

Remarks of Judge William Pryor at Scalia Law School, George Mason University



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In a May 2017 keynote speech at a conference entitled *Behind the Bench: The Past, Present, and Future of Federal Sentencing*, co-sponsored by the Charles Koch Institute, FSR, and the Law & Economics Center at George Mason University Antonin Scalia Law School, Judge Pryor discussed his proposal for federal sentencing reform and responded to some criticisms. Both the Judge's original proposal and related commentaries were published in FSR's Volume 29, Issues 2–3. — Editors

Last year, at the annual meeting of the American Law Institute, I proposed reforms of the federal sentencing guidelines – simpler, “presumptive” guidelines with enhancements that not only would have to be proved to a jury beyond a reasonable doubt but also would have to be enacted by Congress.¹ That proposal was mine alone, and did not reflect the position of the Sentencing Commission. In August, in the final priorities for the 2016–17 amendment cycle published in the *Federal Register*, the Commission included as a priority the “[c]ontinuation of its multi-year examination of the overall structure of the guidelines post-*Booker*, possibly including recommendations to Congress on any statutory changes and development of any guideline amendments that may be appropriate.”² As part of that examination, the Commission stated that it “intends to study possible approaches to . . . simplify the operation of the guidelines, promote proportionality, and reduce sentencing disparities. . . .”³ In February, the *Federal Sentencing Reporter* published my proposal along with responses by Amy Baron-Evans and David Patton, two members of the federal public defender community; Professor Frank Bowman; and retired Judge Nancy Gertner.⁴

In my remarks today, I want briefly to elaborate on my proposal and to respond to recent criticisms of it. My proposal seeks to strike a balance between the three main considerations facing sentencing policy-makers –

1. reducing complexity in the guidelines while promoting both proportionality and certainty in sentencing;
2. ensuring that severity in penalty levels is sufficient but not greater than necessary to promote the statutory purposes of punishment; and
3. avoiding unwarranted sentencing disparities among similar offenders (both inter-judge disparities and demographic disparities).

In his highly influential 1973 book, *Sentencing: Law Without Order*, Judge Marvin Frankel first advocated for the creation of a federal commission to create “binding” guidelines, together with appellate review of sentences, as the best means of achieving a proper balance of these considerations. Frankel's ideas inspired Senators Edward Kennedy and Strom Thurmond, and the rest of the bipartisan coalition who worked to enact the Sentencing Reform Act of 1984, which created the U.S. Sentencing Commission and directed it to promulgate “mandatory” sentencing guidelines.

My proposal likewise is inspired by Judge Frankel's first principles of federal sentencing reform. After having served for several years on the Commission and having studied the 30-year history of the federal guidelines system, I want to avoid the problems caused by the failure of our government to adhere to Judge Frankel's first principles – undue complexity, overly severe penalties for some offenders, and increasing sentencing disparities. Unlike some earlier reformers, I am under no illusion that we can achieve perfect justice in a federal sentencing regime. Because we should not allow the perfect to be the enemy of the good, I propose a system that achieves a happy medium between excessive complexity and unwarranted similarity, between unfettered discretion for sentencing judges and too much rigidity, and between undue severity and undue leniency.

First, we need **simpler guidelines**. Simplification will require a substantial reduction in the large number of aggravating and mitigating factors (or “specific offense characteristics”) in the current *Guidelines Manual*. We can accomplish that simplification by using sentencing data and input from judges and other stakeholders showing which factors matter most in practice. Other factors would be either deleted or relegated to application notes as considerations for where *within* a guideline range to impose a sentence. Along with simplification, I envision a modest reduction in guideline penalty levels for some classes of offenders, particularly first-time, non-violent offenders. We also need a **simpler sentencing table**, with fewer offense levels (we currently have 43) and somewhat broader ranges, which will require Congress to amend the current “25-percent rule” in the Sentencing Reform Act.⁵

Second, these simpler guidelines should be **presumptive** (even the pre-*Booker* guidelines were never actually mandatory).⁶ To increase certainty and proportionality and

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avoid unwarranted disparities, we need guidelines that judges will follow except when substantial and compelling reasons⁷ based on offense or offender characteristics warrant a downward departure. There would be no upward departures. Although I envision downward departures in exceptional cases, the Commission should limit (while not entirely prohibiting) the bases for downward departures to avoid unwarranted disparities. Departures based on a judge's disagreement with a Commission policy⁸ reflected in a particular guideline would not be a proper basis for a departure.⁹ Departures based on some offender characteristics would be appropriate in truly exceptional circumstances so long as those characteristics were not associated with prohibited factors such as race, ethnicity, gender, or other constitutionally suspect characteristics. Departures for substantial assistance and fast-track guilty pleas¹⁰ would remain appropriate.

The Supreme Court's decisions in *Blakely* and *Booker*¹¹ mandate that, in a presumptive guideline system, constitutional procedures not required in the current advisory system would have to be followed. With the exception of a defendant's prior convictions, the indictment would have to allege aggravating guideline factors in addition to the elements of the offense, and the prosecution would have to prove those aggravators to a jury beyond a reasonable doubt (unless the defendant pleaded guilty to them).¹² To avoid constitutional doubt about the Commission promulgating aggravating factors in a presumptive system, Congress would enact aggravating factors proposed by the Commission – as opposed to the existing law that requires Congress to enact legislation affirmatively rejecting guidelines promulgated by the Commission before they otherwise automatically would go into effect within 180 days.¹³

The one part of the current *Guidelines Manual* that I would not substantially change would be Chapter Four, which accounts for a defendant's criminal history. Chapter Four repeatedly has been validated by Commission data as being an excellent predictor of recidivism.¹⁴

Meaningful appellate review of sentences would be essential in my proposed system. That review not only would assure correct calculations of the guidelines and promote consistency in their application but also would assure that downward departures did not occur without substantial and compelling reasons, with an appropriate amount of deference to sentencing judges. To be effective, a presumptive guideline system necessarily requires meaningful appellate review of guideline application and departures.

If we were to have this presumptive guideline system, there would be less need for statutory mandatory minimum penalties, except for the most egregious offenses. Like Justices Kennedy and Breyer, I believe sentencing guidelines are a preferable means of regulating sentencing discretion and determining the appropriate sentences for defendants.¹⁵ Guidelines allow for a consideration of a broader array of relevant sentencing factors in an individual defendant's case than the blunt instrument of

a mandatory minimum, thereby furthering proportionality and better implementing the purposes of sentencing.

Although my experience in helping develop state sentencing guidelines in Alabama inspired me to propose simplifying the federal guidelines, I do not suggest that revised federal guidelines can emulate simpler state guidelines. Typical state guidelines provide for sentencing ranges based solely¹⁶ or almost entirely¹⁷ on the offense of conviction. This state guideline model would not be effective in the federal system in implementing Judge Frankel's first principles. There are vastly more federal criminal laws – a crazy-quilt of over 4,000 crimes spread throughout dozens of titles of the United States Code and enacted by many Congresses over several decades¹⁸ – in contrast with the number of offenses in a typical state penal code.¹⁹ Simpler federal guidelines that assigned offense levels on the Sentencing Table solely or almost entirely based on the offense of conviction would not provide for reasonable proportionality in sentencing among the many different federal offense types, many of which cover a broad spectrum of criminal conduct (such as the federal fraud statutes). If Congress ever were to engage in meaningful criminal code reform,²⁰ a guideline model based primarily on the offense of conviction might be appropriate for the federal system. But, until that occurs, we need to include some specific offense characteristics, in addition to the elements of the offense of conviction, in a simplified system to achieve reasonable proportionality between and among different offense types. The system that I envision, however, would be far simpler than the current 572-page *Guidelines Manual*.

I want briefly to respond to some of the main criticisms of my proposal. I'll begin with the claim that the existing advisory guideline system better implements Judge Frankel's first principles – by balancing complexity, severity, and disparity – than the presumptive system that I propose. I respectfully disagree.

The current *Guidelines Manual* is a relic of the pre-*Booker* so-called “mandatory” guideline system, yet its complexity has actually increased since 2005. Federal sentencing has become more complex because of the “*Booker* three-step process” that is now required.²¹ Although severity has decreased to some degree since 2005, as a result of actions by both Congress and the Commission, there are still many judges (and a good number of prosecutors) who view guideline penalties as generally too severe – which in part explains the high rate of below-range sentences, particularly in the application of certain guidelines (*e.g.*, for child pornography offenses). Much of the undue severity has resulted from congressional directives to the Commission, which can be expected in a system where it has been easy for Congress to add or encourage the Commission to add aggravating factors to an already bloated guidelines manual. As I will explain, this so-called “factor creep” would be unlikely to occur in the presumptive guidelines system that I envision.

Contrary to the assertion made by Baron-Evans and Patton, the advisory guideline system has not decreased unwarranted sentencing disparities; it instead has increased them. Commission data show two types of increasing disparities since *Booker* – inter-judge disparities generally and demographic disparities specifically.²² These two types of disparity are largely a function of judges’ virtually unchecked discretion to vary from guideline ranges in the third step of the *Booker* process. When well over 1,000 federal sentencing judges around the country²³ are permitted that discretion, sentencing disparities inevitably will result.

The suggestion by Baron-Evans and Patton that the “racial gap” between average prison²⁴ sentences for African-American offenders and prison sentences for white offenders has decreased since 2007 primarily because of judges’ ability to consider offender characteristics, as a basis to vary below the guideline ranges, is false. The primary reason for that narrowing gap involves changes in statutes, guidelines, case law, and prosecutorial practices in drug-trafficking cases – in particular, the Commission’s 2007 and 2010 amendments²⁵ to the drug guidelines (especially the crack cocaine guideline) as well as the Fair Sentencing Act of 2010; Supreme Court decisions in 2007 and 2009 permitting downward variances in crack cocaine cases;²⁶ and changes in the types of drug-trafficking offenses charged by federal prosecutors since 2007, which correspond to different racial groups (in particular, fewer crack cocaine prosecutions of African-American defendants and more methamphetamine prosecutions of white defendants).²⁷ In 2007, 4,528 of the 16,415 federal prosecutions against African-American defendants involved crack cocaine charges, and the average sentence in those crack cases was 129 months. By 2016, there were only 1,305 crack cases in the 13,638 federal prosecutions of African-Americans, and the average sentence in those crack cases had fallen to 84 months.²⁸ That data explains the narrowing of the racial gap since 2007.

Baron-Evans and Patton’s superficial analysis of average sentences for African-Americans and whites does not address type of disparities that presumptive sentencing guidelines seek to avoid. Average sentence lengths are largely a function of the types of cases being brought by prosecutors and the sentencing ranges created by Congress and the Commission. They do not tell us whether there are unwarranted disparities in sentences for *similarly situated* offenders of different races being imposed by judges.

Baron-Evans and Patton’s more detailed analysis of Commission data showing that some African-American defendants have benefitted from downward variances based on offender characteristics also fails to make their case for sentencing judges’ unrestrained consideration of offender characteristics. Their analysis looked only at those cases in which district judges specifically recorded on the Statement-of-Reasons forms that African-American defendants received downward variances at least in part based on certain offender characteristics. They infer that, because the

percentage of African-American defendants receiving below-range sentences for these reasons is around the same percentage of African-American defendants in the overall population of federal defendants, sentencing judges are not unduly favoring defendants of other races based on such offender characteristics.

Their conclusion, which is based on a small percentage of federal cases from fiscal year 2015, is called into question by more extensive and more probative Commission data. Several years’ worth of post-*Gall* data show that African-American male defendants are 25.2 percent *less* likely than white male defendants to receive a non-government sponsored below-range sentence, after controlling for a wide variety of factors in a sophisticated multivariate regression analysis.²⁹ That data certainly would appear to conflict with Baron-Evans and Patton’s claim that African-American defendants (the vast majority of whom are males) are benefitting equally from downward variances under section 3553(a)(2) based on “the nature and circumstances of the offense and the history and characteristics of the defendant.” Not only do the Commission’s data analyses show increasing demographic disparities in the post-*Booker* era; independent researchers, working on behalf of the Bureau of Justice Statistics, too have found growing federal sentencing disparities between white male offenders and black male offenders in the years after *Booker*.³⁰

Moreover, there can be no dispute that inter-judge sentencing disparities, regardless of whether they contribute to demographic disparities, have substantially increased since *Booker* as a result of judges’ unfettered discretion to vary from the guidelines coupled with no meaningful appellate review.³¹ I am deeply troubled by the prospect of one defendant receiving a within-range guideline sentence, while another defendant who is similar in every material respect concerning the purposes of punishment receives a below-range sentence (sometimes dramatically lower than the guideline minimum) only because the latter defendant had a different sentencing judge than the former.

It is important to understand that inter-judge disparities often result from sentencing judges’ unrestrained ability to consider offender characteristics – whether they relate to positive aspects of defendant (such as a distinguished educational record); negative aspects (such as having failed to support his children); or sympathetic aspects (such as having had a difficult childhood). Just as they differ in their ideological, cultural, and regional perspectives, sentencing judges invariably differ in how they perceive the mitigating (or aggravating) value of offender characteristics. Different judges will impose different sentences on similar offenders – often *vastly* different sentences – based on their subjective assessment of offender characteristics.

My proposed system would not entirely eliminate consideration of all offender characteristics in a judge’s sentencing calculus. Rather, it would generally limit consideration of offender characteristics as a means of reducing unwarranted disparities while recognizing that *some* consideration of characteristics (except those related to

race and other constitutionally suspect characteristics) may be appropriate in two different ways. First, my system would restrict downward departures to truly exceptional cases in which offender characteristics are particularly relevant to one or more purposes of punishment. Second, my system also would allow for consideration of most offender characteristics with respect to where *within* a sentencing range to impose a sentence. Regarding the latter, it should be remembered that my system would have broader ranges than the current Sentencing Table's ranges. I believe that a guideline system that regulates judges' consideration of offender characteristics in the foregoing manner would achieve a reasonable compromise between the narrow and rigid regime that existed immediately before *Booker* and the essentially unregulated system that has existed since *Booker* (and particularly since *Gall*).³²

I will next turn to the critics' claim that, in a presumptive guideline system, prosecutors will possess undue authority over sentence length – and will increase sentencing disparities – through charging and plea bargain practices. Although it is true that prosecutors always have been able to control sentencing to some degree through charging and plea-bargaining practices – and always will possess that authority in our system of separated powers – that fact does not mean that a simpler, presumptive guideline system with fewer aggravating factors and fewer statutory mandatory minimum penalties will make things worse than the status quo. To the contrary, in a simpler system with fewer sentencing decision-points, prosecutors will have less opportunity, not more, to manipulate sentences. Currently, between charging decisions regarding offenses carrying mandatory minimum sentences, “fact-bargaining” about the multitude of specific offense characteristics, and Rule 11(c)(1)(C) plea bargains, prosecutors possess immense authority over sentencing. Simpler guidelines likely would reduce that influence and result in less prosecutor-driven disparities. I also assume that, in a new presumptive guideline system, the Department of Justice would adopt national policies seeking to assure consistent treatment concerning both charging of offenses and aggravating factors in indictments as well as fact-bargaining about aggravating and mitigating factors.³³

Next, I want to address the argument that continued emphasis on offenders' criminal history in my proposed system would perpetuate unwarranted racial disparities supposedly resulting from Chapter Four of the *Guidelines Manual*. Although African-Americans are disproportionately represented in our criminal justice system compared to white offenders³⁴ and African-American federal offenders have more significant criminal histories on average than other offenders,³⁵ those facts are not a reason to change Chapter Four. As an initial matter, Chapter Four already has substantial mechanisms to exclude consideration of many common minor offenses – such as petty misdemeanors like trespass, public intoxication, and loitering, as well as less serious juvenile offenses³⁶ – which are disproportionately prosecuted against African-Americans.³⁷ Moreover, Chapter

Four provides for increases in penalty levels based on prior *volitional, culpable conduct of offenders* – with the greatest enhancements for prior felony offenses for which offenders received sentences in excess of 13 months and with a limit on the extent to which less serious prior offenses (“one-pointers”) are counted.³⁸ I would much prefer a system that, within reasonable limits, increases penalties based on prior volitional, culpable conduct than one in which judges are free to assign mitigating or aggravating weight to personal characteristics over which offenders may have had little or no control and that do not necessarily relate to culpability for an offense, such as factors associated with the socio-economic status into which they were born. An offenders' criminal history is not a perfect sentencing factor, but it is a much better factor than other offender characteristics in terms of measuring an offender's culpability, and it also has been shown – time and again – to be a strong predictor of recidivism. Its consideration at sentencing serves multiple purposes of punishment.

Critics of my proposal also contend that, over time, Congress would enact an ever-growing number of aggravating factors in a presumptive guideline system – “factor creep”³⁹ – that would result in a “one-way upward ratchet.”⁴⁰ Although the past three decades have shown this pattern to be generally true under the federal guideline system created in 1987, I doubt this would occur to the same extent in the new system that I propose – for two different reasons. Unlike Congress's past directives, which usually have delegated to the Commission the job of implementing the increases in guideline ranges through the administrative process, Congress would have to enact aggravating factors as part of the legislative process for the factors to take effect, much like it currently enacts penal statutes. The bicameral legislative process would likely inhibit factor creep when Congress would not issue a directive to the Commission. Furthermore, under the sentencing reform legislation that I envision, the Commission ordinarily would be the body to propose aggravating factors for Congress to consider enacting into law – both the aggravating factors in an initial “Guidelines 2.0” and any later ones added over time. That process would further check the tendency of Congress to enact inappropriate aggravators on a political whim.

Moreover, in my proposed system, aggravating factors would effectively become “elements” of the offense – in the sense that such factors would have to be pleaded in the indictment, proved to a jury beyond a reasonable doubt (unless a defendant pleaded guilty to a factor), and be subject to the Confrontation Clause and other constitutional limitations. I strongly suspect that the Department of Justice would encourage Congress to be hesitant before adding new aggravating factors, considering the burdens associated with pleading and proving these factors.

Finally, I want to address Professor Bowman's assertion that my proposal appears non-viable in the current political climate. I recognize that getting a major piece of criminal justice reform legislation through Congress is extremely

difficult, as the past few years have proved. Indeed, the Sentencing Reform Act of 1984 took nearly a decade of effort before it became law. Yet we are in a highly unusual time, one that comes along only every generation or so, where there is genuine and sustained bipartisan support for structural sentencing reform. That the prospect of reform is daunting is not a reason not to pursue it or a reason only to tweak the current system. Although bipartisan support for sentencing reform apparently continues to exist in Congress, there is reason to doubt whether the new Administration would support legislation like the Smarter Sentencing Act standing alone. But the new Administration and others in Congress might be attracted to a reform package that reduces some mandatory minimums (and accomplishes other goals, such as *mens rea* and asset forfeiture reform) when joined with a new system of simpler, presumptive guidelines.

The past three decades have taught us that we cannot achieve perfect justice in federal sentencing. Professor Richard Epstein has correctly observed that our entire modern regulatory state has been built on the premise that, “[i]f the law can identify enough factors [and] can indicate the ways in which they should be taken into account . . . , then maybe, just maybe the legal system will reach the heady level of perfection to which it aspires.”⁴¹ He has warned that “the gains from seeking perfection are an illusion” and that “[t]he relevant comparison between simple and complex rules should be conducted not in the language of aspiration, but in the language of realizable achievement. . . . Simple rules are adopted by people who acknowledge the possibility of error up front, and then seek to minimize it in practice. Complex rules are for those who have an unattainable vision of perfection.”⁴² In reforming federal sentencing guidelines, we should keep Professor Epstein’s words in mind. To that end, our federal system needs simpler, presumptive guidelines.

Thank you for inviting me to speak today about my ideas for federal sentencing reform.

Notes

- ¹ Available at https://www.ali.org/media/filer_public/9a/e3/9ae3b6aa-3d91-41ae-84a1-b23cf3d05d30/pryor-remarks.pdf.
- ² Available at <http://www.ussc.gov/policymaking/federal-register-notice/federal-register-notice-final-2017-priorities>.
- ³ *Id.*
- ⁴ See Vol. 29, Numbers 2 and 3, Federal Sentencing Reporter (Dec. 2016/February 2017)
- ⁵ 28 U.S.C. § 994(b)(2).
- ⁶ The American Law Institute (ALI) uses the term “presumptive” rather than “mandatory.” See Model Penal Code: Sentencing § 6B.04 (2007) (Tentative Draft No. 1, which was approved by the ALI at the 2007 annual meeting, see Tentative Draft No. 4 (2016), at xii).
- ⁷ “Substantial and compelling” is the standard governing departures used in several state guideline systems. See, e.g., K.S.A. § 21-6815(a); MICH. C.L.A. § 769.34(3); ORE. R.S. § 213-008-0002(1)(a); MINN. SENT. GUIDELINES § 2.D.1; State v. Ha’ mim, 940 P.2d 633, 636 (Wash. 1997) (en banc); see also Tucker v. State, 799 N.W.2d 583, 586 (Minn. 2011) (defining

“substantial and compelling reasons” as those circumstances “demonstrating that the defendant’s conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question.”) (emphasis in original; internal quotes and citations omitted); *People v. Babcock*, 666 N.W.2d 231, 237 (Mich. 2003) (defining “substantial and compelling” to mean an “objective and verifiable” reason that “keenly or irresistibly grabs our attention,” that is “of considerable worth in deciding the length of a sentence,” and that “exists only in exceptional cases”) (internal quotes and citation omitted); *State v. Hines*, 294 P.3d 270, 276 (Ka. 2013) (“In order to be [substantial and] compelling, the mitigating factor must be one which forces the court, by the facts of the case, to abandon the status quo and to venture beyond the sentence that it would ordinarily impose.”) (citation and internal quotation marks omitted); *State v. Kennedy*, 831 P.2d 712, 714 (Ore. App. 1992) (“The [sentencing commission] constructed, and the legislature enacted, a framework for departure sentences in which the decision to depart is discretionary and the standards for those departures are dependent on the facts of each case. In that framework, appellate review of ‘substantial and compelling’ reasons is aimed at the court’s explanation of why the circumstances on which it relied are so exceptional that imposition of the presumptive sentence would not accomplish the purposes of the guidelines.”); *State v. Alexander*, 888 P.2d 1169, 1174 (Wash. 1995) (“[W]e permit sentencing judges [to depart in order] to distinguish between crimes typical of a defined class and those which are truly distinguishable as ‘extraordinary.’”).

- ⁸ *Cf. Kimbrough v. United States*, 552 U.S. 85 (2007) (allowing “variances” from the “advisory” federal sentencing guidelines based on a district judge’s disagreement with the “policy” embodied in a guideline).
- ⁹ *Cf. Model Penal Code: Sentencing*, § 7.XX(2)(b) (2007) (Tentative Draft No. 1, approved at 2007 annual meeting) (“A sentencing court may not base a departure upon mere disagreement with a presumptive sentence as applied to an ordinary case.”).
- ¹⁰ See USSG §§ 5K1.1 (substantial assistance) & 5K3.1 (fast-track) (2016).
- ¹¹ *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005).
- ¹² The “prior conviction” exception is discussed in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).
- ¹³ See Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. Pa. L. Rev. 1631, 1726-27 (2012).
- ¹⁴ See U.S. Sent. Comm’n, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* (2017), <http://www.ussc.gov/research/research-reports/criminal-history-and-recidivism-federal-offenders>
- ¹⁵ *Harris v. United States*, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring in part and concurring in the judgment); Anthony M. Kennedy, Assoc. Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting, San Francisco (Aug. 9, 2003), available at www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html.
- ¹⁶ See, e.g., Minnesota Sentencing Guidelines and Commentary 79 (2016).
- ¹⁷ See, e.g., Alabama Presumptive and Voluntary Sentencing Standards 39 (2016) (in “Drug [Case:] Prison In/Out Worksheet,” sentencing judge is directed to determine whether a defendant possessed or used a deadly weapon or dangerous instrument).
- ¹⁸ Edwin Meese III and Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. Crim. L. & Criminology 725, 739 (2012) (“There are more than 4,000 federal criminal statutes alone spread out across the fifty-one titles and 27,000 pages of federal law – so many, in fact, that no one, not even the

Justice Department, knows the actual number of federal criminal offenses.”).

19 Melissa J. Mitchell, *Cleaning Up the Closet: Sunsetting Provisions to Help Clean Up Cluttered Criminal Codes*, 54 Emory L. J. 1671, 1674 (2005) (noting two “representative” state criminal codes which contained 421 and 535 separate criminal statutes, respectively); see also, e.g., Minn. Stat., Chpt. 609 (Criminal Code) (2016).

20 Julie O’Sullivan, *The Federal Criminal “Code” is a Disgrace: Obstruction Statutes as Case Study*, 96 J. Crim. L. & Criminology 643 (2006) (discussing the “code reform” movement of the 1970s); see also National Association of Criminal Defense Lawyers, “Code Reform,” <https://www.nacdl.org/criminal-defense.aspx?id=34478> (discussing recent proposed “code reform” legislation introduced in Congress).

21 See USSG §1B1.1, comment. (Back’g) (describing the 3-step process).

22 See U.S. Sent. Comm’n, Report to the Congress: Continuing Impact of United States V. Booker on Federal Sentencing 98 (2012) (“Variation in the rates of non-government sponsored below range sentences among judges within the same district has increased in most districts since Booker, indicating that sentencing outcomes increasingly depend upon the judge to whom the case is assigned.”); *id.* at 108 (“Demographic factors (such as race, gender, and citizenship) were associated with sentence length at higher rates in the *Gall* period than in previous periods.”).

23 In 2016, 954 U.S. District Judges and 347 U.S. Magistrate Judges imposed sentences in cases governed by the federal sentencing guidelines.

24 Notably, their analysis focused only on *prison* sentences and excluded probationary sentences, of which white offenders receive at a higher rate than African-American offenders. See Baron-Evans & Patton, *supra* note __, at 106 (Fig. 1) (noting “[o]ffenders receiving no term of imprisonment are excluded” from the analysis); see also Courtney Semisch, U.S. Sent. Comm., *Alternative Sentencing in the Federal Criminal Justice System*, at 16 (2015) (“Black and Hispanic offenders consistently were sentenced to alternatives less often than White offenders.”).

25 USSG, App. C, amends. 706 (2007) & 750 (2010).

26 *Kimbrough v. United States*, 552 U.S. 85 (2007); *Spears v. United States*, 555 U.S. 261 (2009) (*per curiam*).

27 For instance, in 2007, 21.5% of all federal drug cases involved crack cocaine, while 20.0% of cases involved methamphetamine. U.S. Sent. Comm’n, Sourcebook of Federal Sentencing Statistics Fig. K (2007). By 2016, only 8% of all federal drug cases involved crack cocaine, while 33.5% of cases involved methamphetamine. U.S. SENT. COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Fig. K (2016). The vast majority (over 80%) of cocaine defendants are black, while only a very small percentage (2.5%-6.0%) of methamphetamine defendants are black. By contrast, around half of methamphetamine defendants are white (between 38.3% and 51.5%), while only between 5.5%-8.8% of crack cocaine defendants are white. See 2007 Sourcebook, Tab. 34 & 2016 Sourcebook, Tab. 34. The average prison sentence for crack cocaine defendants in 2007 was 129 months, while the average prison sentence for methamphetamine defendants was 101 months. See 2007 Sourcebook, Fig. J. By 2016, the average prison sentence for crack cocaine defendants had fallen to 84 months, while the average prison sentence for

methamphetamine defendants was 90 months. See 2016 Sourcebook, Fig. J.

28 See 2007 Sourcebook, Tabs. 4 & 34 & 2016 Sourcebook, Tabs. 4 & 34.

29 See 2012 Booker Report, Part E, at p.22 (finding that that African-American male defendants are 25.2 percent less likely than white male defendants to receive a non-government sponsored below-range sentence).

30 Those researchers concluded:

We are concerned that racial disparity has increased over time since *Booker*. Perhaps judges, who feel increasingly emancipated from their guidelines restrictions, are improving justice administration by incorporating relevant but previously ignored factors into their sentencing calculus, even if this improvement disadvantages black males as a class. But in a society that sees intentional and unintentional racial bias in many areas of social and economic activity, these trends are a warning sign. It is further distressing that judges disagree about the relative sentences for white and black males because those disagreements cannot be so easily explained by sentencing-relevant factors that vary systematically between black and white males. (The judge-specific effects take random variation into account.) **We take the random effect as strong evidence of disparity in the imposition of sentences for white and black males.**

William Rhodes et al. (Abt Associates), *Federal Sentencing Disparity: 2005–2012*, at 68 (Oct. 22, 2015), <https://www.bjs.gov/content/pub/pdf/fsd0512.pdf> (emphasis added).

31 See 2012 Booker Report, Part D (“Spread of Non-Government Sponsored Below Range Sentences by Circuit and District”).

32 *Gall v. United States*, 552 U.S. 38 (2007); see also *Pepper v. United States*, 562 U.S. 476 (2011).

33 Such a policy existed during the “mandatory” guidelines era. See, e.g., March 13, 1989 “Thornburgh Memorandum,” entitled “Plea Bargaining Under the Sentencing Reform Act,” set forth in 6 Fed. Sent. Rptr. 347 (1994).

34 See, e.g., Pew Research Center, *The Black-White Gap in Incarceration Rates*, <http://www.pewresearch.org/fact-tank/2014/07/18/chart-of-the-week-the-black-white-gap-in-incarceration-rates/> (July 18, 2014).

35 In FY2016, African-American offenders had an average of 6.2 criminal history points, while white offenders had an average of 4.1 criminal history points and Hispanic offenders had an average of 3.4 criminal history points.

36 USSG §4A1.2(c), (d) (2016).

37 See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 Vand. L. Rev. 1055, 1057 (2015); Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313, 1313 (2012).

38 USSG §4A1.1 (2016).

39 That term was coined by R. Barry Ruback & Jonathan Wroblewski. See *The Federal Sentencing Guidelines Psychological and Policy Reasons for Simplification*, 7 Psych. Pub. Pol’y & L. 739, 752-53 (2001).

40 That expression was first used by Frank O. Bowman in *The Failure of the Federal Sentencing System: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319 (2005), which described the history of the former “mandatory” guidelines from 1987 until 2005.

41 Richard A. Epstein, Simple Rules for A Complex World 38 (1995).

42 *Id.* at 38–39.