

KEYNOTE

The Pendulum of Criminal Justice Since 1967*

*The Honorable Patti B. Saris***

ABSTRACT

On the fiftieth anniversary of the report by President Lyndon B. Johnson's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, Chief Judge Patti B. Saris of the United States District Court for the District of Massachusetts and former Chair of the United States Sentencing Commission offers her thoughts on the events that precipitated the report, its findings and solutions, and how the problems of the U.S. criminal justice system have changed—and remained the same—in the years since its publication.

TABLE OF CONTENTS

INTRODUCTION	1473
I. THE JOHNSON COMMISSION REPORT	1474
A. <i>The Roots of Mass Incarceration</i>	1474
B. <i>Recommendations of the Johnson Commission Report</i>	1476
C. <i>A Swing of the Pendulum: The U.S. Sentencing Guidelines</i>	1477

* The text is a transcript of Judge Saris's Symposium keynote remarks, with citations provided by the *George Washington Law Review*.

** Chief Judge of the United States District Court for the District of Massachusetts and former Chair of the United States Sentencing Commission.

II. THE PENDULUM SWINGS AGAIN: CONTEMPORARY CONCERNS 1479

 A. *Mandatory Minimum Sentencing: Origin and Problems* 1479

 B. *2011 Committee Findings and Analysis* 1482

 C. *Hope for Bipartisan Legislation and the National Conversation* 1483

CONCLUSION 1485

QUESTIONS AND ANSWERS 1486

INTRODUCTION

Whoa, what an introduction. So, I loved Roger Fairfax when he was a law clerk with me. He was a young, excited lawyer. I knew he was going to do great things and he gave me a call and said, “Would you come down to this Symposium?” It was a treat to be able to share—you know, now that he is a fully engaged professor and dean—share with him the passion for criminal justice reform. So, I said, “Great, what do you want me to talk about?” And he said, “Well, it’s the fiftieth anniversary of the Commission set up by President Lyndon Baines Johnson,”¹ and I said, “Well, I need to read it first.” So, he said, “Fine, I’ll send it to you.” And he sent me the Report and I clicked it, and it kept printing and printing and printing. And, truthfully, it was quite thick as I read it, but I enjoyed reading every page of it because I had not understood until I read it what a significant work it was.

And so this is not only the fiftieth anniversary of that Report, but it is also the thirtieth anniversary of the United States Sentencing Guidelines.² So it really was appropriate for me to address what I’ll call the “pendulum of criminal justice since 1967” over the last fifty years. I said, “Well how long do I have to discuss from then to now?” And he said, “Twenty minutes.” So I’m going to do what I can, and if we have time afterwards, I’m hoping that we could have a “Q and A” period, and if not, feel free to shoot me an email. I don’t want to go over my time period because we have such a great panel coming afterwards.

¹ See PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

² See U.S. SENTENCING COMM’N, GUIDELINES MANUAL (1987), <https://www.ussc.gov/guidelines/archive/1987-federal-sentencing-guidelines-manual> [<https://perma.cc/X4VX-25JU>]; see also Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 HOSFTRA L. REV. 1167, 1199–1200 (2017).

So, I did read the Report. All 300 pages of it and 200 recommendations.³ And because I know there are a lot of students here, I'll just briefly go through some of the highlights that hit me. Certainly, this isn't everything or we'd be here all night. But I just want to go through a little bit about what the Report talked about. It recognized the urgency of the nation's crime problem and the depth of ignorance about it.⁴ And essentially for that reason, President Johnson established the Commission on the Enforcement and Administration of Justice.⁵ I had never read it, as I mentioned, but this Report provides important insight into how we became the world's largest jailer,⁶ and what we can do about it.

I. THE JOHNSON COMMISSION REPORT

As former chair of the Sentencing Commission—I'd like to emphasize, its *former* chair, so I do not speak for the Commission but as former chair—I was engaged in the criminal justice reform efforts over the past six years to address the effects of harsh mandatory minimum sentences for drug and gun offenses and the challenge of mass incarceration. I was a staffer on the Senate Judiciary Committee working for Senator Edward Kennedy in the early 1980s when some of these sentencing changes were being debated.⁷ So I hope to discuss the pendulum from the sixties till now.

A. *The Roots of Mass Incarceration*

The roots of mass incarceration began fifty years ago as the country faced rising levels of crime.⁸ I'm going to use the original language

³ See PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *supra* note 1.

⁴ See *id.*

⁵ See Cheryl Corley, *President Johnson's Crime Commission Report, 50 Years Later*, NPR (Oct. 6, 2017, 7:00 AM), <https://www.npr.org/2017/10/06/542487124/president-johnson-s-crime-commission-report-50-years-later> [<https://perma.cc/P7FN-2EV7>] (describing how President Johnson established the Commission and explaining his reasons for doing so and the goals the Commission would seek to accomplish).

⁶ See Mark Gordon, *America Is the Largest Jailer in the World: Land of the Free?*, ALETEIA (July 31, 2014), <https://aleteia.org/2014/07/31/america-is-the-largest-jailer-in-the-world-land-of-the-free> [<https://perma.cc/9EM2-KRFF>] (stating that the United States has the highest incarceration rate in the world "by any statistical measure").

⁷ See Arit John, *A Timeline of the Rise and Fall of "Tough on Crime" Drug Sentencing*, ATLANTIC (Apr. 22, 2014), <https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983> [<https://perma.cc/4A3M-A9QU>] (noting that in the early 1980s, Congress began to rethink and revise sentencing policies).

⁸ See John J. Donohue, *A Critical Look at Crime and Policing in the United States: Comey, Trump, and the Puzzling Pattern of Crime in 2015 and Beyond*, 117 COLUM. L. REV. 1297, 1307 (2017) (noting that fifty years ago the United States was facing rising levels of crime).

from the Report, which sounds a little outdated to us now. The Johnson Commission began its Report with the following poignant statement . . . : “The existence of crime, the talk about crime, the reports of crime, and the fear of crime have eroded the basic quality of life of many Americans.”⁹ It continued, “There is much crime in America, more than ever is reported, far more than [is ever] solved, far too much for the health of [a] Nation.”¹⁰ At that time, it reports, one-third of Americans surveyed in high-crime areas said it was unsafe to walk alone at night in their neighborhoods.¹¹ I found this statistic startling. One-third of the people surveyed said they kept firearms in their houses for protection against criminals.¹² The Commission pointed out that young people between the ages of fifteen and twenty-four committed a disproportionate share of the crime.¹³ It also found that “[d]rug addicts are crime-prone persons. This fact is not open to serious dispute”¹⁴

The Commission “strongly believe[d] that the increasing violence in every section of the Nation compel[led] an effort to control . . . firearms that contribute[d] to . . . violence,”¹⁵ and the recidivism rate was of great concern to the Commission.¹⁶ Roughly one-third of offenders released from prison were reimprisoned, usually for committing new crimes within a five-year period at both the state and federal level.¹⁷ So what happened? Where did this crime happen? The Commission reported that “[t]he risks of victimization from . . . rape, robbery, and burglary [were] clearly concentrated in the lowest income group and decrease[d] steadily at higher income levels. . . . [T]he common serious crimes . . . happen most often in the slums of large cities.”¹⁸

While rates of offenses of violence and against property were higher for blacks than whites, they found that the differences were very small when whites and blacks live in similar conditions. The Commission was of the view, and they always took this broader perspective, “that if conditions of equal opportunity prevailed, the large

⁹ PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, *supra* note 1, at v.

¹⁰ *Id.* at 1.

¹¹ *Id.* at 50.

¹² *Id.* at 51.

¹³ *Id.* at 5.

¹⁴ *Id.* at 221.

¹⁵ *Id.* at 239.

¹⁶ *See id.* at 45–46.

¹⁷ *See id.* at 45.

¹⁸ *Id.* at 35, 38.

differences now found between [black] and white arrest rates would disappear,”¹⁹ so they called out for more equality of conditions.²⁰ The Johnson Report recommended very broadly cast objectives to accomplish things that you don’t see discussed so much in recent years. People were talking about “[e]liminating social conditions closely associated with crime.”²¹ Like why don’t we improve the schools?²² Why aren’t we improving the ability of the criminal justice system to detect, apprehend, and reintegrate into society those who have committed crimes?²³ Why aren’t we using community-based treatment for drug offenders?²⁴ Why aren’t our correctional institutions doing better?²⁵

B. Recommendations of the Johnson Commission Report

Significant for today’s discussion, it recommended the abolition of mandatory minimum sentencing in the area of drug trafficking.²⁶ Just to give you a quick statistic then and now, in 1965 there were about 4,000 drug violators in the Federal Bureau of Prisons, about eighteen percent of the Bureau of Prisons population.²⁷ Now it’s about half of the Bureau of Prisons population, nearly fifty percent, and so that puts it around 80,000, just to give you a sense of the dramatic differences between then and now.²⁸ The average sentence was about eighty-seven months,²⁹ which is longer than I actually had expected, so they were pretty tough back then as well. The Commission called sentencing “less a science than an art.”³⁰

In the final analysis, the Report said criminal justice depended on good judges. But it did decry judicial disparity, the disparity between judges,³¹ saying that your sentence should not depend on a purely for-

¹⁹ *Id.* at 45.

²⁰ *See id.* at 44 (referencing several studies that found that differences in arrest rates are small when whites and blacks live in similar conditions).

²¹ *Id.* at vi.

²² *See id.*

²³ *See id.*

²⁴ *See id.* at vii–viii (referring to community-based treatment in a larger context for most or all offenders and recommending that civil detoxification units be used to treat drug and alcohol offenders).

²⁵ *See id.* at 159.

²⁶ *See id.* at 223.

²⁷ *See id.*

²⁸ *See Inmate Statistics: Offenses*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp [<https://perma.cc/AWE7-95AZ>] (last updated July 28, 2018).

²⁹ *See* PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, *supra* note 1, at 223.

³⁰ *Id.* at 141.

³¹ *See id.*

tuitous circumstance, namely the personality of the particular judge before whom the case was coming.³² It called for the systematic gathering of information to have fairer sentences and to eliminate judicial disparity, including tougher appellate review of sentences.³³

Let me tell you, though, what it didn't call for. Noticeably, the Commission did not ask for sentencing guidelines, nor did it call for longer sentences except for habitual offenders, people we would probably call "career offenders" today.³⁴ Interestingly, not long after that, under the Nixon Administration, Congress eliminated most of the mandatory minimum laws for drug offenses.³⁵ I had forgotten that, so there actually was a congressional response to this Report in order to make sentencing more flexible.³⁶

C. *A Swing of the Pendulum: The U.S. Sentencing Guidelines*

Now I'm jumping forward a decade from the 1970s to the 1980s. There was a big swing of the pendulum in just ten years. Calls for rehabilitation and drug treatment were viewed as liberal pipe dreams. Heroin and, later, crack and gun violence had continued to devastate inner city neighborhoods, and political leaders from both parties, including African American leaders, called for punitive measures with bipartisan sponsorship. Senator Edward M. Kennedy teamed up with Senator Strom Thurmond, and in basically a landslide vote—I think it was a one hundred-to-one and maybe even by the end one hundred-to-zero in the Senate, and an almost similarly lopsided vote in the House—the Congress adopted the Sentencing Reform Act of 1984, which established the Sentencing Commission, a seven-member, bipartisan expert body within the judiciary to establish sentencing guidelines, which went into effect in 1987.³⁷

Now I was, at that point, this young staffer sitting in the back of the hearing room. At the time, I remember that the primary questions being asked were, "Why should a bank robber in California get a more lenient sentence than a bank robber in Texas? Why should it matter which judge within a courthouse you get?" In other words, sen-

³² See *id.* at 145.

³³ See *id.* at 145–46.

³⁴ See *id.* at 141–46.

³⁵ See generally Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

³⁶ See PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *supra* note 1, at 141–46.

³⁷ See Sentencing Reform Act of 1984, ch. 2, Pub. L. No. 98-473, 98 Stat. 1987 (1984).

ators were echoing some of the concerns about judicial disparity that were in the Johnson Commission Report.³⁸

The goal of the Act was primarily to eliminate unwarranted sentencing disparities.³⁹ But there was also another goal. Congress had shifted away from the rehabilitation model almost completely, and it went towards a model of controlling crime using “more certain, less disparate, and more appropriately punitive” sentences.⁴⁰ In 1986, soon after the Commission was established and the guidelines were about to go into effect, President Reagan, and then again in the 1990s President Clinton, signed legislation imposing harsh mandatory minimums.⁴¹ It imposed five- and ten-year mandatory minimum sentences based on drug amounts, which were then incorporated into the guidelines, and ratcheted up sentences for drug trafficking.⁴² This contributed to an explosion of the federal prison population.⁴³ Drug mandatory minimums could be doubled at the discretion of a prosecutor.⁴⁴ This changed how prosecutors made their charging decisions and allowed prosecutors to increase mandatory sentences from five to ten years and ten to twenty years.⁴⁵ By 2014, drug offenders constituted, as I just told you, a majority of the federal prison population.⁴⁶

Gun violence was also rampant. In 1994, Reverend Jesse Jackson said that “more blacks had been killed by other blacks in one year than had been lynched throughout history.”⁴⁷ I got that quote from a recent book put out by Professor Forman at Yale.⁴⁸ In his book, called *Locking Up Our Own*, Professor Forman describes how inner-city

38 See PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, *supra* note 1, at 145–46.

39 See U.S. SENTENCING COMM’N, 1991 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM ii (1991), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf [<https://perma.cc/8PF4-AB85>].

40 *Id.* at 7.

41 See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

42 See Anti-Drug Abuse Act of 1986; Violent Crime Control and Law Enforcement Act of 1994.

43 See, e.g., NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP 1 (2016).

44 See Anti-Drug Abuse Act of 1986; Violent Crime Control and Law Enforcement Act of 1994.

45 See *id.*

46 See U.S. SENTENCING COMM’N, ANALYSIS OF DRUG TRAFFICKING OFFENDERS tbl.1 (2014).

47 JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 195 (2017).

48 See *id.*

communities called out for tougher gun and drug laws.⁴⁹ Tougher armed-career-criminal sentencing laws went into effect with extremely harsh fifteen-year mandatory minimum sentences.⁵⁰ Multiple crimes with a gun could be stacked, so that essentially—and it did happen, not often but it did happen—first-time offenders could receive as much as a life sentence.⁵¹ Tough mandatory minimum sentences were enacted into law at state levels as well; this was not just a federal phenomenon.⁵²

While the mood was punitive, I believe that very few predicted the crisis of mass incarceration, with its devastating effect on minority communities, that was to occur twenty years later, a generation later, with one in three black men coming under state- or federal-court supervision.⁵³ Although thirteen percent of the country's population, they are thirty-seven percent of the nation's prisoners.⁵⁴ At the federal level, by 2013, black and Hispanic offenders made up a large majority of federal drug offenders, more than two thirds of offenders in federal prison, and about eighty percent of those drug offenders were subject to mandatory minimum sentencing.⁵⁵

II. THE PENDULUM SWINGS AGAIN: CONTEMPORARY CONCERNS

So, let me jump again. But now, a generation later, the pendulum has swung again as rates of violent crime have dropped to historic lows (and I'm always a little reluctant to say that because in some cities, they've ticked back up again, like in Chicago) and federal and state prison populations had exploded.⁵⁶ The Sentencing Commission took action.

A. *Mandatory Minimum Sentencing: Origin and Problems*

In 2011, just after I became Chair, we did a study of federal mandatory minimum sentencing. I have to say, it's a bipartisan Commission, with commissioners from all different points of view. There

⁴⁹ See *id.* at 122.

⁵⁰ See *id.*

⁵¹ See *id.* at 121.

⁵² See *id.* at 218–19.

⁵³ See *id.* at 7.

⁵⁴ See JAMES AUSTIN ET AL., BRENNAN CTR. FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 1 (2016).

⁵⁵ See *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 3 (2013) (statement of J. Patti B. Saris, Chair, U.S. Sentencing Commission).

⁵⁶ See FORMAN, *supra* note 47, at 13.

were some members of the Commission who believed in mandatory minimum sentencing and some, like myself, who did not, but we were able to reach consensus.⁵⁷ It was a fabulous Commission to work on because we were trying to get to agreement: what could we agree on when it came to federal sentencing? And so, while there were these different views about mandatory minimum sentencing, we all agreed that the mandatory minimums for drug offenses, like the ones I just described to you, were set too high and applied too broadly.⁵⁸ They swept in couriers and street dealers alike, not just the managers.⁵⁹

I'm dating myself—I always think in terms of the *Miami Vice* television show. Let me ask of the young people here, have you ever heard of *Miami Vice*? You have, right? So, I think, you know, the guys with the motor boats zooming across the water, that's what people had in mind for drug traffickers, but that's not who these mandatory minimums were capturing. They were capturing low-level offenders, street-level offenders, and mules, the people carrying the stuff.⁶⁰ They were too broad. They created a budget crisis.⁶¹

Now, I strongly believe in our federalist system, and this was one classic example where the states took the lead over the federal government. Facing state budget crises, many states, and I'm going to tell you, states like Texas, anyone here from Texas? Texas, South Carolina, California—there's some Maryland people here right? Yes, some Maryland people, took the lead in reducing prison populations.⁶² And when they did that, when they started reducing the sentences and reducing the prison populations, guess what? Crime did not increase.⁶³ That was an important step. All these public safety concerns. Crime did not increase.⁶⁴

And when I became Chair of the Commission, the Federal Bureau of Prisons was literally thirty-seven percent over capacity,⁶⁵ meaning that its budget was one-fourth of the Department of Justice's

⁵⁷ U.S. SENTENCING COMM'N, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, at xxv (2011).

⁵⁸ *See id.* at xxxii.

⁵⁹ *Id.* at xxxii–xxxiii.

⁶⁰ *Id.* at xxxii.

⁶¹ *See Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the S. Comm. on the Judiciary*, 113 Cong. 1, 10 (2013) (statement of Patti B. Saris, Chair, U.S. Sentencing Commission).

⁶² *See, e.g.*, THE PEW CTR. ON THE STATES, TIME SERVED 7 & n.5 (2012).

⁶³ *See id.*

⁶⁴ *See id.*

⁶⁵ *See* JAMES, *supra* note 43, at 20.

budget.⁶⁶ Money that should be going for policing, victims' rights, prosecutors, state support for law enforcement, one-fourth of that money was going to prison.⁶⁷ Congress considered bipartisan legislation to reduce tough mandatory minimums for both gun and drug offenses, and they also introduced bipartisan legislation to try and deal with "back-end" re-entry programs.⁶⁸

Based on these was a statutory mandate for the Commission to ensure that sentencing laws took into account prison capacity⁶⁹ and to consider the proportionality and fairness of sentencing.⁷⁰ In 2014, the Commission unanimously, and again, in a bipartisan way, voted to make an estimated 40,000 prisoners convicted of drug trafficking crimes retroactively eligible for a reduced sentence of an average of twenty-five months.⁷¹ So, in other words, nearly 40,000 people became eligible for a reduced sentence.⁷² And I emphasize the word "eligible" because it wasn't an automatic get-out-of-jail-free card. What happened was it went back to the sentencing judge, who would look at the prison record and look at who the person was.⁷³ But almost all of them were granted that release.⁷⁴ There were very few who were found to be public safety risks.⁷⁵

On November 1, 2015, the first day that it went into effect, 6,000 prisoners were released.⁷⁶ And I have to say, we staged it in a way to make sure the probation officers could be hired up to provide support at the back end, and also to make sure that there was what we call "stepdown programming." People would come back into society

⁶⁶ See U.S. DEP'T OF JUSTICE, 2011 BUDGET SUMMARY (2011), <https://www.justice.gov/sites/default/files/jmd/legacy/2014/01/16/doj-budget-summary.pdf> [<https://perma.cc/VB9L-MPXX>].

⁶⁷ See *id.*

⁶⁸ See, e.g., Press Release, Chuck Grassley, Senators Introduce Bipartisan Comprehensive Crisis Justice Reform Package (Oct. 4, 2017), <https://www.grassley.senate.gov/news/news-releases/senators-introduce-bipartisan-comprehensive-criminal-justice-reform-package> [<https://perma.cc/76B6-BSQ3>].

⁶⁹ 18 U.S.C. § 4047(b)(1) (2012).

⁷⁰ 28 U.S.C. § 991(b)(1)(A) (2012).

⁷¹ U.S. SENTENCING COMM'N, 2014 DRUG GUIDELINES AMENDMENT RETROACTIVITY DATA REPORT 1, 3 tbl.1 (2016).

⁷² *Id.* at 4.

⁷³ *Id.*

⁷⁴ *Id.*; see Sari Horwitz, *Obama to Commute Hundreds of Federal Drug Sentences in Final Grants of Clemency*, WASH. POST (Jan. 16, 2017), https://www.washingtonpost.com/world/national-security/obama-to-commute-hundreds-of-federal-drug-sentences-in-final-grants-of-clemency/2017/01/16/c99b4ba6-da5e-11e6-b8b2-cb5164beba6b_story.html?utm_term=.2a50642942bb [<https://perma.cc/FB4Y-CRPN>].

⁷⁵ See U.S. SENTENCING COMM'N, *supra* note 71, at 13.

⁷⁶ See Horwitz, *supra* note 74.

safely and not just be dumped on the street, because we were so cognizant of the concerns about public safety.⁷⁷ The Commission also, on its own, had retroactively reduced crack penalties in 2007⁷⁸ and also in 2011.⁷⁹ The Commission doesn't do it very often, but has a statutory power to make guidelines retroactive.⁸⁰

I'm proud to say that the prison population decreased from its peak of 217,000 to about 196,000, so it went from thirty-five percent over capacity to seventeen percent over capacity.⁸¹ We needed to address public safety concerns, because remember I keep coming back to the Johnson Commission Report; that was the core. People were afraid. So, how do you address public safety concerns? So, we have this crack team of statisticians and policy analysts who provided exactly what the Commission called out for. They gathered and looked at the data from when we made the reduction in the crack penalties. And we looked at the people who got the full penalty versus the people who got the reduction. And what did we find based on data? We found that the length of incarceration did not increase recidivism.⁸² In other words, there was no increased recidivism because these people got these reduced sentences.

B. 2011 Committee Findings and Analysis

Then we did a bigger study. We looked at recidivism generally and . . . issued an amazing report. If anyone wants to see it, it's online.⁸³ What we found is that basically recidivism right now in the federal system is about fifty percent, which is way too high, over eight years.⁸⁴ On the other hand, we found that the length of incarceration did not have an impact on the amount of recidivism.⁸⁵ And you have

⁷⁷ See *id.*

⁷⁸ See U.S. SENTENCING COMM'N, FAIR SENTENCING ACT AND 2007 CRACK COCAINE AMENDMENTS, <https://www.ussc.gov/research-and-publications/federal-sentencing-statistics/fair-sentencing-act-and-2007-crack-cocaine-amendments> [<https://perma.cc/G53J-9ZPT>].

⁷⁹ See *Frequently Asked Questions: 2011 Retroactive Crack Cocaine Guideline Amendment*, U.S. SENTENCING COMM'N, <https://www.ussc.gov/policymaking/amendments/frequently-asked-questions-2011-retroactive-crack-cocaine-guideline-amendment> [<https://perma.cc/GYP5-6SAA>].

⁸⁰ 28 U.S.C. § 994(u) (2012).

⁸¹ See E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, NCJ 251149, PRISONERS IN 2016, at 3 (2018); see also JAMES, *supra* note 43, at 20.

⁸² See U.S. SENTENCING COMM'N, *supra* note 71, at 3.

⁸³ U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS 15 (2016) ("Almost one-half of offenders released in 2005 (49.3%) were rearrested for a new crime or for an alleged violation of the conditions of their supervision over the eight year follow-up period.")

⁸⁴ *Id.*

⁸⁵ *Id.* at 22.

to be careful when you talk about recidivism because you have to be careful about whether you're talking about rearrest, reconviction, or reimprisonment. So, the data is also set out there on each of these measures.⁸⁶

We also studied disparity in sentencing between white males and black males, because that's a huge concern of the Sentencing Commission, not just disparity within a courthouse but also demographic disparity. We found that black male offenders received, on average, about nineteen percent longer sentences than similarly situated white males.⁸⁷ Some people have criticized the study, and have done alternative versions of the study, but no matter how you do the multiple regression analysis—you know statisticians all do these things differently—there is a significant difference still between the sentencing of white and black males.⁸⁸

C. *Hope for Bipartisan Legislation and the National Conversation*

Bipartisan legislation to reduce mandatory minimum sentences received wide support in both Houses, but we ran out of time to fix the statutes in the last Congress. It's one of my regrets that that didn't happen before I left; we came so close. While President Obama did grant clemency to over 1,700 prisoners⁸⁹ and Attorney General Eric Holder did lessen reliance on mandatory minimums as a prosecutorial tool,⁹⁰ there is a limit to what the President, the Attorney General, or the Sentencing Commission can do without statutory change. For example, we studied career offenders, and, you know, the sentences for career officers are set by statute, like the Armed Career Criminal Statute.⁹¹ As you all know, elections matter, and I see less hope now for bipartisan legislation. I was so hopeful before, I was little Miss

⁸⁶ See *id.* at 7–8 (defining and distinguishing “rearrest,” “reconviction,” and “reincarceration”).

⁸⁷ U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 8 (2017).

⁸⁸ Andrew Kahn & Chris Kirk, *What It's Like to Be Black in the Criminal Justice System*, SLATE: CRIME (Aug. 9, 2015, 12:11 PM), http://www.slate.com/articles/news_and_politics/crime/2015/08/racial_disparities_in_the_criminal_justice_system_eight_charts_illustrating.html [<https://perma.cc/X4V6-6M9D>].

⁸⁹ *Id.*

⁹⁰ Press Release, Office of Pub. Affairs, Dep't of Justice, In Milestone for Sentencing Reform, Attorney General Holder Announces Record Reduction in Mandatory Minimums Against Nonviolent Drug Offenders (Feb. 17, 2015), <https://www.justice.gov/opa/pr/milestone-sentencing-reform-attorney-general-holder-announces-record-reduction-mandatory> [<https://perma.cc/XLP8-6WK2>].

⁹¹ 18 U.S.C. § 924 (2012).

Pollyanna, hoping were going to do this and it didn't happen. But there are glimmers of hope.

Chairman [Chuck] Grassley of the Senate Judiciary Committee just put in a bipartisan piece of legislation.⁹² When I say these bills were bipartisan, that was the beautiful part of it. There had been a tipping point in Congress on criminal justice reform. You know, everyone from Senator [Dick] Durbin and Senator [Patrick] Leahy to Senator Grassley and Senator Mike Lee, Senator [John] Cornyn from Texas.⁹³ That's how much consensus there was that there was a need for change, although they did not always agree on the exact provisions. Don't get me wrong: there were some bitter debates about what should be in it, but at least there was a consensus that things needed to change again.

And another glimmer of hope is that I can't remember the last time Congress put in a significant mandatory minimum. That mandatory penalty is not now the first tool that you go to. And so when we have the opioid crisis now, people are talking about it more as a public health crisis.⁹⁴ And no one's rushing to add an even tougher mandatory minimum.⁹⁵ The courts have initiated many drug courts.⁹⁶ That started from the bottom up.⁹⁷ Judges were really interested in trying to do something; judges brought rehabilitation back to the table.⁹⁸ There are drug courts happening in many jurisdictions and many other problem-solving courts, for dealing with mental health or veterans problems and that sort of thing.⁹⁹ And there's an additional emphasis on alternatives to incarceration. People are thinking once again about the special needs of juveniles because of their better understanding about the science of the juvenile brain.¹⁰⁰ And many states are continuing to press forward for sentencing reform.

⁹² Press Release, *supra* note 68.

⁹³ *Id.*

⁹⁴ See Press Release, U.S. Dep't of Health & Human Servs., HHS Acting Secretary Declares Public Health Emergency to Address National Opioid Crisis (Oct. 26, 2017) <https://www.hhs.gov/about/news/2017/10/26/hhs-acting-secretary-declares-public-health-emergency-address-national-opioid-crisis.html> [<https://perma.cc/J5YH-UNSP>].

⁹⁵ See U.S. DEP'T OF JUSTICE, DRUG COURTS (2018), <https://www.ncjrs.gov/pdffiles1/nij/238527.pdf> [<https://perma.cc/2CCD-4PUV>].

⁹⁶ See WEST HUDDLESTON & DOUGLAS B. MARLOWE, PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 23–24, 45 (2011), <https://www.nadcp.org/sites/default/files/nadcp/PCP%20Report%20FINAL.pdf> [<https://perma.cc/6CDV-LS3S>].

⁹⁷ See *id.* at 23.

⁹⁸ See *id.*

⁹⁹ See *id.* at 23–24, 45.

¹⁰⁰ See, e.g., *A Guide to the Guidelines Series: Practical Tips for Juvenile Drug Treatment*

CONCLUSION

So, I thought I would sum up with certain key takeaways that at least I myself have from the last fifty years. Sounds like a long time. And I was alive for all of it. These are my personal ones, as former chair, not current chair. So, let me just see if you agree. Sentences, particularly in the area of drug trafficking, continue to be too harsh and disproportionate to the role many low-level, nonviolent offenders play, largely as a result of mandatory minimum sentencing, which the Johnson Commission denounced fifty years ago.¹⁰¹ The Johnson Commission recommended using data to support sentencing decisions.¹⁰² To that end, that did happen through the Sentencing Commission. The data is amazing, if anyone wants to go onto the website and look at it.¹⁰³

Second, fear of violent crime and concerns about drug trafficking continue to play a major role in criminal justice policy. You have to just be in New England, it may be true here in D.C. as well: the opioid crisis is what you read about every day in the newspapers. The Johnson Commission was right to take a more holistic approach to solving crime issues like better treatment for drug addicts and programming for the juvenile offenders. As I said, only in recent years has rehabilitation come back into the equation. But I want to emphasize that treatment programs need to be effective in protecting public safety to retain public support. Recent statistical studies show mixed results on drug treatment programs like drug courts,¹⁰⁴ and we have to make sure that what we're doing is evidence-based and studied.

Finally, mass incarceration has had a devastating effect on all communities, particularly minority communities, which are both underpoliced for safety and overpoliced for incarceration. I agree with the Johnson Commission's recommendation that habitual criminals should get a longer sentence to protect public safety.¹⁰⁵ But, and this is what we learned on the Sentencing Commission and our report on

Courts to Implement, NAT'L COUNCIL JUV. & FAM. CT. JUDGES (May 1, 2017), <https://www.ncjfcj.org/Guide-to-the-Guidelines-Series> [<https://perma.cc/V4CT-DBTY>].

¹⁰¹ See PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *supra* note 1, at 141–46.

¹⁰² See *id.*

¹⁰³ See *A Guide to the Guidelines Series: Practical Tips for Juvenile Drug Treatment Courts to Implement*, *supra* note 100.

¹⁰⁴ See, e.g., Wendy P. Guastaferrro, *Pro & Con: Drug Courts an Effective Alternative for Offenders?*, AJC (Apr. 11, 2011, 11:39 PM), <https://www.ajc.com/news/opinion/pro-con-drug-courts-effective-alternative-for-offenders/cRFv27Lgve5f5slRWZFscP> [<https://perma.cc/U6WH-88QQ>] (discussing drug courts in Georgia as an example).

¹⁰⁵ See PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *supra* note 1, at 143.

career offenders, we need to be very careful on how we define these crimes, like these three-strike laws, so that they are not overbroad. We need to consider alternatives to incarceration and the collateral effects of the convictions themselves.

In the long run, though, sentencing policy will not fix the crime problem. And that's where the Johnson Commission Report was brilliant. It's so easy to have the short-term solutions. In the long run, only better policing and attacking the root causes of poverty will result in better crime policy, which is as true today as it was fifty years ago. In my view, policymakers should not waste another fifty years failing to address the root causes. So, I want to thank you all and see if some of you want to ask a question.

QUESTIONS AND ANSWERS

Question: So, you mentioned the opioid crisis and the coverage it's getting. I think, in fact, today the President made a statement about it as well,¹⁰⁶ so there's been a lot of attention paid to it, and many have argued that this public health response to the opioid crisis is exactly what we should've done in response to other crises related to other types of narcotics. I wonder if you have any insight on that observation.

Chief Judge Saris: Well I, being the Pollyanna that I am, I'm just hoping we've learned a lesson. This Forman book is amazing. I agree with its bottom line, which is that people made all these incremental decisions along the line and made decisions on this, that, and the other thing, and didn't understand the impact that increased penalties would have twenty years later.¹⁰⁷ I think that we basically see what happened with the drug sentencing and understand about drug addicts, and so we understand that yes, you need to put people who sell opioids in jail, but people who are addicts and are selling to support their habit also need the treatment. And so I'm hoping we just learned a lesson as a society. That's what I'm hoping.

Question: Aside from the mandatory minimum problem, I would love to get your assessment of the Sentencing Commission and the statute that created it. Do you feel, on balance, that it did make some meaningful reforms?

¹⁰⁶ See Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 26, 2017, 6:18 PM), <https://twitter.com/realDonaldTrump/status/923720632122200064> [<https://perma.cc/V5JD-W4JG>].

¹⁰⁷ See generally FORMAN, *supra* note 47; see also *United States v. Booker*, 543 U.S. 220, 233 (2005).

Chief Judge Saris: Absolutely. I mean, during the last six years, I've never been so proud to be part of an organization because we were able to work together with prosecutors and people with defense backgrounds based on evidence and try and come to good sentencing policy. We like to say we're at the crossroads of the executive, the legislative, and the judicial branches; we're located in the judiciary, but sentencing policy is a shared power. The attorney general has a certain point of view. Ultimately, it's Congress's decision as to what the statutory minimum and maximum are, and they can veto our guidelines. So, we're definitely very much in the political fray, but what we try to do is base our decisions just on the evidence. And I think, in that sense, we fulfilled some of the promise of what the Johnson Commission wanted.

In at least nine opinions, the Supreme Court has looked at the sentencing guideline system in the case called *Booker*,¹⁰⁸ and it held that there was a Sixth Amendment violation with the mandatory guidelines, and therefore they became advisory.¹⁰⁹ And so, you know, when I talk up the sentencing system that was put into effect in the 1980s, it's not the same system that we have today, because of the remedial decision by the Supreme Court. So, we've evolved, and we should evolve. That's what it's supposed to be about. And I didn't go through everything we did, but we also looked at immigration offenses and all sorts of other offenses. I've focused on drugs today.

Question: Are you in favor of bringing back parole guidelines?

Chief Judge Saris: That is a great question and let me explain why that is. The Parole Commission is actually a very professional body, but parole decisions happened behind the scenes, behind closed doors, and the view of the Congress was that this system was crazy. The judge imposes a sentence, and then behind closed doors the Parole Commission has its own little guidelines as to when it is going to release you. This is not transparent. It's not the sentencing judge. No more. Parole is eliminated, and we now use truth in sentencing. All right, well, so now I've been sentencing for a long time. I've been sentencing people since 1994 in the federal system. And just as I've changed, a prisoner has reformed. People change behind bars but

¹⁰⁸ 543 U.S. 220, 233 (2005).

¹⁰⁹ *Id.*; see Jonathan S. Masur, *Booker Reconsidered*, 77 U. CHI. L. REV. 1091, 1091 (2010) (“*Booker’s* reverberations continue to be felt, as federal courts struggle with the newly permissive sentencing regime and the Supreme Court decides case after subsequent case in an effort to iron out the wrinkles caused by its decision.”).

there's no second look at whether a prisoner has reformed. That's harsh.

I remember I went to visit a prison and this guy—in fairness, he was cherry-picked by the BOP¹¹⁰—to meet with us, but he said, you know, “I was a bad guy. I had guns and drugs and that sort of thing.” He said, “But I was twenty-two, and now I'm forty, and I'm a very different person.” And he was; he was a model prisoner. He'd done this, that, and the other; he had completed all the programs, received an education, but there was no chance to do a second look at that person. And so some of the proposals in Congress don't bring back the parole commission, but they had some back-end programs that if you are a model prisoner, you'll get certain reductions off of your penalty.¹¹¹ That was a legislation put together by Senator Cornyn and Senator [Sheldon] Whitehouse, but it didn't go anywhere because the legislation failed, but I wouldn't be surprised if there was legislation that actually passed.¹¹² There'd be an opportunity for a second look at people. So, I think we've learned. It can't go back to the old days where it was all behind closed doors, but we could maybe do more about people who are successful in prison. And I don't know whether that will pass, but it was a serious proposal in the Congress.

Question: You mentioned alternatives to incarceration. I was wondering if you could talk about ones that you see as more effective.

Chief Judge Saris: Well, let me start off with the biggest problem with the alternatives to incarceration from my point of view as a federal judge. I have no say in it. Okay. In terms of just vacating a conviction, there's no expungement statute; you're going to have that felony conviction on your record even if you aren't incarcerated.¹¹³ So, it is up to the U.S. Attorney's Office to provide an alternative, which was essentially, if you do x, y, z then we'll dismiss the indictment. I haven't seen much progress on that level, at least on the federal side. I'm told there are some defendants that are diverted,¹¹⁴ but I wouldn't see them because then they never come to me.

¹¹⁰ Bureau of Prisons.

¹¹¹ See Sentencing Reform Act of 1984, ch. 2, Pub. L. No. 98-473, 98 Stat. 1987 (1984).

¹¹² See Press Release, Sheldon Whitehouse, Whitehouse Cheers Passage of Sentencing Reform and Corrections Act (Feb. 15, 2018), <https://www.whitehouse.senate.gov/news/release/whitehouse-cheers-passage-of-sentencing-reform-and-corrections-act> [<https://perma.cc/Y334-7HDC>].

¹¹³ See generally Raj Mukherji, Paper, *In Search of Redemption: Expungement of Federal Criminal Records*, SETON HALL L. SCH. STUDENT SCHOLARSHIP (2013).

¹¹⁴ U.S. SENTENCING COMM'N, FEDERAL ALTERNATIVE-TO-INCARCERATION COURT PROGRAMS 6, 50 n.267 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf [<https://perma.cc/7V4A-SC9M>].

The Sentencing Commission just did a wonderful report and began gathering information on alternatives that are happening across the federal districts.¹¹⁵ Let me tell you, in Massachusetts what's happening is something called the RISE program,¹¹⁶ and we take people who are either deprived as youth of certain opportunities or people who are primarily addicts with very low criminal histories and usually nonviolent. And we say, if we give you these seventeen hoops to jump through, you get your education, you go to a job, you know, you will have a good shot at a nonincarcerative sentence.¹¹⁷ And we've just started that program, and programs like that are happening all over the country. The judges are being very cautious about it; I mean, they're not giant programs, but they're just the little bites trying to see if this will work. And so, I think there's experimentation happening on alternatives, but for the most part I think it's been an initiative on the state level more than it has been the federal level. But read this report, because it's really interesting. If you're interested in alternatives, the Commission tried to, in a qualitative way, analyze the different kinds of programs that are happening across the federal system.¹¹⁸

Question: [Inaudible.]

Chief Judge Saris: Well, let me just say this. We don't even we have an acting U.S. Attorney, so I think what Attorney General Sessions did was he went back, he revoked the Holder memo¹¹⁹—I'm sort of getting into the weeds a little. He reinstated a memo which says: charge the maximum readily provable crime.¹²⁰ So I think it's gone back to what it was before Attorney General Holder. I'm not quite sure how it will all play out, so I will just have to take a pass. You'll have to invite me back here in a couple of years.

¹¹⁵ See *id.*

¹¹⁶ "RISE" stands for "Repair, Invest, Succeed, Emerge." See *R.I.S.E.*, U.S. PROB. & PRETRIAL SERVS. OFF. DISTRICT OF MASS., <http://www.map.uscourts.gov/rise> [https://perma.cc/CWQ2-J9YX].

¹¹⁷ See U.S. PROB. & PRETRIAL SERVS. OFFICE DIST. OF MASS., THE RISE PROGRAM 1, 3 (2017), <http://www.map.uscourts.gov/sites/map/files/2017%20RISE%20Program%20Statement.pdf> [https://perma.cc/NT3F-KSYV].

¹¹⁸ See U.S. SENTENCING COMM'N, *supra* note 114.

¹¹⁹ Sari Horwitz & Matt Zaposky, *Sessions Issues Sweeping New Criminal Charging Policy*, WASH. POST (May 12, 2017), https://www.washingtonpost.com/world/national-security/sessions-issues-sweeping-new-criminal-charging-policy/2017/05/11/4752bd42-3697-11e7-b373-418f6849a004_story.html?utm_term=.31d818ea085c [https://perma.cc/5YP6-FX2C].

¹²⁰ Memorandum from the Office of the Attorney Gen. on Dep't Charging and Sentencing Policy (May 10, 2017), <https://assets.documentcloud.org/documents/3719247/Jeff-Sessions-s-criminal-charging-policy.pdf> [https://perma.cc/35TZ-AAW9].