

JUDICATURE

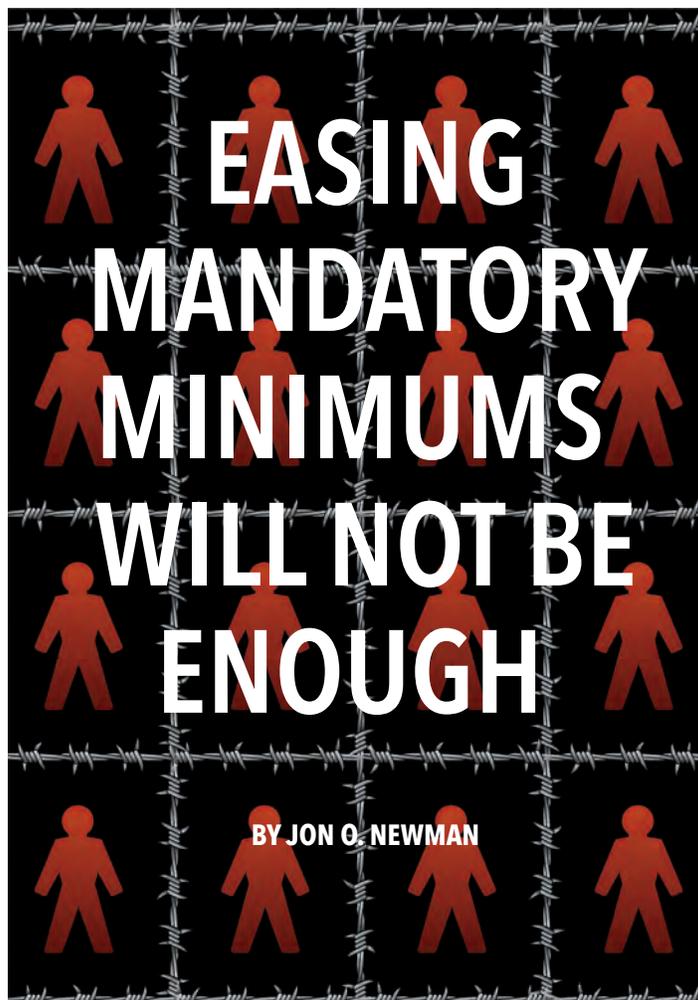
Published by the Duke Law Center for Judicial Studies and reprinted with permission.
© 2016 Duke University School of Law. All rights reserved. www.law.duke.edu/judicature

Congress is finally considering easing mandatory minimum penalties. However, this effort, even if successful, will need to be complemented by actions taken by the United States Sentencing Commission and federal district judges.

If some mandatory minimum requirements are repealed or at least modified, there will be two immediate consequences. First, prosecutors will be deprived of the awesome power to coerce a guilty plea by threatening to charge an offense that will subject a defendant to a mandatory minimum sentence. Second, sentencing judges will be spared the often distasteful obligation to impose a required sentence that is more severe than the one they would have selected had they been free to use their sentencing discretion.

But these immediate consequences, desirable as they are, will be only the first of three steps needed to reduce the severity of sentences currently subject to mandatory minimum requirements. The Sentencing Commission must take the second step of revising the Sentencing Guidelines, and then district judges must take the third step of using their authority to impose non-Guidelines sentences.

The Sentencing Commission was created to use its expertise to set the ranges for federal sentences. However, the Commission, with respect to many offenses, did not prescribe the ranges it thought were appropriate, but instead used the statutory mandatory minimum sentences as a floor and built its sentencing ranges on top. For example, the current



mandatory minimum sentence for selling more than 280 grams of cocaine base is ten years.¹ The current Sentencing Guideline range for selling between 840 grams and 2.8 kilograms of cocaine base is 12 years, 7 months to 15 years, 3 months.² So a defendant who sells 840 grams of cocaine base is subject to the bottom of the applicable Guidelines range that is 2-and-1/2 years longer than the mandatory minimum; the top of the applicable Guidelines range is 5 years longer.

True, the Guidelines are now “advisory” as a result of the Supreme Court’s decision in *United States v. Booker*³, but the Court in *Kimbrough v. United States*⁴ required

sentencing judges to calculate a Guidelines sentencing range before they may elect to impose a non-Guidelines sentence. Once they make the required calculation, federal judges impose a sentence within the calculated range in nearly half of all cases, and impose a sentence within or above the range (or below when the government requests a cooperation reduction) in more than three-quarters of all cases.⁵ So the Commission needs to revise its sentencing ranges for offenses that have been subject to mandatory minimums if and when those minimums, or at least some of them, are eliminated.

In making such revisions, the Commission also needs to rethink its basic approach to setting sentencing ranges for offenses that have been subject to mandatory minimums, primarily narcotics offenses. The Commission elected to make the amount of narcotics the primary determinant of the sentence. The Commission prescribed a table with 17

distinct quantities and assigned an offense level to each quantity.⁶ These offense levels translate into sentencing ranges. For example, selling between 112 and 196 grams of cocaine base places a defendant at offense level 28,⁷ which, with no prior offenses, translates to a sentencing range of 78 to 97 months.⁸ Selling between 196 and 280 grams of cocaine base places a defendant at offense level 30, which, with no prior offenses, translates to a sentencing range of 97 to 121 months.⁹

This detailed calibration of a narcotics sentencing table reflects the Commission’s original view, never altered, that every increment of wrongdoing, even small ones,

must incur an increase in punishment. Of course, a narcotics transaction involving huge quantities of narcotics merits more punishment than a transaction involving a very small amount. But a table with 17 categories of quantities makes little sense.

The Commission took a similar approach for monetary crimes, establishing a loss table with 16 categories.¹⁰ For example, theft of \$5,000 to \$10,000 places a defendant at level 8,¹¹ which translates to a sentencing range of 0 to 6 months,¹² while theft of \$10,000 to \$30,000 places a defendant at level 10,¹³ which translates to a sentencing range of 6 to 12 months.¹⁴ This approach, which I have termed “incremental immorality,” i.e., adding a precise increment of punishment for each increment of wrongdoing, is unknown to any sentencing system in the world. As I have told the Commission in the past, no thief wakes up and decides to steal \$8,000 rather than \$12,000. He might decide between robbing a bank and robbing a convenience store, but if he chooses a convenience store, he takes whatever is in the cash register.

A far more sensible approach to both narcotics and monetary crimes would be to establish just four categories of amounts of narcotics and money — small, medium, large, and very large. Then, the major determinant of sentencing ranges should be changed to role in the offense, which is now just a basis for a small adjustment in the sentence range calculation. The head of a major narcotics organization should receive a very harsh sentence; the girlfriend who on one occasion drives a seller to a transaction should receive a minor sentence, but with the Commission’s narcotics quantity table, she will likely face a sentencing range of many years if the boyfriend handles a large quantity.

Whether or not the Commission makes any of these changes after some mandatory minimums are eliminated, and especially if the Commission fails

to act, federal district judges need to take the third step in a post-mandatory-minimum regime. They need to take full advantage of the opportunity provided by the Supreme Court in *Booker* to impose a non-Guidelines sentence, usually a sentence below the calculated Guidelines sentencing range.

Unfortunately, many district judges, obliged by *Kimbrough* to calculate a Guidelines sentencing range, end their sentencing consideration at that point and simply impose a sentence within the applicable range. If the Commission does not make the revisions suggested above, that range will often be considerably in excess of an appropriate sentence, but not so high that a Court of Appeals, reluctant to alter any sentence, will reject it as unreasonable.

It is not clear whether Congress will actually eliminate any mandatory minimum sentences. But if it does, the Commission and district judges need to do their part in making sentence reduction a reality.

“WHETHER OR NOT THE COMMISSION MAKES ANY OF THESE CHANGES AFTER SOME MANDATORY MINIMUMS ARE ELIMINATED, AND ESPECIALLY IF THE COMMISSION FAILS TO ACT, FEDERAL DISTRICT JUDGES NEED TO TAKE THE THIRD STEP IN A POST-MANDATORY-MINIMUM REGIME. THEY NEED TO TAKE FULL ADVANTAGE OF THE OPPORTUNITY PROVIDED BY THE SUPREME COURT IN *BOOKER* TO IMPOSE A NON-GUIDELINES SENTENCE, USUALLY A SENTENCE BELOW THE CALCULATED GUIDELINES SENTENCING RANGE.”

¹ 21 U.S.C. § 841(b)(iii) (2012).

² United States Sentencing Commission, *Guidelines Manual* § 2D1.1(c)(4) (Drug Quantity Table) (2014) (“Guidelines Manual”).

³ *United States v. Booker*, 543 U.S. 220 (2005).

⁴ *Kimbrough v. United States*, 562 U.S. 85 (2007).

⁵ U.S. SENTENCING COMM’N, ANNUAL REPORT A-5 (2014).

⁶ Guidelines Manual § 2D1.1(c) (Drug Quantity Table) (2014).

⁷ *Id.* at § 2D1.1(c)(6).

⁸ *Id.* at Ch. 5, Pt. A (Sentencing Table).

⁹ *Id.*

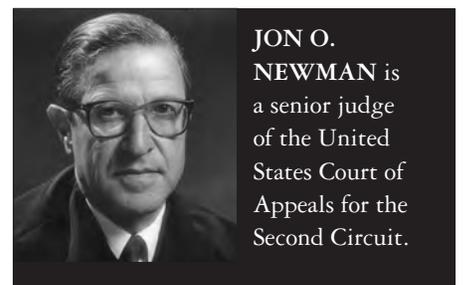
¹⁰ *Id.* at § 2B1.1(b)(1).

¹¹ *Id.* at § 2B1.1(b)(1)(a).

¹² *Id.* at Ch. 5, Pt. A (Sentencing Table).

¹³ *Id.* at § 2B1.1(b)(1)(c).

¹⁴ *Id.* at Ch. 5, Pt. A (Sentencing Table).



JON O. NEWMAN is a senior judge of the United States Court of Appeals for the Second Circuit.