A Better Agenda for the Sentencing Commission: Reducing Mass Incarceration

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Beginning in the 1970s, the United States embarked on a shift in its penal policies, tripling the percentage of convicted felons sentenced to confinement and doubling the length of their sentences.¹ This shift included a dramatic increase in the prosecution and incarceration of drug offenders.² As a result of its move toward long prison sentences, the United States now incarcerates so many people that it has become an outlier, not just among developed democracies but among all nations including highly punitive states such as Russia and South Africa³ and also in comparison to its own long-standing practices.⁴ The present rate of incarceration in the United States is currently almost five times higher than the norm prevailing throughout the 20th Century.⁵ Our country's imprisonment rate has acquired a name – “mass incarceration” – a term meant to provoke shame about the fact that the world's wealthiest democracy imprisons so many people, even at a time when

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⁴Clear & Austin, supra note 1, at 307.

⁵Id.
crime rates have diminished and crime is not one of our most pressing social problems. \(^6\)

Unsurprisingly, the incarcerated population consists disproportionately of minorities. About 40% is African-American, more than three times the 12% African-American share of the general population, and 21% is Hispanic compared to 15% of the general population.\(^7\) Incarceration has an enormously harmful effect on the life prospects of those imprisoned. Released prisoners suffer a 30-40% loss of income, their domestic partnerships are often ruptured and their marriage prospects reduced.\(^8\) They suffer a profound social exclusion making it more likely that they will fall into recidivism and reenter prison.\(^9\) In addition, mass incarceration divides minority communities as the experience of pervasive imprisonment is confined to those who do not have a college education.\(^10\) Mass incarceration also disrupts inner city neighborhoods and tears apart families living there. By 2000, over a million African-American children – 9% of those under eighteen – had a father in jail or prison.\(^11\) Young men grow up thinking prison is a normal part of experience. In short, mass incarceration produces a massive new underclass made up disproportionately of racial minorities.\(^12\) As such, it is major part of the story of increased inequality in the United States and significantly

\(^6\) Weisberg, *supra* note 3, at 25.

\(^7\) Id. at 25-26.

\(^8\) Id.

\(^9\) Id.

\(^10\) *WESTERN*, supra note 2, at 30.

\(^11\) Id. at 5.

\(^12\) Weisberg, *supra* note 3, at 27.
undermines the gains won by the civil rights movement.\textsuperscript{13}

Scholars today largely agree that the prison population is too large.\textsuperscript{14} They also agree that the impact of imprisonment on the crime rate is modest and that the speed at which people are released from prison bears little relation to the likelihood that they will remain crime free.\textsuperscript{15} Thus, many prisoners can serve shorter sentences without triggering an increase in crime. As a result, we can reduce sentence lengths substantially without adversely affecting public safety.\textsuperscript{16}

Federal sentencing policy contributes significantly to the problem of mass-incarceration. Every year the federal government sets a new record for the number of people locked up in federal prisons, presently about 218,000.\textsuperscript{17} Federal prisons are operating 38% over-capacity.\textsuperscript{18} While the state prison population recently declined for the first time in almost forty years, the federal prison population continues to increase.\textsuperscript{19} The unremitting growth of the federal prison population is a direct result of the Sentencing Reform Act ("SRA") of 1984, the federal sentencing guidelines ("the guidelines") promulgated pursuant to the SRA by the United States Sentencing Commission ("the Commission") and statutes imposing mandatory minimum prison sentences for many offenses,

\begin{itemize}
\item \textsuperscript{13}Id.
\item \textsuperscript{14}Clear & Austin, supra note 1, at 307-08.
\item \textsuperscript{15}Id. at 309-11.
\item \textsuperscript{16}Id.
\item \textsuperscript{17}As of September 13, 2012, the exact figure was 218,422. See \url{http://www.bop.gov/locations/weekly_report.jsp} (last visited Sept. 13, 2012).
\item \textsuperscript{18}\url{http://www.justice.gov/jmd/2013justification/}.
\item \textsuperscript{19}See \url{http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetailid=2230}; \url{http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail=2237}.
\end{itemize}
particularly drug offenses.

The guidelines were mandatory until the Supreme Court made them advisory in *Booker*, and when they were mandatory they caused the average federal sentence to increase from twenty-eight to fifty months. Although the Commission stated that it based the guidelines on past sentencing practice, its methodology immediately tilted sentences higher. For many offenses, the Commission ignored past practice and with little or no explanation established much harsher sentences. And, in all but a very small percentage of cases, it prohibited courts from sentencing defendants to probation. To the extent that it relied on past sentencing practice, the Commission calculated average pre-guideline sentences by counting only prison sentences, ignoring that approximately fifty percent of all defendants received probation. Based on Congress's abolition of parole, another feature of the SRA, and the Commission's choices with respect to the guidelines, the average time served by federal defendants rose from thirteen months to forty-three months. One observer summarized the result of the changes in federal penal policy as follows:

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21Lynn Adelman & Jon Deitrich, Disparity: Not a Reason to Fix Booker, 18 FED. SENT’G REP. 160 (Feb. 2006).


23Id.


Changes in sentencing patterns over the past twenty years include a dramatic increase in the length of federal sentences, a monumental shift towards incarceration and away from use of straight probation, a dramatic increase in the size of the federal prison population, and a significant increase in the proportion of drug offenders, especially lower-level drug offenders, in the federal system. This system loves punishment.\textsuperscript{27}

Reducing mass incarceration is conceptually simple. We need to send fewer people to prison and for shorter lengths of time.\textsuperscript{28} In addition, many prisoners currently serving long sentences are elderly and present little risk to public safety. Establishing an early release program for such prisoners would also contribute to reducing the number of people incarcerated.\textsuperscript{29}

A reasonable observer might conclude from the foregoing that the Commission, which has considerable authority with respect to federal sentencing policy, would be making an effort to address the problem of mass incarceration. Such observer would be surprised to discover not only that the Commission has never expressed the slightest interest in the problem, but that it recently asked Congress to enact legislation that would likely result in an increase not a decrease in the federal prison population. The Commission proposed a number of statutory changes all designed to make it more difficult for judges to impose sentences below those called for by the guidelines. Specifically, the Commission asked Congress to require judges to give more weight to the guidelines and to provide additional reasons for imposing sentences that vary substantially from the guidelines. The Commission also asked Congress to require courts of appeals to presume that sentences within the guidelines are reasonable and to scrutinize more carefully sentences based on disagreements with


\textsuperscript{28}Clear & Austin, \textit{supra} note 1, at 316.

\textsuperscript{29}ACLU, \textit{At America's Expense, The Mass Incarceration of the Elderly v-x} (June 2012).
the guidelines.\textsuperscript{30}

The Commission justified its proposed changes on the ground that in the wake of Booker, it had observed “troubling trends in sentencing, including growing disparities among circuits and districts and demographic disparities.”\textsuperscript{31} In other words, the Commission was concerned that judges were exercising the discretion conferred on them by Booker to impose too many sentences below the guidelines. It might seem odd that the Commission was more concerned about judges imposing insufficiently harsh sentences than it was about mass incarceration. As discussed, mass incarceration causes many extremely harmful consequences, and sentencing disparity surely falls many rungs beneath it in overall importance. Further, while reducing unwarranted disparities is one of the Commission's statutory duties,\textsuperscript{32} another is addressing the problem of excessive incarceration. Congress directed the Commission to establish guidelines that minimize the likelihood that the federal prison population will exceed capacity.\textsuperscript{33}

But from an historical perspective, the Commission's proposals were unsurprising. The Commission was doing what it has been doing since it promulgated the guidelines: attempting to reduce disparity by making it as difficult as possible for judges to impose less severe sentences than


\textsuperscript{32}See 28 U.S.C. § 994(f).

\textsuperscript{33}See 28 U.S.C. § 994(g).
those called for by the guidelines. Fortunately, the Congressional subcommittee to which the Commission offered its proposals seemed singularly uninterested in them. However, the fact that the Commission advanced them raises questions about the Commission itself, the most important of which is whether it serves any useful purpose for the Commission to continue to seek ways of compelling judges to impose harsher sentences than they consider appropriate.

In this article, I attempt to address this question. I argue that since its creation the Commission has overemphasized the importance of reducing disparity and of curtailing judicial discretion as a means of doing so. I further argue that this focus has led to a very harsh sentencing regime that, at least before Booker, had no redeeming qualities. I suggest that, instead of continuing down this unproductive path, the Commission ought to take advantage of its prominent position in the sentencing world and address the problem of mass incarceration. Finally, I contend that to the extent that the Commission continues to be concerned about disparity, it needs to think about the subject more analytically and to realize that there are better ways to address it than by curtailing judicial discretion. In fact, the most effective way to address disparity would be to reduce the severity of the guidelines. If judges were in greater agreement with the guidelines, they would be less inclined to impose sentences beneath them.

I.

The idea that judicial discretion should be curtailed to reduce disparity has played an enormously important role in federal sentencing policy in the last forty years. Before the guidelines took effect, federal judges enjoyed broad discretion. In the 1960s and ’70s, however, a group of legal academics led by Marvin Frankel, an administrative law professor who had become a district court judge, concluded that judicial discretion should be reduced. They did so primarily because they
believed that judicial discretion left too much room for the philosophies of individual judges and led to the unequal treatment of similarly situated defendants.\textsuperscript{34}

The reformers did not actually know a lot about sentencing disparity. They argued that disparity in federal sentencing was “shameful,” but the evidence did not support this claim. At most, there were modest disparities.\textsuperscript{35} Nor did their egalitarianism go very deep. There are many kinds of disparity, and many ways of analyzing the issue. The reformers’ concern, however, was limited to inter-judge disparity caused by the exercise of judicial discretion. They expressed little interest in disparity caused by the exercise of prosecutorial discretion or disparity arising from other factors such as regional differences.

The reformers repeated the mantra that like defendants should be treated alike but, beyond that, never persuasively explained why reducing disparity was so important that it justified overturning years of federal law during which, for the most part, it had not been seen as a problem.\textsuperscript{36}

The reformers also didn’t think about or didn’t care whether curtailing judicial discretion might have serious side effects such as harsher sentences. The fact is that curtailing judicial discretion inevitably results in much harsher sentences. This is so both because it enhances the power of prosecutors and because punishment in the United States is so politicized that transferring sentencing authority from judges, who impose sentences on real live people, to a commission of political appointees, which determines appropriate sentences based on data and ideology, virtually guarantees harsher

\textsuperscript{34} Adelman & Deitrich, \textit{supra} note 24, at 240.

\textsuperscript{35}KATE STITH AND JOSÉ A. CABRANES, FEAR OF JUDGING 106-07 (1998).

\textsuperscript{36}American life is full of disparities, many of which are far more significant than sentencing disparity. It is also the case that the people who express the most concern about sentencing disparity often seem to have little interest in other disparities.
Undeterred by the absence of evidence of widespread disparity, by the fact that sentencing decisions are often morally difficult and not susceptible to fair resolution by means of a guideline, or by the possibility of unintended consequences, the reformers plowed boldly ahead. For them, it was enough that limiting judicial discretion would reduce inter-judge disparity even though it was far from clear that this was likely to happen either. In short, the reformers were true believers.

The reformers took their proposal to Ted Kennedy, which, for several reasons, was particularly unfortunate. First, people seeking to improve the criminal justice system should hesitate to take their ideas to Congress. Because crime is such a politicized issue, it is hard to pass a bill related to crime without getting enmeshed in the politics of law and order. The SRA was no exception. Second, Ted Kennedy had a serious weakness as a legislator. He wanted very badly to be thought of as effective and believed that he could earn this reputation if he could get a lot of bills passed. This made him overly eager to sponsor so-called “reform” bills and to accept harmful amendments to get them passed. Thus, in many cases, by the time the final votes were taken on Kennedy’s bills, their value had become highly debatable. No Child Left Behind is an example. The SRA is another.

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Kennedy uncritically bought into the reformers' view that disparity was so important that it justified curtailing judicial discretion, and he agreed to sponsor a bill dramatically changing federal sentencing. It is unclear whether Kennedy foresaw that curtailing judicial discretion would lead to much harsher sentences and thereby harm minorities and the poor, groups of which he was ordinarily a champion. However, as the bill progressed, Kennedy accepted many harmful amendments, including one making the proposed guidelines binding instead of advisory, such that the SRA essentially became another tough on crime bill.\textsuperscript{38} By the time of passage, its most vocal supporter was President Reagan, who touted it as legislation that would “crack down on criminals.”\textsuperscript{39}

Kennedy's bill also picked up support from legislators with long histories of opposition to civil rights such as Strom Thurmond of South Carolina and John McClellan of Arkansas.\textsuperscript{40} These legislators clearly grasped that curtailing judicial discretion would lead to much harsher sentences. Further, Kennedy's bill provided them with a vehicle to strike out at one of their long-standing targets, the federal judiciary. Southern conservatives had been hostile to federal judges since the 1950s because of racially liberal decisions such as Brown,\textsuperscript{41} and conservative hostility only increased as the Supreme Court announced such criminal law decisions as Miranda.\textsuperscript{42} And conservatives found that they could express their disapproval of federal judges by using the new anti-disparity language that Frankel and the other reformers had supplied. Their support for Kennedy's bill,

\begin{itemize}
  \item\textsuperscript{38} STITH & CABRANES, supra note 35, at 41.
  \item\textsuperscript{39} Id. at 46 (citing Congressional Quarterly 1984, 1841).
  \item\textsuperscript{40} Id. at 42-43.
  \item\textsuperscript{41} Brown v. Board of Education, 347 U.S. 483 (1954).
  \item\textsuperscript{42} Miranda v. Arizona, 384 U.S. 436 (1966).
\end{itemize}
however, had more to do with hostility to racially liberal judges than with concerns about sentencing disparity. A few members of the House such as John Conyers of Michigan questioned the whole premise of Kennedy's bill, that the exercise of discretion by federal judges had actually caused serious disparity, and that whatever disparity it did cause justified radically curtailing judicial discretion. Conyers pointed out that justice required “leaving judges free to tailor sentences to the unique circumstances involved in each case,” and that guidelines created by an administrative agency would lead to “an escalation” of sentences due to “political pressure.”

Although history has shown that Conyers was exactly right, a powerful alliance that included Reagan, most Republican legislators, Kennedy and Senate Judiciary Committee Chairman Joe Biden, rejected Conyers’s view, and Kennedy's bill became law.

Unsurprisingly, the Commission proceeded to promulgate guidelines establishing very harsh sentences. Although Frankel had expressed hope that the Commission would serve as a bulwark against harshness, the Commission quickly dashed it. The Commission generally displayed a pro-prosecution bias, and its members viewed the Justice Department and the most law and order

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44 STITH & CABRANES, supra note 35, at 45-46.

45 Id.


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.

As mentioned, the severity of the guidelines was not based on past sentencing practice. The Commission had only the sketchiest data concerning past practice, and its unexplained decision to eliminate probation sentences skewed the data that it did have. Although most of the guidelines are severe, different guidelines followed different paths to severity. For example, at the time that the Commission was formulating the guidelines, Congress enacted the Anti-Drug Abuse Act of 1986 ("ADAA") which established a three tiered sentencing structure generally calling for sentences of zero to twenty years, five to forty years and ten years to life depending on the type and amount of drug. Without explanation, the Commission chose to structure the drug trafficking guideline based on the quantities that the statute set. The result was "increased prison terms far above what had been typical in past practice." On the other hand, the severity of the child pornography guideline developed over time although, again, Congress had a lot to do with it. Congress issued a series of directives causing the guideline to become particularly harsh. The mean sentence for possession of

\footnote{Michael Tonry, The Success of Judge Frankel’s Sentencing Commission, 64 U. COLO. L. REV. 713, 716-17 (1993).

Frankel & Orland, supra note 45, at 661.

Adelman & Deitrich, supra note 22, at 582.

Id. at 583 (quoting U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING 49 (2004) (hereinafter FIFTEEN YEAR REPORT). The time served by federal drug offenders more than doubled following the enactment of the ADAA and the guidelines. FIFTEEN YEAR REPORT, supra, at 53.}
child pornography increased from thirty-six to 110 months.\textsuperscript{52}

With respect to fraud and theft offenses, the Commission, which generally placed great emphasis on quantity, treated the amount of loss as a proxy for seriousness. Thus, it created a guideline driven almost completely by amount. Focusing on amount, however, often leads to the unfair oversimplification of complicated facts. And, in some white collar cases, such as those involving publicly traded companies, the emphasis on amount causes the guideline range to “run amok.”\textsuperscript{53} In United States v. Adelson, for example, a defendant with no criminal record and a history of good works, faced a guideline calling for life imprisonment.\textsuperscript{54} Likewise, in United States v. Parris, the defendants, first time offenders, faced a guideline range of 360 months to life based on “the 'kind of piling-on' of points which is common under the guidelines.”\textsuperscript{55}

Finally, over the last twenty-five years, the Commission has continually amended the guidelines to make them more severe. As Professor Bowman put it, the guidelines have been “subject to a one-way upward ratchet, in which sentences are raised easily and often and lowered only rarely and with difficulty.”\textsuperscript{56} The result is a sentencing regime that Professor Berman recently


\textsuperscript{53}United States v. Adelson, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006); see also United States v. Effers, 458 F. 3d 110, 129 (2d Cir. 2006) (“Under the guidelines, it may well be that all but the most trivial frauds in publicly traded companies may trigger sentences amounting to life imprisonment . . .”).

\textsuperscript{54}\textit{Adelson}, 441 F. Supp. 2d at 511.


\textsuperscript{56}Frank O. Bowman, III, \textit{The Failure of the Federal Sentencing Guidelines: A Structural
described as follows:

Severity is the issue . . . it's severity that is why the federal system right now at this moment in time is so dysfunctional . . . the system has shown an incredible inability to deal with the problem of severity effectively . . . everybody [including the Justice Department] understands that in some of these cases, it's too long . . . we can't go in there and ask for a guideline sentence in front of judges, we'll look foolish. That must be because the guidelines are too severe, and it's foolish to assert in some cases, that the guideline complies with the requirement of 3553(a) to impose a sentence sufficient, but not greater than necessary . . . . 57

Booker has ameliorated the harshness of the guidelines. Yet the fact that most sentences remain within or close to the guideline range indicates that the guidelines have strong gravitational pull. 58 Judges are cautious by nature, and they pay a lot of attention to the Commission's recommendations. Thus, Booker has made a very severe sentencing regime only slightly less severe.

II.

After twenty-five years of guideline sentencing, we know more about disparity and about curtailing judicial discretion as a means of reducing disparity than was known when the SRA was enacted. We have learned that disparity is an elusive and complicated concept. 59 No two offenses or defendants are identical, and the number of factors that can appropriately affect a sentence is virtually unlimited, as are the weights that may be properly placed on such factors. 60 Defendants

Analysis, 105 Colum. L. Rev. 1315 (2005).


58 Saris, supra note 31, at 1.

59 STITH & CABRANES, supra note 35, at 106.

who have committed similar offenses and have similar records may, yet, differ in important ways. We also know that the guidelines frequently fail to capture these differences. The guidelines purport to treat like cases alike, but they achieve this appearance only by imposing artificial definitions of likeness. Further, it is often impossible to describe in a guideline how much influence a fact or personal characteristic should have on a sentence. This is the reason that the Commission placed so much emphasis on quantity. Focusing on the quantity of money stolen or drugs possessed made writing the guidelines easier even though the guidelines that resulted don’t help us to impose fair sentences.

We also know that curtailing judicial discretion doesn’t reduce certain kinds of disparity. For example, binding guidelines made it impossible for judges to check prosecutorial power and, thus, led to a huge increase in prosecutor-created disparity. Further, under binding guidelines racial disparity worsened. The Commission's Fifteen Year Report discloses that the “gap between white and minority offenders was relatively small in the preguidelines era." However, “[c]ontrary to what might be expected at the time of guidelines implementation . . . the gap between African American offenders and other groups began to widen." Disparate treatment by judges accounted for little if

(2005) (explaining that numerical guidelines fail “to recognize the irreducible diversity of values”).

61Duff, supra note 59, at 1173.


63Id. at 93.

64Id. at 87.

65FIFTEEN YEAR REPORT, supra note 50, at 115.
any of this disparity. The source of the problem was the guidelines, in particular the career offender and drug guidelines. The Report states that:

. . . . Today's sentencing policies, crystalized into the sentencing guidelines and mandatory minimum statutes, have a greater impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation. Attention might fruitfully be turned to asking whether these new policies are necessary to achieve any legitimate purpose of sentencing.66

In other words, judges did better at treating offenders of different races equally without binding guidelines.67

And we know that attempting to reduce disparity by curtailing judicial discretion produces very severe sentences. Although I have noted the guidelines' harshness, one study deserves particular mention.68 Judge James S. Gwin, a district court judge in the Northern District of Ohio, analyzed twenty-two cases in which juries returned guilty verdicts. In each case, after receiving the verdict, Gwin provided the jurors with the defendant's criminal record and asked each individual juror to recommend the appropriate punishment without discussing the matter with the other jurors. Although the sample was not large, the jurors provided a reasonable indication of American sentiment. Ohio almost perfectly mirrors the United States in age, employment levels, income, racial composition and political sentiment. The results were dramatic. The jurors thought that the defendants should receive far less severe sentences than those called for by the guidelines.

66Id. at 135.


Combining all twenty-two cases, the median sentence recommended by the jurors was only 19% of the median guideline range and only 36% of the bottom of the guideline range. In other words, the guidelines called for sentences three to five times more severe than the punishment the jurors believed appropriate.69

We also know that some of the promised benefits of curtailing judicial discretion are illusory. For example, Marvin Frankel argued that curtailing discretion would create confidence in the judicial system.70 This, however, turned out not to be true. By trivializing judges’ powers, the pre-Booker guidelines created disrespect for federal sentencing.71 Frankel also argued that curtailing discretion would benefit defendants by decreasing their sense of resentment and by giving them notice of the penalties they faced.72 This argument, however, also turned out to be wrong. No evidence supports Frankel's notion that disparity causes prisoner resentment.73 And while the guidelines provide defendants with notice, they certainly don't benefit them. In fact, the pre-Booker guidelines likely harmed defendants more than anything in the history of federal criminal law, which is why defendants' advocates oppose binding guidelines.

Advocates for defendants also have little use for the Commission's continuing preoccupation with disparity. At a forum on sentencing, Bobby Vassar, an aide to Congressman Bobby Scott, who represents a largely African-American constituency, explained why this is so. Responding to a

69 Id.

70 Adelman & Deitrich, supra note 24, at 248-49.

71 Id. at 250.

72 Id. at 249.

73 Id.
statement by Commission Chair Saris that the Commission was concerned about a study suggesting that under advisory guidelines judges were favoring white defendants. Vassar said that he was suspicious of the Commission's concerns about disparity when the only solution it envisioned was more severe sentences for all defendants. The what defendants, black and white, care about is not disparity but the possibility of receiving a sentence that they regard as fair, which usually will be a sentence beneath the guidelines.

We also know that, despite the fact that the intense focus on reducing disparity failed to produce a sentencing regime that commanded respect, the idea of reducing disparity is seductive. The Commission and others continue to treat disparity as the most important measure of the performance of the federal sentencing system. Professor and former judge Gertner said of the concept's powerful hold:

> The Guidelines essentially supplanted everything. It was almost as if we could no longer speak about anything else . . . . As one judge in Oregon . . . describes it, "It's as if the only thing we are talking about is whether I am doing the same thing as Judge Adelman is doing, even if we are both wrong."\(^{75}\)

Soon after Booker, I had an experience that illustrates the same point. I imposed a substantially below guideline sentence in an unlawful re-entry case, emphasizing the excessive severity of the 16-level guideline enhancement for re-entry after conviction of an aggravated felony.\(^ {76}\) As a subsidiary point, I noted the disparity in sentences in unlawful re-entry cases in districts that had “fast-track”

\(^{74}\)Video recording: The Relevancy & Reach of the U.S. Sentencing Commission (Jan. 19, 2012), available on YouTube (Comments of Bobby Vassar).


Many judges contacted me about the decision, but none were interested in my critique of the severity of the 16-level enhancement. They cared only about the point relating to disparity.\(^{78}\)

In sum, we know or should know that the importance of reducing disparity has been greatly exaggerated. As Professor Stith, co-author of the most comprehensive study of sentencing under the SRA, concluded: “it is a major mistake to construct a system of guidelines whose primary structural objective is to minimize inter-judge sentencing disparity.”\(^ {79}\) The price of curtailing judicial discretion is simply too high. If judges are to be able to impose fair sentences, they need discretion.

III.

Thus, if it continues on the path it has been on, the Commission risks becoming entirely irrelevant. A representative of the American Bar Association, James E. Felman, made this point at the Commission's February 16, 2012 hearing:

The data . . . is . . . startling . . . that roughly one-quarter of all people imprisoned in the entire world are imprisoned here in the United States. . . . [T]he incarceration explosion over the last 40 years in this country is 'unmatched by any other society, in any historical era.' I think that's a remarkable statement. No society in history has done what we're doing now . . . there are more people under correctional supervision in America than were in the Gulag Archipelago under Stalin at the height and there are more black men under correctional supervision that there were slaves in 1850. So to talk about the fact that the . . . rate of variances has changed since Booker from 12.7 percent to 17.2 percent, a 4.5 percent change is - I am just struck that that type of relatively insignificant change, when you consider the change in federal sentence length has been an increase of 300 percent since the guidelines were put into effect. That the percentage of probation - straight probation was between 35 and 40 percent

\(^{77}\) Id.

\(^{78}\) Adelman and Deitrich, supra note 24, at 256.

when the guidelines went into effect. It's now down to a little over seven percent. Those are statistics that ought to motivate this Commission to serious action. But to say that a four and a half percent increase in the rate of non-government sponsored variances is an emergency that it calls for a full overhaul of the system . . . it just feels a little more like we're rearranging the desk chairs on the Titanic, as opposed to really addressing the serious issues that confront our country in terms of sentencing policy. . . .

To play a useful role, the Commission must address today's main problem, too many prisoners resulting from too many unnecessarily long sentences. The Commission has broad powers and, as discussed, is authorized to address this problem. And as the pre-eminent agency in the country dealing with sentencing, by addressing it the Commission would set an important example and could have an impact at the state as well as the federal level.

The Commission might begin by familiarizing itself with some of the voluminous literature on mass incarceration and its damaging effects. Many books and articles have been written on this subject. They include, to mention only a few: Sasha Abramsky, American Furies: Crime, Punishment and Vengeance in the Age of Mass Imprisonment (2007); Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2011); Vanessa Barker, Politics of Imprisonment: How the Democratic Process Shapes the Way America Punishes Offenders (2009); Laurence D. Bobo and Victor Thompson, Racialized Mass Incarceration: Poverty, Prejudice & 80 Testimony of James E. Felman before the United States Sentencing Commission, Feb. 16, 2012, at 380-82 (transcript on file with author).

81 The Commission is statutorily tasked with establishing sentencing policies and practices that meet the purposes of sentencing set forth in 18 U.S.C. § 3553(a); providing certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct, while maintaining sufficient flexibility to permit individualized sentences; reflecting to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and developing means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in §3553(a)(2). 28 U.S.C. § 991(b). While the Commission must reduce unwarranted disparity, it must also ensure that sentences are sufficient but not greater than necessary, 18 U.S.C. § 3553(a); make sure that the guidelines do not produce more inmates than the prisons can handle, 18 U.S.C. § 994(g); and, when appropriate, re-evaluate its work in light of feedback from participants in the system, including judges.

I urge the Commission to pay particular attention to Western's book because it describes the striking associations between mass incarceration and the problem of increased inequality,\textsuperscript{83} which

\textsuperscript{82} BOSTON REVIEW, July/August 2007.

\textsuperscript{83} Weisberg, \textit{supra} note 3, at 27.
has become so serious that it can be reasonably regarded as a threat to our democracy.\footnote{See generally Timothy Noah, The Great Divergence (2012).} We imprison the poor and the uneducated at rates that are distressing even if we ignore race. But once we consider race, the rates are truly horrific. Those imprisoned suffer detriments from incarceration that go beyond the legislated criminal penalty, and those detriments doom many offenders to a continuing cycle of re-incarceration.\footnote{Weisberg, supra note 3, at 27.} Western challenges any sense of self-congratulation about the success of the civil rights movement and the election of an African-American president. He makes clear that mass incarceration, although invisible to many, is a form of residential segregation, and that the invisibility of today's poor remains rooted in the physical and social distance between blacks and whites.\footnote{Id.}

The Commission should then hold public hearings on the problem of mass incarceration. Holding hearings would itself be important because it would signal that the federal government has an interest in the problems of the inner city. It would also create greater awareness of the problem among the many Americans who have not been exposed to it.

In order to reduce the federal prison population, the Commission must also revise the guidelines to make them less severe. A good first step would be to make clear that, if the facts of the offense and the defendant's background warrant it, probation is an appropriate sentence. Section 3553(a) of Title 18 requires courts to impose the least restrictive sentence that satisfies the purposes of sentencing, which, in many cases, will be a sentence of probation. The guidelines, however, obscure this and also fail to reflect the relevant statutory language. Section 3582(a) of Title 18
directs courts to consider the § 3553(a) factors “in determining whether to impose a term of imprisonment.” Reasonably read, this provision means that the first question that a sentencing court must ask is whether to imprison the defendant. But under the guidelines, this is not the first question, nor in most cases is it asked at all. The question that the guidelines ask is what imprisonment range does the defendant fall within. The guidelines treat probation as a footnote, an option available only in a small range of cases. This approach has contributed to making prison the default sentence under the guidelines. To this day, the number of defendants sentenced to straight probation remains extremely small.

The Commission also needs to address the situation of first offenders. In 28 U.S.C. § 994(j), Congress directed the Commission to insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense. Rather than implementing this provision, the Commission viewed it as a “problem.” It responded to the problem by creating “guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short term of imprisonment in such cases.” As a result, the “guidelines contain a presumptive sentence of imprisonment for every felony in the United States

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88 *Id.*

89 *Only about 7% of all federal defendants are sentenced to probation. See Felman, supra note 79, at 382.*

90 *U.S.S.G. ch. 1, pt. A, § 4(d).*
The Commission should reconsider this decision and expand the number of cases in which probation is a guideline approved sentence.

Next, the Commission should systematically reduce the sentencing ranges called for by most guidelines. Although the Commission should examine every guideline, it might begin with those that most frequently result in variances, for these are the guidelines that judges consider most problematically harsh. Even though guideline advocates anticipated that judicial responses would play an important part in guideline revisions, this has not happened. With a few exceptions, no guidelines have ever been reduced. In fact, however, many of the guidelines are too harsh. And the fact that judges don't object to some guidelines doesn't mean that they establish appropriate sentencing levels. If a guideline is not manifestly excessive, judges will often defer to it. As mentioned, judges pay a lot of attention to the guidelines, whether or not such attention is deserved.

Reducing the severity of the guidelines would also advance the Commission's goal of reducing disparity. Judges vary from the guidelines because they regard them as too severe. If judges regarded the guidelines as fair they would follow them more often. In other words, the Commission could achieve its goal of reducing inter-judge disparity by improving the quality of its product, rather than by forcing its consumers, judges, to buy it.

In addition to revising the guidelines, the Commission should also become an advocate for

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93In 2011, judges imposed non-government sponsored, below guideline sentences in 17.4% of cases. They imposed above-guideline sentences just 1.8% of the time. See http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/SBtoc11.htm.
policies that will reduce the prison population. Most importantly, it must argue forcefully for repeal of mandatory minimum sentences. Many federal defendants face charges involving mandatory minimums, including some 74% of defendants charged with offenses involving crack cocaine.\footnote{United States Sentencing Commission, 2011 Sourcebook of Federal Sentencing Statistics 112 (Table 43).} Most of these defendants are small-time street-level drug dealers for whom the mandated five or ten year sentences are manifestly excessive. The Commission has issued an excellent report on mandatory minimums\footnote{U.S. Sentencing Commission, Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (2011).} but has not assumed a leadership role by speaking out and lobbying against them. Possibly, the Commission is reluctant to appear too “political.” Some of the most effective state sentencing commissions, however, are those that have taken strong stands and pushed for sensible results in the highly politicized world of criminal justice. Commissions which function like interest groups are often more successful than those that attempt to depoliticize sentencing but end up aggravating the system’s pathologically severe penalties.\footnote{Barkow, supra note 47, at 813.}

The Commission should repeatedly argue that mandatory minimum sentences are inflexible laws that undermine justice by preventing judges from fixing suitable punishments that take into consideration both the offense conduct and the individual defendant. Alternatively, the Commission should urge Congress to expand the statutory safety valve which, as currently constituted, allows defendants in some drug cases who meet certain criteria to escape mandatory sentences.\footnote{18 U.S.C. § 3553(f).} The problem is that the law applies only to a small percentage of defendants charged with offenses
carrying mandatory minimums. The Commission should seek expansion of the law so that it applies to cases other than those involving drugs and to defendants other than those with minimal records. The safety valve law reflects a desire to allow sentencing flexibility for some offenders. Such flexibility should be more broadly available.

Finally, the Commission should promote legislation establishing a procedure by which elderly prisoners who present no danger to the public can be released. Corrections experts and criminologists generally agree that when prisoners reach age fifty, they fall into the elderly category. The lack of appropriate healthcare and access to healthy living prior to incarceration, added to the stress of prison life, accelerates the aging process. Between 13 and 14% of the federal prison population is presently over age fifty, and this population is increasingly comprised of individuals serving very long sentences who remain in prison in their old age. Many of these prisoners would not pose a threat to public safety if they were released. When Congress enacted the SRA and abolished parole, it eliminated the only effective mechanism by which older prisoners could obtain release. The Commission needs to convince Congress that it is time to create a new one.

IV.

98 See ACLU REPORT, supra note 29.

99 Section 3582(c)(1) of Title 18 provides a means by which elderly prisoners can be released, but it requires a motion from Bureau of Prisons, which has adopted rules so restrictive that few prisoners ever qualify. To its credit, the Commission established a guideline, U.S.S.G. § 1B1.13, interpreting the statute more expansively. The BOP, however, has remained unmoved, adhering to its unduly narrow construction. See Cecilia Klingele, Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release, 52 WM. & MARY L. REV. 465, 510-12 (2010). The Commission could champion a new statutory proposal permitting early release not subject to the BOP's gate-keeping. I suggest that the Commission consider the early release proposals in the revised Model Penal Code. See Margaret Colgate Love & Cecelia Klingele, First Thoughts About “Second Look” and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision, 42 U. TOL. L. REV. 859 (2011).
I recognize that it will be very difficult for the Commission to change its mission as I have suggested. In order to respond to the problem of mass incarceration, the Commission will have to transcend its own history of creating harsh guidelines and continually increasing their severity. As discussed, the Commission will also have to change the way it thinks about disparity. I have argued that the Commission should de-emphasize disparity but, to the extent that it remains a concern, the Commission needs to approach it more thoughtfully. Rather than analyzing disparity, the Commission has consistently responded to it in something of a knee-jerk fashion by quickly moving to curtail judicial discretion. This issue emerged at the Commission’s February 16, 2012 hearing. The Commission indicated that it could respond to the increase in below guideline sentences either by seeking legislation strengthening the guidelines or by restoring mandatory guidelines. Mary Price, counsel for FAMM, an organization opposed to mandatory minimum sentences, pointed out that there were other alternatives, and that the Commission should have examined the reasons for the below guideline sentences before making its “unprecedented request to Congress to stage . . . a legislative intervention.” She noted the Commission’s “lack of curiosity . . . about the causes of variances and sources of disparity” and suggested that it explore “why judges believe the criminal history guideline so frequently fails to account for . . . the defendant's actual prior criminality.”

Price urged the Commission to go “behind the numbers . . . ” to better account “for the role of prosecutors,” and to use “the tools and authorities that you have . . . to improve troublesome sentencing rules . . . ” She testified that the guidelines were “deeply flawed . . . riffed with sentences that are unduly long and severe, overly retributive not proportionate and based on little or no

100 Testimony of Mary Price before the United States Sentencing Commission, Feb. 16, 2012, at 322, 323-24 (transcript on file with author).
empirical evidence of their inherent validity" and that judicial variances were a "barometer and not a problem." She concluded by urging the Commission:

to dig down; refuse to the take the data at face value; embrace the feedback that you're getting; take stock of guidelines that are causing variances; account for the role of other actors and other rules in this system that might be driving disparity; and, above all, don't do anything that's going to slow down or close down the ability to hear what the courts think about the rules that you write . . . but to go to Congress cold and say, this problem is so severe that now we need your help. I found it remarkable . . . you started the ball rolling, but . . . [you] might have rolled it in the wrong direction . . . you presented a lot of raw data to Congress, but there wasn't a lot of analysis. So it doesn't help any of us understand, . . . what's really going on here.  

The questions that Price raised are profoundly important. Unfortunately, the Commission's response to Price's suggestions was less enthusiastic than one would have hoped. One commissioner defensively noted that the congressional subcommittee to which the Commission had presented its proposals had invited testimony from the Commission. Another pointed out that the Commission had no authority over prosecutors but rather was tasked “with looking at the judicial branch,” adding that the Commission believed “that there are outlier sentences and that all of us in this room can agree that, there are outlier sentences.” These comments reinforce the impression that the Commission views its job as policing judges and particularly overly lenient sentences. However, this is not one of the Commission's statutory duties.

If the Commission continues to be concerned about disparity, it surely should make more of an effort to understand it. This means listening to judges and treating below guideline sentences as

101 Id. at 324-347.
102 Id. at 347 (comment of Vice-Chair Jackson).
103 Id. at 349-52 (comments of Commissioner Friedrich).
critiques of the guidelines rather than as aberrant judicial conduct. The Commission should also examine recent studies relating to disparity. Legal scholars are increasingly skeptical of the value of restricting judicial discretion. For example, Professor Tiede, who recently completed a nationwide study of sentencing in federal drug trafficking cases, concluded that if judges are able “to exercise their discretion to fashion just sentences,” any resulting disparity “should be seen as a positive.”

This is so, Tiede determined, because district judges are well qualified, have a lot of sentencing experience and do not abuse their discretion. Tiede also concluded that variations in district caseloads and practices including prosecutorial charging practices are so pervasive that it is essential that judges have the discretion to tailor their sentencing practices in response. Professor Shepherd, who also conducted a nationwide study of sentencing practices, found a connection between expanded discretion and a decrease in crime, concluding that “contrary to the expectations of many of the original tough-on-crime supporters, the reduced discretion under the guidelines is associated with increases in crime, not decreases.”

In addition to having to transcend its own past and to rethink the issue of disparity, in order to address the issue of mass incarceration, the Commission will no doubt have to deal with criticism from some members of Congress. Some students of federal sentencing believe that sooner or later the increase in below guideline sentences will itself provoke Congressional action. Former Commission Chair, Judge William Sessions, for example, argues that the large number of below

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105*Id.* at 40-43.

guideline sentences will ultimately cause Congress to enact new restrictive legislation likely involving more mandatory minimums.107 Sessions supports creating a new system of binding guidelines to avoid what he sees as the only other alternatives, mandatory minimums, on the one hand, or “wanton and freakish disparities,” on the other.108 Professor Bowman, who also supports creating a new system of binding guidelines, believes that new restrictive legislation is likely only if the Republicans gain control of the government.109

For the reasons I have stated and others, I disagree with Sessions and Bowman that it is possible to create a fair system of binding guidelines. I believe that curtailing judicial discretion will always lead to excessively severe sentences. As to what Congress might do, I believe that Bowman is closer to the mark than Sessions. If the Democrats control either branch of government, Congress is unlikely to enact restrictive legislation even if the Commission addresses mass incarceration. The Democrats have likely learned from the harsh sentences produced by the SRA and the guidelines and the resulting pain, particularly to minorities, that curtailing judicial discretion does not lead to improved sentencing. No Democrat is likely to want to reprise the role that Ted Kennedy played three decades ago. Even, however, if the Republicans control the government, I believe it is possible that the Commission could, with a lot of help, address mass incarceration and prevent the enactment of restrictive legislation. And even if it is not possible, the effort is worth making and, in any case,


108Id. at 337.

there are no attractive alternatives.

Ultimately, to be effective, the Commission needs to change in several ways. It has to become the voice of enlightened opinion on matters of sentencing. And, it needs to make the case for less punitive policies as best it can in the political arena. This means explaining some of the truths that we have learned in recent decades. One is that there are too many people in prison and that they are there primarily because of mandatory minimum sentences and overly severe guidelines. Another is that the fact that not all judges sentence in exactly the same way is not a significant problem. A third is that there is no such thing as a below guideline sentence that can be fairly characterized as an outlier. Judges are imperfect and sometimes make poor decisions, but no judge that I have encountered would knowingly impose a sentence that created a risk to the public. And, unreasonable sentences can and should be reversed on appeal. In sum, the problem that the Commission ought to be working on and telling Congress to work on is not judges. Instead, it is time that the Commission took on a more serious issue.