
A “HOLOCAUST IN SLOW MOTION?” AMERICA’S MASS INCARCERATION AND THE ROLE OF DISCRETION

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I. INTRODUCTION

Speaking to the camera in Eugene Jarecki’s film, *The House I Live In*, David Simon said, “The drug war is a holocaust in slow motion.”² Simon, who created the seminal television series about narcotics, *The Wire*, did not use the word “holocaust” casually.

Like most provocative allusions, applying the word “holocaust” to the drug war is part truth and part gross exaggeration. The drug war clearly differs from a holocaust in terms of out-

² THE HOUSE I LIVE IN (Charlotte Street Films 2012). Jarecki’s film won the 2012 Sundance Film Festival’s Grand Jury Prize for Best Documentary Film. See 2012 SUNDANCE FILM FESTIVAL, <http://history.sundance.org/events/1141> (last visited Feb. 27, 2014) (listing 2012 Sundance Film Festival Awards); see also, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 6–7 (2012) (footnotes omitted) (“The racial dimension of mass incarceration is its most striking feature. No other country in the world imprisons so many of its racial or ethnic minorities. The United States imprisons a larger percentage of its black population than South Africa did at the height of apartheid . . . These stark racial disparities cannot be explained by rates of drug crime . . . In some states, black men have been admitted to prison on drug charges at rates twenty to fifty times greater than those of white men. And in major cities wracked by the drug war, as many as 80 percent of young African American men now have criminal records and are thus subject to legalized discrimination for the rest of their lives. These young men are part of a growing undercaste, permanently locked up and locked out of mainstream society.”)

come, certainly: It primarily seeks the imprisonment of millions rather than death.³ The drug war and a holocaust, though, do share one crucial commonality. Both occur when thousands who work within the system are complicit in something they should know is wrong. Both represent a failure of the moral compass, not only of society as a whole, but of those who exercise their discretion to build and maintain the mechanism of injustice. We write this not only as a societal critique, but also as a confession. As a former federal prosecutor and a sitting federal judge, respectively, we have been among those pulling the levers that operate this cruel machine of mass incarceration.

Those complicit when a social function becomes unjust often explain their involvement by describing their limited role—they were simply “following the orders” of others. So it is with the drug war.⁴ The sentencing judge follows the instructions of the U.S. Sentencing Commission (“Sentencing Commission”), the

³ Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1025 (2010) (footnote omitted) (“The public security system in the United States produces shocking racial disparities at every level, from stops to arrests to prosecutions to sentencing to rates of incarceration and execution. The United States, today, places almost one in every thirty of its residents under correctional control in a racial pattern that generates state prison populations that are two-thirds black and Latino.”); *Id.* at 1028 (“Even the most cursory engagement with American criminal justice at the start of the twenty-first century drives home the twin points that the United States puts people under the control of the correctional system at an anomalously high rate, and that it shuts behind bars an overwhelmingly disproportionate number of black and brown persons.”).

⁴ Congressman John Conyers, Jr, has recently written that “[t]he single most significant factor [in the rise of mass incarceration] is this country’s war on drugs.” Congressman John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL’Y REV. 377, 379 (2013). Even some federal circuit judges recognize that the War on Drugs has failed even with the imposition of harsh sentences. *See, e.g.,* *Walking Eagle v. United States*, 742 F.3d 1079, 1083 n.2(8th Cir. 2014) (“In affirming the denial of postconviction relief to Walking Eagle, we nevertheless observe that Walking Eagle’s 20-year mandatory minimum sentence is another example of a harsh sentence that is required for a non-violent crime in what now seems generally recognized as this country’s continuing but unsuccessful War on Drugs.”).

Sentencing Commission follows the lead of Congress, members of Congress do what they imagine their constituents will respond to, and the prosecutors at the Department of Justice (“DOJ”) see themselves as simply making real the directives of Congress, the Sentencing Commission and the judges. By this way of thinking, no one is really culpable. No one is leading; all are being led. It is this way of thinking that is the source of all the wrongs that people impose on each other. In these pages, we want to untie that tangle and lay out both real culpability and the hope for change that is now emerging. Beneath it all is something more important than any academic theory or statistical set: the real lives of people who have been over-incarcerated by our hands and the hands of those who will continue this work until the machine is stopped.

We will start by describing the problem: Part II provides a brief introduction of federal sentencing, an overview of the stunning metrics of mass incarceration in America and a brief glimpse of its dramatic effects. Parts III, IV, V and VI discuss the role of discretion by each of the four players: Congress, the Sentencing Commission, the DOJ and federal trial court judges, in contributing to mass incarceration at the federal level. Part VII discusses how the same exercise of discretion, tilted in different directions, which we have started to see in all four players, bodes well for reversing the trend of mass incarceration. We add specific, practical and achievable suggestions for how discretion by the four players should be utilized to reduce mass incarceration and foster fairer and more just federal sentencing.

We write this at a fortunate moment. There are signs that all four players are slowly moving to change how federal narcotics sentencing increases mass incarceration. What is essential is that these actions be the start, not the end, of a broad, whole and thoughtful reform movement to end mass incarceration in America.

II. THE MASS INCARCERATION EXPLOSION

A. *A brief overview of federal sentencing*

In order to understand the rise of mass incarceration, we start with a very brief history and overview of federal sentencing. “From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion.”⁵ However, “[A]llegations of discrimination and unfairness at sentencing have prompted numerous attempts at sentencing reform in the United States.”⁶ In response to these concerns, especially alleged sentencing disparity among federal district court judges, “and after more than a decade of study and debate, a bipartisan Congress enacted the most far-reaching reform of federal sentencing in this country’s history—the Sentencing Reform Act of 1984 (SRA).”⁷ The SRA, *inter alia*, abolished federal parole and created the Sentencing Commission to develop mandatory federal sentencing guidelines, in the hope that these measures would “provide certainty and fairness at sentencing and reduce the unwarranted disparity in sentencing that Congress found ‘shameful.’”⁸ Prophetically, U.S. Representative John Conyers of Michigan, then chair of the House Subcommittee on Criminal Justice “cautioned that guidelines might actually increase socio-

⁵ Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993); *see also* *Mistretta v. United States*, 488 U.S. 361, 363 (1989) (“For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing. Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long, whether he should be fined and how much, and whether some lesser restraint, such as probation, should be imposed instead of imprisonment or fine.”)

⁶ Hon. William W. Wilkins, Jr., Phyllis J. Newton & John Steer, *Competing Policies in a War on Drugs*, 28 WAKE FOREST L. REV. 305, 307 (1993).

⁷ *Id.* at 305-06. (footnote omitted).

⁸ *Id.* (footnote omitted).

economic disparity in sentencing” and “lead to ‘an escalation of sentences’ due to ‘political pressure.’”⁹ How right he was.

The Guidelines became effective on November 1, 1987, and created a mandatory complex system of federal sentencing rules focusing on defendants’ prior criminal history, the current offense and a plethora of aggravating and precious few mitigating factors about the offense, concluding in a judge computing a narrow range based on a 258 cell grid that expresses a range of months (e.g. 262-327) in the Sentencing Table, the centerpiece of the Guidelines.¹⁰ Over 20 years ago, Professor Albert W. Alschuler noted that the “grid and bear it”¹¹ approach to federal sentencing, which applies “the 258-box federal sentencing grid,” should now “be relegated to a place near the Edsel in a museum of twentieth-century bad ideas.”¹²

From their beginning in 1987, the Guidelines were mandatory until the landmark U.S Supreme Court decision in 2005, *United States v. Booker*.¹³ The *Booker* revolution rendered the Guidelines advisory because mandatory Guidelines violated the Sixth Amendment of the U.S. Constitution.¹⁴ Two years later, in another watershed sentencing decision, *Kimbrough v. United*

⁹ Stith & Koh, *supra* note 5, at 263–64.

¹⁰ 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 101, 132 (2014) (citing *United States v. Newhouse*, 919 F. Supp. 2d 955, 958 n.1 (N.D. Iowa 2013) (Bennett, J.) (citing U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, Sentencing Table (2012)) (“The guideline ranges are contained in a sentencing table or grid consisting of 43 offense levels on a vertical axis and 6 criminal history categories on a horizontal axis that intersect to form a sentencing grid with 258 cells that each contain an advisory guideline sentencing range, except for the 6 cells for offense level 43 that have a single sentence: life”).

¹¹ *United States v. Newhouse*, 919 F. Supp. 2d 955, 957 (N.D. Iowa 2013) (Bennett, J.).

¹² Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 950 (1991).

¹³ 543 U.S. 220 (2005).

¹⁴ *Id.*

States,¹⁵ the U.S. Supreme Court decided that federal trial court judges were empowered to express "policy" disagreements with any specific Guideline even in a "mine-run" or run of the mill case.¹⁶ In yet another major decision, coming down the same day as *Kimbrough*, the Court decided *Gall v. United States*,¹⁷ and held that federal district court judges had discretion to "vary" downward or upward from the Guideline range based, in part, on individual characteristics of a specific case and/or defendant and other factors delineated in 18 U.S.C. § 3553(a).¹⁸

Former federal district court judge, Nancy Gertner, observed:

Notwithstanding principled opposition, something remarkable happened. Judges enforced the new Guidelines with a rigor that was not at all required . . . Judges at all levels, trial and appellate, applied the Guidelines as if they were . . . *diktats*.¹⁹

Indeed, this rigorous application of the Guidelines, coupled with mandatory minimums, propelled a federal prison population increase of 761% from 1980 to 2010, growing from 24,252 to a staggering 209,771.²⁰

¹⁵ 552 U.S. 85 (2007).

¹⁶ *Id.* at 89.

¹⁷ 552 U.S. 38 (2007).

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

¹⁹ Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 524 (2007).

²⁰ PAUL GUERINO, PAGE M. HARRISON & WILLIAM J. SABLO, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2010 (2011, revised Feb. 9, 2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf>.

B. The staggering metrics of mass incarceration

The statistics on mass incarceration are stark but now all too familiar. 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.²¹ "The War on Drugs became its own prison-generating machine, producing incarceration rates that 'defy gravity and continue to grow even as crime rates are dropping.'"²² With 2.2 million people currently in the nation's prisons or jails, the United States is the world leader in incarceration with a 500% increase over the past 40 years.²³ The United States, with the highest incarceration rate in the world, exceeds the highest incarceration rates in Europe by more than 500%.²⁴ The number of people in federal prisons for drug offenses increased 1950% between 1980 (4,749 people) and 2010 (97,472 people).²⁵

²¹ ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD POPULATION LIST (9th ed. 2011), available at http://www.apcca.org/uploads/9th_Edition_2011.pdf.

²² Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1275 (2004).

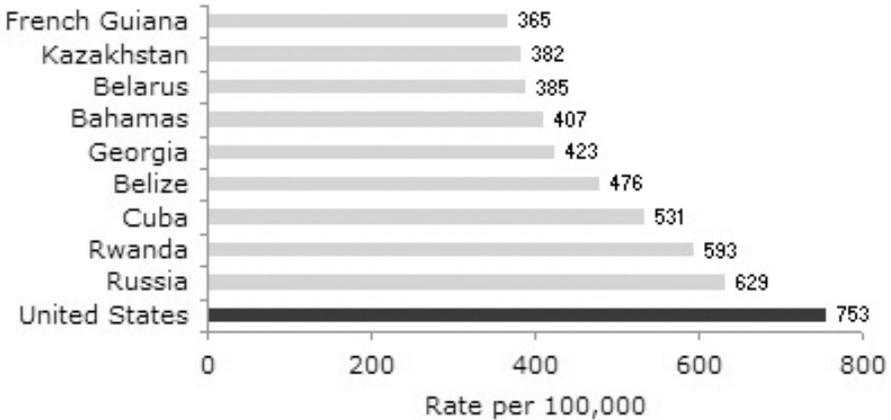
²³ THE SENTENCING PROJECT, FACTSHEET: TRENDS IN U.S. CORRECTIONS 2 (2011), available at http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.

²⁴ López, *supra* note 3, at 1029 (footnote omitted).

²⁵ GUERINO, ET AL., *supra* note 20 (20% of the drug offenders in federal court were convicted of crack cocaine offenses, over 82% were convicted of an offense carrying a mandatory minimum sentence, only 5.6 % of these offenders were given an aggravating role adjustment in their sentencing, and over 83% of these offenders were black); U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 191, 193 (2011). Another 20% of drug offenders convicted in federal court in 2010 were for methamphetamine offenses, and over 83% of them were convicted of an offense carrying a mandatory minimum sentence, and only 5.5% of these offenders were given an aggravating role adjustment in their sentencing. *Id.* at 223, 226; Mark W. Bennett, *Hard Time: Reflections on Visiting Federal Inmates*, 94 JUDICATURE 304 (2011).

The U.S. incarcerates a higher percentage of its population than any country in the world, as the following chart shows.²⁶

**TOP 10 COUNTRIES WITH HIGHEST INCARCERATION RATES
(MOST RECENT YEAR, 2006-2009)**



Source: CEPR analysis of ICPS data

Prison populations have mushroomed through incarceration of increasing numbers of young males, especially young black men, mostly from impoverished urban areas. “As many as 1 in 8 of the adult male residents of these urban areas is sent to prison each year and 1 in 4 is behind bars on any given day.”²⁷ Incarceration is now a bedrock experience for far too many minorities and their families.²⁸ “By 1999, imprisonment had become a

²⁶ *Mass Incarceration: Breaking Down the Data by State*, PRISON LAW BLOG (July 13, 2010, 6:37 AM), <http://prisonlaw.wordpress.com/2010/07/13/mass-incarceration-breaking-down-the-data-by-state/>.

²⁷ Roberts, *supra* note 22, at 1276.

²⁸ *Id.* at 1275–76 (“Because poor black men and woman tend to live in racially and economically segregated neighborhoods, these neighborhoods feel the brunt of the staggering prison figures.”). “As much as criminalizing drugs impacted urban America in general, and poor neighborhoods of color in particular, both spaces were also disproportionately affected after 1970 by an overhaul of state and federal sentencing guidelines related to drug convictions.” Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking*

common life event for black men that sharply distinguishes their pathway through adulthood from that of white men.”²⁹ If white males were incarcerated at the same rate as black males, there would be more than 6 million people in jail and prisons in the United States.³⁰ A black male born in the latter 1960s, after the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, is more than twice as likely to have been imprisoned as one born in the 1940s.³¹ It has gotten far worse. In 2011, according to U.S. DOJ statistics, among prisoners aged 19 and 20, black males were imprisoned at more than nine times the rate of white males.³² Hispanic males were imprisoned at more than three times the rate of white males.³³ Among males ages 20 to 24, blacks were imprisoned at more than seven times the rate of white males.³⁴ Hispanic males were imprisoned at nearly three times the rate of white males.³⁵ Even at the other end of the age spectrum, among males aged 60 to 64, black males were imprisoned at five times the rate of white males and Hispanic males nearly three times the rate of white males.³⁶ Depending on their ages, black females were imprisoned at between two to three times the rate of white females and Hispanic females at

Crisis, Decline, and Transformation in Postwar American History, 93 J. AM. HIST. 703, 709 (2010).

²⁹ Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221, 232 (2009).

³⁰ *Id.* at 228.

³¹ James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 997 (2010). “Moreover, there is no other indicator of community well-being in which the black-white disparity is as great. Blacks are about eight times more likely to go to prison than are whites. The 8:1 disparity dwarfs black-white disparities in, for example, unemployment rates (2:1 disparity), infant mortality (2:1 disparity), and out-of-wedlock births (3:1 disparity).” *Id.* (footnote omitted).

³² GUERINO, ET AL., *supra* note 20, at 8.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 27.

between one to three times the rate of white females.³⁷ As Congressman Conyers has noted “[o]ver the last 4 decades, we have seen an unprecedented rise in the prison population and a disturbing rise in the number of African Americans in prison.”³⁸

In sum, even a decade ago, Professor Dorothy Roberts observed, “The sheer scale and acceleration of U.S. prison growth has no parallel in western societies.”³⁹ One could add to that – no parallel anywhere in the world. Federal sentencing and the corresponding explosion in the federal prison population reflects this. It has grown by more than 400 % from 24,252 in 1980 to over 208,000 in 2009 and finally to 216,728 at the end of 2013.⁴⁰ Nearly half of the inmates in federal prisons are serving time for drug offenses.⁴¹ As of November 29, 2012, the Bureau of Justice Statistics of the DOJ reported that about 6.98 million people in the United States were under correction supervision in prison or jail or on probation or parole.⁴²

C. *The staggering effects of mass incarceration*

There is so much focus on the incarcerated, we tend to ignore the dramatic effects incarceration has on families. At the dawn of the twenty-first century, federal and state prisoners were parents to 1,498,800 children under the age of 18.⁴³ By 2002, one in every 45 minor children had at least one parent in federal or

³⁷ *Id.*

³⁸ Conyers, *supra* note 4, at 387.

³⁹ Roberts, *supra* note 22, at 1272.

⁴⁰ FEDERAL BUREAU OF PRISONS, POPULATION STATISTICS, http://www.bop.gov/about/statistics/population_statistics.jsp (last visited Feb. 28, 2014).

⁴¹ E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2011 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf>.

⁴² Press Release, Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep’t of Justice, One in 34 U.S. Adults under Correctional Supervision in 2011, Lowest Rate Since 2000 (Nov. 29, 2012), available at <http://www.bjs.gov/content/pub/press/cpus11ppus11pr.cfm>.

⁴³ Thompson, *supra* note 28, at 713.

state prisons, and 52% of state inmates and 63% of federal inmates had an estimated 1,706,600 minor children mostly under the age of ten.⁴⁴ By 2010, one in ten American children had one or both parents under correctional supervision (pre-trial, in jail or prison or on some form of probation, parole or term of supervised release).⁴⁵

A 2005 study summarized the effects of mass incarceration on families, “Incarceration impacts the life of a family in several important ways: it strains them financially, disrupts parental bonds, separates spouses, places severe stress on the remaining caregivers, leads to a loss of discipline in the household, and to feelings of shame, stigma, and anger.”⁴⁶

The rise of America as a carceral nation has had “devastating short-term and long-term consequences,” especially for inner cities.⁴⁷ Professor Thompson has described the vicious cycle of mass incarceration and poverty this way:

As the postwar period wore on, America’s urban centers were increasingly trapped in a vicious cycle of imprisonment and want, one that both undergirded and ensured civic distress: mass incarceration increased poverty, increased urban poverty led to even more urban incarceration, and so on. According to analysts, as many as 70 percent of the children whose parents were imprisoned at the close of the twentieth century would end up behind bars themselves, and African American children were more than eight times more likely to

⁴⁴ *Id.*

⁴⁵ *Id.* at 714.

⁴⁶ Ricardo Barreras, Ernest Drucker, & David Rosenthal, *The Concentration of Substance Use, Criminal Justice Involvement, and HIV/AIDS in the Families of Drug Offenders*, 82 J. OF URBAN HEALTH BULLETIN OF THE N.Y. ACAD. OF MED. 1, 168 (2005).

⁴⁷ Thompson, *supra* note 28, at 715.

have a parent in prison than were white children in major cities such as Chicago.⁴⁸

How did America, the land of the free and home of the brave, the shining beacon of freedom to the world, become the world's unchallenged leader in mass incarceration? The next four sections explain this.

III. CONGRESS AND DISCRETION

A. *Congress and sentencing: obsession and inaction*

Congress's discretionary role in criminal law is easily understood—they pass laws that direct the other branches. However, that simplicity masks a more complex reality when we look at modern sentencing. Congress has not performed this task by continually evaluating the field of criminal law and then routinely passing laws to correct problems and improve the system. Instead, Congress's actions have been remarkably uneven. In short, Congress created a massive change in the very structure of criminal law in the mid-1980s, then stood back, disinterested, as the whole thing fell apart. Only recently has there been a return to the traditional role of Congress, as they have for the first time in three decades moved to right-size sentences based on an evaluation of past experience and current realities. In the next few pages, we will lay out this odd and uneven history.

The whole of federal criminal law was transformed in a period of just three years, a spasm that began with Congress passing the Sentencing Reform Act of 1984 (SRA)⁴⁹ and ended with the passage of the Anti-Drug Abuse Act of 1986 (ADAA).⁵⁰ The former got rid of parole in the federal system and created the mandatory United States Sentencing Guidelines ("Guidelines") and the Sentencing Commission. The latter statute delivered the

⁴⁸ *Id.* at 716.

⁴⁹ Pub. L. No. 98-473, 98 Stat. 1987 (1984).

⁵⁰ Pub. L. No. 99-570, 100 Stat. 3207 (1986).

kill shot⁵¹ to proportionality by both instituting mandatory minimum sentences for a variety of narcotics and creating a 100:1 ratio between the amount of powder cocaine and crack cocaine necessary to trigger the thresholds for those mandatory minimums.⁵² All of this was thoroughly bi-partisan; Democrats sponsored the bills, and President Reagan happily signed them into law. The cooperation between ideological opponents is perhaps most clearly revealed in the identities of the two most vigorous proponents of the Sentencing Reform Act in the Senate: arch-conservative Strom Thurmond and paradigmatic liberal Ted Kennedy.⁵³

The journey to that moment may have begun at a dinner party thrown by Ted Kennedy in 1975. Among the guests was Marvin E. Frankel, a former Columbia law professor who had become a federal judge in New York City. Frankel had written a book urging sentencing reform with the provocative title “Criminal

⁵¹ To call a piece of legislation the “kill shot” is an unusually violent allusion, but criminal law is all about violence, on both sides. Crimes are often violent or create the risk of violence (as drug crimes do). On the government side, it is necessarily through violent coercive force—beginning, often, with a door being broken down, a dog being shot, and people being pushed to the floor—that criminals are apprehended and (later) imprisoned. This circle of violence should not be ignored when we consider how we structure our system of criminal law. More incarceration inexorably creates more violence and threatened violence.

⁵² Though it sounds like the product of social science, the 100:1 ratio was simply made up for political effect; no rationale for the ratio was discussed in the legislative history. William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1252 (1996). Moreover, “[t]he 1986 ADAA not only added to the growing number of mandatory minimum statutes but it also established that mandatory penalties are driven by the quantity of drug involved in the offense and not the culpability of the offender.” Larry E. Walker, *Law and More Disorder! The Disparate Impact of Federal Mandatory Minimum Sentencing for Drug Related Offenses on the Black Community*, 10 J. SUFFOLK ACAD. L. 97, 115 (1995) (citations omitted).

⁵³ Stith & Koh, *supra* note 5, at 224, 258.

Sentences: Law Without Order.”⁵⁴ From these genteel beginnings, grew a movement that encompassed law professors and judges as well as politicians. The center of the discussion, beginning in 1974, was a workshop focused on sentencing disparities at Yale Law School, funded by the Guggenheim foundation and convened by Professor Daniel J. Freed.⁵⁵

The impetus toward reform may have included deliberation and academic debate, but the laws that resulted, particularly the ADAA, were hurried, muddled and thoughtless. That law was pushed through just a few weeks before the 1986 Congressional elections—which definitely mattered. As Anthony Lewis wrote in the *New York Times* as the bill was being finalized, “The spectacle of the month in Washington has been the Gadarene rush of politicians to the drug issue. Democrats in the House of Representatives vied with President Reagan and his followers for the most ferocious posture in the crusade against drugs.”⁵⁶ Media reports, rather than systemic study, appear to have driven this lurch in policy.⁵⁷

Indeed, the legislation was the most unlikely result of a major college basketball upset on February, 20, 1986. On that day, unranked Maryland (4-7 in conference play) beat the #1 nationally ranked (and undefeated in conference play) North Carolina Tar Heels, 75-72, in overtime at the recently opened Dean E. Smith

⁵⁴ MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1972).

⁵⁵ KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).

⁵⁶ Anthony Lewis, *Abroad at Home; The Political Narcotic*, *N.Y. TIMES*, Sept. 29, 1986 available at <http://www.nytimes.com/1986/09/29/opinion/a-broad-at-home-the-political-narcotic.html?pagewanted=print>. His use of the term “Gadarene rush” refers to events described in the Bible. Jesus encounters a man inhabited by a demon in the land of the Gadarenes, and casts the demon into a herd of pigs. The pigs then rush down a steep bank into the sea, where they drown. *Mark* 5:9–13.

⁵⁷ Alyssa L. Beaver, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 *FORDHAM L. REV.* 2531, 2568 (2010).

Arena in Chapel Hill.⁵⁸ The game cast Maryland sensation, Len Bias, into the national spotlight. Bias scored 35 points and personally outscored the Tar Heels, 8-4, in overtime play.⁵⁹ He made a phenomenal reverse dunk off a stolen in-bounds pass that has been viewed worldwide.⁶⁰ Bias went on to be drafted second in the nation by the Boston Celtics on June 17, 1986, but died from an overdose of cocaine (powder not crack, but widely reported or assumed as crack) just two days later.⁶¹ “U.S. House Speaker Tip O’Neill – whose district included Boston, where Bias would have played professional basketball—made passing a new drug statute a priority.”⁶² A former counsel to the House Judiciary Committee at the time described it this way in later Congressional testimony in 1993:

The Controlled Substances Act sentencing provisions were initiated in the [House] Subcommittee on Crime in early August 1986 in a climate in the Congress that some have characterized as frenzied. Speaker O’Neill returned from Boston after the July 4th district work period where he had been bombarded with constituent horror and out-

⁵⁸ See, e.g., Tom Socca, *Len Bias in Chapel Hill: February 20, 1986*, SLATE.COM (Feb. 20, 2011, 4:53 PM), http://www.slate.com/blogs/scocca/2011/02/20/len_bias_in_chapel_hill_february_20_1986.html.

⁵⁹ *Id.*

⁶⁰ *Id.* You may see this incredible dunk at: ACC Digital Network, *Maryland’s Len Bias (1986) - ACC Best Dunk Contest*, YOUTUBE (Feb. 18, 2013), <http://www.youtube.com/watch?v=YoCS1fYTXA>.

⁶¹ See, e.g., William Spade, Jr., *Beyond The 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1249–51 (1996); Adam M. Acosta, Comment, *Len Bias’ Death Still Haunts Crack-Cocaine Offenders After Twenty Years: Failing to Reduce Disproportionate Crack-Cocaine Sentences Under 18 U.S.C. § 3582*, 53 HOW. L.J. 825, 826 (2010); LaJuana Davis, *Rock, Powder, Sentencing—Making Disparate Impact Evidence Relevant in Crack Cocaine Sentencing*, 14 J. GENDER RACE & JUST. 375, 381–86 (2011).

⁶² Davis, *supra* note 62, at 382; see also Spade, *supra* note 52, at 1249 (footnote omitted) (“The passage of the Anti-Drug Abuse Act of 1986 (“1986 Act”) was significantly motivated by the death of University of Maryland basketball star, Len Bias, in June, 1986.”).

rage about the cocaine overdose death of NCAA basketball star Len Bias after signing with the championship Boston Celtics. The Speaker announced that the House Democrats would develop an omnibus anti-drug bill, easing the reelection concerns of many Democratic members of the House, by ostensibly preempting the crime and drug issue from the Republicans who had used it very effectively in the 1984 election season. The Speaker set a deadline for the conclusion of all Committee work on this bill as the start of the August recess—five weeks away. The development of this omnibus bill was extraordinary. Typically members introduce bills which are referred to a subcommittee, and hearings are held on the bills. Comment is invited from the Administration, the Judicial Conference, and organizations that have expertise on the issue. A markup is held on a bill, and amendments are offered to it. For this omnibus bill much of this procedure was dispensed with. The careful deliberative practices of the Congress were set aside for the drug bill.⁶³

Included in this reform were a few dramatic weight shifts within federal sentencing. One, of course, was an obvious shift from a system that emphasized rehabilitation (through parole and the wide availability of probation) to one that primarily served the goals of incapacitation and retribution (through mandatory guidelines and statutory minimums). The second was more subtle: The shift of discretion from judges to prosecutors. This was accomplished, in large part, by that same mechanism of mandatory guidelines and statutory minimums—rules triggered by charging decisions that are in the sole discretion of prosecutors.

⁶³ Spade, *supra* note 52, at 1250.

Thus, in the space of a few years, Congress radically transformed federal sentencing by ditching parole, establishing mandatory guidelines, ratcheting up narcotics sentences, taking discretion away from judges and establishing what Justice Scalia called a “junior varsity Congress” (the Sentencing Commission).⁶⁴ What might be more surprising than this swirl of activity is the historical fact that, once Congress finished all this, they pretty much lost interest in the subject until the passage of the Fair Sentencing Act in 2010.⁶⁵ Even when Justice Breyer’s remedial opinion in *Booker*⁶⁶ expressly invited Congressional action in the clearest possible terms — “The ball now lies in Congress’s court”⁶⁷—Congress, for the most part, sat on its hands.

A few notable laws ratcheted up sentences even more over the next two decades, but these movements were relatively minor, sporadic and did nothing to address the problems that were emerging. In fact, they exacerbated those problems, especially the exploding prison population. In 1988, Congress passed another (much less significant) Anti-Drug Abuse Act,⁶⁸ this time including simple possession of crack as a fact triggering a five-year mandatory minimum sentence. Similarly, in 2003, the “Feeney Amendment”⁶⁹ made a few limited changes that shifted more power to prosecutors.⁷⁰ Overall, though, Congress left the mechanizations of sentencing to the Sentencing Commission rather than addressing the increasingly obvious problematic ex-

⁶⁴ *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

⁶⁵ Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

⁶⁶ 543 U.S. 220, 263 (2005) (Breyer, J., delivering the opinion of the Court in part on the remedial provisions).

⁶⁷ *Id.* at 265.

⁶⁸ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

⁶⁹ The Feeney Amendment was part of the PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003). The Amendment was named after its sponsor, Representative Tom Feeney of Florida. For a worthwhile and comprehensive discussion of the Feeney Amendment, see Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295 (2004).

⁷⁰ *Id.*

plosion in incarceration. In fact, Congress's most important action in this period may have been one intended to simply maintain the status quo. In 1995, they expressly rejected a Sentencing Commission proposal to get rid of the 100:1 ratio between crack and powder that was embedded in the Guidelines.⁷¹

It cannot be said that Congress did not know what was going on. Congress insisted that the Sentencing Commission periodically report on the state of sentencing and incarceration, and the Sentencing Commission dutifully reported in 1995, 2002 and 2007 that over-incarceration driven by mandatory minimums was bloating prison populations.⁷² Nothing happened.

In all, this is a fascinating historical arc: A spasm of Congressional activity in the mid-1980s, followed by a long period of inactivity during which it became clear that the spasm of activity created a machine which was remarkably expensive, racially unfair and grossly inefficient. Only now, 25 years later, are there signs of serious Congressional attention turning towards what is going on in federal criminal law and sentencing.

B. The roots of congressional attention and inaction

The primary role of Congress in creating the incarceration explosion (and then ignoring it) is, at a theoretical level, baffling. Congress's use of blunt objects like mandatory minimums to jack up incarceration rates flatly contradicts the core values of both parties. Conservatives, above all else, argue that the federal government should be less intrusive and less expensive. Progressives believe that the federal government should be used, where possible, to help individuals lead fuller and more productive lives and are particularly conscious of the needs of minority groups and the less affluent. A vast system of warehousing non-violent drug offenders who could just as easily be prosecuted by the states not only fails to serve any of these

⁷¹ Pub. L. 104-38, 109 Stat. 334 (1995).

⁷² Beaver, *supra* note 57, at 2550–52.

goals, it pulls in opposition to them. Republicans voted to shove the power of the federal government onto the streets and into areas traditionally reserved to the states, and Democrats voted to needlessly ruin families and create shocking racial disparities in the operation of criminal law. Both sides then remained silent while the undermining of their values became increasingly obvious. How could this have happened?

The answer lies in Congress's nature as a creature of politics. Of those actors we examine here, Congress is the most overtly political. Judges, members of the Sentencing Commission and the Attorney General are all nominated by the President and confirmed by the Senate and, thus, are to some degree products of politics, but elections do not stare them in the face. Members of Congress are nearly always raising money and running for office, and that matters.

Why it matters was acutely observed by the late William Stuntz: "For legislators, pleasing voters might mean producing rules the voters want. But this requires that the rules be simple and understandable, the sort of thing politicians can use in campaign speeches and advertisements."⁷³ Those simple, understandable rules, such as mandatory minimums, almost always serve the base instinct of punishment. The countervailing principles which cut the other way—proportionality and parsimony—are fraught with complexity and heavy with nuance and background. They make terrible sound bites.

If we accept that construct, it makes Congress's actions understandable. The spasm of activity in the mid-1980s, all of it leading towards greater punishment, was simple and popular. The inactivity that followed was driven by the fact that no one wanted to try to explain why, exactly, it was wise to turn the incarceration bus in the other direction.

⁷³ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 530 (2001).

In terms of moral culpability, the willful inaction of Congress for two decades may be darker than the spasm of lawmaking from 1984 through 1986. The initial fit of lawmaking might, perhaps, be blamed on confusion or a failure to think through the consequences. The inaction that followed, however, stretched well into the period where those consequences (the ones laid out end to end like dead bodies in section II) were clear to see. There was no confusion; the results were plain. This was something else: this was cowardice. As an internal critic, Senator Jim Webb, put it in 2009, "Our failure to address this problem has caused the nation's prisons to burst their seams with massive overcrowding, even as our neighborhoods have become more dangerous. We are wasting billions of dollars and diminishing millions of lives."⁷⁴

The period of political cowardice seems to be coming to an end. With the Fair Sentencing Act of 2010 (which changed the mandatory minimum thresholds for crack), Congress took a first step in the other direction and has considered others. This re-evaluation, like the initial spasm of activity, has united ideological opposites as progressives have been joined by Tea Party favorites such as Senators Rand Paul and Mike Lee in seeking further reforms.⁷⁵

IV. THE SENTENCING COMMISSION AND DISCRETION

We believe the Sentencing Commission is one of the most significant culprits in the federal mass incarceration explosion, even though it did not act alone. The Sentencing Commission worked hand-in-hand with its creator and co-conspirator, Con-

⁷⁴ Jim Webb, *Why We Must Fix Our Prisons*, PARADE MAGAZINE (Mar. 29, 2009), available at <http://www.parade.com/104227/senatorjimwebb/why-we-must-fix-our-prisons/>.

⁷⁵ Henry C. Jackson, *Sentencing Laws Draw Attention in Congress*, BOSTON GLOBE, Jan. 12, 2014, available at <http://www.bostonglobe.com/news/nation/2014/01/12/push-for-sentencing-changes-underway-congress/LU5nF58ZrcDInRjrBZRnki/story.html>.

gress, to guarantee dramatically harsher sentences. The implementation of the Guidelines promulgated pursuant to the SRA and Congress's insatiable appetite for mandatory minimum sentences ignited and fueled the mass incarceration explosion.⁷⁶

From its very birth in 1984, the Sentencing Commission utilized its considerable discretion to astoundingly increase the length of sentences. Lest there be any doubt that the Guidelines often impose uber harsh sentences, sometimes the Guideline range exceeds the statutory maximum authorized by Congress!⁷⁷ What possible rationale justifies this? The Guidelines have mostly operated like a one-way upward ratchet, where the Sentencing Commission frequently raises them with ease and rarely lowers them.⁷⁸ Since the inception of the Guidelines "the Commission has raised sentences far more often than it has reduced

⁷⁶ This view is not idiosyncratic of the authors. Judge Bennett's highly regarded colleague and nationally recognized sentencing expert, U.S. District Court Judge Lynn Adelman of the Eastern District of Wisconsin, recently wrote: "The unremitting growth of the federal prison population is a direct result of the Sentencing Reform Act ("SRA") of 1984, the United States Sentencing Guidelines ("the guidelines") promulgated pursuant to the SRA by the United States Sentencing Commission ("the Sentencing Commission"), and statutes imposing mandatory minimum prison sentences for many offenses, particularly drug offenses." Lynn Adelman, *What the Sentencing Commission Ought to be Doing: Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295, 296 (2013); Conyers, *supra* note 4, at 380 (footnotes omitted) ("The United States Sentencing Commission highlighted the multiple ways in which federal mandatory minimum sentences have contributed to the growing federal prison population. The commission found that mandatory minimums apply to more offenses, impose longer terms of imprisonment, and are used more frequently by prosecutors than they were 20 years ago."); Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 449-51 (2013) (observing that the Guidelines and mandatory minimums created a rigid scheme that constrained judicial discretion to impose lower sentences).

⁷⁷ See, e.g., *United States v. Craig*, 703 F. 3d 1001, 1002 (7th Cir. 2012) (Guideline range of life exceeds statutory maximum of 30 years).

⁷⁸ Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1315 (2005). Bowman also argues that the concentration in sentencing power away from federal judges and towards the Department of Justice and Congress "has made the guidelines a one-way upward ratchet increasingly divorced from considerations of

them. Every crime du jour appears to prompt an increase in punishment and a press release."⁷⁹ Thus, harshness in sentencing became the Sentencing Commission's oxygen and mantra.⁸⁰ As Professor Bowman has observed: "At or near the root of virtually every serious criticism of the guidelines is the concern that they are too harsh, that federal law requires imposition of prison sentences too often and for terms that are too long."⁸¹ Professor Marc Miller echoes these concerns: "Perhaps the increased severity should not be surprising, since the federal system is a modest but important part of a national system with overall imprisonment rates that would make the administrators of the Gulag jealous."⁸²

The Sentencing Commission deftly accomplished their goal of astonishing harshness in drug sentences with subtle slight-of-hand. Discretionary policy judgments were made by ignoring "the views and evidence presented by the judiciary, the defense bar, and others who advised against its proposals."⁸³ After the fact disclosure of the Sentencing Commission's rationale was virtually non-existent.⁸⁴ While harshness was the Sentencing Commission's mantra, transparency was their anathema. While the early Sentencing Commission could have adopted open meetings and procedures based on transparency, it opted in-

sound public policy and even from the commonsense judgments of frontline sentencing professionals who apply the rules." *Id.* at 1319–20.

⁷⁹ Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 86 n. 1 (2005).

⁸⁰ Adelman, *supra* note 76, at 296–97 (footnote omitted) ("For many offenses, the Commission ignored past practice and, with little or no explanation, established much harsher sentences").

⁸¹ Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1328 (2005).

⁸² Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1222 (2004) (footnote omitted).

⁸³ Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1643 (2012).

⁸⁴ See, e.g., Adelman, *supra* note 76, at 302 ("Without explanation, the Commission chose to structure the drug trafficking guideline based on quantities that [the Anti-Drug Abuse Act of 1986] set").

stead for private meetings, but included the DOJ's *ex officio* commissioner, engaged in *ex parte* communications with DOJ staff, law enforcement officials and others that were not recorded, and often provided no or very little explanation or rationale for its amendments.⁸⁵ Indeed, as Ms. Baron-Evans and Professor Stith wrote: "Just before resigning, Commissioner Michael Block put the matter more bluntly: 'At times it appears that a majority of the Commission is actively seeking an 'information free' environment in which to make sentencing policy.'" ⁸⁶ Early on in the process of promulgating the Guidelines, the federal judiciary's efforts to persuade the Sentencing Commission to moderate the harshness of the Guidelines were rebuffed as the DOJ was simultaneously exerting its influence for harsher sentences.⁸⁷ "Judges and practitioners watched with alarm as the Commission ignored the views and evidence presented to it and set about implementing an unexplained agenda that profoundly altered federal sentencing in ways the SRA's framers clearly did not intend."⁸⁸

This is illustrated by the Sentencing Commission's promulgation of the drug guidelines. Unsurprisingly, the Sentencing Commission proceeded to promulgate guidelines establishing very harsh sentences.⁸⁹ Everyone, including virtually all federal judges, assumed the drug guidelines were going to be based on empirical data from the thousands of prior drug sentences the Sentencing Commission gathered prior to the promulgation of the drug guidelines. The Sentencing Commission claimed that it

⁸⁵ Baron-Evans & Stith, *supra* note 83, at 1643–44.

⁸⁶ *Id.* at 1645 (footnote omitted).

⁸⁷ *Id.* at 1645.

⁸⁸ *Id.*

⁸⁹ Adelman, *supra* note 76, at 302 ("The Commission generally displayed a pro-prosecution bias, and its members viewed the Department of Justice and the most law-and-order members of Congress as their primary political constituency. As judges began to impose the sentences required by the guidelines, the federal prison population began to shoot up. In the pre-guideline era, judges imposed harsh sentences only when they believed them necessary but, under the guidelines, harshness became 'a rule of law.'").

reviewed 10,000 pre-sentence reports from fiscal year 1984 and 100,000 cases from the computerized files of the U.S. Administrative Office from 1983 to 1985 (not just drug cases, but all types of criminal cases).⁹⁰ Even though the Sentencing Commission farmed this data, it immediately, and arbitrarily, without explanation then or now, jettisoned the nearly 50% of federal sentences where a defendant was given probation—thus hijacking realistic data from prior federal sentencing practices.⁹¹ To make matters worse, the Sentencing Commission abandoned the empirical approach of prior sentences, even with the skewed data of eliminating cases with probation, for a new, significantly harsher approach.

The SRA required the Sentencing Commission to gather the prior sentencing data from drug cases.⁹² In a strange twist, while “empirical data on drug trafficking offenses were gathered . . . they had *no* role in the formulation of the Guidelines ranges for drug trafficking offenses.”⁹³ We find this shocking. Instead, the Sentencing Commission linked the drug guidelines to the then recently enacted “basketball star Len Bias death by drug over-

⁹⁰ U.S. SENTENCING COMM’N, SUPPLEMENTAL REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 16–21 (1987).

⁹¹ Miller, *supra* note 82, at 1222; Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important New Role for District Courts*. 57 *DRAKE L. REV.* 575, 578 (2009) (footnotes omitted) (“[I]n determining preguideline sentencing practice, the commission arbitrarily excluded sentences of probation. This decision significantly skewed the data relating to past practices because approximately 50% of defendants in the preguideline era received sentences of probation”).

⁹² 28 U.S.C. § 944(m) (2006) required that “as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences of imprisonment, the length of such terms actually served.” It goes on to indicate that the Commission “[S]hall not be bound by such average sentences. . . .”

⁹³ *United States v. Diaz*, No. 11–CR–00821–2 (JG), 2013 WL 322243, at *4–11 (E.D.N.Y. Jan. 28, 2013); *see also* *United States v. Hayes*, 948 F. Supp. 2d 1009, 1022–23 (N.D. Iowa 2013) (Bennett, J.).

dose catalyst” legislation—the ADAA—which sailed through Congress without the traditional committee hearings or Senate and House reports.⁹⁴ In doing so, the Sentencing Commission belied its essential claim in 1987 that the Guidelines “mirrored” past sentencing practices. In the 1987 Introduction to the Federal Sentencing Guidelines Manual, the basic claims were (1) that it “mirrored” past practices based on empirical data of prior sentences, and, (2) that while “the guidelines do not perfectly reflect past practices, it also portrays guidelines that do not stray very far or very often from their empirical ‘starting point.’”⁹⁵ This claim of “mirroring” was an obvious attempt to gain credibility with judges and others. We see it like Miller and Wright—a carnival funhouse mirror riddled with distortions.⁹⁶

The Sentencing Commission’s decision to completely reject the prior empirical evidence of prior drug sentences and to substitute, virtually without explanation, drug guidelines triggered to the mandatory minimums of the ADAA, is, in the authors’ view, the most significant act of discretion by the Sentencing Commission that has fueled mass incarceration at the federal level. As Judge Gleeson so eloquently wrote in *Diaz*:

The increased severity of federal drug trafficking sentences is an integral part of the story of mass incarceration. In less than a decade, from 1985 to 1991, the length of federal drug trafficking sentences increased by over two-and-a-half times. Sentences for drug trafficking were “elevated above almost every serious crime except murder. The increase in sentence length for drug offenders

⁹⁴ *Diaz*, 2013 WL 322243, at *4–7; see also *Hayes*, 948 F. Supp. 2d at 1014–31. Both opinions contain detailed history and criticisms of the development of the Commission’s drug Guidelines and the judges’ policy disagreements with them.

⁹⁵ Marc L. Miller & Ronald F. Wright, *Your Cheatin’ Heart(Land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 727 (1999).

⁹⁶ *Id.* at 760.

“was the single greatest contributor to growth in the federal prison population between 1998 and 2010.”⁹⁷

We agree with U.S. District Court Judge Lynn Adelman’s assessment of the drug guidelines, “the deeper problem is that the sentences called for by this guideline are based on virtually nothing—not on past practice, not Commission expertise about the harm caused by drugs, and not on research. The guideline is thus entitled to little respect.”⁹⁸ Moreover, even post *Booker* and *Kimbrough* “[r]ather than embrace judge’s new powers to critically evaluate guidelines as an engine of feedback and constructive change, the Commission attempted to stifle it.”⁹⁹ A major part of this problem “has been the Commission’s attempts

⁹⁷ *Diaz*, 2013 WL 322243, at *10 (footnotes omitted).

⁹⁸ Adelman & Deitrich, *supra* note 91, at 584. Judge Gleeson has thoroughly discussed the Commission’s lack of forthrightness in promulgating the drug guidelines:

“The original Commission was far from forthright about the role of its own data in formulating Guidelines ranges for drug trafficking offenses. The Introduction to the first Guidelines Manual contained the opaque understatement that the ADAA “suggest[ed] or require[d] departure” from that data by “impos[ing] increased and mandatory minimum sentences.” But the Commission otherwise failed to discuss or explain this momentous decision. A later Commission—or at least the staff of a later Commission—lamented this absence of forthrightness. In 2004 the Commission’s fifteen-year report to Congress had these words for the original Commission’s failure to discuss why it extended the “quantity-based” approach of the ADAA across the entire spectrum of drug trafficking sentences:

‘This is unfortunate for historians, because no other decision of the Commission has had such a profound impact on the federal prison population. The drug trafficking guideline . . . had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes.’”

Diaz, 2013 WL 322243, at *6 (footnotes omitted).

⁹⁹ Paul A. Hofer, *Beyond the “Heartland”*: Sentencing Under the Advisory Guidelines, 49 DUQ. L. REV. 675, 696–97 (2011).

to maintain the language and procedures of the mandatory era, while stigmatizing the exercise of judges' new powers as 'outside the system.'"¹⁰⁰ Indeed, it took the Sentencing Commission almost four years to even mention *Booker* and *Kimbrough* in the Guideline Manual and, when it finally did, it emphasized only the continuing importance of judges relying on the Guidelines "and remained silent on how judges might identify unsound recommendations, provide feedback to the Commission and improve the sentences they impose."¹⁰¹

Finally, it appears that the Sentencing Commission never misses an opportunity to attempt to undo the effects of *Booker* and argue for their pre-*Booker* self-invested mandatory regime or at least try and get judges to move closer to the mandatory regime. For example in attempting to play the powerful "race card," the Sentencing Commission has twice reported that in the post *Booker* world judges have increased black-white sentencing disparity.¹⁰² The Starr and Rehavi comprehensive empirical study totally undermines the Sentencing Commission's claims. Their research "suggests that racial disparities in recent years have been largely driven by the cases in which judges have the *least* sentencing discretion: those with mandatory minimums."¹⁰³ While their "assessment of *Booker* is more tentative, but we find no evidence that it *increased* racial disparity. The Sentencing

¹⁰⁰ *Id.* at 696.

¹⁰¹ *Id.* (footnote omitted). Indeed, "[i]n 2010, the Commission admonished judges that mitigating offender characteristics should not be given 'excessive weight' and that their 'most appropriate use' is 'not as a reason to sentence outside the applicable guideline range,' but to determine the sentence within the guideline range." *Id.*

¹⁰² Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 132 *YALE L. J.* 2, 4–5 (2013) (citing U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT'S MULTIVARIATE REGRESSION ANALYSIS 3 (2010) and U.S. SENTENCING COMM'N, CONTINUING IMPACT OF *Booker* on Federal Sentencing 108 (2013)).

¹⁰³ *Id.* at 78.

Commission's contrary conclusion is based on deeply flawed methods."¹⁰⁴ Starr and Rehavi are also deeply concerned about any proposals to attempt to reduce racial disparity in sentencing by imposing stricter restraints on sentencing "especially those that entail expanding mandatory minimums" because the authors found "that prosecutors file mandatory minimums twice as often against black men as against comparable white men."¹⁰⁵

There is, however, despite this backdrop of harshness and inflexibility of the Sentencing Commission, a small ray of hopeful change. As discussed in section VII, there *may* be some progress, although baby steps, by the Sentencing Commission to reduce mass incarceration.

It is companionate that the next section of this article focuses on the DOJ. The advent of the Guidelines shifted enormous and unprecedented power and discretion that had historically, since the founding of the nation, been in the hands of federal district court judges to federal prosecutors.

V. FEDERAL PROSECUTORS AND DISCRETION

A. *The power prosecutors received*

Prosecutors were the great beneficiaries of the shift of discretion embedded in the "reforms" of the mid-1980s.¹⁰⁶ Congress, abetted by the Sentencing Commission, made sure that prosecutors had all the power they might desire.

Even before this shift, of course, federal prosecutors had a significant power that state prosecutors lack — the ability to set their own agendas rather than reacting to street crime. As William Stuntz put it, "there is an enormous amount that federal prosecutors can do — the federal criminal code covers most of the ground state criminal codes cover — but very little that they

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (footnote omitted).

¹⁰⁶ *See supra* Part II.

must do.”¹⁰⁷ The discretion given to federal prosecutors by Congress was piled on top of this already-existing and unique power to pick and choose.

To understand the full range of powers that the mid-80s transformation of criminal law gave to federal prosecutors, it is helpful to consider three of the most apparent system features which effectuated this shift: an elimination of second-chance mechanisms like parole, mandatory minimum, and sentencing guidelines, both mandatory or advisory.

1. The lack of second-chance mechanisms

Until the SRA, parole was a part of the federal scheme and had a dramatic effect on shortening sentences. Importantly, parole gave the system a chance to actively consider rehabilitation in real time — the parole board could consider the behavior of the prisoner during their incarceration. The elimination of parole took all of the power from the parole board and shifted it to the other end of the process: those involved in the sentencing.

This shift, on its face, pushed power to both judges and prosecutors by cutting out another actor (the parole board) entirely in determining the sentence that is actually served. The other two innovations, mandatory minimums and sentencing guidelines, were not so even-handed.

2. Mandatory minimums

As Erik Luna and Paul Cassell have noted, mandatory minimums are not a new phenomena; in 1790 federal law required a life sentence for murder and piracy and a ten-year sentence for someone convicted of causing a ship to run aground.¹⁰⁸ What is

¹⁰⁷ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 543 (2001).

¹⁰⁸ Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 9 (2010).

new, though, is the role of mandatory minimums created as part of the ADA in narcotics cases—a major factor in the prison population explosion chronicled in section II.

The establishment of mandatory minimums by Congress could not have been more direct: Mandatory minimums restrict judges. Importantly, they restrict judges by directly empowering prosecutors in two distinct ways.

First, mandatory minimums are based on the charge of conviction and are usually embedded in the penal code itself within the code section which makes an action a crime.¹⁰⁹ Thus, whether or not a mandatory minimum will apply depends on an action of the prosecutor — specifically the choice of a charge. Where mandatory minimums rest on findings of fact, the prosecutor also controls whether or not those facts are charged and presented. For example, consider 21 U.S.C. § 841’s mandatory minimum of five years if five grams of methamphetamine are at issue. If a prosecutor has a case involving 5.2 grams of methamphetamine, she can include that in the charge, which will invoke the mandatory minimum. If she charges no amount or an amount less than five grams, no mandatory minimum will apply.¹¹⁰ Similarly, if she chooses to enhance a sentence to reach a mandatory minimum based on criminal history, the statute puts the power to do so solely in her hands, because the mandatory sentence applies only if she requests it by filing a § 851 information.¹¹¹ The prosecutor can choose whether or not to bind the judge. The judge has no corresponding power so long as a mandatory minimum applies. Congressman John Conyers, Jr., has recently noted “mandatory minimums place the primary sentencing discretion in the hands of one side of an adversarial

¹⁰⁹ See, e.g., 21 U.S.C. § 841 (2012).

¹¹⁰ *Alleyne v. United States*, 133 S. Ct. 2151 (2013) (holding that the facts supporting a mandatory minimum must be charged and found by a jury).

¹¹¹ 21 U.S.C. § 851(a)(1) (2012), which provides that a notice by way of information prior to trial or plea may be filed by the U.S. Attorney “stating in writing the previous convictions relied upon.”

process — the prosecution — rather than in the hands of a dispassionate judge.”¹¹²

Second, and perhaps more importantly, the presence of a mandatory minimum gives the prosecutor great bargaining power. In the case of narcotics, the mandatory minimums will potentially apply to nearly all defendants in a conspiracy, including the most minor. Thus, a prosecutor can threaten to hit a minor participant with a mandatory minimum if they do not cooperate against others, and that threat is backed up by the power of the law and nearly three decades of such use.

3. Mandatory/advisory sentencing guidelines

In much the same way, and at about the same time, that mandatory sentences grabbed power from judges and handed it to prosecutors, the creation of mandatory guidelines (via the SRA) did much the same thing. Mandatory sentencing guidelines, by their nature, restricted the discretion of judges, and that discretion flowed downhill to prosecutors.

There is one key difference, though. Mandatory minimums are usually triggered by the charge or a few simple facts (such as criminal history or the amount of drugs at issue).¹¹³ Guidelines, in contrast, bounce up and down in response to a welter of complex factors. Mandatory minimums are essentially a charge offense sentencing, while guidelines were developed as a “real” offense system that takes into account not only the crime as charged but also any “relevant conduct” that the prosecutor chooses to prove by a preponderance standard.¹¹⁴ In the end, this is a distinction without a difference. The prosecutor controls the charge, but she also controls the information that will serve as the basis for the “relevant conduct.” One way or another, it flows through her.

¹¹² Conyers, *supra* note 4, at 385.

¹¹³ 21 U.S.C. § 841 (2012).

¹¹⁴ U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2012).

In 2005, of course, the Supreme Court ruled that to remain constitutional the Guidelines were to be considered advisory rather than mandatory.¹¹⁵ While this did pull back a bit from the power shift to prosecutors, it left in place a process which remained centered on the Guidelines as a baseline sentence. Importantly, a federal district court judge still sits down to ponder a sentence with a presentence investigation report that is primarily about calculating a guideline sentence — and which is still cabined and framed by the information that the prosecutor chooses to gather and provide to the probation officer who creates that report.

In each of these ways, prosecutors received broad discretionary powers in the 1980s. What they chose to do with it is an intriguing story about the real roots of disparity.

B. What federal prosecutors did with that power

A primary point of distinction between the state and federal systems is that the federal government has a unified national hierarchy of prosecutors. All receive direction, directly or indirectly, from the Attorney General and his chief assistants at Main Justice. This is distinct from state systems, where the top of the hierarchy usually rests at a local level, in the person of the County or District Attorney. A District Attorney is not governed by the state Attorney General; she is an independent elected official who answers to local voters.

This distinction means that the Attorney General of the United States has unique powers to create uniform policies across the nation. In other words, to create uniformity in the use of discretion by federal prosecutors, the Attorney General is able to issue directives, which specifically limit or guide the use of that discretion, and the ability to create systems of evaluation

¹¹⁵ *Booker v. United States*, 543 U.S. 220 (2005).

to make sure that the local offices and individual attorneys follow those mandates.

The reforms of the mid-1980s sought to create uniformity in sentencing by shifting discretion from judges to prosecutors.¹¹⁶ At a theoretical level, this made sense. Federal judges have remarkable independence and varied backgrounds — a patchwork created by the bare fact that a Reagan appointee will be in the courtroom next to a Clinton appointee, who will be next to an Obama or Bush appointee. Though there is a hierarchy of precedential authority with the Supreme Court at the apex, judges do not have the same kind of chain-of-command national hierarchy that prosecutors do; there is no judicial equivalent to the Attorney General who is the boss of the organization, able to mandate policies great and small. Thus, giving prosecutors discretion rather than judges would seem to move towards uniformity because within the DOJ there is the ability to enforce that uniformity through the exercise of discretion in individual cases.

However, that would only be true if the Attorney General *did* issue strict directives limiting and guiding the use of these new powers. That did not happen. The results were disastrous. At the same time that Congress stopped paying much attention to federal sentencing, a series of Attorneys General failed to create uniformity in the use of discretion by federal prosecutors.

Rather than issuing directives, the Attorneys General from 1986 through 2013 left the employment of these new powers (and the old ones) to United States Attorneys and their assistants.¹¹⁷ Predictably, this created a riot of disparity, which only now can be seen in its full wretchedness.

¹¹⁶ Patti Saris, who later became a federal judge and Chair of the Commission, was a staff attorney for the Senate Judiciary Committee when the Sentencing Reform Act of 1984 was passed. She remembered the core impetus to be one of national uniformity in sentencing: “The rallying cry was: why should a bank robber in California get a different sentence from a bank robber in Texas?” Alschuler, *supra* note 79, at 100.

¹¹⁷ The closest that these leaders came to leading was to put vague statements into the United States Attorney’s Manual, a largely ignored guide to

Judge Bennett, in the context of sentencing Douglas Young, a convicted crack dealer, laid bare the effects of this lack of institutional control.¹¹⁸ Young had been spared an enhancement to his sentence under the provisions of 21 U.S.C. § 851,¹¹⁹ which bumps up mandatory sentences based on criminal history. Importantly, though, this bump only occurs if the prosecutor files information alleging the prior conviction. In other words, the prosecutor, alone, controls the imposition of this stiff enhancement.

The *Young* opinion established just how uneven the application of this important enhancement has been. In the Northern District of Iowa (Judge Bennett's district), for example, such enhancements were employed by prosecutors in about 79% of cases. In neighboring Nebraska, though, where the same mechanism was used, an eligible § 851 defendant was more than 2,532% less likely to receive the enhancement.¹²⁰ Compared to the national median of eligible defendants, a § 851 eligible defendant in the Northern District of Iowa was 626% more likely to receive the enhancement.¹²¹ Indeed the following graph demonstrates the disparity of § 851 enhancement between the neighboring districts and the Northern District of Iowa:

policy. See UNITED STATES ATTORNEYS' MANUAL, http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html (last visited Feb. 28, 2014).

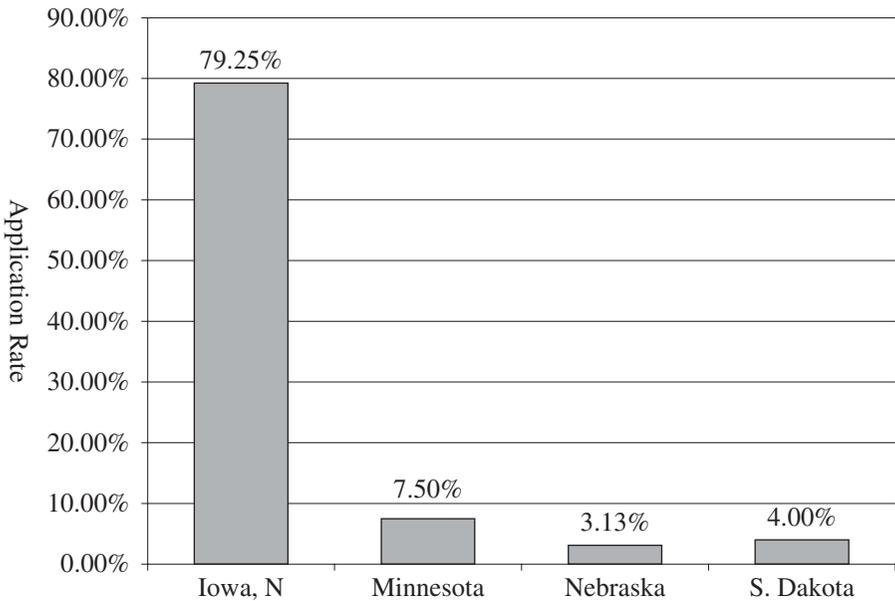
¹¹⁸ *United States v. Young*, 960 F. Supp. 2d 881, 2013 WL 4399232 (N.D. Iowa 2013).

¹¹⁹ 21 U.S.C. § 851's enhancement system was first developed in 1970, but only bumped up crack cases in such dramatic ways after the mandatory minimums contained in the ADAA were in place. *Young*, 960 F.Supp 2d at 889.

¹²⁰ *Id.* at 897.

¹²¹ *Id.* at 894.

FREQUENCY OF § 851 ENHANCEMENT APPLICATION IN SELECTED ADJACENT DISTRICTS



This disparity was not unusual; it turns out that federal prosecutors are wildly disparate not just in the Eighth Circuit but across all circuits and far too many districts.¹²²

Given that there was no unified directive about how to use these powerful tools, we should not be surprised that the determining factor seems to have been simply whose hands held the tools. This kind of disparity (among judges) was the exact concern of Congress in imposing the sentencing reforms of the mid-1980s. Only now is there a realization that the problem is worse amongst and between prosecutors.

There is hope, however. In August of 2013, Attorney General Eric Holder issued new directives about the use of prosecutorial

¹²² *Id.* at App. E.

discretion in charging.¹²³ Specifically, Holder limited the use of both weight-of-narcotic and criminal history enhancements in some cases,¹²⁴ a strikingly bold move in contrast with the laissez-faire attitude of prior Attorneys General. There is hope that momentum has shifted in a new and promising direction.

VI. FEDERAL DISTRICT COURT JUDGES AND DISCRETION

As briefly discussed in section III, prior to the effective date of the Guidelines on November 1, 1987, federal judges had virtually unlimited discretion to sentence from probation to the statutory maximum in every case where a mandatory minimum did not apply. Very few cases prior to the SRA and the ADAA had applicable mandatory minimums — except in very rare cases like treason and piracy.¹²⁵ In fact, the number of mandatory minimum penalties for federal crimes has proliferated over the past 20 years. “Since 1991, the number of mandatory minimum penalties has more than doubled, from 98 to 195 today.”¹²⁶ By the late 1960s “as mandatory minimum penalties for drug offenses became increasingly unpopular,” the Nixon administration proposed and Congress “repealed nearly all mandatory minimum penalties for drug offenses.”¹²⁷ When Congress rushed through the ADAA by bypassing “much of its usual deliberative legislative process,” the Act created numerous mandatory minimums for federal drug offenses.¹²⁸ This Act

¹²³ Holder described the new policies in a speech to the American Bar Association in San Francisco on August 12, 2013. See Douglas A. Berman, *Some Sentencing-Related Highlights from AG Holder's Remarks Today to the ABA*, SENTENCING LAW & POLICY (Aug. 12, 2013), available at http://sentencing.typepad.com/sentencing_law_and_policy/2013/08/some-sentencing-related-highlights-from-ag-holders-remarks-today-to-the-aba.html.

¹²⁴ *Id.*

¹²⁵ U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 22 (2011).

¹²⁶ *Id.* at 71–72.

¹²⁷ *Id.* at 22.

¹²⁸ *Id.* at 23–24.

created quantity levels for different drugs that triggered various mandatory minimums ranging from five years to life.¹²⁹ The ADAA “interacts with the Guidelines in an important way. It trumps the Guidelines.”¹³⁰ So, “ordinarily no matter what range the Guidelines set forth, a sentencing judge must sentence an offender to at least the minimum prison term set forth in a statutory mandatory minimum.”¹³¹ Not surprisingly, this passage of the SRA and the ADAA correlates to a massive increase in the number of federal prisoners:

Historically, in 1940 the federal Bureau of Prisons (BOP) operated just 24 facilities compared to 118 now.¹³² From 1940 over the next four decades the BOP population remained fairly constant at around 24,000 inmates.¹³³ The BOP population mushroomed from 25,000 in 1980 to nearly 219,000 in 2012.¹³⁴

The Supreme Court’s blockbuster decision in *Booker*,¹³⁵ holding that the federal Guidelines were “advisory,” ushered in yet another unprecedented era of federal sentencing reform by restoring some of the discretion to federal sentencing judges lost by the previous mandatory nature of the Guidelines.¹³⁶

¹²⁹ *Id.* at 23.

¹³⁰ *Dorsey v. United States* 132 S.Ct. 2321, 2327 (2012).

¹³¹ *Id.*

¹³² NATHAN JAMES, CONG. RESEARCH SERV., *THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 2* (2013), available at <https://www.fas.org/sgp/crs/misc/R42937.pdf>.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ 543 U.S. 220 (2005).

¹³⁶ The holding in *Booker* that the Guidelines were unconstitutional unless “advisory” was based on the sentencing judge’s determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant which violated the defendant’s Sixth Amendment right to trial by jury. The Court remedied the Sixth Amendment violation by excising the provisions of the SRA that the Court held made the sentencing guidelines “mandatory,” thereby rendering the Guidelines advisory in nature. *Id.* For a

As Judge Bennett has previously written, “the post-*Booker* broadening of judicial discretion has had virtually no impact on mitigating the harshness of sentencing under advisory guidelines rather than mandatory guidelines.”¹³⁷ As the D.C. Circuit has observed, “It is hardly surprising that most federal sentences fall within Guidelines ranges even after *Booker*—indeed, the actual impact of *Booker* on sentencing has been minor.”¹³⁸ The average sentence imposed in terms of months, compared to the average guideline minimum has remained virtually constant from 1996 to 2011.¹³⁹ Thus, federal sentencing judges, for the most part, as a group, remain considerably wedded to the Guidelines. Why is this?

We suggest there are many potential factors at work. The vast majority of federal judges have never sentenced offenders other than under the Guidelines regime. Thus, even with the recent advent of the Guidelines morphing from mandatory to advisory, federal judges by virtue of their experience, feel comfortable with sentences within the Guideline ranges.

Judges are likely deeply connected to and influenced by the Guidelines by the powerful psychological process known as cognitive anchoring.¹⁴⁰ Compelling cognitive psychological research on anchoring suggests that the mathematical ranges of the Guidelines for each defendant strongly “anchor” the judge to that Guideline range.¹⁴¹ Numerous psychological studies have established the anchoring bias consistently produces systematic

more through overview of the federal sentencing process both pre and post *Booker*, see Bennett, *supra* note 10, at 126–34.

¹³⁷ Bennett, *supra* note 10, at 136.

¹³⁸ *U.S. v. Turner*, 548 F.3d 1094, 1099 (D.C. Cir. 2008) (citing U.S. SENTENCING COMM’N, FINAL REPORT ON THE IMPACT OF *United States v. Booker* on Federal Sentencing 57 (2006)).

¹³⁹ U.S. SENTENCING COMM’N, BOOKER REPORT 2012 PART C (2012), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/Part_C1_Overview.pdf.

¹⁴⁰ Bennett, *supra* note 10, at 116–26.

¹⁴¹ *Id.* at 107–26.

errors in judgment in wide-ranging circumstances.¹⁴² This includes judgments by professionals like doctors, lawyers, real-estate agents, psychologists and auditors.¹⁴³ The anchoring effect has also been recognized in a variety of decisions by foreign and American federal and state judges.¹⁴⁴ Surprisingly, the anchoring effect has been deemed robust even when the anchor is irrelevant, inaccurate, implausible, incomplete or even random.¹⁴⁵

We believe this comfort level among federal sentencing judges with the Guidelines has been perpetuated by the myth that most of the Guidelines, including the drug guidelines, are based on empirical historical data, alleged special expertise of the Sentencing Commission, and the Sentencing Commission's exercise of its characteristic institutional role—when in fact they are not.¹⁴⁶ Even the current 2013 Edition of the Federal Sentencing Manual perpetuates this myth. In Chapter One of the Guidelines, The Basic Approach policy statement repeatedly refers to the “empirical approach” of the Guidelines and discusses how the Sentencing Commission “analyzed the data from over 10,000 presentence investigations . . .”¹⁴⁷ As we explained in detail in section IV, the Sentencing Commission's unrelenting efforts to persuade judges to conform their sentences to the Guidelines appears to have initially worked well. We believe as more and more judges become aware of the failings of the Guidelines, especially the drug guidelines, judges will engage in more *Kimbrough* justice.

¹⁴² *Id.* at 107–16.

¹⁴³ *Id.* at 107–08.

¹⁴⁴ *Id.* at 116–26.

¹⁴⁵ *Id.* at 111–14.

¹⁴⁶ *See, e.g., Kimbrough v. United States*, 552 U.S. 85 (2007) (holding that judges had the right to vary downward from the crack guidelines, the Court held: “. . . those Guidelines do not exemplify the Commission's exercise of its characteristic institutional role. In formulating Guidelines ranges for crack cocaine offenses, as we earlier noted, the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of “empirical data and national experience.”).

¹⁴⁷ U.S. SENTENCING COMM'N GUIDELINES MANUAL ch. 1, pt. A (2013).

VII. REVERSAL OF FORTUNES AND THE NEW DISCRETION

A. *The current momentum*

Mass incarceration did not come about overnight and the solutions for it will not be implemented easily or quickly even though it ought to be clear that there are too many people, especially people of color, in too many prisons, serving sentences that are far too long, and that this mass incarceration serves no legitimate penal or law enforcement rationale. But, we sense a growing movement for change. For example, in the Congressional arena on August 3, 2010, President Obama signed into law the first major reform of federal sentencing in years, The Fair Sentencing Act of 2010 (Public Law 111-220) (FSA). This law substantially reduced the sentencing disparity between crack and powder cocaine which had been based on a 100:1 ratio to 18:1, but it did not go far enough.¹⁴⁸ Indeed, in typical congressional fashion during the War on Drugs, Congress, in the FSA, also directed the Sentencing Commission to ensure that the Guidelines provide penalty increases for a variety of aggravating

¹⁴⁸ A few federal judges, including Judge Bennett, refused to apply the harsh 100:1 ratio. *See, e.g., Spears v. United States*, 551 U.S. 261 (2009) (per curiam) (the Supreme Court reversed the Eighth Circuit Court of Appeals and affirmed Judge Bennett's initial use of a 20:1 ratio). Prior to the passage of the FSA, Judge Bennett decided that even the 20:1 ratio created too much disparity between crack and powder defendants and reduced the ratio to 1:1. *See United States v. Gully*, 619 F. Supp. 2d 633, 644 (N.D. Iowa 2009) (noting that a categorical disagreement with the 100:1 guideline was based on several reasons, not least of which was the failure of the Sentencing Commission to exercise its characteristic institutional role in developing the crack guidelines, the lack of any empirical support for the assumptions that motivated adoption of the 100:1 ratio, and the disparate impact of the ratio on black offenders). Then, in *United States v. Williams*, 788 F. Supp. 2d 847 (N.D. Iowa 2011), Judge Bennett decided the first post-FSA decision and refused to follow the politically compromised ratio of 18:1 contained in the FSA, detailing its legislative history and simply finding no empirical or scientific rationale for the 18:1 ratio. He continued to use a 1:1 ratio. *Id.* at 856–90. The 18:1 ratio was indeed a ratio in search of a rationale. *Id.*

factors for *all* drug offenses.¹⁴⁹ Congress actually created 12 new enhancements that potentially increase the Guideline range across all drug types.¹⁵⁰ However, following the Presidential election in 2012, a number of sentencing reform bills aimed at reducing mass incarceration by reducing the length of federal sentences, especially in drug cases, have been filed in Congress.¹⁵¹ Bi-partisan press releases on these issue have been the frequent subject of current media attention.¹⁵²

¹⁴⁹ Pub. L. No. 111-220 §§ 5–6, 124 Stat. 2372 (2010).

¹⁵⁰ *Id.*

¹⁵¹ *See, e.g.*, Justice Safety Valve Act of 2013, S. 619, 113th Cong. (2013–2014) (this 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). 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)); Smarter Sentencing Act of 2013, S. 1410, 113th Cong. (2013–2014) (this bipartisan legislation introduced by Senators Durbin and Lee, would expand the “safety valve” to allow a sentence below mandatory minimums, lower existing mandatory minimums for specific drug offenses and would allow current prisoners to petition courts for a review of their case based on the FSA. There is a House companion bill, H.R. 3382, which was introduced by Representatives Raul Labrador (R-ID) and Bobby Scott, (D-VA)); Recidivism Reduction and Public Safety Act of 2013, S. 1675, 113th Cong. (2013–2014) (this bipartisan legislation introduced by Senators Portman (R-OH) and Whitehouse (D-RI) allows federal inmates to earn seven days more “good time credit” each year for good behavior and obeying prison rules. 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. 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. Finally, the Act gives the BOP 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.)

¹⁵² *See, e.g.*, Linda Greenhouse, Editorial, *Crack Cocaine Limbo*, N.Y. TIMES (Jan. 6, 2014), available at <http://www.nytimes.com/2014/01/06/opinion/>

On November 26, 2013, the Chair of the Sentencing Commission, Judge Patti Saris, sent a letter to the Chair and ranking member of the Senate Judiciary Committee indicating that the Sentencing Commission unanimously recommended to Congress that they consider statutory changes "to reduce the current

greenhouse-crack-cocaine-limbo.html?_r=0 ("President Obama earned a rare moment of bipartisan acclaim last month when he commuted the sentences of eight long-serving federal prisoners. Their crack cocaine offenses had resulted in the harsh penalties mandated by a sentencing formula that Congress repudiated when it passed the Fair Sentencing Act of 2010."); *Congress Shows Bipartisan Support Of Changing Mandatory Sentencing Law*, FOXNEWS (Jan. 5, 2014), <http://www.foxnews.com/politics/2014/01/05/congress-shows-bipartisan-support-changing-mandatory-sentencing-laws/> ("An unusual alliance of Tea Party enthusiasts and liberal leaders in Congress is pursuing major changes in the country's mandatory sentencing laws amid growing concerns about both the fairness of the sentences and the expense of running federal prisons."); Press Release, U.S. Senator Patrick Leahy, Chairman, Senate Judiciary Committee, Statement On The First Session Of the 113th Congress Progress Made And Much Left Incomplete (Dec. 20, 2013), available at <http://www.leahy.senate.gov/press/statement-of-senator-patrick-leahy-chairman-senate-judiciary-committee-on-the-first-session-of-the-113th-congress-progress-made-and-much-left-incomplete> ("I have come to believe, however, that mandatory minimum sentences do more harm than good. I chaired a hearing on Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences on September 18, 2013, and have been working with both Democrats and Republicans on sentencing reform proposals."); Press Release, U.S. Senator, Assistant Majority Leader, Statement On Drug Sentencing Reform Speech By AG Holder (Aug. 12, 2013), available at <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=a31a834d-5d62-434a-81ff-8b671c64198f> ("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. I look forward to working with Attorney General Holder and the bipartisan group of Senators that support reforming outdated laws that have proven not to work and cost taxpayers billions."); Sari Horowitz & Matt Zapotosky, *Holder's Charging Order Aims to Reduce Prison Population*, WASH. POST (Aug. 13, 2013), available at http://www.washingtonpost.com/world/national-security/holders-charging-order-aims-to-reduce-prison-population/2013/08/12/d0660a3e-0384-11e3-9259-e2aaf5a5f84_story.html ("Attorney General Eric H. Holder Jr.'s proposed prison reforms drew praise from criminal justice experts Monday, but some critics said the proposals do not go far enough to begin overhauling a costly and broken law enforcement system.").

mandatory minimum penalties for drug trafficking,” make provisions of the FSA retroactive, expand the current “safety valve” to waive mandatory minimum sentences for a broader range of drug offenders with slightly greater criminal histories — and for the first time expand it beyond drug cases.¹⁵³ Additionally, the Sentencing Commission, on January 9, 2014, voted to publish for public comment “proposed guideline amendments, including possible reductions to the sentencing guidelines levels for federal drug trafficking offenses.”¹⁵⁴ In the accompanying news release, Sentencing Commission Chair Judge Saris stated:

Like many in Congress and in the executive and judicial branches, the Commission is concerned about the growing crisis in federal prison populations and budgets, and believes it is appropriate at this time to carefully consider the sentences for drug traffickers, who make up about half of the federal prison population.¹⁵⁵

As forcefully argued by Judge Lynn Adelman in his seminal article, it appears that the Sentencing Commission may have finally overcome its inordinate preoccupation and fixation with inter-judge sentencing disparity and started making progress to help reduce the nation’s mass incarceration, even if the progress is, as we believe, a baby step.¹⁵⁶ We view these developments by the Sentencing Commission as encouraging signs, but much more needs to be done.

¹⁵³ Letter from Judge Patti B. Saris, Chair, U.S. Sentencing Commission, to Patrick Leahy and Chuck Grassley, Senate Judiciary Committee Chairman and Ranking Member, United States Senate 1–2 (Nov. 26, 2013), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/20131126-Letter-Senate-Judiciary-Committee.pdf

¹⁵⁴ Press Release, U.S. Sentencing Commission, U.S. Sentencing Commission Seeks Comment On Potential Reduction To Drug Trafficking Sentences (Jan. 9, 2014), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20140109_Press_Release.pdf

¹⁵⁵ *Id.* at 1–2.

¹⁵⁶ Adelman, *supra* note 76.

For the first time in our professional lives, the DOJ, on August 12, 2013, through Attorney General Eric Holder, in a historic and courageous announcement to the House of Delegates of the American Bar Association, chartered a new course to help reduce mass incarceration by stating: "It's clear — as we come together today — that too many Americans go to too many prisons for far too long and for no truly good law enforcement reason."¹⁵⁷ The Holder Memo indicated that low-level, nonviolent drug offenders with no ties to gangs or large-scale drug organizations will no longer be charged with offenses that impose severe mandatory sentences. Attorney General Holder called for a change in DOJ policies to reserve the most severe penalties for drug offenses for serious, high-level or violent drug traffickers. This includes a new set of standards and review for the draconian 21 U.S.C. § 851 enhancements that can double all the way to a life sentence and mandatory minimums for certain offenders with prior drug offenses, including old offenses that were not even felonies under state law and for which the offender served no time. He directed his 94 U.S. attorneys across the nation to develop specific, locally tailored guidelines for determining when federal charges should and should not be filed and when § 851 enhancements should and should not be filed.¹⁵⁸ While this is a very welcome, positive and important development, there is absolutely no assurance that the career prosecutors in the 94 federal district courts will actually carry out this initiative. Of even greater concern is whether future Attorney

¹⁵⁷ See Eric Holder, U.S. Attorney General, Address at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

¹⁵⁸ Memorandum from Eric Holder, U.S. Attorney General, to the U.S. Attorneys and Assistant Attorneys General for the Criminal Division (Aug. 12, 2013), *available at* <http://www.justice.gov/oip/docs/a-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf>.

Generals or the DOJ will continue to exercise their discretion to reduce mass incarceration in these and other ways.¹⁵⁹

We are also encouraged by the small but increasing number of federal district court judges that are exercising their discretion by writing opinions declaring policy disagreements with the Guidelines. These judicial policy disagreements cut across a variety of Guideline applications. They share and express the belief that the Guidelines are too harsh.¹⁶⁰

¹⁵⁹ *See id.* (Judge Bennett has been very encouraged by the implementation of the August 12, 2013, Holder memo by local Assistant U.S. Attorneys in cases before him in the Northern District of Iowa. He has observed a recent seismic shift in either not filing or in withdrawing § 851 enhancements. However, we are concerned about unwarranted sentencing disparity created by inconsistent application of the Holder Memo across the 94 districts and the total lack of transparency in disclosing how the Holder Memo is being utilized and if any statistical information of its application will be publically disclosed.)

¹⁶⁰ *See, e.g.* *United States v. Dayi*, 2013 WL 5878922 (D. Md. 2013) (Bredar, J.) (holding that it was appropriate to vary downward by two levels from the advisory Guidelines sentence in the sentences of all twenty-two defendants involved in a conspiracy to distribute more than 1,000 kilograms of marijuana, resulting in a roughly 20 to 25 percent reduction in each defendant's sentence, based on a policy disagreement with the marijuana guidelines; the court noted, *inter alia*, that the guidelines for marijuana-related offenses have remained the same since 1987, but state law and federal enforcement policies had changed significantly); *United States v. Mallatt*, 2013 WL 6196946 (D. Neb. 2013) (Bataillon, J.) (varying downward from an advisory Guideline range of 120 months for a "non-acting out" child pornography offender, based on a policy disagreement with long terms of imprisonment under the Guidelines for such offenders, and imposing a sentence of "time served" followed by 6 years of structured supervised release); *United States v. Hayes*, 948 F.Supp.2d 1009 (N.D. Iowa 2013) (Bennett, J.) (varying downward from an advisory Guideline range of 151 to 188 months to a sentence of 75 months on a methamphetamine offense, based on a policy disagreement with the methamphetamine guidelines and a 25% reduction from a recalculated Guideline sentence of 100 months, reflecting the policy disagreement, based on the prosecution's motion for a substantial assistance reduction under U.S.S.G. § 5K1.1); *United States v. Newhouse*, 919 F. Supp. 2d 955 (N.D. Iowa 2013) (Bennett, J.) (varying downward to 120 months from an advisory Guideline range of 262 to 327 months, based on a policy disagreement with the Career Offender guideline, where the Career Offender guideline more than doubled the 120 month mandatory minimum for a § 851 offense, and

B. How to reverse federal mass incarceration

The same ability to exercise discretion that helped create federal mass incarceration should now be used to eliminate or dramatically reduce it. Here is what we believe needs to be done.

1. Congress—much hope is on the horizon

Most importantly, Congress needs to take seriously its duty to direct federal criminal law towards justice, efficiency and fairness rather than viewing it either as a subject to be avoided or a field in which to score easy political points. Like foreign policy, criminal justice is complex, fluid and involves diverse cultures. "Tough on crime" is about as smart a slogan as "Tough on foreign policy" would be. There are several discrete steps Congress should take.

First, the cycle of over-reaction and disinterest needs to end. Constant attention is warranted, instead. A simple structural

more than quadrupled the 60-month mandatory minimum for a § 841 offense, and more than tripled the Guideline range (without a mandatory minimum) of 70 to 87 months, then granting the prosecution's motion for a 20% substantial assistance reduction down to 96 months); *United States v. Qayyem*, 2012 WL 92287 (S.D.N.Y. 2012) (Wood, J.) (rejecting, on policy grounds, the 500:1 equivalency for MDMA ("ecstasy") to marijuana under the Guidelines, and adopting 200:1 equivalency and finding that the most closely related controlled substance to MDMA is a mixture of BZP and TFMPP); *United States v. Suarez-Reyes*, 2012 WL 6597814 (D. Neb. 2012) (Bataillon, J.) (varying downward from an advisory Guideline range of 27 to 33 months to 1 day of incarceration followed by 5 years of supervised release based on a policy disagreement with the fraud guidelines driven by "amount of loss" and congressional directive rather than empirical data and expertise); *United States v. Diaz*, 2013 WL 322243, at *18 (E.D.N.Y. 2013) (Gleeson, J.) (insightful and scathing critique of the drug guidelines and the Commission and announcing intention to give the drug guidelines "very little weight" until the Commission "does the job right"). For a comprehensive discussion of, and citations to, many additional cases articulating policy disagreements with the Guidelines, *See also*, Scott Michelman & Jay Rorty, *Doing Kimbrough Justice: Implementing Policy Disagreements with the Federal Sentencing Guidelines*, 45 SUFFOLK U.L. REV. 1083 (2012).

change would help with this. Currently, criminal justice is addressed by a subcommittee of the House Judiciary Committee that also handles issues of terrorism and homeland security.¹⁶¹ This portfolio is too large. Criminal justice deserves its own subcommittee. More importantly, Congress should convene a blue-ribbon panel to recommend long-term changes to criminal law, an idea championed by former Senator Jim Webb but never implemented. Such a convening would serve several functions, including the development of relationships between experts in the field and decision-makers in Congress, a link that has been tenuous at best in recent years.

Second, with or without such a blue-ribbon Sentencing Commission, Congress needs to ratchet down the laws that it has, starting with the mandatory minimum sentence provisions of 21 U.S.C. § 841, which should be tossed on the ash heap of history. They were a foolishness based on a lie, that lie being that the weight of narcotics at issue serves as a valid proxy for the relative culpability of a defendant. That simply is not true because the people who make money off narcotics (and are most culpable) are the ones who never touch them and are hardest to catch. Rather than bringing us kingpins, those mandatory minimums have stuffed our prisons with mules and street dealers because they are the ones who are easy to catch while holding onto the threshold amounts of narcotics. These laws never solved a problem and never will.¹⁶² A critical first step would be to pass comprehensive legislation to dramatically reduce or eliminate mandatory minimums for most crimes and to adopt some form

¹⁶¹ The Senate, in contrast, has a subcommittee of its own Judiciary Committee that focuses only on crime and drugs. See U.S. SENATE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON CRIME AND TERRORISM, <http://www.judiciary.senate.gov/about/subcommittees#crime> (last visited Feb. 28, 2014).

¹⁶² Congressman John Conyers, Jr., has written that “[m]andatory sentences, long sentences for nonviolent first offenses, and laws mandating increased penalties for repeat offenders lead to overincarceration. Often, Congress promulgates mandatory minimum sentences in the heat of political passion.” Conyers, *supra* note 4, at 385.

or combination of the most progressive parts of the Justice Safety Valve Act of 2013, the Smarter Sentencing Act of 2013 and the Recidivism Reduction and Public Safety Act of 2013. If Congress exercised their discretion this way, it would maximize the effect of reducing federal mass incarceration.

Third, Congress could easily redress a major and serious structural flaw in the Sentencing Commission since its birth in 1984 – the lack of a defense community representative as a commissioner. It should immediately amend the SRA to add a representative from the defense community to the Sentencing Commission as an *ex officio* member.¹⁶³ This has been the recommendation of the Judicial Conference of the United States after careful vetting through its rigorous committee process. The DOJ has had such an *ex officio* member since the inception of the Sentencing Commission. Unlike the defense community, that DOJ member has always had unfettered access to the Sentencing Commission staff, data and fully participates in all private and public meetings of the Sentencing Commission. The DOJ and the defender community, especially through an *ex officio* Sentencing Commissioner from the Federal Public Defender, should have equal opportunities before the Sentencing Commission. This would enhance the perception of fairness of the Sentencing Commission and give it a much needed and more balanced perspective.¹⁶⁴ It would also bring it in line with

¹⁶³ State sentencing commissions offer a good example of diversity of background. For example, in Minnesota, the sentencing commission is required by statute to be composed of one trial judge, one appellate judge, one justice of the Supreme Court, a public defender, a county attorney, the commissioner of corrections, a peace officer, a parole or probation officer, and three public members appointed by the governor. This last group must include one crime victim. MINN. STAT. ANN. § 244.09, subdivision 2 (West 2014).

¹⁶⁴ See, e.g., Douglas A. Berman, *Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STANFORD L. & POL. REV. 93, 99 (1999) (observing that the Commission “is disposed to ‘fight crime with more time’” and often fails to function in the expert fashion it was intended to because “the SRA provides for a designee of the Attorney

the majority of state sentencing commissions.¹⁶⁵ This would breathe life into Attorney General Holder's statement that "[o]ur laws and their enforcement must not only be fair, they must also be perceived as fair."¹⁶⁶

In short, Congress needs to solve problems rather than create them. That takes time, attention and compromise, and there is increasing hope that Congress may favor us with all three. In the words of Congressman Conyers: "Congress must take thoughtful action now to end mass incarceration and its disparate impact on African Americans."¹⁶⁷

2. Department of Justice—the unprecedented leadership and vision of Attorney General Holder

Attorney General Eric Holder's recent movements towards imposing more discipline among line prosecutors in using discretion is a sincere and meaningful step in the right direction. It needs to be a first step and not the last. Otherwise, as outlined in section V above, prosecutor-created disparities will continue.

To continue that walk towards real and proportional justice, the DOJ needs to monitor and review the compliance of line attorneys with the new requirements included in the Holder memo of August 12, 2013. Sadly, the direction of Main Justice in guiding such discretion in the past has been primarily through the United States Attorney's Manual, which is often ignored. If, for example, the historical disparities created by differential use

General to be an ex officio member of the Commission, but provides no equal vent representation to a member of the defense bar.").

¹⁶⁵ Richard S. Frase, *State Sentencing Guidelines Still Going Strong*, 78 JUDICATURE 173,174 (1995).

¹⁶⁶ Eric Holder, U.S. Attorney General, Remarks at the Charles Hamilton Houston Institute for Race and Justice and Congressional Black Caucus Symposium: Rethinking Federal Sentencing Policy 25th Anniversary of the Sentencing Reform Act (June 24, 2009), available at <http://www.freerepublic.com/focus/f-chat/2278757/posts>.

¹⁶⁷ Conyers, *supra* note 4, at 387.

of the enhancements pursued through 21 U.S.C. § 851 are to be eliminated, the new limitations on that discretion need to have teeth. Prosecutors, by dint of their work, are keenly aware of what directives are advisory and what are mandatory. If consistency is to be achieved, the new directives need to be cleanly communicated as mandatory, actions of prosecutors on the ground need to be catalogued and a keen focus must be maintained on making sure that this new directive is truly normative.

In terms of hiring, the DOJ may want to consider new approaches. It might not be surprising that the use of discretion varies so much by district, since hiring is by district. National hiring of Assistant United States Attorneys could establish a standard set of qualifications and skills to be sought, resulting in more consistent outcomes. Importantly, this would also allow for a more consistent valuation of the skills that matter most in employing discretion — skills that are too often lacking in prosecutors whose primary goal is to rack up convictions and create long sentences. While some will recoil at the suggestion of national hiring for prosecutors, such a reaction is misplaced; after all, we do not object to the national hiring and training of FBI agents by that same DOJ.

Moreover, the DOJ needs a solid dose of imagination as it continues, properly, to try to limit the spread of illegal narcotics. Rather than continuing to focus on the labor within that trade, there is great promise in interdicting the cash flow instead—the true lifeblood of any business. New solutions need to be sought out, even as the old, failed answer is discarded.

At the same time, the DOJ needs to use its considerable weight with some members of Congress to push for (or at least not obstruct) meaningful reform of federal sentencing as Congress walks down the drastic measures imposed in the mid-1980s, including mandatory minimums. It is counter-intuitive, of course, to expect anyone to give up power, and mandatory minimums do give power to DOJ prosecutors. Still, the primary imperative for the DOJ is to pursue the moral value it should

embody — justice. Mandatory minimums have led to injustice in myriad ways, and enough time has passed and statistics compiled to accept that outcome as sad but true.

It may be too much to hope that the DOJ be a primary agent of change as our society gently turns away from the harsh retributionist tone we have maintained for 40 years. Still, it has a role to play, albeit one that would require uncharacteristic humility.

3. The Sentencing Commission—there is a lot of work to be done

The Sentencing Commission, by its organic statutory creation, was mandated by Congress to formulate the Guidelines “to minimize the likelihood that the Federal prison population will not exceed the capacity of the Federal prisons, as determined by the Commission.”¹⁶⁸ We know of no evidence that the Sentencing Commission has ever followed this mandate. Data from the DOJ and the BOP indicates that the BOP has operated at overcapacity at least since 1981.¹⁶⁹ At least since 1999, the BOP has been at overcapacity by more than 30% in each subsequent year and by fiscal year 2012 was at 38% overcapacity.¹⁷⁰ In some categories of BOP facilities, the overcapacity rates reached as high as 62% in 2004.¹⁷¹ Tellingly, “while the number of state inmates have decreased, the federal population has continued to increase.”¹⁷² We strongly urge the Sentencing Commission to take this Congressional mandate more seriously. If they had at the time of the passage of the original Guidelines and later upward ratcheting, we would not have the serious overcrowding of fed-

¹⁶⁸ 28 U.S.C. § 944(g) (2012).

¹⁶⁹ JAMES *supra* note 132, at 21, Figure 10.

¹⁷⁰ *Id.* at 22, Table 2.

¹⁷¹ *Id.*

¹⁷² *Id.* at 2.

eral prisons that we now have—even with the massive building of new prisons over the past 30 years.¹⁷³

Thus, our first recommendation for the Sentencing Commission is that it should direct its staff to prepare mass incarceration impact statements (MIIS) to determine the effect of adopting each proposed new Guideline or any proposed modifications to existing Guidelines before they are posted for public comment. The MIIS’s should also be made public.

The testimony by James T. Skuthan, Chief Assistant Federal Public Defender for the Middle District of Florida, before the United States Sentencing Commission, Public Hearing on Proposed Drug Amendments, March 17, 2011, suggested numerous specific ways the drug guidelines could be changed to reduce cost and the length of sentences. Examples included detailed recommendations to lessen the severity of the Drug Quantity Table; expansion of the safety-valve and other downward adjustments for non-violent, low-level drug offenders lacking aggravating adjustments; and expanding mitigating role adjustments (here the public defender community through Mr. Skuthan, recommended nine very specific fixes to Guideline 3B.1.2.).

This raises two suggestions for reform. First, adopt the thoughtful suggestions of Mr. Skuthan, a superb spokesperson for the defense community. It appears that some of his suggestions are reflected in the Proposed Amendments to the Sentencing Guidelines published for public comment on January 17, 2014.¹⁷⁴ This reinforces the need for an *ex officio* member for the Sentencing Commission from the defense community. If the Sentencing Commission had an *ex officio* member from the defense community years ago, these critical potential reforms to the Guidelines might have happened much earlier. On April 10, 2014, the Commission unanimously voted to adopt the so called “All Drugs Minus Two” amendments to the Drug Quantity Ta-

¹⁷³ *Id.* at 34.

¹⁷⁴ Sentencing Guidelines for United States Courts, 79 Fed. Reg. 3280-01 to 3289-94 (Jan. 17, 2014).

bles, in Guidelines § 2D1.1 (manufacturing importing, exporting, or trafficking) and §2D1.11 (distributing, importing, exporting, or possessing a listed chemical). This amendment lowers the base offense levels by two for various quantities of drug offenses.¹⁷⁵ “The Commission estimates that approximately 70 percent of federal drug trafficking defendants would qualify for the change, with their sentences decreasing as average of 11 months . . .”¹⁷⁶ Judge Patti B. Saris, chair of the Commission noted in the press release that his was only a “modest reduction” towards “reducing the problem of prison overcrowding at the federal level . . .”¹⁷⁷

Mr. Skuthan’s suggestions on fixing, specifically, the Mitigating Role Guideline, which was not adopted by the Commission, demonstrate an important teaching for reducing mass incarceration in federal prisons. Fine tuning of existing Guidelines can significantly impact mass incarceration in the federal system as opposed to radical proposals like eliminating the Guidelines altogether or legalizing certain drugs. This requires the Sentencing Commission to take the lead in examining existing Guidelines with a critical eye to find new ways within the existing structure to reduce mass incarceration.

¹⁷⁵ News Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Votes to Reduce Drug Trafficking Sentences: Commission Sends Amendments to Congress Including Provisions to Implement the Violence Against Women Reauthorization Act (Apr. 10, 2014), *available at* http://www.uscc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140410_Press_Release.pdf; U.S. Sentencing Comm’n, Amendments to the Sentencing Guidelines (Preliminary) Amendment 3. Drugs, p. 1 (2014), *available at* http://www.uscc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140410_Unofficial_RFP_Amendments.pdf.

¹⁷⁶ News Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Votes to Reduce Drug Trafficking Sentences: Commission Sends Amendments to Congress Including Provisions to Implement the Violence Against Women Reauthorization Act (Apr. 10, 2014), *available at* http://www.uscc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140410_Press_Release.pdf.

¹⁷⁷ *Id.*

Next, the Sentencing Commission should do more to encourage on an ongoing basis suggestions from outside experts like judges, academics, law enforcement and members of the defense community (in addition to the *ex officio* DOJ commissioner) to reduce mass incarceration. We believe if the Sentencing Commission solicited the views of the defense community and federal judges on a regular basis, there would be no shortage of suggestions to amend the Guidelines in an effort to reduce mass incarceration while still addressing the necessary public safety and penological concerns

We recommend, as has former U.S. District Court Judge Nancy Gertner, that the Sentencing Commission should establish a section on their excellent web page where members of the public, the legal academy, federal judges, the Sentencing Commission, Congress and their staffs could easily access all federal judicial sentencing opinions either criticizing or expressing some form of *Kimbrough* type policy disagreement with the Guidelines.¹⁷⁸ This would promote greater transparency and a new perception that the Sentencing Commission is more interested in just and fair sentencing rather than perpetuating its own existence and its self-promotion of the very Guidelines it promulgates. Finally, the Sentencing Commission needs to put a massive hydraulic brake on “doing what is has been doing since

¹⁷⁸ Douglas A. Berman, *Advice for the US Sentencing Commission from Former USDJ Nancy Gertner*, SENTENCING LAW & POLICY (Sept. 30, 201), available at http://sentencing.typepad.com/sentencing_law_and_policy/2013/09/advice-for-the-us-sentencing-commission-from-former-usdj-nancy-gertner.html (“If the Commission is interested in minimizing disparity in sentencing in a post-*Booker* world (which should be one of its goals — hardly the only one), what better way than to make certain that the opinions of district court judges are communicated more broadly to the federal bench?”); *Id.* (“To look at the Commission web site, there is only one orthodoxy — the Guidelines and Appellate Court decisions that rarely say much of anything. In fact, the message conveyed by the web site is that the Commission is not interested in uniformity as a general matter, just one kind of uniformity — the uniform enforcement of its flawed product, the U.S. Sentencing Guidelines.”).

Congress created it: attempting to make it as difficult as possible for judges to impose sentences below those called for by the guidelines.”¹⁷⁹

4. Federal judges—there is no algorithm for human judgment

We encourage federal district court judges to think more deeply about doing greater *Kimbrough* justice — that is, take a harder look at whether specific Guidelines, perhaps because they are not based on empirical data, national experience “or the Commission’s exercise of its characteristic institutional role”¹⁸⁰ should be subject to a judge’s policy disagreement — even, as *Kimbrough* finds, “in a mine-rune case.”¹⁸¹ The rationale for greater *Kimbrough* justice is reflected in a quote from U.S. District Court Judge Bruce Jenkins:

We forget that the computer is just a tool. It is supposed to help — not substitute for thought. It is completely indifferent to compassion. It has no moral sense. It has no sense of fairness. It can add up figures, but can’t evaluate the assumptions for which the figures stand. Its judgment is no judgment at all.¹⁸²

Precisely because the Guidelines cannot replace judicial judgment because there is no algorithm for it, federal judges should encourage each other to critically examine the foundation for the Guidelines under which they sentence. The simple truth is the “problem is that few guidelines can be shown to be based on actual preguideline sentencing practice or on Commission research and expertise.”¹⁸³ It is through this practice of federal dis-

¹⁷⁹ Adelman, *supra* note 76, at 298.

¹⁸⁰ *Kimbrough v. United States*, 552 U.S. 85, 109 (2007).

¹⁸¹ *Id.* at 110.

¹⁸² Bruce S. Jenkins, *The Legal Mind in the Digital Age*, THE FEDERAL LAWYER 28, 31 (2011) available at <http://www.fedbar.org/Federal-Lawyer-Magazine/2011/February/The-Legal-Mind-in-the-Digital-Age.aspx?FT=.pdf>.

¹⁸³ Adelman & Jon Deitrich, *supra* note 91, at 578.

strict court judges critically examining the Guidelines that the Guidelines will actually improve and deliver greater justice. "Only if district courts engage in this enterprise will federal sentencing practices improve."¹⁸⁴ This is exactly what *Booker* envisioned.¹⁸⁵

The SRA and its transfer of power from judges to the Sentencing Commission and to the DOJ has seriously eroded the role of moral judgment in federal sentencing. Some of that discretion and moral judgment has been restored in the post-*Booker* world. But sentencing requires the consideration of much more than where the offense characteristics and the criminal history appear on the intersection of a 258-box sentencing grid. Federal sentencing requires a keen sensitivity to often unique and infinite questions raised by the vagaries of real life – often lives and offenses that the sentencing Guidelines “grid and bear” it approach are incapable of capturing. Offenders are much more than just the typed description of them contained on the pages of presentence reports. They are multi-dimensional human beings each with their own distinctive and unique past. Judges, not standardized Guidelines, are in the best position to weigh all of the circumstances surrounding the nature of the offense, the history and characteristics of the offender and the other statutory sentencing factors and impose a dispassionate, moral judgment in the form of the appropriate sentence. The libertarian Cato Institute has publically recognized this at least 2002.¹⁸⁶ “Only a trial court . . . guided by experience, and dispassionate in decisionmaking – can morally judge a convicted crimi-

¹⁸⁴ *Id.* at 581 (footnote omitted).

¹⁸⁵ *Id.* at 581 n.40 (noting that in *United States v. Booker*, 543 U.S. 220, 264 (2005) the Court observed: “As we have said the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.”).

¹⁸⁶ ERIK LUNA, CATO INSTITUTE, MISGUIDED GUIDELINES: A CRITIQUE OF FEDERAL SENTENCING (2002), available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa458.pdf>.

nal. The personal assessment of facts and circumstance, along with the interaction between judge and defendant, provides the basis for a court's imposition of moral judgment in the form of a sentence."¹⁸⁷ No sentencing guideline can determine a sentence with what Judge Guido Calabresi has so wisely observed as a "sense of balance, which allows one to weigh that which cannot be measured."¹⁸⁸ The Guidelines are simply incapable of weighing that which cannot be measured. We encourage federal judges to do more Calabresi weighing.¹⁸⁹

Finally, we encourage federal judges to visit BOP facilities to meet with inmates they have sentenced. Most federal judges have visited just one federal prison. This occurs during their initial orientation in their first year on the bench in "baby judges" school sponsored by the Federal Judicial Center, the training arm of the federal courts. Most sitting federal judges have never met with inmates they have sentenced. We believe doing so will improve judges' thinking about the length of sentences most defendants need, especially low-level, non-violent drug addicts. We believe it will also provide judges with important new insights into each of the statutory factors of sentencing.

Judge Bennett has visited hundreds of inmates he has personally sentenced.¹⁹⁰ After doing so and having intensive group and one-one one discussions with most of these inmates, Judge Bennett has observed many who are working very hard in self-improvement educational, vocational, psychological including addiction and life skills programs. Most, low-level, non-violent drug addicts, after three to five years in federal prisons, have

¹⁸⁷ *Id.* at 11.

¹⁸⁸ Guido Calabresi, *What Makes a Judge Great: To A. Leon Higginbotham, Jr.*, 142 U. PA. L. REV. 513 (1993).

¹⁸⁹ For an excellent overview of some of the reasons why federal judges seem reluctant to vary from the Guidelines, see Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523 (2007).

¹⁹⁰ Mark W. Bennett, *Hard Time: Reflections on Visiting Federal Inmates*, 94 JUDICATURE 304 (2011).

received the maximum benefit of incarceration and are simply being warehoused. Among the problems with the current federal sentencing regime, especially in low level, non-violent drug addict cases, is that the length of the sentences driven by mandatory minimums and the harshness of the drug Guidelines deprive far too many of hope. Without hope they have little incentive to better themselves.

VIII. CONCLUSION

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.

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.

For reformers, there is a bit of irony and a lot of joy in the fact that the boldest call for reform has come not from an academic or an activist, but from the Attorney General himself. In his August 12, 2013, speech to the American Bar Association, he made no secret of the fact that a realignment of policy is in the process, one that is aimed squarely at the problem of over-incarceration:

It's time — in fact, it's well past time — to address . . . unwarranted disparities by considering a fundamentally new approach . . . we must face the reality that, as it stands, our system is in too many

respects broken. The course we are on is far from sustainable. And it is our time — and our duty — to identify those areas we can improve in order to better advance the cause of justice for all Americans.

As the so-called “war on drugs” enters its fifth decade, we need . . . to usher in a new approach. And with an outsized, unnecessarily large prison population, we need to ensure that incarceration is used to punish, deter, and rehabilitate — not merely to warehouse and forget.

Today, a vicious cycle of poverty, criminality, and incarceration traps too many Americans and weakens too many communities. And many aspects of our criminal justice system may actually exacerbate these problems, rather than alleviate them.

It’s clear — as we come together today — that too many Americans go to too many prisons for far too long, and for no good law enforcement reason . . .

The bottom line is that, while the aggressive enforcement of federal criminal statutes remains necessary, we cannot simply prosecute or incarcerate our way to becoming a safer nation.

Today — together — we must declare that we will no longer settle for such an unjust and unsustainable status quo . . . And we must resolve — as a people — to take a firm stand . . . for justice.

This is our chance — to bring America’s criminal justice system in line with our most sacred values.

This is our opportunity — to define this time, our time, as one of progress and innovation.

This is our promise — to forge a more just society.¹⁹¹

When it is the leader of the nation’s federal prosecutors who makes the most eloquent statement towards justice and proportionality, we are living in interesting and very hopeful times.¹⁹² Left to be seen, of course, is whether or not this vision will become a reality. For that to happen, there are many of us — on the bench, in the academy, in Congress and within the bar — who must accept responsibility for the mess we have made and humbly move forward to a better solution. As Martin Luther King, Jr., so often reminded us, “The arc of the moral universe is long, but it bends toward justice.”¹⁹³ However, as the history of the rise of mass incarceration in America has taught us — the arc does not bend on its own.

¹⁹¹ See Eric Holder, U.S. Attorney General, Address at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>; see also, *Eagle v. United States*, 742F.3d 1079, 2014 WL 563572, at *4 n.2 (8th Cir. 2014) (Noting that in the same speech, Attorney General Holder noted the need to “‘fundamentally rethink the notion of mandatory minimum sentences for drug-related crimes,’ as these sentences ‘oftentimes generate unfairly long sentences’ and, as a result, ‘breed disrespect for the system.’”).

¹⁹² In his first speech as U.S. Attorney General, on January 21, 1961, Robert F. Kennedy spoke: “All of us might wish at times that we lived in a more tranquil world, but we don’t. And if our times are difficult and perplexing, so are they challenging and filled with opportunity.” See Department of Justice, *Honoring Attorney General Robert F. Kennedy*, U.S. DEP’T OF JUSTICE, THE JUSTICE BLOG (Jan. 21, 2011), <http://blogs.justice.gov/main/archives/1149>. We are optimistic that Attorneys General Holder’s and Kennedy’s words vivify the movement to reform mass incarceration in America.

¹⁹³ See TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63*, 197 (1988) (“[O]ne of King’s favorite lines, from the abolitionist preacher Theodore Parker, [was] ‘The arc of the moral universe is long, but it bends toward justice.’”).

