congress expand the application of the "safety valve"? Will Congress fund drug re-entry programs? Will Congress fund more drug treatment programs? Will the Commission do more to lessen the harshness of the guidelines? Will federal judges exercise more "*Kimbrough* justice?" Will federal judges exercise more discretion under the Section 3553(a) factors? Will there be a "legislative backlash" to federal judges doing "*Kimbrough* justice" and variances under the Section 3553(a) factors? Will the Attorney General's efforts to reform mass incarceration succeed? Will future Attorney Generals follow the path blazed by Attorney General Holder or reverse course? Will the efforts to reduce mass incarceration endanger public safety?