Sentencing Federal Drug Offenders: Evidence of Judicial Activism

I. Introduction

Policy makers, practitioners, and academics have long brought attention to variations in criminal justice outcomes.¹ A principal focus is on sentencing practices because a perception of inconsistencies in penalties might indicate unfairness in penalty outcomes and an abuse of discretion.² Such concerns are further muddled by America's evolution into a state of mass incarceration in which, critics argue, too many individuals are being sent to prison and for longer-than-necessary periods of time.³

This Article reports on an original empirical study that explores strategic decision-making in criminal penalties. More specifically, the study is of discretionary reductions in the severity of penalties within the federal sentencing system for drug offending. A focus on criminal justice research at the federal level is meaningful. The federal government now operates the single largest criminal justice system by inmate count in the United States.⁴ Indeed, the federal prison system itself is among the top twelve largest by country in the world.⁵ In contemporary times, federal authorities act as a role model in the administration of justice:

[The federal government] provides resources, collects and develops best practices, and serves as the communicator and facilitator of these best practices throughout the country. . . . Because state, local, and tribal governments are limited by the need to devote resources to solving problems unique and endemic to their particular jurisdictions, the [f]ederal government plays [an] explicit role[] in advancing public policy to respond to gathering threats.⁶

The federal criminal justice system is fundamentally a guidelines-based system, ever since its enactment of the Sentencing Reform Act of 1984. The Federal Sentencing Guidelines ("guidelines") at a basic level offer a grid whereby the offense severity and the individual's criminal history determine a recommended range of penalty. Designed to foster more uniformity across federal courts, the guidelines provide a potential exemplar for other jurisdictions hoping for a more structured approach to determining criminal penalties.⁷

An equally important reason to study federal sentencing is found in a recent observation that at least some federal trial judges have instituted a "public campaign for criminal

justice reform" specifically in sentencing outcomes.⁸ Where legislative solutions to important issues such as mass incarceration and overly severe penalties have largely failed to overhaul the system, certain federal judges are calling for the judiciary to "bring about meaningful sentencing reform simply by doing their jobs differently."⁹ At a high level, federal judges may approach their daily tasks from a new angle by reconsidering, even potentially rejecting, the very nature of the guidelines system. As retired federal Judge Mark Bennett opines, the "grid and bear it approach to the Guidelines is incompatible with real judging."¹⁰ On a similar note, another federal judge asserts that the "one-size-fits-all approach to sentencing" set up by the guidelines are only equitable to individuals by coincidence.¹¹

Hence, some view the guidelines system of aggregation—treating purportedly similar cases altogether—as inconsistent with fundamental notions of individualized justice.¹² I have previously labeled this state of affairs McSentencing, pointing out that the federal guidelines system borrows from automated efficiencies perfected by fast-food chains. The system processes defendants through an assembly line of justice machinery that calculates numeric culpability levels to output (purportedly) consistent and uniform results, thereby downplaying individuality and human emotions.¹³

The present study is focused on drug offenders for important reasons. Observers portray the Sentencing Reform Act as having transferred much discretion away from federal judges.¹⁴ "The shift in power incentivized prosecutors to bring many more criminal matters to federal court, where they could get easy convictions by wielding their enhanced adjudicatory power. The most dramatic charging increases were to drug and immigration case-loads."¹⁵ At around the same time in the 1980s, the infamous drug war in America led to "an unprecedented number of arrests, record levels of incarceration, and massive racial disparities."¹⁶ An important reason is that federal law treats drug offenders quite harshly at sentencing.¹⁷ Consequently, "federal drug cases have engendered the greatest policy debate since the inception of the guidelines."¹⁸ Today, federal criminal justice remains preoccupied with drug offenses.¹⁹

Nonetheless, there are signs that the decades-long penchant for increasing the severity of drug sentencing is

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ebbing. Recent drug epidemics have been portrayed more as public health issues than as posing a danger of drug-crazed violence toward innocent civilians.²⁰ There may be a race-based reason for the chill. “Recent analyses suggest that both rhetoric and policy regarding drugs has become kinder and gentler as a result of the whiteness of this latest drug crisis.”²¹ The hype of the violent cocaine user of the 1980s and 1990s has ceded to a crisis with methamphetamine, a drug habit that tends to be viewed more leniently. Some jurists observe that methamphetamine users are more likely white or Hispanic and “often employed in blue collar industrial jobs like meat packing.”²² Correspondingly, the media portrays opiate users more as victims than as violent criminals.²³

The suggestions mentioned earlier are also important in terms of federal judges stepping up to challenge what they perceive as overly punitive punishments for drug offending, which neither Congress nor the Commission has been sufficiently willing to address. Experts “argue that federal judges have a critical role to play in future federal drug law reform in light of Congress’s long-standing failures to meaningfully change the laws. Judges can use their considerable discretion . . . to counteract the unwarranted harshness” of federal drug laws.²⁴ Thus, the present study is meant to explore avenues by which interested judges can try to avoid mandatory or otherwise severe drug sentencing policies in their everyday chores of sentencing individual defendants. Importantly, this study draws on interdisciplinary insights that statutory law or other formal policies are not necessarily indicative of how the law plays in the real world.

[T]he core of much socio-legal scholarship is an understanding of the law as something that is always interpreted, understood, applied, and experienced in multiple, contested and often competing ways. To that end, empirical socio-legal scholarship has moved beyond simply measuring the gap between ‘law-on-the-books’ and ‘law-in-action,’ focusing instead on the translation process between formal law and its implementation in practice.²⁵

Before investigating how federal guidelines are applied in actual cases to reduce federal drug sentences, a brief summary of the federal guidelines system is offered to situate the context of this study.

II. A Quick Primer on Federal Guidelines

The Sentencing Reform Act of 1984 created a presumptive sentencing system managed by the U.S. Sentencing Commission (“Commission”).²⁶ A holistic reform ordered that the Commission develop a determinate system of sentencing guidelines to systematize sentencing outcomes principally by restraining judicial discretion. “Proponents of this package hoped that it would end judge-to-judge and region-to-region disparities, promote candor in sentencing, and provide judges with relative values in sentences.”²⁷

An unforeseen development recast how the guidelines were to operate. In the seminal case of *United States v. Booker* in 2005, the Court found that the system operated in an unconstitutional manner because judges, rather than juries, were the arbiters of facts that increased sentence length.²⁸ Bestowing advisory status was the Supreme Court’s remedial fix to avoid overturning the entire guidelines system.²⁹

The *Booker* fix did not, however, return to the judiciary the wide discretion that existed pre-guidelines. In a series of cases since then, the Supreme Court has reaffirmed that federal judges remain significantly circumscribed by the Commission’s guidelines and policies.³⁰

At their heart, the guidelines provide for a series of calculations in order to determine the defendant’s offense severity level and criminal history score. With these two numbers in hand, the district judge consults a single guidelines grid to obtain the recommended prison sentence.³¹ The grid is not the end of the decision-making process, though. Once the guidelines-recommended penalty for the individual defendant is determined, the judge considers whether any departure provision contained in the guidelines may apply.³² Guidelines-based departures may be downward or upward—that is, they may justify a sentence below or above the recommendation.

Per the statutory framework and guidelines policy, a judge may deviate for reasons not included in the guidelines if “there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines.”³³ Judges may also reject the recommendation for other reasons, including on the basis of a direct policy dispute with a relevant policy.³⁴

The existence of greater discretion afforded by *Booker* has led empirical researchers to study how discretion is used.³⁵ Yet serious gaps exist in the empirical legal studies literature regarding certain sentencing practices. The dual modal approach to sentencing research is to focus on the in/out decision (i.e., whether the penalty requires any time of imprisonment) and sentence length.³⁶ Other types of intermediate sentencing decisions deserve more attention because they may also substantively exacerbate disparities in outcomes while contributing to, or alleviating, mass incarceration.

III. Methods to Mitigate Drug Sentences

The results reported herein follow from a mixed-methods study of federal sentencing. The study uses the fiscal year 2019 data set available from the Commission³⁷ to offer (1) a quantitative component that statistically analyzes numerical data from a large sample of individual sentences and (2) a qualitative component of textual comments that sentencing judges submit when completing a Statement of Reasons form in an individual case. This section reports on the quantitative component, and then Part IV addresses the qualitative context that helps explain the quantitative results and expounds upon them.

Overall, the data set includes a sample of 20,393 sentences for drug possession or trafficking offenses in the federal criminal system in fiscal 2019. The vast majority (97.2%) were trafficking-related offenses. Study findings show that district judges utilized a variety of means to reduce sentences for drug offenders, as outlined below.

A. Below-Guideline Sentences

A suggested judicial reform to alleviate harsh penalties is to “push down on [the] range” produced by guidelines’ computations because the Supreme Court has reiterated that district judges cannot assume that a guidelines-based sentence is reasonable as applied to the individual case.³⁸ Overall, the majority of drug offenders (62.8%) were sentenced below the guideline range.³⁹ Among that majority, 59% of sentences included reductions sponsored by the government, and 41% involved discretionary actions on the part of judges without a prosecutorial motion. Moreover, downward departures led to material savings. The average percent reduction beneath the guideline minimum was 44%, with an actual average reduction of forty-six months (with a standard deviation of forty-one months). These statistics clearly show the significant extent to which federal judges are deviating from the drug guidelines in terms of the proportion of offenders and the degree of reductions.

B. Within-Range Sentences

Even penalties that were compliant with guideline range recommendations tended to be at the lower end of the range: 36% of within-guideline-range cases were precisely set at the guideline minimum number of months, and an additional 28% were in the lower half of the range. In total, three-quarters of within-range drug sentences were at the midpoint of the range or lower.

C. Alternatives

A reform-oriented federal jurist suggests that judges actively reduce prison populations by utilizing alternatives to incarceration.⁴⁰ Here, an analysis of the 2019 data set shows that judges employed alternatives to prison as part of the sentences in a small but robust set of cases. Almost six hundred defendants received less custodial-type sentences in which a portion was not prison time, but comprised some time in community confinement, intermittent confinement, and/or home detention.

D. Fast Track

A fast-track program in a district permits “a federal prosecutor to offer a below-guidelines sentence in exchange for a defendant’s prompt guilty plea and waiver of certain pretrial and post-conviction rights.”⁴¹ The guidelines technically permit a fast-track departure only if the U.S. Attorney General and the U.S. Attorney for the district agree to apply it in the particular judicial district.⁴² In fiscal 2019, 6% of drug offenders received the benefit of fast-track sentencing with lower sentences. No known list of permitted fast-track programs exists, and thus it is not possible

to tell whether all of these fast-track departures were formally permitted, rather than a result of purely discretionary actions.

E. Mitigating Mandatory Minimums

Two out of three drug defendants (67.1%) were subject to a mandatory minimum penalty for at least one count of conviction. Despite the term *mandatory*, there are two main statutory and guidelines-based methods for averting such a minimum penalty: substantial assistance and safety valve.

1. **Substantial Assistance.** The substantial assistance departure permits a judge to avoid an otherwise applicable mandatory minimum if the defendant provides information regarding the criminal investigation of another person.⁴³ This departure, which requires a motion by the prosecutor in the particular case,⁴⁴ is often employed as a plea negotiation tactic.⁴⁵

Overall, regardless of whether a mandatory minimum applied, 22% of drug offenders benefited from prosecutor-approved departures for providing information to investigators. Among the subset for whom a mandatory minimum otherwise applied, one-quarter (25.5%) received a substantial assistance reduction.

2. **Safety Valve.** Another official excuse for varying from a mandatory minimum uses a “safety valve” mechanism. Some background may be helpful. Drug-trafficking offenders with qualifying prior offenses have been subjected to enhanced mandatory penalties.⁴⁶ Yet the tough-on-crime philosophy underlying the war on drugs has appeared to be declining in recent years.⁴⁷ A statutory safety valve allows a court to impose a sentence that avoids an otherwise applicable mandatory minimum if certain criteria are met (e.g., having a minimal criminal history, not being a leader, being nonviolent, and providing information).⁴⁸ In addition, the First Step Act of 2018 expanded the statutory safety valve to permit more drug offenders to be relieved of a mandatory minimum or, if no mandatory minimum applied, to receive a reduction in sentence.⁴⁹

The prosecution is the gatekeeper of the safety valve in terms of confirming whether the defendant provided sufficient cooperation in investigations, though approval rests with the individual sentencing judge.⁵⁰ In conjunction with the statutory safety valve, the guidelines include a reduction in offense levels for those who meet the criteria but may not otherwise have been subject to a mandatory minimum.⁵¹

Among all drug defendants, regardless of mandatory minimums, 34% received some safety valve relief. Within the subset of drug defendants facing a mandatory minimum, 39% (38.7%) received a safety valve benefit.

A defendant could benefit from both substantial assistance and the safety valve. Among those with a mandatory minimum, some drug defendants received only the substantial assistance relief (16.7%), some only the safety valve (29.9%), while a minority enjoyed both types of relief (8.8%).

Table 1: Coded Reason for Sentence

Reason	n
Rehabilitation	1,209
Nonviolent nature	795
Policy disagreement with a guideline	317
Low likelihood of recidivism	213
Influenced by others	107
Defendant unaware of the type or purity of the drug(s) involved	86
General guideline adequacy issue	83
Potential for future rehabilitation	75
Disparity in crack vs. powder policy issue	64
Criminal history due to drug addiction	37

F. Reduced Culpability

Two additional types of guidelines-based mitigating factors were salient: 96% of defendants received a reduction in levels for accepting responsibility for their crimes, and 19% of drug offenders received a reduction in offense levels for their mitigating role in the crime. While the proportion of offenders who received the acceptance of responsibility reduction was comparable between drug offenders and non-drug offenders, the percentage of drug offenders who earned a reduction for having a small role in their offenses was significantly greater than that for non-drug offenders (19.1% vs. 2.3%).

IV. Reasons for Reducing Sentences

Sentencing judges complete a Statement of Reasons form to explain sentences in individual cases.⁵² Judges can check boxes on a standard set of reasons, plus they are invited to incorporate free-form, textual comments to justify their decisions.⁵³ Table 1 provides a selected list of Commission-created codes for departing downward that were checked or textually noted in more than a few cases. Judges can choose more than one of them in any particular case. The following discussion merges the rationales for reducing penalties in Table 1 and the qualitative analyses of free-form explanations given by judges because there are (more or less) obvious connections between them.

A. The Sentencing Theory of Rehabilitation

Judges cited rehabilitative projections in issuing lesser sentences in ~1,300 cases, using two coded reasons that appear related: “rehabilitation” and “potential for future rehabilitation.” Another reason commonly given that appears consistent with the reformation potential of drug offenders referenced a low likelihood of recidivism, cited in over two hundred cases.

B. Policy Disagreements

In their reasons for departing downward, judges cited a policy disagreement with the guidelines in over three hundred cases. This sentiment is rather generic, and various policies within the drug guidelines are controversial. Additional evidence highlights a few of the likely types of policies to which this general rationale may apply. For one,

opposing harsh sentences for nonviolent drug offenders was noted in hundreds of cases. A representative textual comment indicated that the “court has a disagreement with the guidelines for nonviolent drug offense[s] and finds them excessive.”

Drug sentences are primarily based on a combination of drug quantity and drug type,⁵⁴ which can drive sentences higher than mandatory minimums.⁵⁵ A long-standing policy disagreement began when the guidelines harbored a 100:1 crack-to-powder disparity in the drug quantity ratio, meaning that sentences for crack were disproportionately higher than an equivalent weight of powder cocaine.⁵⁶ The Supreme Court in *Kimbrough v. United States* ruled that judges could disagree with the Commission’s policy on such a ratio for crack versus powder cocaine and thus deviate from that policy as a result.⁵⁷ Bowing to this controversy, the Commission has since substituted an 18:1 crack versus powder ratio.⁵⁸ Nonetheless, the crack/powder imbalance still appears to present an issue to judges in 2019, as it was specifically employed as a rationale to reduce sentences in sixty-four cases.

A more current controversy concerns downward deviations based on a policy disagreement with the ratios in methamphetamine sentencing,⁵⁹ such as the First Circuit highlighted in *United States v. Bean*.⁶⁰ The Commission recognizes three forms of the drug according to their level of concentration: *ice*, which is the purer and presumptively more predictive form; *actual methamphetamine*, as determined by the weight of the controlled substance present in a mixture or substance; and *methamphetamine mixture*, which refers to the usable mixture or substance that includes the controlled substance.⁶¹ A 10:1 ratio of drug quantity in sentencing exists between methamphetamine mixture on one hand and ice and actual methamphetamine on the other.⁶²

Textual comments suggest significant policy disputes with methamphetamine sentences. Judges cited at least twenty-five times their belief that the methamphetamine guidelines were not based on empirical evidence, while two comments relatedly portrayed the methamphetamine guidelines as arbitrary in nature. In about fifteen cases, courts more specifically rejected the ratio between methamphetamine mixture versus ice and actual methamphetamine.

Relatedly, several courts noted the unfairness of penalty severity due to issues related to the purity of the methamphetamine involved. For instance, one court claimed: “Distinction in guideline sentences over pure methamphetamine has . . . led to substantial and unwarranted disparities in sentencing based on whether the methamphetamine was lab tested.” In another case, the “Court applied a downward variance because the purity of the Meth created undue punishment for the quantity of drugs involved in the offense.” Two other comments recognize that times change, in that “establishing offense levels based on the purity of methamphetamine may be an outdated process,” and opine that the relevant guidelines’

emphasis on weight is contrary to a “[c]hange in circumstances concerning methamphetamine and access to large quantities of the drug.”

Rationales contained broader concerns that the guidelines may rely upon misleading proxies if the individual is unaware of the quantity, purity, or type(s) of drugs they may be trafficking.⁶³ Various courts expounded upon certain issues that convinced them to reduce sentences accordingly. In one example, the judge expressed discomfort with focusing on the purity of the drug, as it did not necessarily reflect the defendant’s role in the chain of events.

In their daily job of sentencing, many federal judges appeared to engage in reform mindedness in other ways. Judges cited some generic disagreement with the adequacy of guidelines in eighty-three cases. It is not clear what such disagreements may mean at a higher level, but other evidence is suggestive. As an illustration, critics fear that after the First Step Act, the potential *second* step will stall if judges do not proactively register their dissatisfaction with harsh drug laws to effectuate reform and reduce mass incarceration.⁶⁴ Indeed, some judges in this sample expressed a desire to promote congressional intent toward reform as presented by the First Step Act by lightening sentences for drug offenders. Exemplary of this sentiment was a note that the given reduced sentence was meant to “[p]romote public policy behind FIRST STEP Act [to] account for disparity between [guidelines].”

C. Individual Circumstances

As a general rule, observers have asserted that the federal judicial system lacks “empathy, understanding others, compassion, and humility.”⁶⁵ In these drug cases, though, judges at times showed sensitivity for the individual defendant’s plight. Textual notations variously commented upon the defendant’s “challenging,” “difficult,” or “troubled” background. Several courts mentioned some type of personal or family “tragedy” or “extreme circumstances” that plagued the individual’s life and helped explain their drug crimes. Similarly, the defendant’s history of trauma was alluded to in discussing downward departures in seven instances.

Another category of rationale for reduced sentences involved sentiments about reduced culpability. Judges in 107 cases cited the defendants’ being influenced by others in committing their drug offense(s).

Perhaps the most salient comments were those that more definitively summarized how a defendant seemingly found her/himself in a circumstance in which, it was implied, a full awareness of what they were becoming involved in was lacking. In some cases, individuals were portrayed as opportunistic yet naive. For example, a judge referred to one defendant as an “18 year old smuggling drugs to pay for college” and another as dealing because he had “incurred debt and [was] unable to afford [his] education.” In a third case, a downward departure was rationalized because “Defendant opportunistically

supplemented his income by selling some of his own surplus pills.”

Additionally, some judges perceived individuals as less culpable because of what one characterized as a defendant’s “[l]ack of knowledge of offense details.” As a further example, the court in one case accepted that the defendant “thought [he was] smuggling money” rather than drugs. In another, the reason was “timing of knowledge,” in that the defendant was “told at [the] last minute that the car had drugs and he did not have time for reflection but continued to drive car.” In a similar vein, the court wrote that the defendant “was recruited through [F]acebook to drive cars from [Mexico] to car lots in US. After accepting job learned cars would be loaded with drugs. Threatened when tried to withdraw.”

D. Third-Party Influences

Finally, it seems appropriate, in an article focused on judicial efforts to reduce sentences (at least for drug offenders), to acknowledge other players in the mix. A few courts cited discomfort with a form of sentencing entrapment in which undercover agents controlled the amount and purity of drug in the transaction, as in what one judge dubbed a reverse sting operation. The fact that weight and purity are the principal methods for determining the punitiveness of the drug guidelines can result in unfairness. A judge justified a below-range sentence by noting: “Guidelines [are] driven by amount and quality of drug. Undercover agent had control over amount of drug he wanted to buy.” Similarly, judges departed because the “quantity [was] driven by undercover law enforcement agents” and concern with the “role of gov agents in orchestrating the charged offense conduct that did not transpire.” A further illustration was that the “[o]ffense was conducted on one occasion despite attempts from government for further drug sales.”

One last quote, from a textual comment explaining a downward departure for a drug defendant, is remarkable for another reason: “The court stated that the variance is based on defense counsel doing a good job litigating on behalf of the [defendant].” This sentiment summarily encapsulates the idea that the guidelines may be meant to guide and to offer a purportedly reasonable sentence in the average case, yet sentencing at heart remains an endeavor in which the individual defendant has rights to representation and, in the end, to a fair sentence.

V. Conclusions

Even in a regime designed to constrain discretion, actors who are intent on reform can find ways to manage the system to achieve their ends. This study provides evidence of judicially crafted reforms through daily sentencing practices at the individual level. The sample consisted of drug offenders, which further emphasizes the consequences of reform-oriented practices, considering that this population comprises a significant percentage of federal cases and is the focus of much concern about overincarceration and unnecessarily harsh penalties. The strength in

this progressive stance is also experienced at the collective level, in the sheer volume of sentences falling below minimum recommendations. These results highlight that the law as applied in the field may be explained by ideological differences with the law on the books.

Notes

- * JD, The University of Texas School of Law; PhD, The University of Texas at Austin (criminal justice). The U.S. Sentencing Commission is lauded for making available the data set used in the study reported herein.
- ¹ Michael Tonry, *Sentencing Matters* 4 (1996).
- ² Cassia Spohn, *Twentieth-Century Sentencing Reform Movement: Looking Backward, Moving Forward*, 13 *Criminology & Pub. Pol'y* 535, 537 (2014).
- ³ Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 *UKMC L. Rev.* 113, 113–14 (2018).
- ⁴ Nathan James, Cong. Res. Serv., R42937, *The Federal Prison Population Buildup: Options for Congress* 1 (2016).
- ⁵ See Fed. Bur. Prisons, *Population Statistics*, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited May 1, 2021) (reporting 152,124 prisoners in federal custody); Roy Walmsley, *World Prison Brief* (12th ed. 2018), http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf.
- ⁶ Nat'l Crim. Just. Ass'n, *The Federal Government's Role in Justice Administration* 3 (2005), <http://www.ncja.org/issues-and-legislation/role-federal-govt-administration-justice/role-federal-govt-administration>.
- ⁷ Rhys Hester, *Sentencing in US American Jurisdictions*, in *Sentencing: Anglo-American and German Insights* 151, 151 (Kai Ambos ed. 2020).
- ⁸ Jessica A. Roth, *The "New" District Court Activism in Criminal Justice Reform*, 72 *N.Y.U. Ann. Surv. Am. L.* 187, 189 (2018).
- ⁹ Stefan R. Underhill, *Everyday Sentencing Reform*, 87 *UMKC L. Rev.* 159, 159 (2018).
- ¹⁰ Mark W. Bennett, *A Judge's Attempt at Sentencing Inconsistency After Booker: Judge (Ret.) Mark W. Bennett's Guidelines for Sentencing*, 41 *Cardozo L. Rev.* 243, 261 (2019).
- ¹¹ Underhill, *supra* note 9.
- ¹² Bennett, *supra* note 10, at 266.
- ¹³ See generally Melissa Hamilton, *McSentencing: Mass Federal Sentencing and the Law of Unintended Consequences*, 35 *Cardozo L. Rev.* 2199 (2014).
- ¹⁴ Mona Lynch, *Booker Circumvention? Adjudication Strategies in the Advisory Sentencing Guidelines Era*, 43 *NYU Rev. L. Soc. Change* 59, 64 (2019).
- ¹⁵ *Id.*
- ¹⁶ Katherine Beckett & Marco Brydolf-Horwitz, *A Kinder, Gentler Drug War? Race, Drugs, and Punishment in 21st Century America*, 22 *Punishment & Society* 509, 510 (2020).
- ¹⁷ Erica Zunkel & Alison Siegler, *The Federal Judiciary's Role in Drug Law Reform in an Era of Congressional Dysfunction*, 18 *Ohio St. J. Crim. L.* 283, 285 (2020).
- ¹⁸ Lynch, *supra* note 14, at 74 n.84.
- ¹⁹ Zunkel & Siegler, *supra* note 17, at 284.
- ²⁰ Alexander Testa & Jacqueline G. Lee, *Trends in Sentencing of Federal Drug Offenders: Findings From U.S. District Courts 2002–2017*, 51 *J. Drug Issues* 84, 85–86 (2021).
- ²¹ Beckett & Brydolf-Horwitz, *supra* note 16, at 511.
- ²² Mark W. Bennett, *Addicted to Incarceration: A Federal Judge Reveals Shocking Truths About Federal Sentencing and Fleeting Hopes for Reform*, 87 *UMKC L. Rev.* 1, 2 (2018).
- ²³ Beckett & Brydolf-Horwitz, *supra* note 16, at 511.
- ²⁴ Zunkel & Siegler, *supra* note 17, at 288.
- ²⁵ Lynch, *supra* note 14, at 68 (citations omitted).
- ²⁶ Sentencing Reform Act of 1984, Pub. L. No. 98–473, §§ 211–300, 98 Stat. 1837, 1987–2040.
- ²⁷ Frank H. Easterbrook, *Introduction*, 26 *Am. Crim. L. Rev.* 1813, 1813 (1989).
- ²⁸ The Court ruled that such judicial factfinding violated the Sixth Amendment. 543 U.S. 220, 245 (2005).
- ²⁹ 543 U.S. at 249.
- ³⁰ *Peugh v. United States*, 186 L. Ed. 2d 84, 95 (2013).
- ³¹ U.S. Sentencing Guideline Manual ch. 5 pt. A, sent'g tbl. (2015).
- ³² *Id.* at § 1B1.1(b).
- ³³ 18 U.S.C. § 3553(b) (2000); U.S. Sentencing Guideline Manual § 5K2.0 (2015).
- ³⁴ *Kimbrough v. United States*, 552 U.S. 85, 108–11 (2007).
- ³⁵ William Rhodes et al., *Federal Sentencing Disparity: 2005–2012*, at *6 (2015).
- ³⁶ Travis W. Franklin et al., *Extralegal Disparity in the Application of Intermediate Sanctions: An Analysis of U.S. District Courts*, 63 *Crime & Delinq.* 839, 840 (2017).
- ³⁷ U.S. Sentencing Comm'n, *Individual Offender Datafiles, Fiscal Year 2019* (2020), <https://www.ussc.gov/sites/default/files/zip/opafy20nid.zip>.
- ³⁸ Underhill, *supra* note 9, at 168.
- ³⁹ Less than 2% represented upward departures from guideline ranges.
- ⁴⁰ Underhill, *supra* note 9, at 169.
- ⁴¹ Thomas E. Gorman, *A History of Fast-Track Sentencing*, 21 *Fed. Sent'g Rep.* 311, 311 (2009).
- ⁴² U.S. Sentencing Comm'n, *2018 Guideline Manual* § 5K3.1 (2018).
- ⁴³ 18 U.S.C. § 3553(e).
- ⁴⁴ U.S. Sentencing Comm'n, *Sentencing Guideline Manual* § 5K1.1 (2018).
- ⁴⁵ Lynch, *supra* note 14, at 88 (citations omitted).
- ⁴⁶ See generally U.S. Sentencing Comm'n, *Mandatory Minimum Penalties for Drug Offences in the Federal Criminal Justice System* (2017).
- ⁴⁷ Testa & Lee, *supra* note 20, at 85.
- ⁴⁸ 18 U.S.C. § 3553(f).
- ⁴⁹ Pub. L. No. 115–391, § 402, 132 Stat. 5221 (2018).
- ⁵⁰ Sarah E. Ryan, *Judicial Authority Under the First Step Act: What Congress Conferred Through Section 404*, 52 *Loyola U. Chi. L. J.* 67, 77 (2020).
- ⁵¹ U.S. Sentencing Comm'n, *Sentencing Guideline Manual* §§ 2D1.1, 2D1.1, 5C1.2 (2018).
- ⁵² U.S. Sentencing Comm'n, *Federal Sentencing: The Basics* 11–12 (2020).
- ⁵³ Jelani Jefferson Exum, *The Evolution of the Statement of Reasons Form*, 28 *Fed. Sent'g Rep.* 169, 171 (2016).
- ⁵⁴ Bennett, *supra* note 22, at 4.
- ⁵⁵ Zunkel & Siegler, *supra* note 17, at 286.
- ⁵⁶ Quincy H. Ferrill, *Forgotten by the Fair Sentencing Act and the First Step Act: Federal Methamphetamine Sentencing Reform*, SSRN (May 9, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623531.
- ⁵⁷ *Kimbrough v. United States*, 552 U.S. 85 (2017).
- ⁵⁸ *Fair Sentencing Act of 2010*, Pub. L. No. 111–220, 124 Stat. 2372; Bennett, *supra* note 22, at 2.
- ⁵⁹ Ferrill, *supra* note 56.
- ⁶⁰ *United States v. Bean*, 371 F. Supp. 3d 46 (D. N.H. 2019).
- ⁶¹ Ferrill, *supra* note 56.
- ⁶² U.S. Sentencing Guidelines Manual, § 2D1.1(c) (2018).
- ⁶³ Bennett, *supra* note 22, at 4.
- ⁶⁴ Zunkel & Siegler, *supra* note 17, at 313.
- ⁶⁵ Nora V. Demleitner, *Reforming Federal Sentencing: A Call for Equality-Infused Menschlichkeit*, 26 *Wash. & Lee J. Civ. Rts. & Soc. Just.* xi, xxx (2020).