

# HONORING AND CELEBRATING MYRNA RAEDER

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It is a great privilege to be honoring Myrna Raeder and to celebrate her impressive career, scholarship and personhood. How appropriate to bring together scholars and advocates who share and will carry on her passions. Thank you everyone at Southwestern Law School who worked so hard to imagine and realize this symposium, for gathering us together, and for giving us the opportunity to reflect on the many gifts and fierce challenges Myrna gave to each of us. There is no finer tribute we can give than to carry on her work – the development of ideas and the encouragement of women – in the academy, in the home and behind prison walls.

Today we do just that. To be sure, we are only able to scratch the surface and to highlight a few of the areas that are measurably richer for Myrna's touch. She was a woman who believed in the capacity of women and the obligation of all of us to develop rules and create opportunities that would nurture and encourage, rather than thwart and stymie, that capacity. Realistic about the challenges, Myrna faced them head on.

With her keen ear and eye and her boundless compassion, Myrna cared deeply about sexual violence and its intersection with the criminal justice system. Rachel Van Landingham carries on that important work by drawing on her experience and encouraging us to think about sexual violence in the military context. Jane Stoeber articulates concerns about co-locating services to address domestic violence that provide a frame for those values in a new context. Highlighting survivor safety, autonomy, and the collateral consequences of providing information reminds us all of the Raeder norms. Merle Weiner pushes us to reimagine the law's obligation to broaden its conception of parenting by insuring the value of a supportive and cooperative relationship. Her creative proposals to further these objectives through both civil and criminal law are consistent with the Raeder balancing of different

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approaches to legal problem solving. Bennett Capers challenges us to consider the role of gender in sexual violence and urges that the law protect refusal of subjugation.

Myrna was a lawyer's lawyer. She loved puzzles and intellectual challenge but she also understood how much turns on the practical realities of wrestling a legal issue to the ground in the real world. The sometimes dry and rule-bound field of evidence was one of her many arenas and areas of expertise. Building on Myrna's role in crafting model codes, Marina Angel invites us to advocate for legislative reform that would make evidence of prior acts of abuse admissible in narrow circumstances. Countering the conception of women as battered and helpless, her proposal recognizes the strength and capacity of the women Myrna championed. Understanding that the work is never done, co-author and friend Paul Rothstein pays tribute to Myrna by highlighting the challenges *Crawford* Confrontation Clause analysis poses to the admissibility in criminal cases of out-of-court statements by children about abuse. All of us will face the questions he raises, not only in analyzing the Supreme Court's decision in *Ohio v. Clark* but in assessing our own roles in the emerging debate about the role of faculty in counseling students and in reporting abuse allegations. We will do well to remember Myrna's tireless efforts to both protect children and the rights of those accused of crime. Aviva Orenstein honors Myrna by extending her important scholarship criticizing the Supreme Court's Confrontation Clause analysis in the context of an abusive relationship.

This afternoon promises a rich array of thought-provoking presentations about the intersection of gender with the criminal justice system and the juvenile detention system. Angela Irvine will describe her collaboration work with transgender youth in New Orleans who are energized by the power of empirical research in their community. Heidi Rummels and Norma Cumpian will inspire us all with their work to both obtain the release of abused women and to strengthen family ties of incarcerated mothers. Ellen Podgor will remind us of the brilliant Raeder strategic choices. Finally, Robert Schwartz will describe the pathbreaking work done by The Juvenile Law Center in Philadelphia, Catherine Carpenter will describe lifelong stigmatization of being labeled a sex offender for juvenile misconduct, and Jyoti Nanda will discuss the ways in which schools are adopting a criminal justice model at the cost of educating our children.

Myrna chose areas, both for her scholarship and for her advocacy, that are not always uplifting. Her work focused on protecting and empowering some of the most vulnerable members of our society – women who are abused and children of women convicted of crime. Rather than seeing them as victims, she saw their potential and resilience. In their stories, and those

of their advocates, she found strength, motivation and inspiration. We honor her best when we emulate these traits.

In that vein, I am going to focus my remarks on three areas of opportunity, promise and perhaps hope. First, the remarkable legislative achievement of the Prison Rape Elimination Act or PREA, enacted in 2003. Second, The Second Chance Act of 2007. Referred to the Senate Judiciary Committee for reauthorization just last month, it marks another positive step by Congress, one that focuses on reintegration and insuring that people leave prison with the tools they need to build a new life. Third, the executive initiative, prompted by a relentless coalition of advocacy and professional groups, that has given us a robust and promising federal program – Clemency Project 2014.

Although the number of women in prison has always been a relatively small percentage of the total population, the female population has been increasing at a much faster rate than the male population. And, the women have different pathways to prison. The majority have histories characterized by physical and psychological violence. Myrna wrote extensively about this and about the gendered aspects of federal sentencing policies that led to the increasing number of women who spend decades in federal prisons for relatively limited roles in drug crimes.

The reality of prison rape forces us to confront, in very stark terms, the reality of the lives people are forced to survive in prison. During the 1980s and 90s, advocates, scholars and human rights reporters began to focus on the continued sexual assault of women behind bars.<sup>1</sup> In 2003 PREA, the product of a bipartisan and unanimous effort with interesting origins,<sup>2</sup> gave us a powerful statute and a group of sturdy and fearless commissioners who gathered heart-rending testimony during hearings around the country. During those sessions, the Commission heard compelling voices as it listened to stories from every sector of the system.<sup>3</sup> The arduous process of obtaining federal regulations was a saga in itself. Thousands of comments to the

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1. See, e.g., *Women Prisoners of the D.C. Dep't of Corr. v. D.C.*, 877 F. Supp. 634 (D.C.D.C. 1994), *vacated in part, modified in part*, 93 F.3d 910 (D.C. Cir. 1996); NOT PART OF MY SENTENCE (Amnesty International 1999), available at <http://www.amnesty.org/en/library/asset/AMR51/019/1999/en/7588269a-e33d-11dd-808b-bfd8d459a3de/amr510191999en.pdf>; *Lucas v. White*, No. C 96-02905, available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0009-0001.pdf> (private settlement agreement with the Federal Bureau of Prisons).

2. Brenda V. Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues*, *Criminal Law Brief American University Washington College of Law*, 1, 10-18 (2008).

3. See NATIONAL RAPE ELIMINATION COMMISSION REPORT (June 2009), available at <https://www.ncjrs.gov/pdffiles1/226680.pdf>.

proposed regulations finally led to significantly stronger codified rules in May, 2012.<sup>4</sup>

The auditing provisions of PREA survived and the Bureau of Justice Statistics (“BJS”) continues to gather information that demonstrates work not yet done. The last report highlights that correctional administrators identified a statistically significant increase in the number of sexual victimization allegations in prisons, jails, and other adult correctional facilities that confirms a three-year trend.<sup>5</sup> The BJS reports are rich and provide a great deal of troubling information. For example, state prison administrators reported a 17% increase in the number of substantiated sexual victimization allegations since reporting began in 2005; the number of allegations of sexual victimization in prisons increased 39% during that same period.<sup>6</sup> Between 2009 and 2011, more than 40% of the victims of substantiated incidents involving staff were female and a staggering 67.2% of the victims in local jail were women.<sup>7</sup>

The PREA reporting, statistics and information reveal the gendered nature of the prison experience, a theme that permeates Myrna’s work. In 1993, the same year that United States District Court Judge June L. Green issued a comprehensive opinion in a case that challenged a wide range of conditions experienced by the DC women prisoners,<sup>8</sup> Myrna was working diligently on the front end – keeping women out of prison in the first place.

Commitment to inter-disciplinary collaboration was a hallmark of Myrna’s work. By 2003, the year that PREA passed, she had become a major contributor to law reform projects at ALI and the National Institute of Corrections. That year, she provided the legal framework to support the important policy prescriptions articulated by Drs. Covington, Bloom and Owen in *Gender Responsive Strategies: Research Practice and Guiding Principles for Women Offenders*. Dr. Bloom was impressed by her tenacity and credits her with supplying the foundation that led to implementation of gender-responsive programming and policies throughout the country.

We would do well to follow her example, to mine the PREA data and view it through the lens of gender equity. Is the experience of women in prison comparable to that of the men? Should we be pushing for additional information? Asking hard questions and insisting on the answers? For

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4. See Prison Rape Elimination Act National Standards, 28 C.F.R. § 115 (2012).

5. See U.S. DEPT. OF JUSTICE, SPECIAL REPORT, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2009-2011 (2014).

6. *Id.*

7. *Id.* at 12.

8. *Women Prisoners of the D.C. Dep’t of Corr. v. D.C.*, 877 F. Supp. 634 (D.C.D.C. 1994), *vacated in part, modified in part*, 93 F.3d 910 (D.C. Cir. 1996).

example, why is a rape kit administered in only a small minority of the cases where allegations are substantiated? Why are victims of substantiated incidents not routinely tested for HIV and STDs? Can we prove that we are failing to protect the women we are locking up?

The Second Chance Act of 2007 was designed to improve outcomes for people returning to communities after incarceration.<sup>9</sup> One part of the Act authorizes grants aimed at both adults and juveniles.<sup>10</sup> On October 27, 2014, California Attorney General Kamala Harris announced that her office was one of the four Second Chance Act grantees.<sup>11</sup> It has received an award of nearly \$750,000 to fund “Back on Track LA,” a recidivism reduction pilot program described as a partnership that includes the sheriff’s department, probation department, local community colleges, a charter school and private foundations.<sup>12</sup> The partnership “will provide higher education opportunities to incarcerated participants including prerequisites to community college degrees, credentials and certificates.”<sup>13</sup> A month earlier, on September 24, 2014, Attorney General Holder had announced that the “Office of Juvenile Justice and Delinquency Prevention will provide \$7 million in Second Chance Act funds to bolster reentry programs for juveniles.”<sup>14</sup> An additional “\$1.8 million will go to a new Juvenile Reentry Legal Assistance Program managed jointly with the Department of Housing and Urban Development.”<sup>15</sup> The Justice Department has also made grants to five states to implement pre-trial reforms and evidence-based parole practices and to another five states to support efforts to reduce recidivism.<sup>16</sup>

In addition to funding research and programs focused on successful reentry and lowering recidivism, the Act created the possibility that people in federal prison could be released to Residential Reentry Centers or halfway houses up to twelve rather than only six months before the end of their sentences.<sup>17</sup> Curiously, the Federal Bureau of Prisons (“BOP”) did not

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9. See Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008).

10. *Id.* at 661-68.

11. *California Attorney General’s Office Awarded \$750,000 to Fight Recidivism*, CSG JUSTICE CTR., Oct. 27, 2014, <http://csgjusticecenter.org/reentry/media-clips/california-attorney-generals-office-awarded-750000-to-fight-recidivism/>.

12. *Id.*

13. *Id.*

14. *Attorney General Discusses Justice Reinvestment, New Grant Awards*, CSG JUSTICE CTR., Sept. 24, 2014, <http://csgjusticecenter.org/jr/posts/attorney-general-talks-justice-reinvestment-new-grant-awards/>.

15. *Id.*

16. *Id.*

17. Second Chance Act of 2007, 18 U.S.C. § 3624 (2008); see also *The Bureau of Prisons Should Fully Implement Ameliorative Statutes to Prevent Wasted Resources, Dangerous Overcrowding, and Needless Over-Incarceration: Federal Bureau of Prisons Oversight Hearing*

embrace this expansion. Rather, it issued internal guidance creating a presumption against such early release and a requirement that each exception be authorized personally by the Regional BOP Director.<sup>18</sup> During federal litigation, the BOP revised its policy and, theoretically, a wider window is available. That reaction provides a useful reminder that systemic change comes slowly and requires vigilance to achieve.

A recent study by the National Institute of Justice is more encouraging than this isolated example of recalcitrance. Issued as the first part of a two part evaluation, the report noted a “culture shift” among the agencies that received Second Chance Act funding – from a focus on simply enforcing re-entry rules and regulations to a rehabilitative philosophy.<sup>19</sup>

The third ray of hope comes to us from President Obama and the Department of Justice. In response to an integrated campaign led by various non-profit organizations, the administration has announced a new clemency initiative and the formation of a non-governmental coalition, Clemency Project 2014, that will implement the initiative.<sup>20</sup> This program has the potential to provide early release to thousands of people in federal prisons.<sup>21</sup>

The federal constitution vests the president with the power to exercise clemency – either through pardon or sentence commutation.<sup>22</sup> The Sentencing Reform Act of 1984 abolished parole for federal crimes committed after November 1, 1987.<sup>23</sup> That statute also created the Sentencing Commission, the body that promulgates federal sentencing guidelines,<sup>24</sup> upheld as constitutional in 1989<sup>25</sup> and considered mandatory until 2005.<sup>26</sup> The Act’s structural reform effectively vested release decisions in the prosecutor who, to a large extent, determined the sentence at the time of indictment.

By 1993, the dramatic escalation of our prison population – both state and federal – had become apparent. In an important article published that

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*Before Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 2 (2009) (testimony of Stephen R. Sady, Chief Deputy Federal Public Defender for the District of Oregon), available at <http://or.fd.org/Sady/written%20stmt%20july%202009.pdf>.

18. *See id.* at 2-3.

19. Nancy Ritter, ‘*Cultural Shift*’ is Among Findings of Second Chance Act Evaluation, NAT’L INST. OF JUST. J. NO. 273, Dec. 2013, available at <http://nij.gov/journals/273/Pages/second-chance-act-evaluation.aspx>

20. *See* CLEMENCY PROJECT 2014, <https://www.clemencyproject2014.org/> (last visited Feb. 3, 2015).

21. *See id.*

22. U.S. CONST. art. II, § 2, cl. 1.

23. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 211, 98 Stat. 1887 (1984).

24. *Id.* at 2017-18.

25. *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

26. *United States v. Booker*, 543 U.S. 220, 266 (2005).

year, Myrna explained the discriminatory effects of the supposedly gender-neutral federal sentencing guidelines and mandatory minimum sentencing.<sup>27</sup> She explained that the failure to take into account gender-based realities of criminal activity and child rearing meant that girlfriends or wives of more culpable male defendants often found themselves subject to social and cultural pressures that coerced participation in criminal activity.<sup>28</sup> Without the information required to provide meaningful cooperation to the government, these women had nothing to bargain away the longer guideline sentences.<sup>29</sup> Describing the impact of the War on Drugs, Myrna warned us early of the disproportionate effect that this battle would have on women and their children.<sup>30</sup> And it has.

Again, she not only challenged the policy implications of the new sentencing regime but used her lawyering skills to craft prescriptions that would allow advocates to strive for justice in individual cases while the political process wound its way to a more enlightened approach. She taught us to argue domestic violence, not just as an affirmative defense but as a mitigating circumstance at sentencing that would justify downward departure. She combed the cases and BJS statistics for statements that could be crafted into arguments. Never compromising her principles or extending a position beyond where her considerable integrity would allow, she was clear about her commitment and objectives. Calling for greater rationality and further study into the nature of women's roles as facilitators of criminal activity, she focused on the guidelines' effects and their particularly detrimental effect on the children of single mothers.

Myrna's predictions about the gendered nature of the federal sentencing guidelines, and the inevitable inequity that would follow became all too real. Once the Sentencing Reform Act took full effect, clemency became the only meaningful opportunity for people sentenced to federal prison to be released prior to the expiration of their sentence. Yet presidents rarely exercise that power, other than to grant controversial pardons shortly before their departure from office.<sup>31</sup> The new clemency initiative provides an opportunity

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27. Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 906-08 (1993).

28. See generally *id.*

29. See *id.* at 979-81, 983-85.

30. See *id.* at 923-24.

31. See *Standards for Consideration of Clemency Petitioners*, DEPARTMENT OF JUSTICE, <http://www.justice.gov/pardon/about-office-0> (last visited Feb. 04, 2015). The one notable exception is the special pardon board that President Ford established to review draft evaders following the Vietnam War. See Marjorie Hunter, *See Ford Offers Amnesty Program Requiring 2*

to promote the proposals Myrna identified two decades ago and to achieve meaningful relief for women who are serving unduly harsh federal sentences.

Concern about the impact of the failed war on drugs, which had led to what we now refer to as mass incarceration, grew as state and federal budgets buckled under the strain of overcrowded prisons. For twenty years, a coalition of scholars and advocates waged an orchestrated campaign to eliminate the cocaine/crack disparity that had been part of the federal sentencing guidelines. In 2009, the Supreme Court recognized the irrationality of that disparity.<sup>32</sup> Passage of the Fair Sentencing Act of 2010 further remediated sentences but the statute does not apply retroactively.<sup>33</sup>

Last December, the President granted commutation to eight people.<sup>34</sup> When the Department of Justice announced the new clemency initiative, it described those individuals as having been sentenced “under an outdated regime.”<sup>35</sup> President Obama has said that he wants to consider applications from people who are similarly situated.<sup>36</sup> Two of the eight commutations were granted to women who exemplify the defendants Myrna wrote about twenty years ago.<sup>37</sup>

Helen Gray was sentenced in 1996 to 240 months for conspiracy to distribute cocaine base (crack) and possession of a firearm by a convicted felon.<sup>38</sup> It is unclear whether Ms. Gray was a convicted felon.<sup>39</sup> She insisted that she was permitted to own the gun and that she received a sentence of probation for a minor incident.<sup>40</sup> Chief Judge Lawson stated at sentencing that he thought the sentence was too harsh but that his hands were tied.<sup>41</sup> Ms. Gray wrote to him seeking a transfer in 2007, describing her family members

*Years Public Work; Defends His Pardon of Nixon*, N.Y. TIMES, Sept. 17, 1974, available at <http://www.nytimes.com/learning/general/onthisday/big/0916.html#article>.

32. See *Spears v. United States*, No. 085721, slip. op. at 5 (U.S. Jan. 21, 2009), <http://www.supremecourt.gov/opinions/08pdf/08-5721.pdf>.

33. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

34. See *Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants*, DEPARTMENT OF JUSTICE (Apr. 23, 2014), available at <http://www.justice.gov/opa/pr/announcing-new-clemency-initiative-deputy-attorney-general-james-m-cole-details-broad-new>.

35. *Id.*

36. *Id.*

37. See *President Obama Grants Pardons and Commutation*, THE WHITE HOUSE (Dec. 19, 2013), <http://www.whitehouse.gov/the-press-office/2013/12/19/president-obama-grants-pardons-and-commutation>.

38. *Id.*

39. See Motion to Modify Sentence/Conviction at 1, *United States v. Alexander*, No. 7:CR00023-HL (M.D. Ga. Jan. 23, 2012), ECF No. 170.

40. See *id.* at 1-2.

41. See Letter from Helen Ruth Gray to the Honorable Judge Hugh Lawson Seeking Advice at 1, *United States v. Alexander*, No. 7:CR00023-HL (M.D. Ga. July 9, 2007), ECF 142.2.



and her wish to be closer to them.<sup>42</sup> Stephanie Yvette George was sentenced in 1997 to mandatory life imprisonment for conspiracy to distribute cocaine base, the longest sentence of any of her co-defendants.<sup>43</sup> At sentencing, Judge Roger Vinson described her as “a girlfriend and bag holder and money holder” and stated that he wished he had another alternative because, in his judgment, her role did not warrant a life sentence.<sup>44</sup> On the day of her release, Ms. George was reunited with the four children she had been away from for 17 years.<sup>45</sup> These commutations demonstrate that women convicted of drug conspiracy, even those with a prior felony conviction and a firearm conviction, are now viable candidates for clemency.

On April 23, 2014, when Deputy Attorney General James M. Cole announced the new clemency initiative, he called for a criminal justice system that was not only fair but one that was perceived to be fair and stated: these “older, stringent punishments that are out of line with sentences imposed under today’s laws erode people’s confidence in our criminal justice system. I am confident that this initiative will go far to promote the most fundamental of American ideals—equal justice under law.”<sup>46</sup>

The Department has announced that it will prioritize applications from individuals who meet the following criteria:<sup>47</sup>

1. currently serving a federal sentence in prison and, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense(s) today;
2. non-violent, low-level offender without significant ties to large scale criminal organizations, gangs or cartels;
3. has served at least 10 years of their prison sentence;
4. does not have a significant criminal history;

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42. See Letter from Helen Ruth Gray to the Honorable Judge Hugh Lawson Requesting a Transfer at 1-2, *United States v. Alexander*, No. 7:CR00023-HL (M.D. Ga. Aug. 25, 2007), ECF 143.

43. *Stephanie George*, FAMB, <http://famm.org/stephanie-george/> (last visited Feb. 4, 2015); see also John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, N.Y. TIMES (Dec. 11, 2012), [http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?pagewanted=all&_r=0); *President Obama Grants Pardons and Commutation*, THE WHITE HOUSE (Dec. 19, 2013), <http://www.whitehouse.gov/the-press-office/2013/12/19/president-obama-grants-pardons-and-commutation>.

44. *Stephanie George*, FAMB, <http://famm.org/stephanie-george/> (last visited Feb. 4, 2015).

45. *Id.*; see also *The First Day of the Rest of Her Life*, ACLU, <https://www.aclu.org/smart-justice-fair-justice/first-day-rest-her-life> (last visited Feb. 4, 2015).

46. *Announcing New Clemency Initiative*, *supra* note 34.

47. *Id.*

5. has demonstrated good conduct in prison; and
6. has no history of violence prior to or during their current term of imprisonment.

Women should fare well under these criteria. Importantly, non-retroactive legislation and judicial precedent do not make an applicant ineligible. As long as she can make a persuasive argument that she “likely would have received a substantially lower sentence if convicted of the same offense(s) today,” a woman will have cleared that hurdle.<sup>48</sup>

The new clemency initiative builds on repeated repudiation of “the outdated regime” by the Department.<sup>49</sup> Attorney General Holder has repeatedly issued policy statements and guidance about sentencing and prosecutorial discretion that signaled this change.<sup>50</sup>

A May 19, 2010 memo titled “Department Charging and Sentencing” explicitly superseded memos that required strict adherence to the sentencing guidelines.<sup>51</sup> Rather than ruling out any consideration of gender, the memo counseled prosecutorial decisions that would be mindful of a “duty to ensure that [decisions] are made without *unwarranted* consideration of such factors as race, gender, ethnicity or sexual orientation.”<sup>52</sup> It also emphasized individualized assessment of the facts and circumstances in both charging decisions and advocacy at sentencing.<sup>53</sup>

An August 13, 2013 memo titled “Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases” reinforced the concept of individual assessment.<sup>54</sup> Acknowledging that, “[i]n some cases, mandatory minimum and recidivist enhancement statutes have resulted in unduly harsh sentences and perceived or actual disparities,” the memo advised that prosecutors should decline to

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48. *Id.*

49. *Id.*

50. *See, e.g.*, Memorandum from Attorney General Eric H. Holder, Jr. to All Federal Prosecutors 1 (May 19, 2010), *available at* <http://www.fd.org/docs/select-topics/sentencing-resources/holdermemo.pdf?sfvrsn=4>; Memorandum from Attorney General to United States Attorneys and Assistant Attorney General for the Criminal Div. 1 (Aug. 12, 2013), <http://www.fd.org/docs/select-topics/sentencing-resources/august-12-2013-holder-memo.pdf?sfvrsn=4>; Memorandum from Attorney General to United States Attorneys and Assistant Attorney General for the Criminal Div. 1 (Aug. 12, 2013), *available at* <http://www.fd.org/docs/select-topics/sentencing-resources/august-12-2013-holder-memo.pdf?sfvrsn=4>.

51. Memorandum from Attorney General Eric H. Holder, Jr. to All Federal Prosecutors, *supra* note 50, at 1, 3.

52. *Id.* at 1 (emphasis added).

53. *Id.* at 2-3.

54. Memorandum from Attorney General to United States Attorneys and Assistant Attorney General for the Criminal Div., *supra* note 50, at 1.

charge a drug amount that would trigger a mandatory minimum sentence if certain identified criteria are met.<sup>55</sup> Ultimately, the memo stated that prosecutors should decline to file charges under the recidivist enhancement statute unless the defendant has engaged in conduct that makes the case appropriate for severe sanctions.<sup>56</sup> Finally, a September 24, 2014 memo clarified that a recidivist enhancement charge “should not be used for the sole or predominant purpose of inducing a defendant to plead guilty.”<sup>57</sup>

The Department of Justice memoranda are a welcome reversal of severe prosecutorial policy. They reinforce the tone of recent amendments by the United States Sentencing Commission that have reduced the guideline range for crack to make it more commensurate with powder cocaine and have created other guidelines that allow sentencing courts to consider whether relatively minor or discrete roles played by some defendants convicted of drug conspiracy warrant leniency. By recognizing that the guidelines are advisory<sup>58</sup> and that factual findings used to enhance a sentence must be found by a jury,<sup>59</sup> the Supreme Court has also helped to shine a light on unfairly disparate and harsh sentences. Although these developments do not apply retroactively, clemency provides an opportunity for people in federal prison to benefit from the changing tide. We should take the Department at its word, extend the concepts that Myrna outlined in 1993 and urge that they be incorporated beyond clemency.

Scholarship, advocacy and development of professional norms that embody integrity and focus on the pursuit of justice are essential to building and maintaining a legal system of which we can all be proud. But what transforms successful scholars, advocates and professionals into champions of change is compassion – a strong desire to alleviate the suffering of another when that person is stricken by misfortune. Few have the legal power to exercise mercy but all of us have the capacity to identify suffering and to work to alleviate it. Myrna embodied and modeled mercy on a daily basis. She forgave all of us for our mistakes and recognized that they do not define

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55. *Id.* at 1.

56. *See id.* at 3. Six days later, on August 19, 2013, the Attorney General issued additional guidance about the retroactivity of the August 13 memo and clarified that it would not apply to cases where a sentence had been imposed. *See* Memorandum from Attorney General Eric H. Holder, Jr. to All Federal Prosecutors, *supra* note 50, at 1, 3.

57. Memorandum from Attorney General to Dep’t of Justice Attorneys (Sept. 24, 2014), available at <http://www.fd.org/docs/select-topics/sentencing-resources/memorandum-to-all-federal-prosecutors-from-eric-h-holder-jr-attorney-general-on-851-enhancements-in-plea-negotiations.pdf?sfvrsn=6>.

58. *United States v. Booker*, 543 U.S. 220, 266 (2005); *Apprendi v. N.J.*, 530 U.S. 466, 476 (2000), et al.

59. *Alleyne v. United States*, 133 S. Ct. 2151, 2163-64 (2013).

us or our clients. Her scholarship, her mentoring of generations of students, and her indefatigable efforts to reform the legal profession and the law, insure that her influence will continue to sustain us. We honor her by continuing her work for women locked up in the criminal justice system and for their innocent children who all too often share in their suffering.