Social Science At Sentencing:
A Survey of Federal Sentencing Decisions, 2005-2017

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The Sentencing Commission was established to formulate and advance national sentencing standards based on empirical data and evolving historical experience. But the Commission has no monopoly on expertise, and indeed, in some cases, the Guidelines are driven not by empirics at all but by blunt Congressional mandate – finding grim expression in the six-fold increase in the federal prison population since the Commission was established. Moreover, post-*Booker*, the Guidelines are but one factor in the sentencing analysis and there is a wealth of research from academia and non-profit organizations that can illuminate the sentencing factors under 18 U.S.C. §3553. Across the country, judges are embracing this research to help them formulate sentences that satisfy the competing demands of punishment, deterrence, incapacitation and rehabilitation. This memo is the beginning of a project to collate excerpts from sentencing decisions that rely on social science research to support departures and variances below the applicable guideline ranges, providing advocates with material for their sentencing memoranda, and hopefully, inspiring them to search for more and better data to justify lenient sentences, with an emphasis on alternatives to incarceration.[1]

Contents:

[1] Prepared for the 26th FBA/NACDL/ABA Annual National Seminar on Federal Sentencing, St. Petersburg, Florida. Please email murrayj@umn.edu with suggestions of additional cases.

1. Purposes of Sentencing

- ***United States v. Walker***, 2017 WL 2198194 (D. Utah May 18, 2017) (Waddoups, J.) (varying to 10 years probation from guideline range of 151 to 188 months; contains lengthy discussion of data on general and specific deterrence).

Studies reviewed by the Office of Justice Programs at the National Institute of Justice (NIJ) concluded that prisons can exacerbate, not reduce, recidivism:

> [C]ompared to non-custodial sanctions, incarceration has a null or mildly criminogenic impact on future criminal involvement. We caution that this assessment is not sufficiently firm to guide policy, with the exception that it calls into question wild claims that imprisonment has strong specific deterrent effects.

Office of Justice Programs, National Institute of Justice, *Five Things About Deterrence*, United States Department of Justice (May 2016), https://nij.gov/five-things/pages/deterrence.aspx [hereinafter NIJ, *Five Things*] (quoting Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Johnson, *Imprisonment and Reoffending, Crime and Justice: A Review of Research*, vol. 38, (2009)).9 The NIJ also notes that age is a powerful factor in deterring crime and that criminals naturally age out of crime. Id. (citing Robert J. Sampson, John H. Laub, and E.P. Eggleston, *On the Robustness and Validity of Groups*, 20 Journal of Quantitative Criminology 1, 37–42 (2004)). The Sentencing Commission's research shows that the two factors most closely associated with recidivism rates (criminal history and age) point in opposite directions here: the higher the offender's criminal history points and criminal history category, the higher the rate of recidivism (80.1% rearrest rate for category VI offenders); meanwhile, the older the age of the offender, the lower his or her recidivism rate (24.7% rearrest rate for individuals age 51–60 years). *See* U.S.S.C., *Recidivism Among Federal Offenders: A Comprehensive Overview*, Parts II & IV (March 2016), http://www.ussc.gov/research/research-reports/recidivism-among-federal-offenders-comprehensive-overview. . .

The NIJ, culling from Professor Nagin's 2013 article summarizing the current state of theory and empirical knowledge about deterrence, states that sending a convicted individual to prison is not a very effective way to deter crime and that increasing the severity of punishment does little to deter crime. *See* NIJ, *Five Things*. Nagin states the conclusion more precisely: is it the "certainty of apprehension and not the severity of the legal consequence ensuing from apprehension" that is a more effective deterrent. Daniel S. Nagin, *Deterrence in the Twenty–First Century, Crime and Justice in America: 1975–2025*, at 202 (2013) . . .

Most of the public is unaware of how harsh federal sentences can be, which suggests that the incremental severity of sentence does not act as an effective general deterrent. *See* Nagin, *Deterrence* at 204 ("Not surprisingly, the surveys find that knowledge of sanction regimes is poor. ... [F]or individuals for whom sanction threats might affect their behavior, it is preposterous to assume that their perceptions conform to the realities of the legally available sanction options and their administration."). According to Nagin, the more effective general deterrence comes from better visibility of policing, which increases certainty of punishment, rather than increasing the severity of punishment on the back end. *See id*.at 201, 252–53.

- ***United States v. Nolf***, 30 F.Supp.3d 1200 (D.N.M. 2017) (Browning, J.) (departing to 60 months in career offender case based on substantial assistance and rough childhood, and citing at length defendant's brief containing research on deterrence, etc.)

  Nolf analyzes four sentencing factors: (i) incapacitation, asserting that while true criminal history category VI offenders have a recidivism rate of 55% within two years of their release, career offenders based on drug offenses have only a 27% rate, which " 'more closely resembles the rates for offenders in lower criminal history categories in which they would be placed under the normal criminal history scoring rules,' " First Nolf Brief at 10 (quoting U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* at 133–34 (2004)); (ii) deterrence, asserting that "empirical research on general deterrence shows that while certainty of punishment has a deterrent effect, 'increases in severity of punishments do not yield significant (if any) marginal deterrent effects,' " First Nolf Brief at 11 (quoting Michael Tonry, *Purposes and Functions of Sentencing* 34 Crime and Justice: A Review of Research 28–29 (2006)); (iii) just deserts and respect for the law, positing that, "[a]ccording to a public opinion survey conducted on behalf of the Commission in 1997, there was little support for sentences consistent with most habitual offender legislation," First Nolf Brief at 13; and (iv) avoidance of unwarranted sentencing disparities, arguing that the career offender guideline leads to both unwarranted disparity, but also unwarranted uniformity, i.e., "the career offender guideline 'makes no distinction between defendants convicted of the same offenses, either as to the seriousness of their instant offense or their previous convictions," First Nolf Brief at 13.

- ***United States v. Courtney***, 76 F.Supp.3d 1267 (D.N.M. 2014) (Browning, J.) (varying to 24 months in fraud case from guideline range of 57 to 71 months)

  The weight of the research indicates that incarceration—imposing it at all or increasing the amount imposed—either has no significant correlation to recidivism or increases the defendant's likelihood to recidivate. *See*, *e.g.*, Lin Song & Roxanne Lieb, *Recidivism: The Effect of Incarceration and Length of*

Time Served 4–6, Wash. St. Inst. for Pub. Pol'y (Sept.1993), available at http://wsipp. wa.gov/ReportFile/1152/Wsipp_Recidivism–The–Effect–of–Incarceration–and–Length–of–Time–Served_Full–Report.pdf (summarizing available studies on the correlation between incarceration and recidivism); T. Bartell & L.T. Winfree, *Recidivist Impacts of Differential Sentencing Practices for Burglary Offenders*, 15 Criminology 387 (1977)(outlining the results of a New Mexico-based study and concluding that offenders placed on probation were less likely to be reconvicted than similarly situated offenders who were incarcerated) [and additional cites in the case itself] . . .This trend obtains even for white-collar criminals. *See* David Weisburd *et al*., *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology 587 (1995). Thus, specific deterrence is a suspect ground for increasing incarceration, except insofar as the offender will be prevented—though not "deterred" in the usual sense—from committing additional crimes while in custody for the longer time period . . .

An avalanche of criminological studies have determined that this theoretical symmetry between severity of punishment and certainty of detection does not exist in the real world. *See* Isaac Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. Pol. Econ. 521, 544–47 (1973)(finding that the certainty of punishment was a more important indicator than severity in deterring murder, rape, and robbery); Harold G. Grasmick & George J. Bryjak, *The Deterrent Effect of Perceived Severity of Punishment*, 59 Soc. Forces 471, 472 (1980)(reviewing twelve deterrence studies and explaining that "nearly all these researchers conclude that perceived certainty of legal sanctions is a deterrent, [while] only one (Kraut) concludes that perceptions of the severity of punishment are part of the social control process") [and many more in the case itself].

- ***United States v. Young***, 960 F. Supp. 2d 881 (N.D. Iowa 2013) (Bennett, J.) (district court judge analyzed empirical data provided to him by Sentencing Commission at his request, demonstrating "jaw-dropping" nationwide disparities in use of recidivist enhancement; granted downward variance and 5K departure to 24 months)

  The grim state of affairs for § 851 enhancements prior to the national policy established by the Holder 2013 Memo is starkly revealed by an examination of the Commission's § 851 data on the one occasion that it collected such information. Every year, pursuant to its statutory mandate, the Commission publishes national data collected from federal sentencings spanning all ninety-four districts.17 In 2011, the Commission conducted the first and only, additional targeted coding and analysis project on nationwide application of 21 U.S.C. § 851 recidivist enhancements as part of the REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Commission's 2011 REPORT). Ninety-three of the ninety-four districts reported data, and the Commission described

in detail its methodology for its targeted § 851 study.18 The Commission's 2011 REPORT itself notes, "[This] study of drug offenses and mandatory minimum penalties demonstrates a lack of uniformity in application of the enhanced mandatory minimum penalties." Commission's 2011 REPORT at 253.

Because the Commission's 2011 REPORT does not contain the raw data used for the § 851 analysis, I requested it directly from the Commission, and the Commission quickly responded by sending me the "851 datafile," which is contained in Appendix F. I then re-analyzed and reformatted the raw data in several significant ways that go far beyond the Commission's analysis. These data are presented in a variety of charts and graphs included in the text and appendices of this opinion.19 All of the statistics used in the empirical analysis sections of this opinion (B–E) and in the appendices are drawn exclusively from the Commission's "851 datafile."20 Sections B and C compare the application of § 851 enhancements in the N.D. of Iowa to national statistics and the Eighth Circuit respectively. Section D examines disparity that can be found within circuits, and Section E shows a lack of uniformity even in multi-district states. All statistics in the text of the opinion are rounded to whole numbers, and figures in the footnotes and appendices are calculated to two decimal places.

- ***United States v. Bannister***, 786 F.Supp.2d 617 (E.D.N.Y. 2011) (Weinstein, J.) (blockbuster 67-page decision addressing a wealth of social science literature analyzing court's obligation to impose what it viewed as excessively harsh mandatory minimum sentences)

  A purpose of imprisonment is to deter people generally from engaging in crime. Another form of deterrence directed to this particular criminal who has violated the law—specific deterrence—is designed to prevent recidivism.

  Compelling arguments have been made that the deterrent value of a sentence is highest when the chances of its being administered are high and the offender is able to rationally consider the consequences of his or her actions. It appears to be primarily in the certainty of punishment, not its severity, that deterrent power lies. See Steven N. Durlauf & Daniel S. Negin, *Imprisonment and Crime: Can Both be Reduced?*, 10 Criminology & Pub. Pol'y 13, 37 (2011); Wright, supra, 1–2, 4–5.

  General deterrence depends on potential offenders' rational assessment of the likely costs and benefits of crime. Shawn D. Bushway & Peter Reuter, *Deterrence, Economics, and the Context of Drug Markets*, 10 Criminology & Pub. Pol'y 183, 184 (2011). That the defendants in this case were rationally capable of making accurate cost-benefit assessments when they were young, before embarking on crime, seems doubtful.

Deterrent power of either type is reduced when potential offenders' reasoning ability is impaired due to alcohol or drug use. *See* Wright, *supra*, at 2. It may be similarly affected among young people due to the natural rate of brain development. *See* B.J. Casey et al., *The Adolescent Brain*, 28 Developmental Rev. 62, 64 (2008) ("A cornerstone of cognitive development is the ability to suppress inappropriate thoughts and actions in favor of goal-directed ones, especially in the presence of compelling incentives."); *United States v. C.R.*, No. 09–CR–155, draft op., at 375 (E.D.N.Y. Mar. 10, 2011) (collecting sources).

General deterrence particularly may be impaired when the perceived injustice of punishment damages the credibility of the justice system.

> [Studies suggest] that knowledge of systematic injustice produced by the criminal justice system ... can have a range of deleterious effects on people's attitudes and behavior. People are less likely to comply with laws they perceive to be unjust. They may also be less likely to comply with the law in general when they perceive the criminal justice system to cause injustice.... [In contrast,] if the criminal justice system reflects ordinary perceptions of justice, it can take advantage of a range of psychological mechanisms that increase assistance, compliance, and deference.

Paul H. Robinson, et al., *The Disutility of Injustice*, 85 N.Y.U. L. Rev. 1940, 2016 (2010) . . .

There is little evidence, however, that incapacitating the members of the modest-sized drug organization described in the instant case will cause a net decrease in crime. The sentences in this case will not suppress the demand for crack and heroin, nor are they likely to work any meaningful effect on the price or supply of drugs sold by other organizations near Louis Armstrong Houses. *See* Bushway & Reuter, *supra*, at 190 (reporting that the inflation-adjusted prices of cocaine and heroin in the United States have declined or remained relatively constant since the 1980s, while incarceration of drug offenders has increased dramatically). In this respect, the mandatory minimum sentences at issue here have failed in their apparent intention of depleting the pool of cheap, unskilled criminal labor on which the drug trade relies. Mark Osler, *What Would It Look Like if we Cared about Narcotics Trafficking?: An Argument to Attack Narcotics Capital Rather than Labor* 3 (unpublished manuscript) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1800370& (last visited Apr. 4, 2011). There is no shortage of would-be players, veteran criminals, and directionless young people to replace the incarcerated defendants as managers, enforcers, and dealers in the drug trade. See id. at 5 (stating that incarceration attempts "to shut [drug networks] down by taking away something they can easily replace.").

- ***United States v. Haynes***, 557 F.Supp.2d 200 (D. Mass 2008) (Gertner, J.) (imposing sentence of 13 months on low-level cocaine distributor in a public housing project, where recommended sentencing range was 27-33 months under Sentencing Guidelines, in light of defendant's life history, including his relationship with his children, and minor role he played in conduct targeted in extensive drug operation sweep).

  It is clear that punishment plays an important role in deterring crime, but the nature of that relationship is not so clear cut. There is a significant downside to what has been called the American experiment in mass incarceration. Large numbers of people reenter communities that have little or no ability to absorb them, resulting in a constant shuffling and reshuffling of neighborhood residents. And while prisoners are obviously not committing crime in their communities while they are incarcerated, they also are not functioning as parents, workers, consumers, or neighbors.12 The deterrence message itself may be equivocal: "The effect on these communities is compounded by the fact that imprisonment has become an almost inevitable aspect of the experience of growing up as a black male in the U.S." Marc Mauer, *Lessons of the "Get Tough" Movement in the United States* 6 (2004).

  While public safety certainly calls for the incapacitation of some, there is another side to the equation, which, after *United States v. Booker*, 543 U.S. 220 (2005), may finally be given the serious consideration it deserves. The facts presented by Haynes' case force the Court to confront the inescapable fact that disadvantaged communities like Bromley–Heath are injured both by crime and by the subsequent mass incarceration of their young men. *See* Donald Braman, *Criminal Law and the Pursuit of Equality*, 84 Tex. L. Rev. 2097, 2114–17 (2006). Compare Randall Kennedy, Race, Crime, and the Law 373–76 (1997), with Todd R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (2007). Courts may no longer ignore the possibility that the mass incarceration of nonviolent drug offenders has disrupted families and communities and undermined their ability to self-regulate, without necessarily deterring the next generation of young men from committing the same crimes . . .

  The sentencing literature has only recently begun to address whether or not mass incarceration works; what the impact on communities is when large numbers of young men of a certain age are imprisoned; and what the impact is on families and on children. *See*, *e.g.*, Travis, supra note 12. However, there is growing evidence that the coerced removal of residents from poor and disadvantaged neighborhoods—even of those thought to be involved in criminal activity—may, in some cases, undermine a community's ability to self-regulate and exercise informal social control over crime by further disrupting the creation of social and familial bonds. *See* Todd R. Clear, *The Problem With "Addition by Subtraction": The Prison–Crime Relationship in*

Low–Income Communities, in Invisible Punishment: The Collateral Consequences of Mass Imprisonment 181 (Marc Mauer & Meda Chesney–Lind eds., 2002); Todd R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (2007). To be sure, these concerns should not lead to wholesale leniency, no matter the facts. Rather, they suggest that courts should tread extremely cautiously when deciding whether and how long to incarcerate nonviolent drug offenders.

- ***United States v. Adelson***, 441 F.Supp.2d 506 (S.D.N.Y. 2006) (Rakoff, J.) (departing to 42 months in fraud case where guidelines were life and government asked for 15 to 30 years in prison).

  As for prison time, the Court concluded that, notwithstanding all the mitigating factors outlined above, meaningful prison time was necessary to achieve retribution and general deterrence. But as to the latter, there is a considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective "white collar" offenders. *See*, *e.g.*, Richard Frase, *Punishment Purposes*, 58 Stanford L.Rev. 67, 80 (2005); Elizabeth Szockyj, *Imprisoning White Collar Criminals*?, 23 S. Ill. U. L.J. 485, 492 (1998). Cf. United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* 56 (2004) (noting that the Sentencing Guidelines were written, in part, to "ensure a short but definite period of confinement for a larger proportion of these 'white collar' cases, both to ensure proportionate punishment and to achieve deterrence") (emphasis supplied); transcript of sentence, *U.S. v. Saad*, 1/17/06, at 33 (similar remarks of Government prosecutor at time of Dr. Saad's sentence).

2. <u>Non-Custodial Sentences</u>

- ***United States v. Dokmeci***, 2016 WL 915185 (E.D.N.Y. March 9, 2016) (Gleeson, J.) (memorandum in support of diversion and probationary sentence for two drug offenders, respectively, following their successful completion of a court-supervised drug treatment program)

  One of the inspirations for our alternative to incarceration programs was "sentencing reforms in the states, which have turned to drug courts to help cope with the rising tide of drug offenders in their criminal justice systems over the last few decades."32 DOJ has long been supportive of state drug courts. And data from those programs prove they work. There are more than 2,700 drug courts in the states that serve over 136,000 people.33 Nationwide, 75% of drug court graduates do not get rearrested for at least two years after completing their program.34 Drug courts reduce crime as much as 45% more than other sentencing options for those eligible for the programs.35 A Department of Justice study shows that "drug court participants reported 25 percent less criminal activity and had 16 percent fewer arrests than comparable offenders not enrolled in drug courts."36 Moreover, 26% fewer

drug court participants report drug use, and they are 37% less likely to test positive for illicit substances.37 Drug courts in the states also save money—as much as $3,000 to $13,000 per participant.38 Perhaps most importantly, the judge-involved treatment programs work to combat addiction. When not accompanied by judge supervision, approximately 70% of substance-abusing offenders drop out of treatment early.39 Drug courts have been shown to be six times more likely to keep offenders in treatment for longer, which matters immensely in the recovery process.40

Our POP and SOS programs have been successful. As shown in Table 1, 39 defendants (out of a total of 74) have now completed their participation. Of those, 28 (71.8%) were successful. All but two of the 28 successful participants (92.9%) received sentences that did not include incarceration. Those results alone compel the conclusion that the programs have achieved their initial goal, that is, they are providing sensible alternatives to the incarceration reflex that has afflicted our federal system for too long.

- ***United States v. Leitch***, 2013 WL 753445 ((E.D.N.Y. February 28, 2013) (Gleeson, J.) (statement of reasons for accepting diversionary disposition for low–level drug offender who completed a court-supervised drug treatment program)

  The case mix in federal courts is certainly different than that in state courts. But anyone who believes that the federal system deals only with "the most serious drug and violent" offenders isn't familiar with the federal criminal docket. The make-up of the federal prison population bears this out. In 2011 only 7.6% of federal prisoners were incarcerated for violent crimes.56 The bulk of the federal prison population is made up of drug offenders; in 2011, about half of all federal prisoners were incarcerated for drug offenses.57 And they are mainly nonviolent, low-level offenders. In 2011 roughly 84% of drug defendants had no weapon involved in the offense,58 and more than half of drug defendants (53%) had a criminal history category of I, signifying a minor or no criminal history.59 And only 6% of drug defendants could be classified as managers or leaders, i.e. individuals occupying the highest rungs of a drug enterprise.60

  The incidence of substance abuse is high among the federal prison population. According to a 2004 DOJ report, roughly 63% of all federal prisoners identified as regular drug users and 45% met the criteria for drug dependence or abuse.61 About 19% of all federal prisoners committed their offense to support their drug habit.62 Among drug offenders, about 52% met the criteria for drug abuse or dependence, 57% reported drug use in the month before the offense, and 32% reported drug use at the time of the offense.63 About 25% of drug offenders committed their offense to support their drug habit.64 . . .

Finally, it bears emphasis that when a judge chooses between a prison term and probation, she is not choosing between punishment and no punishment. Probation is less severe than a prison term, but both are punishment. . .

In addition to standard and special conditions, there is an array of alternative sanctions—home confinement, community service, and fines, for example—that allow judges to impose enhanced (and sometimes even constructive) punishment without sending the defendant to prison.74

> Fn 74: MICHAEL TONRY, SENTENCING MATTERS 132 (1996) ("[F]or offenders who do not present unacceptable risk of violence, well-managed intermediate sanctions offer a cost-effective way to keep them in the community at less cost than imprisonment and no worse later prospect for criminality.").

- ***United States v. Dossie***, 851 F.Supp.2d 478 (E.D.N.Y. 2012) (Gleeson, J.) (memorandum criticizing obligation to impose five year mandatory minimum sentence)

  The success of the Drug Treatment Alternative to Prison Program ("DTAP") in Brooklyn over the past twenty years proves the efficacy of treating defendants like Dossie rather than subjecting them to prison terms. Graduates of DTAP "have a five-year post-treatment recidivism rate that is almost half the rate for comparable offenders who served time in prison." Charles J. Hynes, Kings Cnty. Dist. Attorney, *Drug Treatment Alternative–to–Prison Twentieth Annual Report at Exec. Summ*. (2011).10 . . .

  Drug courts and other alternatives to incarceration reduce substance abuse and crime more effectively and much less expensively than incarceration, probation, or treatment programs not involving judicial participation. Jim Ramstad, Senior Policy Advisor, Nat'l Assoc. of Drug Ct. Professionals, *Testimony to U.S. House of Reps., Comm. on Appropriations, Subcomm. on Commerce, Justice, Sci., & Related Agencies* (Mar. 11, 2011).

- ***United States v. Bannister***, 786 F.Supp.2d 617 (E.D.N.Y. 2011) (Weinstein, J.) (blockbuster 67-page decision addressing a wealth of social science literature analyzing court's obligation to impose what it viewed as excessively harsh mandatory minimum sentences)

  As prison sentences are reduced or eliminated, non-incarceratory methods of rehabilitation can be used and improved to minimize the risk of recidivism. Systems of probation, parole, and supervised release have proven to be effective when violations are met with swift, consistent, and predictable negative consequences. *See* Mark A.R. Kleiman, *Smarter Punishment, Less Crime*, Am. Prospect, Jan.-Feb. 2011, at A5 (discussing a probation enforcement program for drug offenders in Hawaii).

"Problem-solving" or "behavioral" courts may order nonviolent offenders to undergo drug and alcohol treatment, counseling, or *657 other programs as an alternative to incarceration. In some circumstances, charges are dismissed when a convict has successfully complied with such a regimen. Sasha Abramsky, *May It Please the Court*, Am. Prospect (Jan.-Feb. 2011), at A14. Crucial to post-release programs is job training to equip ex-convicts for lawful work. *See* Adam Serwer, *Permanent Lockdown*, Am. Prospect (Jan.-Feb. 2011), at A16. Non-incarceratory methods have proven effective when used in a coordinated fashion.

By combining punishment and rigorous court monitoring with essential services like drug treatment, counseling, and job training, problem-solving courts have successfully reengineered how courts respond to societal dysfunction, especially low-level, nonviolent crime. These courts have a demonstrated record of reducing recidivism and forging better outcomes for offenders, victims, and communities.

Hon. Jonathan Lippman, Chief Judge Judith S. Kaye: *A Visionary Third Branch Leader*, 84 N.Y.U. L. Rev. 655, 658 (2009). But see Hon. Kevin S. Burke, *Just What Made Drug Courts Successful*?, 36 New Eng. J. on Crim. & Civ. Confinement 39, 51 (2010) (arguing that drug courts may coerce defendants, including victims of racial profiling, to accept guilty pleas); Nat'l Assn' of Crim. Defense Lawyers, *America's Problem–Solving Courts: The Criminal Costs of Treatment and the Case for Reform* 22–24 (2009), available at http://www1.spa. american.edu/justice/documents/2710.pdf (criticizing problem-solving courts' tendency to direct resources to nonviolent, first-time offenders instead of higher-risk offenders).

Technological advances promise useful innovations in non-incarceratory sentencing, either after or in lieu of a custodial sentence. Electronic monitoring of ex-convicts' movements helps keep convicts confined to their homes and other permissible locations and enables probation officers and police to locate them quickly when they stray-and to swiftly detect any crimes they may commit. *See* Graeme Wood, *Prison Without Walls*, Atlantic, Sept. 2010, at 88. Biological monitoring systems detect alcohol use and could be used to identify the abuse of other drugs or the presence of elevated tension. *Id.* at 96. Such tools promise the effective control of criminals at much lower cost and without subjecting them to the anti-rehabilitative aspects of prison life. *Id.* at 88, 96. Because would-be coconspirators may realize that associating with an electronically monitored convicted felon increases the likelihood of their own detection and capture, such tools may dissuade criminal conspiracies involving monitored ex-prisoners.

- ***United States v. Germosen***, 473 F.Supp.2d 221 (D. Mass. 2007) (Gertner, J.) (applying aberrant act departure to sentence drug courier to probation)

  The Sentencing Reform Act, 28 U.S.C. § 994(j) directed the Sentencing Commission to deal specifically with first offenders. It ordered the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense ..." *Id.*

  The Commission, however, implemented that statutory directive by redefining "serious offense" in a way that was entirely inconsistent with prior practice, and not at all based on any real data or analysis. First offender status was folded into criminal history category I. Category I included those who had never had any encounters with the criminal justice system, never been arrested, as well as individuals who had been arrested and convicted but received short sentences. Shortly after the implementation of the Guidelines, it was clear that the Commission's decisions led to a far higher incarceration rate for non-violent first offenders than had been the pattern preGuidelines.11

  There is a demonstrable difference in the recidivism rates of real first offenders as compared to other defendants in Criminal History Category I. *See* Michael Edmund O'Neill, *Abraham's Legacy: An Empirical Assessment of (Nearly) First–Time Offenders in the Federal System*, 42 B.C. L.Rev. 291 (2001). Minimal or no prior involvement with the criminal justice system is a powerful predictor of a reduced likelihood of recidivism. *See A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score*, 15 (Jan. 4, 2005), http//www.ussc.gov/publicat/RecidivismSalient FactorCom.pdf. Commission reports have concluded that first offenders are more likely to be involved in less dangerous offenses and that their offenses involve fewer indicia of culpability, such as no use of violence or weapons, no bodily injury, a minor role, or acceptance of responsibility. They are more likely than offenders with criminal histories to have a high school education, to be employed and to have dependents. *Recidivism and the First Offender* (May 2004), http://www.ussc.gov/publicat/Recidivism—First Offender.pdf.

3. **Costs of Incarceration**

- ***United States v. Smith***, 2016 WL 4679267 (E.D.N.Y. September 7, 2016) (Weinstein, J.)

  In view of the excessive incarceration rates in the recent past and their deleterious effects on individuals sentenced, their families, society and our economy, parsimony in incarceration is to be prized. *See*, *e.g.*, 18 U.S.C. § 3553(a) ("The court shall impose a sentence sufficient, but not greater than

necessary"); National Research Council of the National Academies, *The Growth of Incarceration in the United States, Exploring Causes and Consequences*, 8 (2014) ("Parsimony: the period of confinement should be sufficient but not greater than necessary to achieve the goals of sentencing policy."); *see also United States v. Aguilar*, 133 F. Supp. 3d 468, 476-80 (E.D.N.Y. 2015) (documenting evidence of negative impact on children of parents' separation).

- ***United States v. Diaz***, 2013 WL 322243 (E.D.N.Y. March 10, 2014) (Gleeson, J.) (lengthy decision justifying substantial downward variance in drug case on grounds that drug guidelines lack an empirical basis; decision analyzed and critiqued Sentencing Commission data, and also cited Commission reports and social science literature)

  Perhaps the best indication that the Guidelines ranges for drug trafficking offenses are excessively severe is the dramatic impact they have had on the federal prison population *despite* the fact that judges so frequently sentence well below them.

  In 1984, when the Sentencing Reform Act was passed, the federal prison population was 34,263.78 By 1994, it was 95,034;79 by 2004, it was 180,328.80 In 2011, there were 214,774 prisoners in the custody of the federal government.81 The Federal Bureau of Prisons ("BOP") is now the largest corrections system in the country.82

  The increased severity of federal drug trafficking sentences is an integral part of the story of mass incarceration.83 In less than a decade, from 1985 to 1991, the length of federal drug trafficking sentences increased by over two-and-a-half times.84 Sentences for drug trafficking were "elevated above almost every serious crime except murder."85 The increase in sentence length for drug offenders "was the single greatest contributor to growth in the federal prison population between 1998 and 2010."86 . . .

  Mass incarceration comes at great cost; prison is expensive. The annual cost of housing a prisoner is $21,006 for a minimum-security facility; $25,378 for a low-security facility; $26,247 for a medium-security facility; and $33,930 for a high-security facility.92 The President's Fiscal Year 2013 budget request for BOP is over $6.9 billion dollars, an increase of $278 million or 4.2% from the Fiscal Year 2012 budget.93 The BOP budget request accounts for about 25% of DOJ's overall budget request.94 We will spend almost exactly as much on federal prisons alone as we do on the entire federal judiciary.95

- ***United States v. Leitch***, 2013 WL 753445 ((E.D.N.Y. February 28, 2013) (Gleeson, J.) (statement of reasons for accepting diversionary disposition for low–level drug offender who completed a court-supervised drug treatment program)

Everywhere you look federal policy makers are complaining about the rising costs of incarceration.1 Last year, in a letter to the United States Sentencing Commission ("Commission"), the Department of Justice ("DOJ") called for a review of federal sentencing policy—"both systemically and on a crime-by-crime basis"—in an effort to rein in prison costs.2 In Fiscal Year 2012 DOJ's budget for "incarceration and detention grew by several hundred million dollars," and was "on a funding trajectory that will result in more federal money spent on imprisonment and less on police, investigators, prosecutors, reentry, and crime prevention."3 Despite a sustained increase in federal prison spending, the continued growth in the prison population has resulted in overcrowding. Our federal prisons are 38% over capacity, and DOJ reports that "[t]his level of crowding puts correctional officers and inmates alike at greater risk of harm and makes recidivism reduction far more difficult."4 The Bureau of Prisons projects that the federal prison population will continue to grow through 2020,5 a forecast DOJ has described as "troubling."6

- *See also* ***United States v. Bannister***, 786 F.Supp.2d 617 (E.D.N.Y. 2011) (Weinstein, J.) (blockbuster 67-page decision addressing a wealth of social science literature analyzing court's obligation to impose what it viewed as excessively harsh mandatory minimum sentences)

4. <u>Public Opinion on Sentences</u>

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

  In a public opinion survey conducted on behalf of the Sentencing Commission in 1997, "there was little support for sentences consistent with most habitual offender legislation. To be sure, longer previous criminal records led to longer sentences, but at substantially smaller increments than under such initiatives as 'three-strikes-and-you're out.' " Press Release, U.S. Sentencing Comm'n, *Public Opinion on Sentencing Federal Crimes* (March 17, 1997) (quoting executive summary prepared by Peter H. Rossi & Richard A. Berk), available at http://www.ussc.gov/Research/Research—Projects/ Surveys/19970314_ Public_Opinion_on_Sentencing/JP_EXSUM.htm. Application of the Career Offender guideline results in many low-level, non-violent drug addicts serving sentences grossly disproportionate to their role and culpability and hardly promotes respect for the law. Quite the opposite, totally disproportionate, unduly harsh sentences breed disrespect for the law.

- ***United States v. Polizzi***, 549 F.Supp.2d 308 (E.D.N.Y. 2008) (Weinstein, J.), *vacated sub nom*., 564 F.3d 142 (2d Cir. 2009) (defendant has no right to jury instruction on applicable mandatory minimum sentence and district court acted within its discretion in declining to provide such an instruction).

[S]ome public opinion polling data suggests that while jurors are generally supportive of mandatory minimums in the abstract, when forced to analyze how the mandatory minimum statutes apply to some of the individual defendants before them, they become less willing to see doled out the harsh sentences required by such laws. *See* Brandon K. Applegate, et al., *Assessing Public Support for Three–Strikes–and–You're–Out Laws: Global Views Versus Specific Attitudes*, 42 Crime & Delinquency 517 (1996) (finding that when respondents *442 are given descriptions of a crime that would require life terms under three-strikes laws, most would not sentence defendant to life term, and that most favored exceptions to three-strikes laws in many situations, despite fact that eighty-eight percent of respondents said that they wanted the state to adopt a three-strikes law).

- *See also* ***Graham v. Florida***, 560 U.S. 48 (2010) (considering national public opinion in assessing the constitutionality of sentencing juveniles to life in prison without the possibility of parole for non-homicide offenses).

- ***Simon v. United States***, 361 F.Supp.2d 35 (E.D.N.Y. 2005) (Sifton, J.)

  Proponents of the Guidelines have argued that they provide just sentences because they generally track public opinion.17 One of the few areas where the Guidelines substantially deviate from the public's views, however, is with respect to the harsh difference in treatment between crack and other drugs.18 A public opinion study sponsored by the Commission revealed that when asked to provide sentences for criminals convicted for trafficking in various drugs, the public chooses about the same median sentence for crack, heroin, and powder cocaine. *See* [PETER ROSSI & RICHARD BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED (1997)] supra note 6, at 83. In sum "the type of drug being sold is just not very important" to the public. *Id.* Where such a deviation between the Guidelines and public opinion exists, the reasonableness of the sentence they recommend diminishes. *Cf. Wilson*, 350 F.Supp.2d at 917 (arguing that the Guidelines should be given great weight because they closely track public opinion).

5. <u>"Framing Effect" of the Sentencing Guidelines</u>

- ***Peugh v. United States***, 133 S.Ct. 2072 (2013) (*Ex Post Facto* Clause prohibits federal courts from sentencing a defendant based on guidelines that were promulgated after he committed his crimes, when the new version of guidelines provides a higher sentencing range than the version in place at the time of the offense)

  Although the federal system's procedural rules establish gentler checks on the sentencing court's discretion than Florida's did, they nevertheless impose a series of requirements on sentencing courts that cabin the exercise of that

discretion. Common sense indicates that in general, this system will steer district courts to more within-Guidelines sentences.

Peugh points to considerable empirical evidence indicating that the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges. Even after Booker rendered the Sentencing Guidelines advisory, district courts have in the vast majority of cases imposed either within-Guidelines sentences or sentences that depart downward from the Guidelines on the Government's motion. *See* United States Sentencing Commission, *2011 Sourcebook of Federal Sentencing Statistics*, p. 63 (Figure G) (16th ed.) (USSC). In less than one-fifth of cases since 2007 have district courts imposed above- or below-Guidelines sentences absent a Government motion. *See ibid*. *See also* Baron–Evans & Stith, *Booker Rules*, 160 U. Pa. L. Rev. 1631, 1677 (2012). Moreover, the Sentencing Commission's data indicate that when a Guidelines range moves up or down, offenders' sentences move with it. *See* USSC, *Final Quarterly Data Report, FY 2012*, p. 32 (Figure C); *USSC, Report on the Continuing Impact of United States v. Booker on Federal Sentencing, Pt. A*, pp. 60–68 (2012).5

The federal system adopts procedural measures intended to make the Guidelines the lodestone of sentencing. A retrospective increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence to constitute an ex post facto violation.

- ***United States v. Ingram***, 721 F.3d 35 (2d Cir. 2013) (Calabresi, C.J., concurring)

  The so-called "anchoring effects" long described by cognitive scientists and behavioral economists, *see* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci. 1124 (1974), show why the starting, guidelines-departure point matters, even when courts know they are not bound to that point. When people are given an initial numerical reference, even one they know is random, they tend (perhaps unwittingly) to "anchor" their subsequent judgments—as to someone's age, a house's worth, how many cans of soup to buy, or even what sentence a defendant deserves—to the initial number given.1 Because anchoring effects influence our judgments, we cannot be confident that judges who begin at criminal category VI and thence depart to whatever below-guidelines sentence they think appropriate would end up reaching the same "appropriate" sentence they would have reached had they, instead, started from the category V guideline range and departed from there.2

- ***United States v. Carthorne***, 726 F.3d 503 (4th Cir. 2013) (Davis, C.J., dissenting)

  For years now, all over the civilized world, judges, legal experts, social scientists, lawyers, and international human rights and social justice communities have been baffled by the "prison-industrial complex" that the United States has come to maintain. If they want answers to the "how" and the "why" we are so devoted to incarcerating so many for so long, they need only examine this case. Here, a 26–year–old drug-addicted confessed drug dealer, abandoned by his family at a very young age and in and out of juvenile court starting at age 12, has more than fourteen years added to the top of his advisory sentencing guidelines range (387 months rather than 211 months, see ante, maj. op. at 508 & n.3), because, as a misguided and foolish teenager, he spit on a police officer. His potential sentence thus "anchored" and "framed",7 at the high end, between 17 and 32 years, Carthorne may or may not feel fortunate to have received "only" 25 years (300 months) in prison. I do not believe he is "fortunate" at all.

- *See also Molina-Martinez v. United States*, 136 S.Ct. 1338, 1346 (2016) (addressing anchoring role of Guidelines, and noting there is "considerable empirical evidence indicating that the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges") (*quoting Peugh*, 133 S.Ct., at 2084).

6. <u>Collateral Consequences</u>

- ***United States v. Nesbeth***, 188 F.Supp.3d 179 (E.D.N.Y. 2016) (Block J.) (imposing in cocaine importation case where guidelines were 33 to 41 months "a non-incarceratory sentence today in part because of a number of statutory and regulatory collateral consequences she will face as a convicted felon") (citing *Doe v. United States*, 110 F.Supp.3d 448 (E.D.N.Y. 2015), *supra*).

  Today, the collateral consequences of a felony conviction form a new civil death.16 Convicted felons now suffer restrictions in broad ranging aspects of life that touch upon economic, political, and social rights.17 In some ways, "modern civil death is harsher and more severe" than traditional civil death because there are now more public benefits to lose, and more professions in which a license or permit or ability to obtain a government contract is a necessity.18 Professor Alexander paints a chilling image of the modern civil death:

  > Today a criminal freed from prison has scarcely more rights, and arguably less respect, than a freed slave or a black person living "free" in Mississippi at the height of Jim Crow. Those released from prison on parole can be stopped and searched by the police for any reason ... and returned to prison for the most minor of infractions, such as failing to

> attend a meeting with a parole officer.... The "whites only" signs may be gone, but new signs have gone up—notices placed in job applications, rental agreements, loan applications, forms for welfare benefits, school applications, and petitions for licenses, informing the general public that "felons" are not wanted here. A criminal record today authorizes precisely the forms of discrimination we supposedly left behind—discrimination in employment, housing, education, public benefits, and jury service. Those labeled criminals can even be denied the right to vote.19 . . .

Remarkably, there are nationwide nearly 50,000 federal and state statutes and regulations that impose penalties, disabilities, or disadvantages on convicted felons.32 Of those, federal law imposes nearly 1,200 collateral consequences for convictions generally, and nearly 300 for controlled-substances offenses.33 District courts have no discretion to decide whether many of these collateral consequences should apply to particular offenders. The result is a status-based regulatory scheme; by the very fact of an individual's conviction, he or she is subject to a vast array of restrictions.34

The range of subject matter that collateral consequences cover can be particularly disruptive to an ex-convict's efforts at rehabilitation and reintegration into society. As examples, under federal law alone, a felony conviction may render an individual ineligible for public housing,35 section 8 vouchers,36 Social Security Act benefits,37 supplemental nutritional benefits,38 student loans,39 the Hope Scholarship tax credit,40 and Legal Services Corporation representation in public-housing eviction proceedings.41 Moreover, in addition to the general reluctance of private employers to hire ex-convicts,42 felony convictions disqualify individuals from holding various positions.43

Oftentimes, the inability to obtain housing and procure employment results in further disastrous consequences, such as losing child custody or going homeless.44 In this way, the statutory and regulatory scheme contributes heavily to many ex-convicts becoming recidivists45 and restarting the criminal cycle.46

Denials of social benefits and the difficulty of obtaining employment are only two aspects of post-conviction life. States impose other restrictions that exclude convicted felons from fully rejoining society. Except for Maine and Vermont, which allow convicts to vote absentee while serving an incarceratory sentence, every state disenfranchises convicted felons to some extent.47 Ten states, depending on the crime committed, impose permanent bans on a felons' right to vote.48

Felons are also often excluded from the important civic duty of sitting on a jury. As of 2003, thirty-one states imposed a lifetime ban on ex-convicts serving jury duty, while the vast majority of the remaining nineteen imposed

at least some restrictions.49 While many citizens may not lament the loss of the privilege, these exclusions disproportionately prohibit blacks from serving on juries.50

- ***Doe v. United States***, 110 F.Supp.3d 448 (E.D.N.Y. 2015) (Gleeson, J.), vacated, 833 F.3d 192 (2d Cir. 2016) (district court had no jurisdiction to expunge federal criminal conviction, although noting "the unfortunate lifelong toll that these convictions [after a successful rehabilitation] often impose on low-level criminal offenders")

  [Extract from district court opinion with scholarly references omitted]:
  A conviction for even a minor federal felony can have wide-ranging effects on, among other things, a defendant's employment, housing, and educational opportunities. Those effects sometimes "impose additional burdens on people who have served their sentences ... without increasing public safety in essential ways."5 And "research reveals that gainful employment and stable housing are key factors that enable people with criminal convictions to avoid future arrests and incarceration."6 Simply put, the public safety is better served when people with criminal convictions are able to participate as productive members of society by working and paying taxes.

  A criminal record poses an especially high barrier to employment. Nearly seventy percent of U.S. employers now perform some form of criminal background check on prospective employees.7 A criminal record exacerbates the increased difficulty that older workers like Doe already face in the job market.8 Those difficulties are further exacerbated by race. Doe is black, and studies show that her race is even more of an impediment to her employment prospects than her conviction.9

7. Offender Attributes

a. Age

- Trio of Supreme Court cases addressing scientific research on the youth brain in the context of outlawing mandatory life without parole for juveniles: *Miller v. Alabama*, 132 S.Ct. 2455, 2464 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005)

- ***United States v. Howard***, 773 F.3d 519 (4th Cir. 2016) (vacating upward departure to life sentence as unreasonable).

  The district court's sentence failed to appreciate what we cannot ignore—that the three predicate convictions, upon which the district court focused so heavily in assessing its departure and sentencing options, occurred when Howard was between sixteen and eighteen, and that youth is a "mitigating factor derive[d] from the fact that the signature qualities of youth are transient;

as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Roper*, 543 U.S. at 570, 125 S.Ct. 1183 (citation and internal quotation marks omitted). *Cf.* Barry C. Feld, *The Youth Discount: Old Enough To Do The Crime, Too Young To Do The Time*, 11 Ohio St. J.Crim. L. 107, 137 (2013) ("The [Supreme] Court's jurisprudence of youth recognizes that juveniles who produce the same harms as adults are not their moral equals and do not deserve the same consequences for their immature decisions.") . . .

Howard was forty-one years old when he was sentenced, and studies demonstrate that the risk of recidivism is inversely related to an inmate's age. A 2014 Bureau of Justice Statistics report, which tracked the recidivism rates of state prison inmates for five years post-release, notes that three years after release from prison, 75.9% of inmates age 24 or younger at the time of release had been rearrested for a new offense, compared to 69.7% of inmates ages 25 to 39, and 60.3% of inmates age 40 or older. Matthew R. Durose, et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, Bureau of Justice Statistics 12 (2014), http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986. A 2002 report, which tracked inmates three years after release, noted that more than 80% of prisoners under 18 were rearrested, compared to 45.3% of those age 45 or older. Patrick A. Langan et al., *Recidivism of Prisoners Released in 1994, Bureau of Justice Statistics* 12 (2002), http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1134. No doubt statistics for offenders released after age 60 are even more compelling. *See* generally Vera Inst. of Justice, *It's About Time: Aging Prisoners, Increasing Costs, and Geriatric Release* (April 2010), http://www.vera.org/pubs/its-about-time-aging-prisoners-increasing-costs-and-geriatric-release-0. Indeed, there is no reason to believe that offenders sentenced in North Carolina are significantly different in this regard from those sentenced in, say, Iowa: "There is a statistically significant drop in recidivism for offenders aged 45 to 54 compared with 35 to 44 year olds, and rates for those aged 55 and older are even lower." Lettie Prell, *Iowa Recidivism Report: Prison Return Rates*, FY 2013 7 (2014), http://www.doc.state.ia.us/Research/TrendsRecidivismFY13.pdf. (All reports saved as ECF opinion attachments).

- ***United States v. Jefferson***, 2015 WL 501968 (D. Minn. February 5, 2015) (Davis, J.) (on *Miller/Graham* resentencing, imposed sentence of 50 years rather than life)

Research shows that typically, adolescents are vulnerable to peer pressure, and that adolescents are therefore more likely to take risks when in the presence of peers. In fact, risk-taking in the presence of peers has been identified as "one of the hallmarks of adolescent risk-taking." Albert Chein, et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14:2 Developmental Sci. F1, F1 (2011). Increased risk-taking in the

presence of peers is also associated with greater neural activity in the areas of the brain associated with reward processing. Id. In addition, studies show that youth may gravitate toward the protection a gang offers in areas where gangs are prevalent. Emma Alleyne & Jane Wood, *Gang Involvement: Psychological and Behavioral Characteristics of Gang Members Peripheral Youth, and Nongang Youth*, 36 AGGRESSIVE BEHAV. 423, 424 (2010). In the context of this case, engaging in the acts of murder or attempted murder gave that gang member "status." In other words, rewarding the gang member for committing a violent act. At the same time, the pressure to conform to the codes of the 6–0–Tres gang would have been great as well, given the consequences of a perceived violation of such codes. *See Id.* ("gangs [ ] exert [ ] two types of social power that attract youth: coercive power-the threat or actual use of force and violence; and the power to pay, buy, impress and to delegate status and rank to its members.").

- ***United States v. Carmona-Rodriquez***, 2005 WL 840464 (S.D.N.Y. April 11, 2005) (Sweet, J.) (sentencing defendant in drug distribution case to 30 months, where Guidelines were 46 to 57 months).

  Carmona-Rodriguez will be fifty-five years old on May 13, 2005, and she has no known prior criminal convictions . . . United States Sentencing Commission, *Measuring Recidivism: The Criminal History Computation Of The Federal Sentencing Guidelines*, at p. 28 (2004) (stating that for those defendants in Criminal History Category I, the recidivism rate for defendants who are between the ages of 41 and 50 is 6.9 percent whereas the recidivism rate for such defendants who are between the ages of 31 and 40 is greater than 12 percent), available athttp:// www.ussc.gov/publicat/Recidivism_General.pdf.

- *See also Hendrickson* below.

b. **Childhood**

- ***United States v. Terry*****,** 427 F.Supp.2d 1132 (M.D. Ala. 2006) (Thompson, J.) (departing from 84-105-month range to 60 months due to failures in defendant's experience of foster care).

  But the State may be worse than Dr. Frankenstein because it saddled Terry with criminal-history points, by criminalizing his conduct and imposing inexplicably harsh punishments, that are now coming back to haunt him. Unfortunately, just as Terry made choices in his life that brought him to the place he is today, the State's repeated failure to live up to its promise to provide him a better life also contributed to his being here and facing such a long sentence. This case therefore differs considerably from that of a defendant who merely had a difficult upbringing and lacked guidance as a youth, *see* U.S.S.G. § 5A1.12. A variance may not be warranted simply

because Terry had a difficult childhood or because his background somehow "caused" the instant misconduct; the variance is warranted here because, during that difficult upbringing the State, acting as his parent, saddled him with criminal-history points by responding to his conduct with criminal sanctions rather than parental care.

Of course, Terry's situation is but one sad story against a background of bleak statistics about young men who age out of foster care. It is estimated that 38 % of youths who age out of the foster-care system are emotionally disturbed; 25 % are involved in the criminal justice system; 50 % have been arrested at one time; less than 50 % have graduated from high school; less than 40 % are continuously employed; and the average weekly salary for those who do remain employed is $205 (less than $11,000 annually). Richard Wertheimer, *Youth Who "Age Out" of Foster Care: Troubled Lives, Troubling Prospects,* CHILD TRENDS RESEARCH BRIEF, at 5 (December 2002), available at http://www.childtrends.org/Files/FosterCareRB.pdf; Wald & Martinez, *supra,* at 3. Thus, Terry's troubled early adulthood is exactly what one might expect given the circumstances he faced growing up. *See* Wald & Martinez, *supra,* at 3. Yet, in spite of this knowledge, the State never made serious efforts to address Terry's needs and reacted to his predictable problems with severe criminal sanctions.

> Fn. 11: The State's failure to ensure a proper education has very real consequences. Approximately 16 % of all young men ages 18-24 without a high school degree or GED are incarcerated or on parole at any one time; among black males, such as Terry, the number is 30 %. Michael Wald & Tia Martinez, *Connected by 25: Improving the Life Chances of the Country's Most Vulnerable 14-24 Year Olds,* William and Flora Hewlitt Foundation Working Paper, at 7 (November 2003), available at http://www.hewl ett.org/NR/rdonlyres/60C17B69-8A76-4F99-BB3B84251E4E5A19/0/FinalVersionofDisconnectedYouthPaper.pdf. This outcome can likely be traced in large part to the fact that those without high school diplomas are at high risk of long-term unemployment. One study found that half of young people who lacked a high school diploma were disconnected from the labor force for three or more years between their 18th and 25th birthdays. *Id.* at 6. These consequences are manifest in Terry's life.

c. <u>Socio-economic Circumstances</u>

- ***United States v. Aguilar***, 133 F.Supp.3d 468 (E.D.N.Y. 2015) (Weinstein, J.) (imposing sentence of time-served in document forgery case, as well as recommending to immigration judge that defendant not be deported)

"A broad[ ] reason for the link between poverty and crime is the choice limiting effect of deprivation. It is the capacity of poverty to limit choice,

especially in a manner that inclines people to criminal behavior[.]" Mirko Bagaric, *Rich Offender, Poor Offender: Why it (Sometimes) Matters in Sentencing*, 33 Law & Ineq. 1, 12 (2015); *see also*, *e.g.*, Amir Sariaslan et al., *Childhood Family Income, Adolescent Violent Criminality and Substance Misuse: Quasi–Experimental Total Population Study*, 205 Brit. J. of Psychiatry 286–90 (2014) (finding children of low-income parents experienced seven-fold increased hazard rate of being convicted of violent crime as compared to peers of high-income parents); *see also* Jody Armour, *Nigga Theory: Contingency, Irony, and Solidarity in the Substantive Criminal Law*, 12 Ohio St. J.Crim. L. 9, 19–20 (2014) (explaining how the powerful urge to condemn people of color who are also poor induces the denial of collective accountability for the criminal consequences of poverty).

Splitting families with resulting impoverishment may increase the risks of future criminality of the children. "[N]umerous studies ... demonstrate a direct link between poverty and crime and consequently higher imprisonment rates for the poor." Bagaric, supra at 6.

> The increased inclination toward crime resulting from disadvantage stems broadly from the lack of resources and opportunities that are an almost unavoidable aspect of economic deprivation. Crime often results from frustration-aggression, which can stem from being subjected to inequality that is entrenched by poverty, poor schools, violent neighborhoods, racism, and single-parent families. Further, it is established that poverty negatively affects the development of children, contributing to poor impulse control, low self-esteem, and reduced educational achievements, all of which are conducive to harmful activity such as crime.

Id. at 10–11 (emphasis added).

- ***United States v. Jefferson***, 2015 WL 501968 (D. Minn. February 5, 2015) (Davis, J.) (on *Miller/Graham* resentencing, imposed sentence of 50 years rather than life)

  Studies show that a bad home environment, or living in a bad neighborhood "are major risk factors for juvenile crime, including homicide." Alan Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths, in Youth on Trial: A Developmental Perspective on Juvenile Justice* 33 (Thomas Grisso & Robert G. Schwartz eds., 2000) at 47–48. The Court finds that this factor weighs in favor of a sentence other than life in prison.

- ***United States v. Handy***, 2008 WL 3049899 (E.D.N.Y. August 4, 2008) (Weinstein J.) (30-month sentence where guidelines were 37 to 41 months in gun possession case)

Ramel Handy's life story appears to be taken directly from what has been accurately described as "the feeder systems into the Cradle to Prison Pipeline." *See* Marian Wright Edelman, Keynote Address, Brooklyn Law School *Symposium, Disproportionate Minority Youth Contact*, in 15 J.L. & Pol'y 919, 920 (2007). Abandoned by his natural parents, Handy grew up in his aunt's household in a high-crime area of Brooklyn. *See* Presentence Report dated Apr. 7, 2008 ("PSR") ¶ 22. He is unaware of the residence and status of his siblings who were raised by other relatives. *Id*. ¶¶ 22-25. At the age of twelve, Handy was shot while walking near his home. *Id*. ¶ 34. After being enrolled in special education classes due to behavioral problems, he stopped attending school when he was fourteen years old and turned to criminal activity. *Id*. ¶ ¶ 38-39.

- *See also* ***United States v. Santa***, 2008 WL 2065560 (E.D.N.Y May 14, 2008) (same)

- ***United States v. Hawkins***, 380 F.Supp.2d 143 (E.D.N.Y. 2005) (Weinstein, J.) (departing downward to probation from guideline of 12 to 18 months in fraud case, based on extraordinary rehabilitation)

  The disadvantage, dysfunction, and toxicity of a defendant's development is substantially causative. The following excerpt provides a still fairly accurate narrative of variations in socioeconomic deprivation in New York City, reflected in crime statistics: [lengthy excerpt not included] . . . JONATHAN KOZOL, AMAZING GRACE 3-5 (Perennial ed.2000). *See id.* at 143 ("Nearly three quarters of the inmates of state prisons in New York come from the same seven neighborhoods of New York City: the South Bronx, Harlem, Brownsville, Bedford-Stuyvesant, South Jamaica, East New York, and the Lower East Side of Manhattan.").

- *See also* ***United States v. Bannister***, 786 F.Supp.2d 617 (E.D.N.Y. 2011) (Weinstein, J.) (blockbuster 67-page decision addressing a wealth of social science literature analyzing court's obligation to impose what it viewed as excessively harsh mandatory minimum sentences)

d. <u>Family Ties</u>

- ***United States v. Walker***, 2017 WL 2198194 (D. Utah May 18, 2017) (Waddoups, J.) (varying to 10 years probation from guideline range of 151 to 188 months).

  [.]Mr. Walker's improved familial relationships and relationships with his community also support the lack of any need to further deter Mr. Walker at this point. Studies show that supportive family connections predict reduced recidivism, while breaking up families leads to increased recidivism. Kimberly Bahna, "*It's a Family Affair"—The Incarceration of the American*

Family: Confronting Legal and Social Issues, 28 U.S.F. L. Rev. 271, 275 (1994) ("Research has shown that the disruption in family ties during incarceration actually increases the criminal behavior of ex-inmates."); Shirley R. Klein et al., *Inmate Family Functioning*, 46 Int'l J. Offender Therapy & Comp. Criminology 95, 99–100 (2002) ("[A]lthough family ties do not guarantee success after release, the absence of such ties increases the likelihood of failure. The relationship between family ties and lower recidivism has been consistent across study populations, different periods, and different methodological procedures.").

- ***United States v. Aguilar***, 133 F.Supp.3d 468 (E.D.N.Y. 2015) (Weinstein, J.) (Weinstein, J.) (imposing sentence of time-served in document forgery case, as well as recommending to immigration judge that defendant not be deported)

  The significant and lasting pain young children and adolescents experience due to the loss of a parent is well-documented, especially when that loss is due to a parent's death or divorce. School systems, adult caregivers, family members and society at large tend to acknowledge the legitimacy of children's unique grieving processes, even when those processes include antisocial behaviors, such as acting out at school, withdrawing from friends or even getting into trouble with the law. The fields of child psychology, education and medicine have strived to develop effective interventions and support systems and to imbue these children with a strong sense of resiliency and the ability to cope.

  > *Less care has been taken, however, to address and acknowledge the trauma children experience as a result of the loss of a parent to prison.*

  See Patricia Allard, *When the Cost is Too Great: The Emotional and Psychological Impact on Children of Incarcerating Their Parents for Drug Offenses*, 50 Fam. Ct. Rev. 48, 50 (2012) (emphasis added [in original]). Even less care is taken to address and acknowledge the trauma children experience as a result of parental deportation.

- ***United States v. G.L.***, 305 F.R.D. 47 (E.D.N.Y. 2015) (Weinstein, J.) (downward variance to time served to courier of cocaine)

  Individuals incarcerated as a result of drug convictions comprise half of our prison population. Trends in U.S. Corrections, The Sentencing Project, 3 (2013). Most are low-level lawbreakers with no record of violent offenses. *Id.*

  The number of women in prison, many of whom are incarcerated for drug offenses, has been increasing at a rate fifty percent more than that of men since 1980. *Id.* at 4; *see also A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits*, The Sentencing Project, 4 (Nov.2013);

Conference, Women, Prison, and Gender–Based Violence, Cornell Law School's Avon Global Center for Women and Justice, *et al.* (2015). While the Guidelines must not discriminate between male and female criminals, family responsibilities cannot be ignored in individual cases. 28 U.S. § 994. *Cf.* Jenni Vainik, *The Reproductive and Parental Rights of Incarcerated Mothers*, 46 Fam. Ct. Rev. 670, 676 (2008) (citation omitted) ("incarcerated mothers are typically their children's sole caregiver") . . .

"Incarceration of a parent normally causes major negative economic, social, and psychological consequences to the child, and may have life-long [adverse] repercussions." Michal Gilad, *The Young and the Helpless: Re–Defining the Term "Child Victim of Crime*," 32 (U. Penn. Law School, Working Paper No. 14–23); *cf.* Jean C. Lawrence, *ASFA in the Age of Mass Incarceration: Go to Prison—Lose Your Child*? 40 Wm. Mitchell L.Rev. 990, 1003 (2014).

For children under the age of five, both lack of parent-child bonding and disruption of an existing bond can create difficulties in cognitive and language development as well as in forming relationships and regulating emotions later in life. Older children separated from their parents suffer developmental harm as well, often in the form of behavioral and educational difficulties. Sarah Abramowicz, *Beyond Family Law*, 63 Case W. Res. L.Rev. 293, 321 (2012) (citations omitted); *see also Bannister*, 786 F.Supp.2d at 653–55 (collecting literature and discussing effect of incarceration on family and community).

"Many inmates have a difficult time reestablishing their relationships with their children upon their release." Vainik, 46 Fam. Ct. Rev. at 680 (citation omitted) . . .

In view of the excessive incarceration rates in the recent past and their unnecessary, deleterious effects on individuals sentenced, society and our economy, parsimony in incarceration is prized. *See*, *e.g.*, 18 U.S.C. § 3553(a) ("The court shall impose a sentence sufficient, but not greater than necessary"); National Research Council of the National Academies, *The Growth of Incarceration in the United States, Exploring Causes and Consequences*, 8 (2014) ("Parsimony: the period of confinement should be sufficient but not greater than necessary to achieve the goals of sentencing policy.").

e. <u>Mental Illness/Disorders</u>

- ***United States v. Dikiara***, 50 F.Supp.3d 1029 (E.D. Wis. 2014) (Adelman, J.) (imposing sentence of 15 months in mail fraud case where guidelines dictated a range of 41 to 51 months, based on defendant's gambling addiction).

The American Psychiatric Association recently reclassified pathological gambling from an impulse control disorder to an addiction-related disorder. *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders ("DSM–V") 585 (5th ed.2003); *see also* Ferris Jabr, *How the Brain Gets Addicted to Gambling*, Scientific American, Nov. 5, 2013. Defendant also cited research that slot machines, her preferred mode of gambling, were more addictive than other forms of gambling. *See* Natasha Dow Schull, *Slot Machines are Designed to Addict*, N.Y. Times, Oct. 10, 2013 ("Studies by a Brown University psychiatrist, Robert Breen, have found that individuals who regularly play slots become addicted three to four times faster (in one year, versus three and a half years) than those who play cards or bet on sports."). The report from counselor Zangl described addictive type behaviors and reactions on defendant's part, including a description of how she was drawn to the machines—the colors and the themes. The report also indicated that she kept thinking she would eventually win enough to pay back the money she had taken. This too was consistent with the literature, including the notion of "chasing one's losses" referenced in the DSM–V. Defendant further presented literature discussing how this kind of addiction can lead from hoping for a big score to cover past losses on to illegal activity. S.H. Dakai, *Compulsive Gambling: An Examination of Compulsive Gambling, Including Pathology, Chemistry Exchange, Similarities to and Differences from Substance Abuse*, Gambling *1033 Phases, and Assessment Questionnaires, Journal of Addictive Disorders, 8–9 (2004). Given the impact of her gambling addiction, which was well-supported by the defense materials, a below range term sufficed to provide just punishment.1

- ***United States v. Ferguson***, 942 F.Supp.2d 1186 (M.D. Ala. 2013) (Thompson, J.)

  A few "exceptionally" mentally ill defendants may be found incompetent to stand trial or judged not guilty by reason of insanity; however, there also exists a spectrum of mental deficits and diseases that lessen, but do not erase, a person's responsibility for her crimes. *See* Jennifer S. Bard, *Re–Arranging Deck Chairs on the Titanic: Why the Incarceration of Individuals with Serious Mental Illness Violates Public Health, Ethical, and Constitutional Principles and Therefore Cannot Be Made Right by Piecemeal Changes to the Insanity Defense*, 5 Hous. J. Health L. & Pol'y 1, 4–5 (2005). . . .

  The amended guidelines also reflect the growing recognition that treating mentally ill criminal defendants rather than imprisoning them better serves both the defendants and society. *See, e.g., United States v. Bannister*, 786 F.Supp.2d 617, 656–67 (E.D.N.Y.2011) (Weinstein, J.); *Policy Topics: The Criminalization of People with Mental Illness, National Alliance on Mental Illness*, http://www.nami.org (last visited February 18, 2013); W. David Ball, *Mentally Ill Prisoners in the California Department of Corrections and Rehabilitation: Strategies for Improving Treatment and Reducing Recivisim*,

24 J. Contemp. Health L. & Pol'y 1, 34–37 (2007). Prison is not an appropriate setting for mentally ill defendants to receive treatment, as such individuals may be more vulnerable to difficult living conditions and abuse from other prisoners. Human Rights Watch*, Ill–Equipped: U.S. Prisons and Offenders with Mental Illness* 56, 59 (2003). This is because, "[f]or mentally disordered prisoners, danger lurks everywhere":

> "They tend to have great difficulty coping with the prison code—either they are intimidated by staff into snitching or they are manipulated by other prisoners into doing things that get them into deep trouble.... [M]ale and female mentally disordered prisoners are disproportionately represented among the victims of rape. Many voluntarily isolate themselves in their cells in order to avoid trouble. Prisoners who are clearly psychotic and chronically disturbed are called 'dings' and 'bugs' by other prisoners, and victimized. Their anti-psychotic medications slow their reaction times, which makes them more vulnerable to 'blind-siding,' an attack from the side or from behind by another prisoner."

Id. at 56–57 (*quoting* Terry Kupers, *Prison Madness: The Mental Health Crisis Behind Bars and What We Must Do About It* 20 (1999)). Providing comprehensive, effective treatment for those mentally ill defendants whose disorder drives their criminality will more likely protect the public from suffering future crime—and that treatment does not come from incarceration.

f. <u>Substance Abuse</u>

- ***United States v. Hendrickson***, 25 F.Supp.3d 1166 (N.D. Iowa 2014) (defendant's drug addiction warranted a six-month variance below low end of guidelines range)

  [Extract from opinion with scholarly references in footnotes omitted]: Today, "[a]ddiction is defined as a chronic, relapsing brain disease that is characterized by compulsive drug seeking and use, despite harmful consequences."6 Compulsive drug seeking and use despite harmful consequences certainly characterizes Hendrickson's conduct. Thus, while addiction was once thought of as merely a moral failure, it is now rightly identified as a serious medical condition.

  "[Drug addiction] is considered a brain disease because drugs change the brain—they change its structure and how it works."7 These changes are physical, rather than merely psychological:

  > Brain imaging studies from drug-addicted individuals show physical changes in areas of the brain that are critical to judgment, decisionmaking, learning and memory, and behavior control. Scientists believe that these

changes alter the way the brain works, and may help explain the compulsive and destructive behaviors of addiction.8

A recent study suggests that drug abuse damages a person's orbitofrontal cortex (OFC)—the brain region responsible for evaluating hasty decisions—impairing the person's judgment, especially regarding a decision's long-term consequences.9 Damage to the OFC is particularly harmful because "the OFC contributes to a variety of behavioral states and functions, including the processing or reward, emotion and decision making, which are essential components of motivational-directed behavior."10

By changing the brain, addiction affects a person's thinking and behavior.11 While "[t]he initial decision to take drugs is mostly voluntary ... when drug abuse takes over, a person's ability to exert self control can become seriously impaired."12 "[D]rugs of abuse are characterized as 'hijacking' the neuro-biological mechanisms by which the brain responds to reward ..."13 "When faced with a choice that brings immediate reward, even at the risk of incurring future negative outcomes, including loss of reputation, job, and family, [addicts] appear oblivious to the consequences of their actions."14 Stated plainly, addiction biologically robs drug abusers of their judgment, causing them to act impulsively and ignore the future consequences of their actions. *See* David M. Eagleman et al., *Why Neuroscience Matters for Rational Drug Policy*, 11 MINN. J.L. SCI. & TECH. 7, 26 (2010) ("More than physical dependence, addiction represents changes in the brain that lead to ... diminished capacity for the control of impulses."). Hendrickson's criminal conduct clearly reflects his lack of judgment and impulse control.

Taken together, this scientific evidence speaks to a fundamental issue at sentencing: culpability.

- *See also Walker* above (citing *Hendrickson* favorably).

g. <u>Medical Needs</u>

- ***United States v. Dimasi***, Eyeglasses, 2016 WL 6818346 (D. Mass. November 17, 2016) (Wolf, J.)

The Bureau of Prisons' restrictive policy for filing § 3582(c)(1)(A)(i) motions was criticized by the Department of Justice Inspector General and various organizations, including Human Rights Watch. In 2013, the Bureau's policy was broadened to make inmates who are not terminally ill eligible for consideration, including elderly inmates with a serious medical condition. However, the Department of Justice Inspector General found in February 2016 that few aging inmates have been the beneficiaries of motions for compassionate release under the expanded policy. In an amendment which became effective on November 1, 2016, the United States Sentencing

Commission encouraged the Bureau of Prisons to file motions for compassionate release more often and, therefore, to permit courts to decide more often, after considering the legally required factors and the Commission's guidance, whether a reduction of sentence is warranted.

In February 2016, the Department of Justice Inspector General reported that, "[a]lthough the [Bureau of Prisons] has revised its compassionate release policy to expand consideration for early release to aging inmates, ... few aging inmates have been released under it." Office of Inspector General, U.S. Department of Justice, *The Impact of an Aging Inmate Population*, E–15–05, at 51 (February 2016), https://oig.justice.gov/reports/2015/e1505.pdf. Human Rights Watch similarly stated that, "[f]rom August 2013, to December 2015, the Bureau of Prisons received 3,142 requests for compassionate release, and approved only 261. Of these approvals, 178 (68%) were for cases in which the applicant had a terminal condition." Human Rights Watch, *Public Comment on Proposed Amendment* 81 Fed. Reg. 2295, at 3 (March 21, 2016), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20160321/HRW.pdf.

h. Parental Incarceration

- ***United States v. R.V.***, 157 F.Supp.3d 207 (E.D.N.Y. 2016) (Weinstein, J.) (departing to probation in child pornography case where applicable guideline range was 78 to 97 months)

"Incarceration of a parent normally causes major negative economic, social and psychological consequences to the child, and may have life-long [adverse] repercussions." Michal Gilad, *The Young and the Helpless: Re–Defining the Term "Child Victim of Crime "* (U. Penn. L. Sch., Working Paper No. 14–23, 2014), at 31–32; cf. Jean C. Lawrence, *ASFA in the Age of Mass Incarceration: Go to Prison—Lose Your Child* ? 40 Wm. Mitchell L.Rev. 990, 1002–03 (2014) (noting that "the Center for Disease Control has determined that parental incarceration is an 'adverse childhood experience' (ACE) that 'significantly increases the likelihood of long-term negative outcomes for children.' ") (footnote omitted); Sarah Abramowicz, *Beyond Family Law*, 63 Case W. Res. L.Rev. 293, 321 (2012) (footnotes omitted) ("[C]hildren separated from their parents suffer developmental harm as well, often in the form of behavioral and educational difficulties."); *see also United States v. Bannister*, 786 F.Supp.2d 617, 653–55 (E.D.N.Y.2011) (collecting literature and discussing effect of incarceration on family and community) . . .

Upon release from prison, many inmates "have a difficult time reestablishing their relationships with their children." Jenni Vainik, *The Reproductive and Parental Rights of Incarcerated Mothers*, 46 Fam. Ct. Rev. 670, 680 (2008) (footnote omitted)[.]

- ***United States v. Aguilar***, 133 F.Supp.3d 468 (E.D.N.Y. 2015) (*see* above)

- *See* ***Ferguson***, ***Bannister*** above.

8. Case Attributes

a. Persons Convicted of Immigration Offenses

- ***United States v. Aguilar***, 133 F.Supp.3d 468 (E.D.N.Y. 2015)

"The existence of deportation policies and practices has negative emotional, relational, financial, and academic consequences for ... parents and children." Kalina Brabeck & Qingwen Xu, *The Impact of Detention and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration*, 32(3) Hisp. J. Behav. Sci. 341, 355–566 (2010); Brian Allen, Erica M. Cisneros & *Alexandra Tellez, The Children Left Behind: The Impact of Parental Deportation on Mental Health*, 24 J. of Child and Fam. Stud. 386, 386–392 (2015) (finding children with a deported parent were significantly more likely to display externalizing and internalizing problems than children whose parents were not deported or in the process of deportation). Consequences include feelings of abandonment, symptoms of trauma, fear, isolation, depression, family fragmentation, and financial hardship. *See* Ajay Chaudry et al., *Facing our Future: Children in the Aftermath of Immigration Enforcement*, The Urban Institute (Feb.2010), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/ 412020–Facing–Our–Future.PDF . . .

> The nature of detention, which ... often includes human rights violations, separation from family members, and the anticipation of permanent separation resulting from deportation and uncertainty regarding length, is regarded as a major contributing factor to mental deterioration, despondency, suicidality, anger, and frustration among detainees.... [A]n additional factor that contributes to the detained parent's stress is decisions that will need to be made regarding her or his U.S.-citizen children if the parent is deported . . .Parents . . . must [often] decide whether it is better for children to remain with the parent, but with potentially limited access to health care and educational opportunities, or to remain in the United States with its array of opportunities and supports, but without one or both parents' present nurturing support.

Kalina M. Brabeck, M. Brinton Lykes & Cristina Hunter, *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families*, 84 Am. J. of Orthopsychiatry 496, 499 (2014) ("Brabeck I") (citations omitted) . . .

Children from separated families are particularly susceptible to psychological harm. See Jonathan Baum et al., *In The Child's Best Interest?: The Consequences of Losing a Lawful Immigrant Parent to Deportation*, University of California, *478 Berkeley School of Law (Mar.2010), https://www.law.berkeley.edu/files/Human_Rights_report.pdf (finding children who experienced immigrant parental separation suffer from behavioral challenges with respect to eating, sleeping and controlling emotions). Reports from clinical psychologists who met with affected families concluded that: "[T]he level of post-traumatic stress disorder and anxiety rivaled that seen in war torn countries like Bosnia. The kids can't concentrate, and are being mistakenly diagnosed as having behavioral problems when their symptoms are actually caused by stress, depression and anxiety resulting from [separation]." James D. Kremer et al., *Severing a Lifeline: The Neglect of Citizen Children in America's Immigration Enforcement Policy, A Report by Dorsey & Whitney LLP to The Urban Institute* 70 (2009), http://www.dorsey.com/files/upload/DorseyProBono_SeveringLifeline_ReportOnly_web.pdf (emphasis added).

b. Persons Convicted of Sex Offenses

- ***United States v. Jenkins***, 854 F.3d 181 (2d Cir. 2017) (vacating sentence of 225 months in case of possession of child pornography as "shockingly high")

Our conclusion that Jenkins's sentence was shockingly high is reinforced by the important advances in our understanding of non-production child pornography offenses since we decided Dorvee. To begin with, the latest statistics on the application of sentencing enhancements confirm that the enhancements Jenkins received under this Guideline are all-but-inherent. In 2014, for example, 95.9% of defendants sentenced under § 2G2.2 received the enhancement for an image of a victim under the age of 12, 84.5% for an image of sadistic or masochistic conduct or other forms of violence, 79.3% for an offense involving 600 or more images, and 95.0% for the use of a computer. *See* U.S. Sentencing Comm'n, *Use of Guidelines and Specific Offense Characteristics (Offender Based)*, Fiscal Year 2014 42–43, available at http://www.ussc.gov/sites/default/files/pdf/research–and–publications/federal–sentencing–statistics/guideline–application–frequencies/2014/Use_of_SOC_Offender_Based.pdf.

Since *Dorvee*, the Sentencing Commission has also produced a comprehensive report to Congress examining § 2G2.2. U.S. Sentencing Comm'n, *Report to the Congress: Federal Child Pornography Offenses* (2012) [hereinafter "USSC Report"], available at http://www.ussc.gov/sites/default/files/pdf/news/congressional–testimony–and–reports/sex–offense–topics/201212–federal–child–pornography–offenses/Full_Report_to_Congress.pdf. In this report, the Commission explains that it "believes that the current non-production guideline warrants

revision in view of its outdated and disproportionate enhancements related to offenders' collecting behavior as well as its failure to account fully for some offenders' involvement in child pornography communities and sexually dangerous behavior." *Id.* at xxi. Since the Commission has effectively disavowed § 2G2.2, it should be clearer to a district court than when we decided Dorvee that this Guideline "can easily generate unreasonable results." 616 F.3d at 188 . . .

Whether a child pornography offender has had or has attempted to have contact with children is an important distinction. "The failure to distinguish between contact and possession-only offenders [is] questionable on its face," and this failure "may go against the grain of a growing body of empirical literature indicating that there are significant, § 3553(a)–relevant differences between these two groups." *United States v. Apodaca*, 641 F.3d 1077, 1083 (9th Cir. 2011); *see e.g.*, Shelley L. Clevenger et al., "*A Matter of Low Self–Control? Exploring Differences Between Child Pornography Possessors and Child Pornography Producers/Distributers Using Self–Control Theory*," 28 Sexual Abuse 555 (2016) (finding online offenders have greater victim empathy and greater levels of self-control than offline offenders).

- ***United States v. R.V.***, 157 F.Supp.3d 207 (E.D.N.Y. 2016) (Weinstein, J.) (departing to probation in child pornography case where applicable guideline range was 78 to 97 months) *(note, decision is 60 pages long with extensive citations to social science literature regarding shifting societal norms, the revolution in technology, role of the internet in distribution of child pornography, the connection between consumption of child pornography and child abuse, the impact of parental incarceration on children,)*

  Several reports have found that, generally, child pornography offenders are "at low risk to commit hands-on sexual assaults of children." Austin F. Lee, et al., *Predicting Hands–On Child Sexual Offenses Among Possessors of Internet Child Pornography*, 18 Psych., Pol. & Law 644, 668 (2012) . . .

  Recent research suggests that the recidivism rate of child pornography offenders may be low, with most child pornography viewers unlikely to engage in future sexual offenses. *See* Richard B. Krueger & Meg S. Kaplan, *Non–Contact Sexual Offenses: Exhibitionism, Voyeurism, Possession of Child Pornoraphy, and Interacting with Children Over the Internet*, ECF No. 44 (unpublished manuscript), at 51–52 (describing a 2010 study of child pornography offenders by Seto, Hanson and Babchishin which "revealed that 4.6% of online offenders committed a new sexual offense during the 1.5 to 6 year follow-up period; 2.0% committed a contact sexual offense, and 3.4% committed a new child pornography offense . . .

- ***United States v. Kelly***, 868 F.Supp.2d 1202 (D.N.M. 2012) (Black, J.) (departing to 60 months in child pornography case where guidelines range was 87 to 108 months)

  Under U.S.S.G. § 2G2.2, Kelly's Guideline sentence is a range of 87–108 months. However this Guideline, § 2G2.2, is not the product of the Sentencing Commission's usual institutional competence and expertise, but is instead the result of numerous politically-based Congressional directives. Originally, the Sentencing Commission drafted § 2G2.2 with significantly lower sentences. Congress has since repeatedly mandated that the Guideline be amended, each time to increase the penalties; often overriding the Sentencing Commission's expert judgment to the contrary.2 With each amendment, "major changes would come from Congress, and would be dictated not by experience and study, but instead by a general, moral sense that the penalties for 'smut peddlers' should always, and regularly, be made stricter, not weaker."3

  Fn. 3: Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines* (Jan. 1, 2009), at 8–9, available at http://www.fd.org/pdf_lib/child%20porn%20july%20revision.pdf.

- ***United States v. Dorvee***, 616 F.3d 174, 184 (2d Cir. 2010) (vacating sentence of 240 months in case of possession of child pornography as "substantively unreasonable")

  [T]he Commission did not use [its typical] empirical approach in formulating the Guidelines for child pornography. Instead, at the direction of Congress, the Sentencing Commission has amended the Guidelines under § 2G2.2 several times since their introduction in 1987, each time recommending harsher penalties. *See* United States Sentencing Commission, *The History of the Child Pornography Guidelines*, Oct. 2009, available at http://www.ussc.gov/general/20091030_History_Child_Pornography_Guidelines.pdf (last visited April 19, 2010).7 . . .

  The Commission has often openly opposed these Congressionally directed changes. In 1991, as Congress was considering a proposal to direct the Commission to alter the child pornography Guidelines (by revoking the Commission's earlier creation of a new, lower base level for receipt, possession, and transportation of images than for sale or possession with intent to sell), the Chair of the Commission wrote to the House of Representatives stating that the proposed Congressional action "would negate the Commission's carefully structured efforts to treat similar conduct similarly and to provide proportionality among different grades of seriousness," and would instead "require the Commission to rewrite the guidelines for these offenses in a manner that will reintroduce sentencing disparity among similar defendants." *See* Troy Stabenow, *Deconstructing the Myth of Careful Study: A*

Primer on the Flawed Progression of the Child Pornography Guidelines, January 1, 2009, at 4–9, available at http://www.fd. org/pdf_lib/child% 20porn% 20july% 20revision.pdf (unpublished Comment, last visited July 28, 2010). Congress did not follow the Chair's advice. In 1996, the Commission criticized the two-level computer enhancement (which is currently set forth at § 2G2.2(b)(6) and was adopted pursuant to statutory direction) on the ground that it fails to distinguish serious commercial distributors of online pornography from more run-of-the-mill users. *See* United States Sentencing Commission, *Report to Congress: Sex Offenses Against Children Findings and Recommendations Regarding Federal Penalties*, June 1996, at 25–30, available at http://www.ussc.gov/r_congress/SCAC.PDF (last visited April 15, 2010).8 Speaking broadly, the Commission has also noted that "specific directives to the Commission to amend the guidelines make it difficult to gauge the effectiveness of any particular policy change, or to disentangle the influences of the Commission from those of Congress." *See* United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, *supra*, at 73.

c. <u>Drug cases</u>

- ***United States v. Gardner***, 20 F.Supp.3d 468 (S.D.N.Y. 2014) (Rakoff, J.) (applying 1:1 ratio rather than the 18:1 ratio of crack to powder cocaine in calculating applicable guideline range in crack distribution case).

  As for the claim that crack cocaine is "associated" with violence, the Government has offered no scientific evidence, and the Court is not aware of any such evidence, that crack cocaine causes its users to engage in more violent activity than if they had used powder cocaine. Instead, the Government argues that crack cocaine distribution is more likely to be "associated" with violence than powder cocaine distribution because, according to some studies, it is sold in relatively more violent "open-air bazaars" (an apparent euphemism for street sales in poor communities). *See* Gov. Mem. at 4, 14–15*; see also*, *e.g.*, Richard B. Felson & Luke Bonkiewicz, *Guns and Trafficking in Crack–Cocaine and Other Drug Markets*, 59 Crime & Delinquency 319 (2013); Roland G. Fryer, Jr. et al., *Measuring the Impact of Crack Cocaine* (Nat'l Bureau of Econ. Research, Working Paper No. 11318, 2005) . . .

  [T]he studies relied on by the Government cannot and do not isolate the purported impact of open-air dealing on rates of violence. *See*, *e.g.*, Felson & Bonkiewicz, supra, at 325–29; Fryer et al., supra, at 20–26. This is fundamental, because multiple other equally or more plausible theories exist for the (modestly) increased violence associated with crack-cocaine use and distribution. For example, it is well established that crack cocaine is preferred over powder cocaine in poor, predominantly African–American

communities,3 communities that have long tended to suffer from higher levels of violent crime.4 More generally, one would need a much more careful statistical analysis than any presented by the Government to determine whether the violence more associated with crack cocaine than with powder cocaine is a function of a multitude of socioeconomic differences, or is instead the result of some difference related to the two substances themselves or to their methods of distribution. Indeed, the only conclusion one can state with certainty is that the severe effects of the 18:1 ratio are primarily visited upon African–Americans: a disparity that would require far more conclusive evidence of a difference between crack and powder cocaine before it could be justified in terms of the purposes of 18 U.S.C. § 3553(a).

Finally, this entire discussion about violence fades into near-irrelevance when one remembers that in the overwhelming majority of offenses involving both crack and powder cocaine, there is no indication of any violence. *See* 2007 Report, at 37 (noting that, in 2005, violence was observed in 6.2% of powder cocaine cases and in 10.4% of crack cocaine offenses). And, as the Sentencing Commission noted in its 2007 Report, supra, if a defendant is convicted of an offense that involves violence, the Guidelines elsewhere provide for upward enhancements to his Guidelines score. *See*, *e.g.*, U.S.S.G. §§ 2D1.1(b)(1), (b)(2). But this has nothing to do with any difference between crack and powder cocaine.

- Other cases addressing crack disparity with references to social science and empirical studies: *United States v. Holland*, 2011 WL 98313 (D. Neb. 2011); *United States v. Douglas*, 746 F.Supp.2d 220 (D. Me. 2010); *United States v. Medina*, 2009 WL 2948325 (S.D. Cal. September 11, 2009); *United States v. Gully*, 619 F.Supp.2d 633 (N.D.Iowa 2009); *United States v. Smith*, 359 F.Supp.2d 771 (E.D. Wis. 2005).

- ***United States v. Diaz***, 2013 WL 322243 (E.D.N.Y. March 10, 2014) (Gleeson, J.) (lengthy decision justifying substantial downward variance in drug case on grounds that drug guidelines lack an empirical basis; decision analyzed and critiqued Sentencing Commission data, and also cited Commission reports and social science literature)

  The overwhelming majority of drug trafficking offenders are neither managers or leaders—in Fiscal Year 2011, roughly 93% of drug trafficking offenders did not fall into either of those leadership categories.50 . . .

  The mitigating role cap helps very few defendants. Roughly 13% of those convicted of drug trafficking offenses in Fiscal Year 2011 received a mitigating role adjustment to begin with,59 and not all of them qualified for the cap. In Fiscal Year 2011, only approximately 7% of all drug trafficking offenders received the cap.60 . . .

How far out of line are the drug trafficking ranges? The degree to which sentencing judges vary downward provides a clue. In the period from December 11, 2007 to September 30, 2010, the average reduction from the bottom end of the applicable sentencing range in non-government sponsored below-range sentences was 39 months for crack offenses (32.7% reduction) and 27 months for cocaine and heroin offenses (respectively, 33.7% and 37.2% reductions).73

United States v. Kupa, 976 F.Supp.2d 417 (E.D.N.Y. 2013) (Gleeson, J.) (painstaking critique of sentences produced by prosecutorial use of recidivist enhancement)

In truth, many powerful arguments have been advanced in favor of the repeal of mandatory minimums entirely,11 and I agree with them. My point here is that as long as the powers currently conferred on prosecutors to enhance drug trafficking mandatory minimums exist, they should not be used for the indefensible purposes of coercing guilty pleas and punishing those who go to trial.

> Fn. 11: *See*, *e.g.*, *Mandatory Minimum Sentences: Hearing Before the H. Comm. on the Judiciary Subcomm. on Crime, Terrorism and Homeland Security*, 111th Cong. (2009) (statement of Judge Julie E. Carnes, Chair, Criminal Law Comm., Judicial Conference of the United States, available at http:// judiciary.house.gov/hearings/pdf/Carnes090714.pdf (last visited Sept. 24, 2013) (explaining "why mandatory minimum statutes are systemically flawed and will rarely avoid undesirable outcomes"); Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Address at the ABA Annual Meeting (Aug. 9, 2003), at 4, available at http://www.reentry. net/library/attachment.149465 (last visited Sept. 24, 2013) ("I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust."); *see also* Gerard E. Lynch, *Sentencing Eddie*, 91 J. CRIM. L. & CRIMINOLOGY 547, 562 (2001); Myrna S. Raeder, *Rethinking Sentencing and Correctional Policy for Nonviolent Drug Offenders*, 14 CRIM. JUSTICE 1, 53 (1999); MICHAEL TONRY, SENTENCING MATTERS 135 (1996); ("Evaluated in terms of their stated substantive objectives, mandatory penalties do not work.) The record is clear from research in the 1950s, the 1970s, the 1980s, and the 1990s that mandatory penalty laws shift power from judges to prosecutors, meet with widespread circumvention, produce dislocations in case processing, and too often result in imposition of penalties that everyone involved believes to be unduly harsh."); Stephen Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L.REV. 199 (1993).

- ***United States v. Hayes***, 948 F. Supp. 2d 1009 (N.D. Iowa 2013) (Bennett, J.) (downwardly departing to a sentence of 75 months, from an applicable

guideline range of 151 to 188 months, based on the district court's policy disagreement with methamphetamine guidelines).

"No other drug is punished more severely based on purity." Amy Baron–Evans, *Deconstructing the Meth Guidelines*, Presentation for the Sentencing Resource Counsel, Federal Public and Community Defenders, at 12, available at txn.fd.org/Meth.pps. The Commission assumed that offenses involving actual methamphetamine are more severe than offenses involving mixtures of methamphetamine. The Commission reasoned: "Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs." U.S.S.G. § 2D1.1., cmt. n.26(c). While it may seem logical to punish a pure substance more than mixed substance, there is no support in the legislative history to explain the formula underlying greater methamphetamine purity to greater months of imprisonment. *See* Amy Baron–Evans, *Deconstructing the Meth Guidelines*, Presentation for the Sentencing Resource Counsel, Federal Public and Community Defenders, at 12, available at txn.fd.org/Meth.pps. This issue is heightened when the offender was merely a courier or mule who has no knowledge of the purity of the methamphetamine he or she is transporting . . .

The level of harmfulness is difficult to measure and many drug abuse experts contend that methamphetamine is not the most harmful drug. *See* Amy Baron–Evans, *Variance, Departures, and Deconstructing the Meth Guidelines: Current Trends and Cautionary Tales*, CJA Trial Panel Annual Training (Dec. 12, 2012), at 119, available at http://ca7.fd.org/Indiana_Southern/Documents/Baron–Evans–% 20Slides.pdf. For example, a study by David J. Nutt and colleagues consistently ranks alcohol, heroin, and crack cocaine as more harmful than methamphetamine. David J. Nutt et al, *Drug Harms in the UK: a multicriteria decision analysis*, 376 THE LANCET 1558 (2010). "For legislative purposes, drugs have mostly been classified according to their addictive potency. Such classifications, however, lack a scientific basis." Jan van Amsterdam et al, *Ranking the Harm of Alcohol, Tobacco and Illicit Drugs for the Individual and the Population*, 16 EUR. ADDICTION RESEARCH 202, 202–204 (2010) (ranking the mean harm scores of crack cocaine, heroin, tobacco, and alcohol higher than methamphetamine) . . .

This problem of the current drug trafficking regime, "in which offenders of widely differing culpability receive unreasonably similar sentences," has been called "excessive uniformity." Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. QUANT. CRIMINOL.. 155, 156 (2009). "Excessive uniformity in drug sentencing has its genesis in guideline-based rules of sentencing, including an overemphasis on drug quantity, the 'relevant conduct' standard, and the narrow scope and applicability of culpability-based

sentencing adjustments." *Id.* The original Commission focused on quantity since "the amount of drugs was more easily quantifiable than role in the offense and, it was thought, quantity would serve as a good proxy for role." *Id.* "[D]rug quantity is sometimes a plausible surrogate for an offender's dangerousness, culpability or level of organizational responsibility. At best it is a crude surrogate." Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 851–73 (1992). Changes in the drug trade have resulted in larger drug quantities, making the large quantity indicator of responsibility ineffective. *Id.*

- ***United States v. Dossie***, 851 F.Supp.2d 478 (E.D.N.Y. 2012) (Gleeson, J.) (memorandum criticizing obligation to impose five year mandatory minimum sentence) (*see also* Section 3 above).

  I am mindful of the fact that federal prosecutors find significant value in the way that charging mandatory minimum sentences helps them solicit the cooperation of defendants. *See* Lanny A. Breuer, *The Attorney General's Sentencing and Corrections Working Group: A Progress Report*, Fed. Sent'g Rep., Dec. 2010, at 110, 112 ("We favor mandatory minimum sentences because such sentences remove dangerous offenders from society, ensure just punishment, and are an essential tool in gaining cooperation from members of violent street gangs and drug distribution networks."). I have previously written about the "enormous boost" mandatory minimum sentences give to federal law enforcement in its effort to advance investigations and obtain convictions by enlisting cooperation. John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 Hastings L.J. 1095, 1120 (1995). Federal prosecutors have gotten so inured to using severe sentences to leverage cooperation that, "[t]o an increasing degree, the Department has come to justify its requests for tougher sentencing rules, not on the ground that offenders actually deserve the higher sentences, but simply because the threat of the higher sentence provides a greater inducement for defendant cooperation." Frank O. Bowman, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 Stanford L.Rev. 235, 252 (2005).

- ***United States v. Vasquez***, 2010 WL 1257359 (E.D.N.Y. March 30, 2010) (Gleeson, J.) (memorandum criticizing obligation to impose five year mandatory minimum sentence)

  The 1986 law was passed just as the recently-created United States Sentencing Commission was writing the federal sentencing guidelines, which would set forth sentencing ranges for all federal crimes. The Commission examined more than 10,000 drug sentences from around the country and considered formulating guidelines based on national averages. But it realized that it would not make sense to provide a guidelines range of, say, five to seven years when a mandatory sentencing law would trump the guidelines sentence

and require at least a ten year sentence. So the Commission fashioned sentencing ranges for all drug offenses-whether or not a mandatory minimum sentence was applicable-that were proportional to the severe minimum sentences established by Congress. A later Commission-in its 15-year report to Congress in 2004-criticized the original Commission's failure to discuss why it extended this "quantity-based" approach of the 1986 act across the entire spectrum of drug sentences, stating, "This is unfortunate for historians, because no other decision of the Commission has had such a profound impact on the federal prison population. The drug trafficking guideline ... had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes." U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 49 (2004).

- ***United States v. Garrison***, 560 F.Supp.2d 83 (D. Mass. 2008) (Gertner, J.) (departing in drug distribution case to 30 months from 46-57 month range).

  In many drug conspiracies, especially those involving gangs, there is a strict hierarchy—the source, the packager, the wholesale distributor, the retail distributer. *See*, *e.g.*, Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of a Drug–Selling Gang's Finances*, 115 Q.J. Econ. 755 (2000) (describing allocation of organizational responsibilities, risk, and financial reward, and noting that street-level dealers face greater risk for diminished gain). All that can be said with confidence about Garrison is that he was a street-level dealer. . . .

  Nor does the government's position account for the other consequences of harsh crack sentences, such as the impact of lengthy imprisonment on these same communities. *See*, *e.g.*, Todd R. Clear, *The Problem With "Addition by Subtraction": The Prison–Crime Relationship in Low–Income Communities, in Invisible Punishment: The Collateral Consequences of Mass Imprisonment* 181 (Marc Mauer & Meda Chesney–Lind eds., 2002); Todd R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (2007).

d. <u>Firearms Cases</u>

- ***United States v. Lawrence***, 2017 WL 2462530 (E.D.N.Y. June 6, 2017) (Weinstein, J.) (departing 11 months from guideline minimum in felon-in-possession case based on exacerbating risks of prison and absence of deterrence value of long sentence)

  For gun crimes there is little reliable evidence "of a general deterrent effect of lengthy sentencing enhancements that impose additional years of incarceration for crimes committed with a firearm." Def.'s Ex. B (Report of Jeffrey Fagan.

Ph.D.), at 8–12 (citing in support: Steven Raphael & Jens Ludwig, *Prison Sentence Enhancements: The Case of Project Exile*, in EVALUATING GUN POLICY 251 (Jens Ludwig & Philip J. Cook, eds., 2003); Richard Rosenfeld, Robert Fornango & Eric Baumer, *Did Ceasefire, Compstat, and Exile Reduce Homicide?*, 4 CRIMINOLOGY & PUB. POL'Y 419 (2005); Colin Loftin & David McDowall, *"One with a Gun Gets You Two": Mandatory Sentencing and Firearms Violence in Detroit*, 455 ANNALS AM. ACAD. POL. & SOC. SCI. 150 (1981); Colin Loftin, Milton Heumann & David McDowall, *Mandatory Sentencing and Firearms Violence: Evaluating an Alternative to Gun Control*, 17 L. & SOC'Y REV. 287 (1983); Colin Loftin & David McDowall, *The Deterrent Effects of the Florida Felony Firearm Law*, 75 J. CRIM. L. & CRIMINOLOGY 250 (1984); David McDowall, Colin Loftin & B. Wiersema, *A Comparative Study of the Preventive Effects of Mandatory Sentencing Laws for Gun Crime*, 83 J. CRIM. L. & CRIMINOLOGY 378 (1992); John J. Donohue III, *Assessing the Relative Benefits of Incarceration: Overall Changes and the Benefits on the Margin*, in DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM 269 (Steven Raphael & Michael Stoll eds., 2009); Thomas A. Loughran, Edward P. Mulvey, Carol A. Schubert, Jeffrey Fagan, Alex R. Piquero & Sandra H. Losoya, *Estimating a Dose–Response Relationship Between Length of Stay and Future Recidivism in Serious Juvenile Offenders*, 47 CRIMINOLOGY 699 (2009)); *see also* Feb. 28 Hr'g Tr. at 12:21–14:23.

Degree of certainty—as opposed to the length and severity—of punishment provides the strongest general deterrence effect. Def.'s Ex. B (Report of Jeffrey Fagan. Ph.D.), at 12; see generally Feb. 28 Hr'g Tr. "People are more motivated by the probability of being caught than by the severity of the punishment ... increased sanctions do not substantially reduce future recidivism but instead produce only a small deterrent or incapacitation effect on recidivism." Def.'s Ex. B (Report of Jeffrey Fagan. Ph.D.), at 7 (internal quotation marks, citations, and footnotes omitted). Professor Fagan could not conclude that "people who were engaged or thinking about the possibility of engaging in violence [would] be affected by the difference in [the length of] sentences." Feb. 28 Hr'g Tr. at 42:23–43:18.