

SENTENCING REDUCTIONS VERSUS SENTENCING EQUALITY

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INTRODUCTION

THE Sentencing Reform Act of 1984 was enacted by an odd conglomeration of Democrats and Republicans who agreed that federal sentences should be based upon relevant offender and offense characteristics, not including such things as race, gender, geography, ideological bent of the sentencing judge, military service or the employment history of a defendant, or a defendant's citizenship or nationality.¹ The Act's first goal was that similarly situated defendants should receive similar federal sentences at the front end; and any sentencing differential should be well explained by an objective and rational factor not already taken into account by the Sentencing Commission² or awarded because the defendant has provided substantial assistance to the government on another prosecution.³ The Act's second goal was transparency and notice; sentences should

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1. Susan R. Klein & Sandra Guerra Thompson, *DOJ's Attack on Federal Judicial "Leniency," The Supreme Court's Response, and the Future of Criminal Sentencing*, 44 TULSA L. REV. 519, 520 (2009). See also *Mistretta v. United States*, 488 U.S. 361, 366, 412 (1989) (upholding constitutionality of Guidelines and quoting Senate Report detailing congressional intent); U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 20 (1991) [hereinafter USSC SPECIAL REPORT] ("[T]he Sentencing Reform Act was prompted in large measure by Congress's concern that the lack of a comprehensive and systematic approach to sentencing in the federal courts permitted unwarranted sentencing disparity.').

2. If the Commission has not accounted for some relevant factor concerning the defendant's conduct or his character, the judge can "depart" upwards or downwards if he clearly delineates the grounds for such departure, subject to what was originally *de novo* appellate review. See U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 5K2 (2015) [hereinafter USSC MANUAL], available at <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf>; USSC SPECIAL REPORT, *supra* note 1, at 20-26 (providing step-by-step tour of the Guidelines).

3. See Klein & Thompson, *supra* note 1, at 520-26; USSC MANUAL, *supra* note 2, § 5K1.1 (permitting government to move for a downward departure even below the mandatory minimum penalty where the defendant provides substantial assistance to the government in pursuing other criminal matters). Defendants can also receive lower fast-track sentences in certain federal jurisdictions that have too many cases of a particular category to handle. Examples of this include immigration cases

be determinate so that a defendant can accurately calculate her minimum and maximum sentence on the front end from the face of the indictment before she pleads guilty or begins her trial.⁴ Such sentences should be equally determinate on the back end, a feat accomplished primarily through abolishing parole. No federal official can later award time off the sentence at the back end based upon factors such as whether the offender has been “rehabilitated,” how good a defendant’s behavior was while incarcerated, or because of prison overcrowding.⁵ This prevents the same irrelevant facts about the crime and the offender that were cut out at the front end (ideology of parole board, overt or unconscious race or gender discrimination by parole employees) from creeping in at the back end.⁶

Whatever one thought of these twin goals in 1987 when the Sentencing Reform Act was implemented, they have become significantly less relevant in today’s federal world of draconian and mandatory minimum sentencing, especially in the drug trafficking, child pornography, and fraud arenas. Mass incarceration has run rampant—with 1% of our adult population currently incarcerated in a federal or state prison, and a much higher almost 3% if you factor in probation, parole, or other correctional supervision.⁷ Our top federal law enforcement officer, former Attorney General Eric Holder, opined recently that “our system has perpetuated a destructive cycle of poverty, criminality, and incarceration that has trapped countless people and weakened entire communities—particularly communities of color.”⁸ Even the President of the United States noted in his State of the Union

along USAOs with borders to Mexico. Whether these reductions are rational, as well as objective, I will leave to the reader.

4. Klein & Thompson, *DOJ’s Attack*, *supra* note 1, at 521-22. There will be some variations in sentences based upon contested issues concerning which FSG section and enhancements apply. There is also a 25% range within each guideline box ultimately determined to be the correct one. *See* USSC MANUAL, *supra* note 2, at 404 tbl. *See also* NORMAN ABRAMS, SARA SUN BEALE & SUSAN RIVA KLEIN, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 1390 tbl. (6th ed. 2015).

5. The federal good time credit statute provides that a federal “prisoner who is serving a term of imprisonment of more than 1 year” may receive credit toward the service of that sentence “of up to 54 days” if she has “displayed exemplary compliance with institutional disciplinary regulations.” 18 U.S.C. § 3624(b)(1) (2006). This is calculated by the Bureau of Prisons (BOP) to result in a maximum of 47 days of good time credit per year served instead of the 54 ostensibly promised by the statute. *Barber v. Thomas*, 560 U.S. 474, 479 (2010).

6. *See generally* ABRAMS, BEALE & KLEIN, *supra* note 4, at 1377-1492. Congress believed that parole boards cannot accurately judge which offenders have been rehabilitated, and thus will no longer recidivate.

7. *See* DANIELLE KAEBLE ET AL., *CORRECTIONAL POPULATIONS IN THE UNITED STATES*, 2014, at 1, 2 tbl.1 (Bureau of Justice Statistics No. NCJ 249513, rev. Jan. 21, 2016), *available at* <http://www.bjs.gov/content/pub/cpus14.pdf>. *See also infra* notes 16 & 26.

8. Eric Holder, U.S. Attorney Gen., Speech Presented at Brennan Center for Justice, New York University Law School (Sept. 23, 2014), *reprinted in* 27 *FED. SENT’G REP.* 293 (2015) (discussing DOJ’s Smart on Crime initiative and advocating the elimination of mandatory minimum drug sentences). *See also* Eric Holder, U.S. Attorney General, Remarks at the National Press Club (Feb. 17, 2015), *reprinted in* 27 *FED. SENT’G REP.* 297 (2015) (lauding favorable results of Smart on Crime initiative in reducing prison sentences and recidivism).

address for 2015 that the reform of our criminal justice system is a top bipartisan priority.⁹

I have become convinced that sentences are so out-of-whack with most basic principles of justice that the prospect that female offenders may receive slightly lower prison terms than their male counterparts should no longer be at the very top of our reform agenda.¹⁰ This is not to suggest that scholars and the public should not be concerned with sentencing disparity, especially based upon race. It is true that giving federal judges more discretion at sentencing in 2005 led to lower average prison terms for all offenders, but it increased sentencing disparity between Blacks and Whites.¹¹ However, the disparity between federal and state offenders in sentencing is so much wider (and occurs so much more frequently) than the disparity among similarly situated federal offenders that the latter is not as significant a matter in absolute terms.¹² If we can keep people out of prison and/or

9. President Barack Obama, State of the Union Address (Jan. 12, 2016), *available at* <http://www.c-span.org/video/?402620-1/2016-state-union-address>.

10. From what I read in the newspapers, the top priority of many African-American reform groups appears to be keeping their teenage boys from being gunned down by white police officers. That concern sparked the “Black Lives Matter” movement. A second concern appears to be that “if current trends continue, [1] of every [3] [African] American males born today can expect to go to prison in his lifetime.” THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 2 (Aug. 2013) [hereinafter SENTENCING PROJECT REPORT] (quoting Mark Mauer, *Addressing Racial Disparities in Incarceration*, PRISON J., Sept. 2011 Supp., at 87S, 88S). More recently, Mauer acknowledges that his claim is a bit dated, and a truer estimate may be “that about 1 in 4 black males can expect to end up in jail.” Glenn Kessler, *The Stale Statistic that One in Three Black Males ‘Born Today’ Will End up in Jail*, WASH. POST (June 16, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/06/16/the-stale-statistic-that-one-in-three-black-males-has-a-chance-of-ending-up-in-jail/>.

11. Granting federal judges discretionary sentencing authority post-*Booker* has indeed led to a significant increase in the percentage of sentences below the guideline-range. The current data show an increase in out-of-range sentences compared to the pre-*Booker* era. In fiscal year 2003, about 70% of defendants received within-range guidelines sentences. In fiscal year 2012, only about 52% of all defendants received a within-guidelines sentence. See ABRAMS, BEALE, & KLEIN, *supra* note 4, at 1475 (deriving data from the U.S. Sentencing Commission’s 2012 *Sourcebook of Federal Sentencing Statistics*, <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2012/sourcebook-2012>).

12. Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 674 (1997) (noting that many federal criminal laws, particularly those concerning drugs and weapons, require much longer sentences than at the state level). See also Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 881 (2005) (arguing that draconian federal criminal sentences are driven by politics and not reason); Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 574-75 (2011) (suggesting that federal interest in higher sentences has led to unwarranted federal intervention in areas of traditional local control); Susan R. Klein, Michael Gramer, Daniel Graver & Jessica Winchell, *Why Federal Prosecutors Charge: A Comparison of Federal and New York State Arson and Robbery Filings, 2006-2010*, 51 HOUS. L. REV. 1381, 1425 (2014) [hereinafter Klein et al., *Why Federal Prosecutors Charge*] (providing examples of much lower sentences for state versus federal felons). Moreover, the fact that 95% of felony cases tried and sentenced nationwide are in state court means that most black offenders are in the state system serving state sentences. See Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 7 & 92 tbl.9-A (2012) (establishing

make their sentences shorter and their reentry into free society more successful, such benefits will, presumably, extend to black citizens as well. The trick will be to do so without widening the disparity any further. And we may have to accept that Whites might benefit more than non-Whites as a necessary evil in order to achieve critical reforms. Reformers, scholars, and policymakers should pour their funding and energy into championing alternatives to criminalization (such as fines, drug treatment, anger management courses, and apologies) and alternatives to long prison terms (such as probation and parole).

Thus, I have reluctantly become an advocate of *United States v. Booker*,¹³ the Supreme Court case that ended mandatory federal sentencing. Judges have used the new advisory status of the Federal Sentencing Guidelines (“FSG”) to significantly decrease prison sentences below those previously mandated by the Guidelines. Unfortunately, as judicial discretion widens post-*Booker*, unwarranted sentencing disparity is likewise on the rise, which may just be the price we have to pay for reform. While we should continue to fund studies regarding the effect that the *Booker* case has on judicial discretion and racial equality in federal sentencing (especially the outstanding and ongoing work completed by the U.S. Sentencing Commission), the funds expended to incarcerate individuals at the federal and state levels, estimated between \$50 to \$80 billion a year,¹⁴ might be better utilized in discovering what offenses we could safely decriminalize, what programs are effective in keeping individuals out of prison in the first place, which prison treatment or after-prison supervision programs are effective in curbing recidivism, and what methods might predict whether a fine, a lower sentence, or a probationary sentence might replace a prison term. We should employ “evidence-based sentencing” (“EBS”) on the front end and evidence-based parole and supervision on the back end.

In Part I of this Essay, I offer statistics regarding the numbers of prisoners in federal and state prison, list what crimes the prisoners committed, and provide the percentage of prisoners who are non-White. In Part II, I offer some statistics and an explanation as to why more judicial discretion (with fewer mandatory minimum penalties) might mean an increase in sentencing disparities between Whites and

that federal felony convictions in the United States, since at least as far back as 1992, have comprised only 5% of the total).

13. *United States v. Booker*, 543 U.S. 220, 246 (2005) (holding as a matter of constitutional law in a 5-4 decision that mandatory sentencing guidelines—where facts that increase the otherwise applicable statutory maximum penalty are found by a judge using a preponderance of the evidence test—violate the Sixth Amendment, and further holding as a matter of statutory interpretation that the Congress intended the Federal Sentencing Guidelines to be advisory and therefore constitutional).

14. The federal government spent about \$7.5 billion on the federal prison system in fiscal year 2016, and the Bureau of Prisons has requested just slightly less for fiscal year 2017. FEDERAL PRISON SYSTEM: BUREAU OF PRISONS, FY 2017 BUDGET REQUEST AT A GLANCE, <https://www.justice.gov/jmd/file/822106/download>. The states spent almost \$50 billion on corrections in 2013. 2013 *Annual Survey of State Government Finances*, U.S. CENSUS BUREAU (2013), <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. See also text accompanying *infra* note 25. The average cost in 2013 of incarcerating a prisoner in the federal system for one year is \$29,291. See NATHAN JAMES, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 15 tbl.1 (Cong. Research Serv. No. R42937, 2014), available at http://digital.library.unt.edu/ark:/67531/metadc287931/m1/1/high_res_d/R42937_2014Apr15.pdf.

Blacks. Implementing probation and parole programs may also lead to a similar widening in disparity. In Part III, I offer a few reforms to decrease sentence length and increase parole across the board. Some of these reforms include elimination of mandatory minimum penalties, evidence-based sentencing, risk-assessment probation and parole decisions, and an increase in the uses of economic sanctions and decriminalization of minor offenses. Such programs will no doubt rebound to the benefit of our minority populations overall, even if it might mean that in particular cases minority defendants receive slightly higher sentences for the same misconduct as their white counterparts.¹⁵ Likewise, if sentencing and parole decisions based upon risk assessment lead to lower overall sentences and quicker releases, we may have to tolerate it even if it generates higher risk numbers for certain minority offenders. Critics of criminal law sentencing and substantive reform proposals need to remember the big picture and not lose sight of the forest of mass incarceration for the trees of unwarranted sentencing disparity.

I. THE STATISTICS

Very simply put, we have far too many prisoners—far more than any other country in the world.¹⁶ I say “too many” because these numbers are not justified by corresponding low crime rates.¹⁷ While it is true that the crime rate decreased sharply from 1991 to 2013,¹⁸ the unprecedented growth in incarceration rates from the 1970s until about 2014 was likely not the cause (or certainly not the primary

15. See U.S. SENT’G COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 3 (2012), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf [hereinafter USSC *BOOKER* REPORT].

16. The U.S. incarcerates about 698 per 100,000 in 2015, down from 743 per 100,000 in 2011. See ROY WALMSLEY, INT’L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 5 tbl.2 (11th ed. 2015), available at http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition.pdf (citing U.S. Bureau of Justice Statistics).

17. James Q. Wilson, *Hard Times, Fewer Crimes*, WALL ST. J., May 28, 2011, at C1 (noting that only one-quarter of the crime decrease experienced between the 1970s & 1990s was attributable to mass incarceration); William Spelman, *The Limited Importance of Prison Expansion*, in *THE CRIME DROP IN AMERICA* 97, 123 (Alfred Blumstein & Joel Wallman eds., 2d ed. 2005) (“[I]n short, the prison buildup was responsible for about one-fourth of the crime drop. Other factors are responsible for the vast majority of the drop.”). See also *infra* notes 19-21.

18. See *Crime in the United States: By Volume and Rate per 100,000 Inhabitants, 1991-2010*, FED. BUREAU OF INVESTIGATION (2010), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl01.xls> (reporting that the number of violent crimes committed per 100,000 was 758 in 1991); *Crime in the United States: By Volume and Rate per 100,000 Inhabitants, 1995-2014*, FED. BUREAU OF INVESTIGATION (2014), <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-1> (reporting that the number of violent crimes committed per 100,000 was 366 in 2014); *Crime in the United States: By Volume and Rate per 100,000 Inhabitants, 1994-2013*, FED. BUREAU OF INVESTIGATION (2013), https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/1tabledatacoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1994-2013.xls (reporting violent crime was 463 per 100,000 in 2004 but decreased to 387 in 2012). See generally FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK’S LESSONS FOR URBAN CRIME AND ITS CONTROL* (2012) (noting that according to the FBI national statistics, the number of violent crimes committed per 100,000 people was 758 in 1991 and 368 in 2013).

cause) of this decrease.¹⁹ Recent data suggests that higher prison terms did not contribute to the crime decrease we experienced over the last two decades.²⁰ In fact, a study by the Pew Charitable Trust showed that during the period from 1994 to 2012, the states with the most significant drops in crime also saw reductions in their prison populations.²¹ Our society cannot sustain itself economically with the current level of mass incarceration.²² The 1.7 million in federal and state prisoners (2.2 million when you add jails, and over 5 million when you add anyone under some kind of criminal justice supervision)²³ all need to be fed, housed, given medical care and supervised. Spending on corrections, incarceration, and law enforcement has increased to \$260 billion per year nationwide.²⁴ The U.S. spends, by some estimates, \$80 billion a year on incarceration alone.²⁵

It appears that federal and state lawmakers are beginning to realize that decreasing the prison population does not make them “soft” on crime. Or perhaps it is simply the pendulum swinging the other way. In any case, we had the smallest total prison population in 2014 since 2005, a decline driven by declining admissions, not releases.²⁶

This current though thankfully decreasing high incarceration rate is especially true for federal prisoners. Federal sentences are so high compared to state sentences that although the federal government prosecutes only about 5% of felonies nationally (leaving the state and local governments to prosecute the other 95%),²⁷ the federal government houses 13% of the total prison population.²⁸ These individuals are rarely convicted of violent crimes, but rather for immigration violations (29% of federal criminal case filings in 2014), drugs crimes (32% of the federal criminal docket), and fraud offenses (10% of all federal felonies filed in

19. THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 3-4 (Jeremy Travis et al. eds., 2014).

20. OLIVER ROEDER, LAUREN-BROOKE EISEN & JULIA BOWLING, BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? 15 (2015).

21. *Prison and Crime: A Complex Link*, THE PEW CHARITABLE TRUSTS (Sept. 2014), http://www.pewtrusts.org/~media/assets/2014/09/pspp_crime_webgraphic.pdf?la=en. The same study showed that the states that took the most measures to reduce their prison populations saw a decrease in crime. *Id.*

22. Jonathan Simon, *Rise of the Carceral State*, 74 SOC. RES. 471, 499 (2007). See also THE GROWTH OF INCARCERATION IN THE UNITED STATES, *supra* note 19.

23. See E. ANN CARSON, PRISONERS IN 2014 (Bureau of Justice Statistics No. NCJ 248955, 2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf>.

24. Holder, *supra* note 8, at 293.

25. Richard Halstead, *Mill Valley Lawyer Helps Build Bipartisan Support to Reform U.S. Criminal Justice System*, MARIN INDEP. J. (San Rafael, Cal.) (Jan. 17, 2016, 11:25 AM PST), <http://www.marinij.com/article/NO/20160117/NEWS/160119814> (discussing President Obama’s State of the Union address). See also sources cited *supra* note 14.

26. See CARSON, *supra* note 23, at 1-2 (noting that we currently have over 1.5 million persons incarcerated, which is slightly less than 1% of U.S. residents over the age of 18).

27. See Klein & Grobey, *supra* note 12, at 7 & 92 tbl.9-A.

28. CARSON, *supra* note 23, at 2 tbl.1 (reporting that the feds have 210,567 prisoners, states have 1,350,958).

2014).²⁹ For those federal offenders convicted in fiscal year 2014, few committed violent crimes: the violent offender categories consisted of terrorism (0.1%); murder (0.1%); manslaughter (0.1%), kidnapping (0.1%); sexual abuse (0.7%); assault (1%); robbery (1.0%); arson (0.1%), and Racketeered Influenced Corrupt Organization Act (1.1%).³⁰ The only offense category that comprised more than 10% of federal criminal offenders that in many instances might be labeled as violent (but is instead given a separate category) were firearms offense filings, which includes being a felon-in-possession and using a firearm during and in relation to a crime of violence or drug offense (10.5% of federal felony filings in 2014).³¹

Though, as detailed above, most federal criminal charges are immigration offenses, that is not who you will find in federal prisons. Neither will you find violent offenders. Most federal inmates are serving draconian sentences for drug, fraud, and weapons offenses.³² Such sentences are not only much higher than drug and fraud sentences at the state level, but also much higher than the average state sentence for violent crimes such as murder, rape, and robbery. In the federal system, those whom the Bureau of Justice Statistics (“BJS”) term “violent” offenders make up only 7% of the total prison population.³³ In 2014, over 50% of those in federal correctional facilities were drug offenders, 6% were incarcerated for property offenses (including fraud), 9% had committed immigration offenses, and 16% had committed weapons offenses (which not only includes possessing a firearm in relation to another felony, but also being a felon-in-possession of a firearm and many other offenses).³⁴ In 2015, 51% of federal prisoners were serving drug offense sentences, 18% were serving firearms sentences, 5% of the prisoners had been convicted of fraud, and 6% were convicted of child pornography/prostitution offenses.³⁵

What are state offenders imprisoned for? Unlike in the federal system, in the state prisons more than half of the inmates (53.2%) are serving time for violent offenses.³⁶ This includes murderer (12%), sexual assault (12.5%), robbery (14%), and aggravated assault (10%).³⁷ For non-violent offenses, 15.7% are drug offenders, 19.3% committed property crimes (including 2.1% for fraud), and 11% were sentenced for public order offenses (which includes weapons offenses).³⁸

By any count, we have too many Black and Hispanic prisoners. While African-Americans comprised only 13.2% of our 318 million U.S. residents in 2014

29. U.S. SENT’G COMM’N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.3 (2014) [hereinafter USSC 2014 SOURCEBOOK], <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table03.pdf>.

30. *Id.* See also FEDERAL JUDICIAL CASELOAD STATISTICS tbl.2-D (2014), reprinted in ABRAMS, BEALE & KLEIN, *supra* note 6, at 16-18.

31. USSC 2014 SOURCEBOOK, *supra* note 29, at tbl.3

32. CARSON, *supra* note 23, at 17 tbl.12.

33. *Id.*

34. *Id.*

35. U.S. SENTENCING COMM., QUICK FACTS: FEDERAL OFFENDERS IN PRISON—JANUARY 2015 (2015) (on file with Toledo Law Review) [hereinafter FEDERAL OFFENDERS IN PRISON—JANUARY 2015].

36. CARSON, *supra* note 23, at 17 tbl.12.

37. *Id.* at 16 tbl.11.

38. *Id.*

(with white non-Hispanics at 62%, Hispanics/Latinos at 17%, and the remainder Asian/Pacific Islanders and Native American),³⁹ black men made up 37% of the combined state and federal male prison population.⁴⁰ While white Americans comprised 62% of our total population, white males made up just 32% of our combined state and federal male prison population.⁴¹ Hispanics comprise 17% of the total U.S. population, but Hispanic men comprised 22% of the male state and federal prison population.⁴² Separating out just the federal offenders (but not separating by gender), 34.5% of the current federal prison population is Black, 35.2% is Hispanic, and 29.6% are White.⁴³ Only 1 in every 106 white adult males was incarcerated in 2012, compared to 1 in every 15 adult black males.⁴⁴ For males ages 18-19, Blacks were nine times more likely to be imprisoned than Whites.⁴⁵ If these current trends continue, “one of every three or four black ... males born [in 2013 will] go to prison in his lifetime[!]”⁴⁶

What crimes are Black and Hispanics incarcerated for in the federal and state systems, as compared to white prisoners? Fifty-seven percent of Blacks sentenced under state jurisdiction committed violent offenses, while the figure for Hispanics is 59% and the figure for Whites is 48%.⁴⁷ Sixteen percent of Blacks incarcerated in a state system have committed a property offense, as compared with 13% of Hispanics and 25% of Whites.⁴⁸ Sixteen percent of black state prisoners were convicted of a drug offense, while that figure is 15% for Hispanics and Whites.⁴⁹ Finally, 5% of black offenders in the state system were convicted of a weapons offense, while the figure is the same for Hispanics and less than 3% for Whites.⁵⁰ The picture in federal prisons is different. Ten percent of Blacks incarcerated at a federal facility were convicted of a violent offense, while that figure is 2% for Hispanics and 7% for Whites.⁵¹ Fifty-three percent of Blacks in the federal penitentiary are in for drug-related offenses, while that figure is 57% for Hispanics but only 40% for Whites.⁵² Twenty-five percent of black federal prisoners were

39. *Quick Facts: United States*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/00> (last visited Mar. 10, 2016) (select “Race and Hispanic Origin” under “Table: All Topics” dropdown).

40. CARSON, *supra* note 23, at 15.

41. *Id.*

42. *Id.*

43. FEDERAL OFFENDERS IN PRISON—JANUARY 2015, *supra* note 35.

44. Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States: A Look at the Racial Disparities Inherent in Our Nation’s Criminal-Justice System*, CENTER FOR AM. PROGRESS (Mar. 13, 2012), <https://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states/>.

45. CARSON, *supra* note 23, at 15.

46. SENTENCING PROJECT REPORT, *supra* note 10, at 1.

47. CARSON, *supra* note 23, at 16.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 17.

52. *Id.*

convicted of a weapons offense, as compared to 7% for Hispanics and 15% for Whites.⁵³

II. RACIAL DISPARITY IN FEDERAL SENTENCING

What kind of sentences are offenders receiving in the federal system? I find the statistic regarding race particularly troubling. First, the Sentencing Commission reports that Whites comprised 24% of those convicted of federal offenses in 2014, Blacks comprised 20%, and Hispanics comprised 52% (the remaining 4% were Pacific Islanders and Native Americans).⁵⁴ Yet Blacks comprise 34% of the federal prison population (and Hispanics comprise 35%), with Whites comprising less than 30%.⁵⁵ Why do Blacks, who are committing only 20% of the offenses, comprise 34% of the federal prison population? One can theorize that they either commit more serious offenses than their white counterparts, or that they receive higher sentences for the same offenses. Recent evidence from the Sentencing Commission shows a mixed bag resulting from the Court's decision in *Booker* to give federal judges more discretion in sentencing decisions.⁵⁶

First, the good news. Since federal judges were given discretion to give shorter sentences (except when they ran up against a mandatory minimum penalty, which trumps the Guidelines), average federal sentences have become significantly shorter. The Sentencing Commission, in a 2012 report, analyzed and compared data from four discrete periods of time.⁵⁷ What they call the *Koon* period (from 1996 to 2003) correlates to the period of time when the Federal Sentencing Guidelines were mandatory, unless a judge justified a departure. Departures were reviewed leniently under an abuse of discretion standard.⁵⁸ What they call the PROTECT Act period (2003-2004) was the timeframe when federal judges could not easily depart from the Guidelines.⁵⁹ Congress changed the standard of review to *de novo*, and literally kept a list of federal judges who dared to use their departure authority.⁶⁰ The *Booker* period (from 2005-2007) is the immediate aftermath of the Court's *Booker* holding that the Federal Sentencing Guidelines were now advisory. The *Gall* period (from 2007-2011) was after a series of SCOTUS decisions enforcing *Booker*, essentially disallowing appeals courts from reversing district judges' below-

53. *Id.*

54. USSC 2014 SOURCEBOOK, *supra* note 29, at tbl.4, available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table04.pdf>.

55. *Id.* See also FEDERAL OFFENDERS IN PRISON—JANUARY 2015, *supra* note 35.

56. *BOOKER REPORT*, *supra* note 15, at 3.

57. *Id.* at 2-3.

58. *Koon v. United States*, 518 U.S. 81, 113-14 (1996) (holding that appellate courts should examine departure decisions for abuse of discretion, rather than exercising *de novo* review).

59. Mark H. Allenbaugh, *The PROTECT Act's Sentencing Provisions, and the Attorney General's Controversial Memo: An Assault Against the Federal Courts*, FINDLAW (Aug. 13, 2003), <http://writ.news.findlaw.com/allenbaugh/20030813.html>.

60. For a lively description of these historical events in federal sentencing, see Klein & Thompson, *supra* note 1, at 526, 530.

guidelines sentences.⁶¹ The results of this report are as follows. The average federal sentence between 2005 and 2007 (what the U.S. Sentencing Commission calls the “*Booker* period”) was 54 months.⁶² The average federal criminal sentence between 2008-2011 (what the Sentencing Commission calls the “*Gall* period”) was down to 49 months.⁶³ Additional data from the U.S. Sentencing Commission after this 2012 report establishes that in 2014 the average federal sentence was down to 44 months!⁶⁴

These federal sentence lengths are on a downward spiral because judges are no longer bound by the mandatory federal sentences (which most jurists and scholars thought were too high).⁶⁵ For example, between 1992 and 2002 during the *Koon* period about 64% of sentences were within the FSG range, but in 2003, shortly after Congress made it more difficult to depart downward from the Federal Sentencing Guideline range (the PROTECT period), 70% of all federal offenders were sentenced within the FSG range.⁶⁶ That dropped to 60% post-*Booker* in 2005, and then to 54% post-*Gall* in 2007.⁶⁷ In 2014 only 46% of federal offenders were sentenced within the FSG range.⁶⁸ Thus, giving judges discretion at sentencing has the salutary effect of decreasing sentence lengths overall.

Now for the bad news. The Sentencing Commission’s 2012 report indicated a disturbing trend since *Booker* for black offenders to receive higher sentences than similarly situated white offenders. During the most recent period in that report (the *Gall* period), sentences for black male offenders were almost 20% higher than for similarly situated white male offenders. That difference was 15% in the *Booker*

61. *See Gall v. United States*, 552 U.S. 38, 46 (2007) (holding that the standard of review for “reasonable” federal sentences is abuse of discretion). *See also Kimbrough v. United States*, 552 U.S. 85, 111 (2007) (holding that a below-guideline sentence for crack cocaine dealing is not unreasonable when it is based on a disagreement with Congress or the Commission).

62. USSC *BOOKER* REPORT, *supra* note 15, at 5.

63. *Id.* at 5, 59 (explaining that the mean sentence during the *Gall* period was 75 months for drug trafficking, 20 months for immigration offenses, 59 months for firearm offenses, 25 months for violating fraud provisions, and 93 months for engaging in child pornography).

64. USSC 2014 SOURCEBOOK, *supra* note 29, at S-29 tbl.13, http://isb.uscc.gov/content/pentahocdf/RenderXCDF?solution=Sourcebook&path=&action=table_xx.xcdf&template=mantle&table_number=Table13 (explaining that the mean sentence was 68 months for drug trafficking, 15 months for immigration offenses, 27 months for fraud, 137 months for child pornography, and 82 months for firearms offenses).

65. This is not to imply that sentence length for every federal offense has decreased from 2005 to the present. However, most of the increases, where there have been increases, are due to congressional enactments over which federal judges have no control (such as increased mandatory minimum penalties). Thus, the average sentence in the *Koon* period for child pornography was 34 months, but by 2014 it was 137 months. USSC *BOOKER* REPORT, *supra* note 15, at 5 (34-month sentence); USSC 2014 SOURCEBOOK, *supra* note 29, tbl.13 (137-month sentence). Likewise, the average firearm offense was 59 months during the *Gall* period, but by 2014 had risen to 82 months. USSC *BOOKER* REPORT, *supra* note 15, at 5; USSC 2014 SOURCEBOOK, *supra* note 29, tbl.13.

66. USSC *BOOKER* REPORT, *supra* note 15, at 5, 58.

67. *Id.* at 58.

68. USSC 2014 SOURCEBOOK, *supra* note 29, at tbl.N, available at <http://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/TableN.pdf> (explaining that 2% were sentenced above the FSG range and 52% were sentenced below the range).

period, and only 5% during the PROTECT ACT period.⁶⁹ There were no differences in the sentencing disparity for Hispanic males during these four time periods.⁷⁰ Broken down by offense category, for firearm offenses black offenders received sentences 10.2% longer than their white counterparts during the *Gall* period, 8.5% higher during the *Booker* period, 5% higher during the PROTECT period, and 6% higher during the *Koon* period.⁷¹ For drug trafficking, Blacks received sentences almost 14% higher than their white counterparts in the *Gall* period.⁷² While sentences have been decreasing across all categories, sentences for Whites are decreasing much faster.⁷³ The Commission does not suggest that racism by federal judges accounts for this differential. Instead, it notes that not covered in the Commission's multivariate regression analysis are things such as past violence by the defendant and prior employment history.⁷⁴ Nonetheless, criminal history was covered by the FSG in each distinct sentencing period, and as federal judges received more discretion, the sentencing differential rose.

69. USSC *BOOKER* REPORT, *supra* note 15, at 108. A newer study sponsored by the Department of Justice came to the same conclusions as the Commission. See WILLIAM RHODES ET AL., FEDERAL SENTENCING DISPARITY 2005-2012, at 67 (Bureau of Justice Statistics No. NCJ 248768, 2015), <http://www.bjs.gov/content/pub/pdf/fsd0512.pdf> (finding "trends toward increased racial disparity between 2005 and 2012 ... likely attributable to judicial behavior, not prosecutorial behavior"). It is important to note that there are critics of the Commission's findings of racial disparity in its 2012 Report, most vocally Paul J. Hofer. See generally Paul J. Hofer, *The Commission Defends an Ailing Hypothesis: Does Judicial Discretion Increase Demographic Disparity?*, 25 FED. SENT'G REP. 311 (2013); Paul J. Hofer, *Review of DOJ-Commissioned Report: Racial Disparity in Post-Booker Sentencing*, 28 FED. SENT'G REP. 196 (2016), 2016 WL 1417774. See also Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1667-81 (2012) (suggesting that racial disparities stem from mandatory minimums, not the exercise of judicial discretion); Sonia B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 15 (2013) (suggesting that the role of prosecutors is greater than that of judges in explaining racial disparity in federal sentencing).

70. USSC *BOOKER* REPORT, *supra* note 15, at 108. Sentences for white female offenders were 31% shorter than their white male counterparts during the *Gall* period, sentences for black females were 33% shorter, and sentences for Hispanic females were 18% shorter. For a slightly different picture for Hispanic males shortly before the *Koon* period, see SENTENCING PROJECT REPORT, *supra* note 10, at 12 ("In his 2001 analysis of 77,236 federal cases from 1991 to 1994, for instance, Professor David Mustard found that even when cases were controlled for the severity of the offense, the defendant's prior criminal history, and the specific district court's sentencing tendencies, blacks received sentences 5.5 months longer than whites and Hispanics received sentences 4.5 months longer than whites.").

71. USSC *BOOKER* REPORT, *supra* note 15, at 109-10 (providing a graph that indicates the differences).

72. *Id.* at 110.

73. *Id.* ("[A]lthough sentence length for both Black male and female offenders and White male and female offenders have decreased over time, White offenders' sentence length has decreased more than Black offenders' sentence length.").

74. *Id.* at 9 ("Because judges make sentencing decisions based on many legal considerations, such as violence in an offender's past, or an offender's employment history, which are not controlled for in the Commission's multivariate regression analysis, these results should be interpreted with caution and should not be taken to suggest race or gender bias on the part of judges.").

Despite this large and unwarranted sentencing differential between black and white federal prisoners (with black prisoners receiving 20% higher sentences for the same conduct), the differential between state and federal sentences overall (among all races) is even larger. For example, in a study my previous co-authors and I conducted of every robbery and arson case filed in New York State and the federal government between the years of 2006 and 2009, the mean sentence was 84.2 months for federal arson and 160.2 months for federal robbery.⁷⁵ On the other hand, the mean sentence was only 41.1 months for state arson and 44.6 months for state robbery.⁷⁶ More globally, the median time served for state prisoners released in 2012 was 28 months for violent offenses, 12 months for property offenses, and 13 months for drug offenses.⁷⁷ However, the median length for all federal offenses in 2014 was 44 months.⁷⁸ Criminal defense attorneys who work in both systems will confirm that federal sentences are significantly higher, across offense types, at the federal than state level. This, again, explains why the federal prison system houses 13% of the total prison population in the United States, despite the fact that the federal government charges only 5% of the felonies.⁷⁹ It is a bit of a mystery why federal sentences are so much longer than state sentences, when one considers that only 7% of federal inmates are violent offenders, in contrast with 53% of state inmates being violent offenders.⁸⁰ Thus, it appears to me that a decrease in federal sentencing overall would constitute a significant improvement for all races.

III. THE REFORMS

What can we, as a society, do to resolve the issue of mass incarceration, while trying at the same time to keep crime levels low and eliminate racial disparity in sentencing? There are quite a number of possible reforms on every level, though many include the possibility of maintaining or even increasing racial disparity in sentencing. I suggest attacks on all fronts. First, we should decriminalize minor offenses to the greatest extent possible, to keep individuals and their families out of the criminal justice system altogether. We might also employ our law enforcement officials in community policing efforts, including predictive policing, that may also prevent criminal incidents. Next, I advocate evidence-based sentencing, drug courts

75. Klein et al., *Why Federal Prosecutors Charge*, *supra* note 12, at 1425. The authors secured Cooperation Agreement with the U.S. Sentencing Commission and had access to all plea agreements during the relevant time period, purchased data from the New York State Division of Criminal Justice Services, and obtained access to the FBI's national Uniform Crime Reports. *See also id.* at 1389-98 (describing the study and data). We analyzed the federal and state robbery and arson laws to ensure we were comparing only those crimes with similar elements. *Id.*

76. *Id.* at 1425.

77. CARSON, *supra* note 23, at 18.

78. USSC 2014 SOURCEBOOK, *supra* note 29, at tbl.13. I use "time served" for state sentencing and "sentence length" for federal sentencing because the federal system has no parole, thus prisoners serve their entire sentence minus a potential 15% for good time. State prisoners are generally released after serving only a fraction of their sentence.

79. CARSON, *supra* note 23, at 2. *See also* Klein et al., *Why Federal Prosecutors Charge*, *supra* note 12, at 1385 & n.17.

80. CARSON, *supra* note 23, at 17.

and treatment, as well as fines and probation rather than incarceration at the front end, once involvement in the criminal justice system has become inevitable. At the back end, once incarceration has become a reality, I advocate risk assessment in determining release dates, reviving an enthusiastic parole system and active rehabilitation programs for inmates.

Predictive policing is a relatively new concept whereby law enforcement officers use computer models and social media to track and monitor known individuals within their communities to try to prevent crimes before they occur.⁸¹ So far, the RAND Corporation suggests that the limited studies on its efficacy establish that “the improvement in forecasting crimes had been only five or ten percent better than [with] regular policing methods,” and the Criminal Law Reform Project of the ACLU, not surprisingly, worries that “predictive policing tend[s] to legitimize the profiling of racial minorities who live in poor, high-crime neighborhoods.”⁸² An even more radical idea for preventing crime is to pay ex-convicts not to reoffend. In Washington D.C. and Richmond, California, the cities hire ex-convicts to mentor violent offenders, gang members, and other individuals, and pay those individuals monthly stipends if they stay out of trouble.⁸³

Federal prosecutors can decriminalize minor offenses by offering deferred prosecution agreements (“DPA”) to those individuals caught committing them. The federal Code provides for these DPAs, which eliminate a defendant’s criminal record entirely upon a period of good behavior.⁸⁴ Though currently limited by DOJ policy to corporate offenders,⁸⁵ the congressional history of DPAs suggests that such deals are appropriate for first-time drug offenders and nonviolent property offenders as well, and their use could thus be greatly expanded.⁸⁶ Federal and state judges can in essence decriminalize unnecessary federal offenses by meting out very

81. See John Eligon & Timothy Williams, *On Police Radar for Crimes They Might Commit*, N.Y. TIMES, Sept. 25, 2015, at A1 (describing predictive policing program in Kansas City, MO and dozens of other police departments across the country).

82. *Id.* at A-17.

83. See, e.g., Aaron C. Davis, *Cities Have Begun to Challenge a Bedrock of American Justice: They’re Paying Criminals Not to Kill*, WASH. POST (Mar. 26, 2016), https://www.washingtonpost.com/local/dc-politics/cities-have-begun-to-challenge-a-bedrock-of-american-justice-theyre-paying-criminals-not-to-kill/2016/03/26/f25a6b9c-e9fc-11e5-a6f3-21ccdbcf5f74e_story.html.

84. 18 U.S.C. § 3161(h)(2) (enacted 1974) (tolling the Speedy Trial Act clock for Deferred Prosecution Agreements filed with the court).

85. U.S. ATTORNEYS’ MANUAL § 9-22.010 (1997), available at <http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.200>; CRIMINAL RESOURCE MANUAL § 712(E)-(F), available at <http://www.justice.gov/usam/criminal-resource-manual>.

86. For excellent historical discussions of DPAs, see *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 22-24 (D.D.C. 2015); S. REP. NO. 93-1021, at 37 (1974), reprinted in ANTHONY PARTRIDGE, FED. JUDICIAL CTR., LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974, at 117-18 (1980), available at [http://www.fjc.gov/public/pdf.nsf/lookup/lhiststa.pdf/\\$file/lhiststa.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/lhiststa.pdf/$file/lhiststa.pdf); Alethea Anne Swift, *Obstructing Justice: The Federal Government’s Disuse of Deferred Prosecution Agreements for Non-Corporate Defendants* (unpublished comment) (on file with author).

low or probationary sentences for what they consider to be less serious offenses. I have noticed this happening on the federal level with crimes for which either Congress or the Federal Sentencing Commission has amended penalties to be even more draconian than usual. Many judges simply refuse to impose the heavy sentences suggested. For example, I have seen the phenomenon over past few years with child pornography cases,⁸⁷ and I saw it happen a bit earlier, after the 2008 financial crisis, with fraud cases.⁸⁸

Better yet, Congress and state legislatures could do this more transparently and fairly. We can start by reconsidering whether a “war on drugs” has done more harm to American families than good.⁸⁹ Reclassification of drug offenses from criminal courts back to the medical profession or drug courts would, in my opinion, save many lives (defendants, their families, as well as communities) and constitute a net benefit.⁹⁰ Similarly, many misdemeanor offenses at the state level could be decriminalized or converted to fine-only civil infractions.

87. Amendments to the federal code and mandatory minimum penalties and amendments to the Federal Sentencing Guidelines enhanced sentences for child pornography for using the internet. For a while, every criminal defendant was receiving many additional years for using the internet as part of their child pornography offenses. *E.g.*, *United States v. Dorvee*, 616 F.3d 174, 176 (2010) (describing sentencing scheme under Guidelines and finding a 240-month sentence substantively unreasonable). Once federal judges figured out that the use of the internet is an invariable incident of the offense, they began to disallow the enhancement or find other reasons to depart downward. *See United States v. R.V.*, 2016 WL 270257, at *1 (E.D.N.Y. Jan. 26, 2016) (“Prosecution under the current sentencing framework has largely failed to distinguish among child pornography offenders with differing levels of culpability and danger to the community.”). *See also* U.S. SENTENCING COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES: JANUARY 2010 THROUGH MARCH 2010, at 3 & tbl.8 (2010), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf (surveying more than 600 federal district judges and revealing wide support for the view that some of the child pornography Guidelines are too severe); U.S. SENTENCING COMM’N 2012 ANNUAL REPORT 44 (2012), available at <http://www.ussc.gov/about/2015-annual-report/archive/annual-report-2012> (select “Chapter Five-Research” hyperlink) (noting that in 2012 child pornography offenses made up the highest proportion of non-government sponsored below-Guidelines sentences at 45.2%).

88. Again, for a while the Commission raised sentences for fraud cases, based on things like intended, but not actual fraud loss, such that defendants were receiving what ultimately was a life-sentence for a non-violent white collar offense. *See, e.g.*, *United States v. Adelson*, 441 F. Supp. 2d 506, 507 (S.D.N.Y. 2006) (rejecting Guidelines-recommended life sentence for sophisticated accounting fraud in favor of 42 months); ABRAMS, BEALE, & KLEIN, *supra* note 6, at 1464 (citing fiscal year 2012 Sentencing Commission data (only 50% of section 2B1.1 fraud offenders were sentenced within the guideline range, a sharp drop from 83% in 2003)); Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823, 836-37 (2014) (noting that mean fraud sentences rose from the teens into the low twenties between 1996 and 2010, reaching a high of 23.2 months in 2010, and then decreasing again between 2011 and 2014).

89. *See generally* DOUGLAS N. HUSAK, LEGALIZE THIS! THE CASE FOR DECRIMINALIZING DRUGS (2002) (providing detailed and balanced analysis of both sides of the decriminalization argument, and concluding that the current drug policy is not only ineffective but, more importantly, unjust); Randy E. Barnett, *The Harmful Side Effects of Drug Prohibition*, 2009 UTAH L. REV. 11 (arguing that much of the harm associated with drug use is caused by the fact that drugs are illegal).

90. In 2013 there were almost 2500 drug court programs operating in the United States. *Drug Court Activity Update*, JUSTICE PROGRAMS OFFICE (Dec. 15, 2014), http://jpo.wrlc.org/bitstream/handle/11204/3896/Drug%20Court%20Activity%20Update_Composite%20Summary%20Information.pdf?sequence=3. Studies show that these programs have a rearrest rate for offenders at 12 to

Fines or apologies as a substitute for prison also hold some promise. Interesting scholarship suggests that the option of an economic sanction might be effective if used carefully and sparsely.⁹¹ The American Law Institute has drafted several versions of the revised Model Penal Code that allows such assessments but caps economic sanctions based upon a “reasonable financial subsistence” standard.⁹² Such a standard limits the amount of economic sanction (that may replace prison time) based upon the individual’s ability to otherwise maintain reasonable necessities for her and her family. The problem, once again, is that such reforms can be misused to punish poverty and race. Economically struggling municipalities might use fines for misdemeanor offenses as a substitute for tax dollars. This, of course, is part of what went wrong in Ferguson, Missouri, leading to the recent consent decree between the City and the Department of Justice (“DOJ”).⁹³

State and federal judges can begin or continue to employ evidence-based sentencing, which will lead to much lower sentences overall. Evidence-based sentencing refers to the use of empirical research on factors predicting criminal recidivism.⁹⁴ Based upon this research, sentencing judges can be provided with risk scores for each defendant. Several states have incorporated actuarial risk assessments into their sentencing guidelines.⁹⁵ These tools can be used by judges at the front end at sentencing hearings to make an empirical assessment of whether an offender will reoffend if not incapacitated. These same tools can be employed by parole boards and those supervising release at the back end to decide whether a defendant can safely be released and to prioritize the rehabilitation programs such an offender might receive in prison and/or in lieu of prison or upon release to again reduce recidivism. In the best situation, a tool like EBS can determine an offender’s treatment needs and permit a supervision program that will safely divert an offender from the prison system.

Some scholars and policymakers in other states have criticized the use of EBS, primarily on the grounds that it is unethical.⁹⁶ Many of the risk factors for

58% lower than for offenders given more traditional sentences. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-53, ADULT DRUG COURTS: STUDIES SHOW COURTS REDUCE RECIDIVISM, BUT DOJ COULD ENHANCE FUTURE PERFORMANCE MEASURE REVISION EFFORTS 19-20 (2011), available at <http://www.gao.gov/assets/590/586793.pdf>.

91. See generally Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 MINN. L. REV. 1837 (2015).

92. MODEL PENAL CODE: SENTENCING § 6.04 cmt. b (Tentative Draft No. 3, 2014).

93. See Consent Decree at 19, 78, *United States v. City of Ferguson* (E.D. Mo. Apr. 19, 2016) (No. 4:16-CV-00180-CDP).

94. John Monahan & Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CLINICAL PSYCHOL. 489, 495 (2016). See also Nicholas Scurich & John Monahan, *Evidence-Based Sentencing: Public Openness and Opposition to Using Gender, Age, and Race as Risk Factors for Recidivism*, 40 LAW & HUM. BEHAV. 36 (2016) (discussing EBS as a way to predict criminal recidivism).

95. Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 809 (2014) (noting that at least 20 states have begun to incorporate risk-assessment in criminal sentencing).

96. See, e.g., Bernard E. Harcourt, *Risk as a Proxy for Race*, 27 FED. SENT’G REP. 237, 237 (2015) (“[R]isk [assessment] today has collapsed into prior criminal history, and prior criminal history has

recidivism, such as employment, poverty, criminal history, antisocial attitudes, substance abuse, and education levels, serve as close proxies for race and socio-economic status. Obviously we cannot allow judges to punish people for immutable characteristics for which they hold no blame.⁹⁷

Federal judges who wish to use risk-assessment on the front end (at the time of imposition of sentence) can do so under current law by employing the sentencing factors set out in 18 U.S.C. § 3553(a).⁹⁸ These factors are so inclusive that essentially any sentence permitted by law is acceptable and explainable. While this won't allow a judge to sentence below a mandatory minimum, it will allow her to depart downward to such minimum, or, if there is no minimum, down to probation.⁹⁹ This use of evidence-based programming is functioning quite well in many states, at both the sentencing and parole periods. For now, federal judges can employ EBS on the front end only (since there is no parole), but state judges can utilize this method on the back end as well as the front.

Though scholars disagree on the propriety of parole, I suggest it should be embraced as another avenue for release of offenders and reduction in mass incarceration rates. The vast majority of states have parole release housed within indeterminate sentencing systems. Most of these parole boards rely on risk assessment tools. There is always the risk of racial biases in the design and administration of these parole systems. Even scholars who aren't crazy about parole agree that reform of the process can decrease unwarranted racial disparity in parole decisions. For example, Professor Kevin Reitz suggests a 10-point plan for improvement of parole release systems, which asks parole authorities to "validate

become a proxy for race. The combination of these two trends means that using risk-assessment tools is going to significantly exacerbate the unacceptable racial disparities in our criminal justice system.”).

97. For an excellent synopsis of the drawbacks of EBS, see Eric Holder, U.S. Attorney Gen., U.S. Dep't of Justice, Speech at the National Association of Criminal Defense Lawyers 57th Annual Meeting and 13th State Criminal Justice Network Conference (Aug. 1, 2014) (transcript available at <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-association-criminal-defense-lawyers-57th>).

98. Factors to be considered in imposing a sentence sufficient, but not greater than necessary, include:

- (1) the nature and circumstances of the offense and history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(1)-(2) (2014).

99. Many federal felonies are not amendable to probation-only sentencing, though this would be quite simple to fix. See 18 U.S.C. § 3561(a)(1) (2012) (providing for sentence of probation unless an individual is sentenced for a Class A or Class B felony). Thus, a defendant would have to be convicted only of a Class C, D, or E felony or any level of misdemeanor to be eligible for probation.

their instruments on their local offender populations and consider how actuarial predictions of recidivism are inexorably connected to race and social class.”¹⁰⁰

Most states have already started down the path of reform. Improving the federal criminal justice system has proven more elusive. There are currently two legislative proposals before Congress that are both steps in the right direction, and one even has a good chance of passing!¹⁰¹ The Safe, Accountable, Fair, and Effective (“SAFE”) Justice Reinvestment Act of 2015, a bipartisan proposal introduced on June 25, 2015, in the House by U.S. Representatives Jim Sensenbrenner (R-Wisconsin) and Bobby Scott (D-Virginia) would narrow the range of offenders eligible for mandatory minimum sentences and expand recidivism reduction programs as well as early release incentives to all offenders.¹⁰² Modeled after evidence-based sentencing at the state-level, it requests the U.S. Attorney General to: (1) develop post-sentencing assessment of inmates’ risks and needs, (2) provide risk reduction programming to inmates, and (3) institute early release for inmates who successfully comply with their case plans.¹⁰³

The Sentencing Reform and Corrections Act of 2015 (“SRCA”), a bipartisan proposal in the Senate (Charles Grassley (R-Iowa) and Dick Durbin (D-Illinois)), would, if enacted, reduce some of the harshest mandatory minimum sentences,¹⁰⁴

100. Edward E. Rhine, Joan Petersilia, & Kevin R. Reitz, *The Future of Parole Release: A Ten-Point Reform Plan*, CRIME AND JUSTICE: A REVIEW OF RESEARCH (Michael Tonry ed., forthcoming 2016) (manuscript at 18, available at <http://ssrn.com/abstract=2672033>).

101. Beyond this brief mention, I will not discuss the other sentencing bills introduced in 2015 because they have no chance of passage. The Justice Safety Valve Act of 2015, S. 353, 114th Cong. § 1 (2015), was introduced on Feb. 3, 2015 by Senators Patrick Leahy (D-Vt.) and Rand Paul (R-Ky.). The Smarter Sentencing Act of 2015, S. 502, 114th Cong. § 1 (2015), was introduced on Feb. 12, 2015 by Senators Mike Lee (R-Utah) and Richard Durbin (D-Ill.), and Representatives Raul Labrador (R-Idaho) and Bobby Scott (D-Va.) introduced corresponding legislation in the House. This bill would shorten mandatory drug minimum sentences by half if necessary to accomplish the general objectives of punishment set out in 18 U.S.C. § 3553(a), and allow the 18 U.S.C. § 3553(f) safety valve provision to become available to a wider percentage of defendants. S. 502, § 2.

102. H.R. 2944, 114th Cong. (2015). Congressmen Sensenbrenner and Scott, both of the House Judiciary Committee’s Subcommittee on Crime, Terrorism, Homeland Security, and Investigation, worked for 18 months on this bill along with a bipartisan Over-Criminalization Task Force. *H.R.2944-Sensenbrenner-Scott SAFE Justice Reinvestment Act of 2015*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/2944/all-info> (last visited June 1, 2016) (for bill’s summary and history). See also ROBERT C. SCOTT & OVER-CRIMINALIZATION TASK FORCE, DEMOCRATIC VIEWS ON CRIMINAL JUSTICE REFORMS RAISED BEFORE THE OVER-CRIMINALIZATION TASK FORCE & THE SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS (2014), available at <http://www.nacdl.org/overcrimtaskforce/>.

103. See H.R. 2944. The risk reduction includes substance abuse treatment, education, and prison jobs. This bill was referred to the subcommittee on Crime, Terrorism, Homeland Security and Investigations on July 9, 2015, and no further action had been taken as of June, 2016. See *H.R. 2944-SAFE Justice Reinvestment Act of 2015*, CONGRESS.GOV, available at <https://www.congress.gov/bill/114th-congress/house-bill/2944> (last visited June 1, 2016) (for bill’s summary and history).

104. The SRCA would reduce the results of three strikes to 25 years rather than life, it would reduce a 20-year mandatory minimum to 15 years, and it would limit mandatory minimum sentences for using a firearm during a crime of violence of drug crime to offenders who have previously been convicted and served a sentence for such an offense. See S. 2123, 114th Cong. §§ 101, 103-104 (2015).

give federal judges more flexibility in sentencing low-level offenders,¹⁰⁵ and devote more resources to rehabilitating low-risk offenders. This bill was created in response to SAFE and has garnered the approval of many conservative senators.¹⁰⁶ Though more modest than the SAFE proposal, the SRCA is more likely to be enacted.¹⁰⁷

Though neither of these bills is a panacea, and much more needs to be done, I highly recommend both and hold some slight optimism for passage (though perhaps not immediately). On January 20, 2016, the same day that the Senate Judiciary Committee held a major hearing on criminal justice reform, members of Law Enforcement Leaders to Reduce Crime and Incarceration (a group of over 160 prominent police chiefs, sheriffs, federal law enforcement personnel, district attorneys, federal prosecutors, and attorneys general) sent a letter to the House and Senate Leadership urging Congress to act on the Sentencing Reform and Corrections Act of 2015.¹⁰⁸ The ABA likewise supports the bill,¹⁰⁹ as does the DOJ.¹¹⁰

CONCLUSION

At the end of last semester's first-year criminal law class, a student came to my office to ask me a question about *Wilson v. Tard*, a habeas case where a drug-addled defendant shot and killed his equally drug-addled roommate as they were arguing over who got to use "the works" to shoot up some heroin first.¹¹¹ The issues we addressed were what *mens rea* was required to prove a reckless manslaughter, whether the state of mind attached to the attendant circumstance of

105. It would broaden the existing safety valve provision and create a new safety valve for certain defendants who would otherwise be subject to a mandatory minimum 10-year sentence. See S. 2123, § 102.

106. The House bill corresponding to the SRCA of 2015, H.R. 3713, 114th Cong. (called the Sentencing Reform Act of 2015), is sponsored by Congressman Bob Goodlatte (R-Va.), Chairman of the House Judiciary Committee. The Committee approved the Sentencing Reform Act of 2015 on Nov. 18, 2015. See *H.R. 3713-Sentencing Reform Act of 2015*, CONGRESS.GOV, available at <https://www.congress.gov/bill/114th-congress/house-bill/3713/all-info> (last visited June 1, 2016) (for bill's summary and history).

107. S. 2123 was approved by the Senate Judiciary Committee on Oct. 22, 2015. It was placed on the Senate Calendar on Oct. 26, 2015 and no additional action had been taken by either house as of January 2016. See *S. 2123-Sentencing Reform and Corrections Act of 2015*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/2123/all-info> (last visited June 1, 2016) (for bill's summary and history).

108. See Letter from Law Enforcement Leaders to Reduce Crime & Incarceration, to U.S. Senators Mitch McConnell & Harry Reid, and U.S. House Representatives Paul Ryan & Nancy Pelosi (Jan. 20, 2016), available at <http://lawenforcementleaders.org/wp-content/uploads/2016/01/Law-Enforcement-Leaders-SCRA-Letter-of-Support.pdf>.

109. Rhonda McMillion, *Bipartisan Collaboration in the Senate Increases Chances for a Major Criminal Justice Reform Act*, A.B.A. J. (Dec. 1, 2015, 1:10 AM CST), http://www.abajournal.com/magazine/article/bipartisan_collaboration_in_the_senate_increases_chances_for_a_major_crimin.

110. Statement of Sally Quillian Yates Deputy Attorney Gen., Hearing on S. 2123 Before the Comm. on the Judiciary 2 (Oct. 19, 2015), <https://www.judiciary.senate.gov/imo/media/doc/10-19-15%20Yates%20Testimony.pdf>.

111. *Wilson v. Tard*, 593 F. Supp. 1091, 1093 (D.N.J. 1984).

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“under circumstances manifesting extreme indifference to human life,”¹¹² who had the burden of proof on the defendant’s mistake of fact defense, and whether it was constitutional for the state to demand that the mistake had been arrived at “reasonably.”¹¹³ However, my student was much more interested in why Mr. Wilson didn’t have a job and was not in a drug-treatment program, whether he would get any help in prison, and why so many African-American men Mr. Wilson’s age are under criminal justice supervision. I had to admit that these critical issues were not the focus of our first-year criminal law class. But that is the discussion we need to focus on as citizens and scholars.

The more discretion we give to those with decision-making authority over policing, sentencing, and parole, the more opportunity we have to reduce mass incarceration in the United States. Unfortunately, those same decision-makers might make conscious or unconscious race-based decisions. We cannot devise a system without human error and human prejudices. The best we can hope for is increased awareness of the issues as we continue to try to reform the criminal justice system.

112. *Id.* at 1093 n.1.

113. *Id.* at 1093.