

At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles

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I recently completed more than a decade of service on the United States Sentencing Commission, the last fourteen months as its chair. My term as chair began in the month that marked the twenty-fifth anniversary of the Sentencing Reform Act of 1984 (“SRA”).¹ The SRA was landmark federal legislation that created the bipartisan Commission, situated it at the crossroads of the three branches of the government,² and charged it with the mission of creating sentencing guidelines for federal judges to follow that would reduce “unwarranted disparity” in sentencing while at the same time implement the primary purposes of criminal punishment in a just and rational manner.³ It is at this important juncture that I reflect upon where federal sentencing is at the present time, how it got to where it is, and where it should go in the future. This article attempts to share some observations about the past twenty-five years and to recommend a possible path forward.

During my service on the Commission, I listened to the views and ideas of my fellow commissioners, members of the three branches of the federal government, and representatives of

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¹ Pub. L. 98-473, 98 Stat. 2015 (1984).

² See *infra* notes ___-___ and accompanying text.

³ See *infra* notes ___-___ and accompanying text.

all the stakeholders in the federal criminal justice community. I read many thousands of pages of staff memoranda, legal opinions, public comments, academic articles, and empirical studies, as well as heard testimony from hundreds of witnesses who testified before the Commission. Throughout all of this period I also served as a federal district judge and sentenced more than a thousand defendants pursuant to the sentencing guidelines (both in their “mandatory” and “advisory” iterations).⁴ It is from this dual perspective – as a sentencing judge and as a policy-maker – that I write.

As I discuss below, during my tenure the Commission witnessed several important milestones in sentencing policy that reflected the shifting influences of the three branches of the federal government. I began my service in the wake of *Koon v. United States*,⁵ in which the Supreme Court reclaimed a substantial amount of the discretion that the SRA had taken from sentencing judges a decade before by providing a highly deferential standard of appellate review of district courts’ departures from the guidelines.⁶ In 2003, Congress reacted to *Koon* by enacting the PROTECT Act,⁷ which not only directed the Commission to ensure that downward departures from the applicable guidelines ranges were substantially reduced, but also for the first time made direct amendments to the *Guidelines Manual* and thereby bypassed the Commission’s notice and

⁴ The sentencing guidelines – in both their “mandatory” and “advisory” forms – are discussed at *infra* notes ___-___ and accompanying text.

⁵ 518 U.S. 81 (1996).

⁶ *See infra* notes ___-___ and accompanying text.

⁷ Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108—21 (2003).

hearing procedures for amendments.⁸ The PROTECT Act was one of several specific directives from Congress that, along with a growing number of statutes requiring mandatory minimum prison sentences, were designed to increase punishment, restrain judges' sentencing discretion, and afford prosecutors more power over sentencing.⁹ As a result, the sentencing guidelines have become increasingly more severe. And, not coincidentally, the prison population has mushroomed. Between 1999 and 2010 the federal prison population increased by 76%, from 119,185 at the end of 1999 to 210,142 in October 2010,¹⁰ resulting in a 37% over-capacity in the Bureau of Prisons's facilities.¹¹ The Bureau of Prisons recently estimated that, on average, it

⁸ See *infra* notes ___-___ and accompanying text.

⁹ See *infra* notes ___-___ and accompanying text.

¹⁰ See Federal Bureau of Prisons, *Weekly Population Report*, available at http://www.bop.gov/news/weekly_report.jsp (last visited Oct. 19, 2010); see also Bureau of Justice Statistics, *Compendium of Federal Justice Statistics 1999-99* Table 7.9, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs9907.pdf> (noting at the end of fiscal year 1999, the federal prison population was 119,185). If federal inmates in privately-run facilities and state facilities are included, the total federal prison population is 219,000. See "About the Bureau of Prisons," available at www.bop.gov/about/index.jsp (last visited Nov. 19, 2010). At the time of the initial promulgation of the federal sentencing guidelines in late 1987, the federal prison population was 44,000. Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 FED. SENT'G. REP. 29, 29 (July/Aug. 1993). As a result of this growth in the federal prison population, the number of federal prisons has nearly doubled in the past two decades. See Written Testimony of Harley G. Lappin, Director, Federal Bureau of Prisons, before U.S. Sentencing Commission, at 1 (Nov. 20, 2009), available at <http://www.usc.gov/AGENDAS/20091119/Lappin.pdf>.

¹¹ See Lappin testimony, *supra* note ___, at 1. During the same period, the states' prison population rose less dramatically – from 1.2 million to 1.4 million – and even showed a slight drop in 2009. See Pew Center for the States, *Prison Count 2010* 1 (Apr. 2010), available at http://www.pewcenteronthestates.org/uploadedFiles/Prison_Count_2010.pdf. A substantial portion of the increased federal prison population resulted from a disproportionate increase in prosecutions for violations of the criminal immigration laws, which grew from approximately 4,200 in 1999 (representing 7.5% of the federal caseload of non-petty offenses) to over 26,000 in 2009 (representing over 32% of the federal criminal caseload of non-petty offenses). Compare U.S. Sent. Comm'n, *2009 Sourcebook of Federal Sentencing Statistics* 11 (Figure A) (32.2% of

costs \$27,251 per year to incarcerate a federal inmate.¹²

Congress's attempts to restrain sentencing judges' discretion via the PROTECT Act were short-lived. The Supreme Court's decision in *United States v. Booker*¹³ shifted the pendulum dramatically back in favor of such discretion. As a result of *Booker*, what had been a "mandatory" guideline system that had inhibited departures from the guidelines' narrow sentencing ranges became an "advisory" system that currently permits judges to consider offender characteristics and the circumstances of an individual case in order to adjust the severity of sentences.¹⁴ Although the length of average sentences for most offenses has not changed significantly since *Booker*,¹⁵ the frequency of sentences imposed within guideline ranges has continued to decline,¹⁶ which raises concerns of increasing sentencing disparity among the circuits and within individual courthouses.¹⁷

federal offenders sentenced in 2009, *i.e.*, approximately 26,200, were immigration offenders), with 1999 *Sourcebook of Federal Sentencing Statistics* 11 (Figure A) (7.5% of federal offenders sentenced in 1999, *i.e.*, approximately 4,200, were immigration offenders). Immigration prosecutions are uniquely federal, which in part may explain why the federal prison population dramatically outpaced the state prison population during the past decade. Putting aside immigration offenses, however, the federal prison population has dramatically grown in significant part due to longer prison terms resulting from mandatory minimum sentences. *See infra* note ___ and accompanying text (noting that 28% of federal cases subject to the sentencing guidelines involve one or more mandatory minimum provisions).

¹² See Carol Rosenberg, *Cost to House Federal Prisoners Adjusted Higher*, MIAMI HERALD, Sept. 13, 2010 (quoting BOP spokesman Edmond Ross).

¹³ 543 U.S. 220 (2005).

¹⁴ See *infra* notes ___-___ and accompanying text.

¹⁵ See *infra* notes ___-___ and accompanying text.

¹⁶ See *infra* notes ___-___ and accompanying text.

¹⁷ See *infra* notes ___-___ and accompanying text.

The Department of Justice recently has decried what it considers to be a dual system of justice that has evolved during the past six years under the *Booker* regime, with judges increasingly divided over whether or not they follow the now advisory guidelines in imposing sentences.¹⁸ Perceiving growing sentencing disparities and undue leniency in some cases, Congress has responded by enacting more mandatory minimum sentences and has sent the Commission a series of specific directives to increase the guidelines in the attempt to restrain the judiciary's exercise of discretion in favor of leniency. This response undercuts Congress's original laudatory intent, expressed in the SRA, to create an "independent" and "expert" federal sentencing agency removed to a large degree from the political pressures facing the legislative branch.¹⁹ Judges oppose the use of mandatory minimum sentences and specific congressional directives resulting in increasingly harsh guidelines provisions. Increasing numbers of judges accord guidelines written at Congress's specific direction less weight than those promulgated by the Commission after consideration of empirical data, legal and policy research, and the legal parameters set in the SRA to guide the Commission's work.²⁰ Congress's ability to set the terms

¹⁸ See *infra* notes ___-___ and accompanying text.

¹⁹ See Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 297 (1993) (noting that the Commission, which was to be filled with "experts," was created out of the concern "that a Congress caught up in the politically volatile issues of law enforcement and crime control would be unable or unwilling to avoid the temptation to increase criminal sentences substantially"); Richard P. Conaboy, *The United States Sentencing Commission: A New Component in the Federal Criminal Justice System*, FED. PROBATION 58, 62 (Mar. 1997) (observing that the Commission "was intended to insulate sentencing policy, to some extent, from the political passions of the day" and that, as "an independent, expert agency, the Commission's role is to develop sentencing policy on the basis of research and reason"); see also *infra* notes ___-___ and accompanying text.

²⁰ See *infra* notes ___-___ and accompanying text.

of punishment for offenses that it defines²¹ and the executive branch’s concern over sentencing disparities are pitted against the judiciary’s responsibility to consider circumstances of the offense and characteristics of the individual offender in the sentencing process.

As these events reflect, during the past quarter-century federal sentencing policy has been a struggle among the three branches of government, with each branch possessing a legitimate stake in formulating the policy but at times exerting inordinate influence at the expense of the other branches. The Commission has faced – and will continue to face – enormous challenges in its mission to serve as the neutral expert at the intersection of the three branches regarding federal sentencing policy.

Ultimately, in our constitutional system, it is Congress’s prerogative to “devise and install, long term, the sentencing system compatible with the Constitution, that Congress judges best for the federal system of justice.”²² In the same manner in which the Commission has had to adjust to dramatic statutory changes in the past (such as the PROTECT Act), I envision that additional changes will occur in the foreseeable future and the Commission will yet again be forced to adjust. In particular, I predict – in the words of the “remedial” opinion in *Booker*²³ – that, despite

²¹ *See, e.g.*, *United States v. Evans*, 333 U.S. 483, 486 (1948) (“In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions.”).

²² *Booker*, 543 U.S. at 265.

²³ There were two opinions for the Court in *Booker* – Justice Stevens’s opinion for five Justices held that mandatory guidelines violated the Constitution where a defendant’s guidelines sentencing range was increased by facts not found beyond a reasonable doubt by a jury (or admitted by a defendant under oath), *Booker*, 543 U.S. at 221; and Justice Breyer’s opinion for a different set of Justices (with only Justice Ginsburg joining both blocs), which held that the systemic “remedy” for the constitutional defect identified in Justice Stevens’s opinion was to excise the portion of the SRA that made the guidelines “mandatory” (thus rendering them “advisory”). *See id.* at 244.

allowing the “advisory” guidelines system created by Court to exist for over six years to date, Congress eventually will hit back the “ball” that the *Booker* lobbed in Congress’s “court” with respect to retooling the guidelines system.²⁴ With this in mind, and as a consequence of its unique vantage point of being at the crossroads of the three branches of government, the Commission must take the lead in developing an improved federal sentencing scheme that recognizes the legitimate interests of each branch.

As I explain in greater detail below, I urge the Commission, working together with Congress, to reformulate the guidelines in a manner that removes the main obstacle that has hindered lasting achievement of the aspirations of the SRA: the undue complexity and rigidity of the guidelines system, which have resulted in large part from congressional directives and mandatory minimums and which have caused increasing numbers of judges to resist (and, after *Booker*, in some cases entirely reject) substantial portions of the current guidelines. The Commission should streamline individual guidelines (primarily by reducing the amount of numeric aggravating factors in Chapters Two and Three) and also simplify the Sentencing Table in Chapter Five of the *Guidelines Manual* to provide for fewer and broader sentencing ranges.²⁵ I

²⁴ See *id.* at 265 (“Ours, of course, is not the last word: The ball now lies in Congress’ court [to retool the guidelines system.]”).

²⁵ In this article, I discuss various relevant chapters in the *Guidelines Manual*. To assist the reader who is not fluent in the guidelines: Chapter Two contains the guidelines that address various offense types and focus primarily on offense characteristics (*e.g.*, USSG §2B1.1, which concerns theft and fraud offenses). Chapter Three contains various “adjustments” to guidelines calculations based on a variety of aggravating and mitigating factors that apply to a wide variety of offenses (*e.g.*, USSG §3E1.1, which provides for up to a three-level downward adjustment if a defendant “accepts responsibility” by pleading guilty). Chapter Four contains instructions for calculating a defendant’s criminal history points. Chapter Five contains the Sentencing Table (the grid which determines the guidelines sentencing range based on the defendant’s final offense level and criminal history calculations) as well as guidelines and policy statements concerning offender characteristics (*e.g.*, USSG §5H1.12, which provides that “[l]ack of guidance as a youth

also propose that Congress make the guidelines presumptive²⁶ (rather than advisory) and provide for meaningful appellate review to generally keep sentences within the presumptive ranges (thus making mandatory minimum statutory penalties unnecessary).²⁷ Such a presumptive system subject to meaningful appellate review would meet Congress's and the executive branch's valid desire to minimize disparate sentences being imposed on similarly situated defendants who committed similar offenses. At the same time, however, broader sentencing ranges and fewer numeric aggravating factors would allow sentencing judges to better account for individual offender and offense characteristics, thereby allowing judges to carry out their traditional role in determining fair and just sentences.

I take on the task of making recommendations for change with an appreciation of the obstacles that must be overcome in the implementation of such changes. Some would say asking Congress to limit use of mandatory minimum penalties or judges to accept a presumptive guideline structure is a meaningless exercise. I disagree. Seeking to provide a sentencing guidelines system that is more likely than past or present systems to be stable over time is well worth the effort. My proposed system would not be perfect; no sentencing system ever will come close to being perfect. At the very least, my proposal is intended to advance the dialogue

and similar characteristics indicating a disadvantaged upbringing are not ordinarily relevant grounds in determining whether a departure is warranted").

²⁶ I prefer the adjective "presumptive" over "mandatory" (the term typically used to describe the pre-*Booker* federal guidelines). I agree with Kenneth R. Feinberg, the former counsel to the Senate Judiciary Committee who was the primary drafter of the Sentencing Reform Act of 1984, who stated: "these Guidelines must not be confused with so-called mandatory sentences. The Guidelines are presumptive and the judge is not required to follow them rigorously or without exception." Stephen G. Breyer & Kenneth R. Feinberg, *The Federal Sentencing Guidelines: A Dialogue*, 26 CRIM. L. BULL. 5, 17 (1990).

²⁷ See *infra* notes ___-___ and accompanying text.

regarding changes that are needed.

The remainder of this article proceeds in five parts. Parts I and II contain a brief history of the Sentencing Reform Act (and the Sentencing Commission and guidelines), including my perspective on the competing roles of the three branches of government in setting sentencing policy since 1984. Part III describes my observations about the state of our current sentencing system, a quarter of a century after the passage of the SRA and six years after the Supreme Court's monumental decision in *Booker*. In Part IV, I further elaborate on my proposed changes to the current system, seeking to balance the need for individualized sentencing and appropriate deference to sentencing judges against the need to reflect the interests of the other two branches of government regarding the appropriateness of certain punishments for federal offenses. Part V offers some concluding thoughts.

My proposal in Part IV does not directly address two other widely made criticisms of the current federal sentencing system – that there is both undue severity²⁸ and a lack of proportionality²⁹ with respect to the manner in which certain federal offenses are punished. I believe that Congress (with respect to statutory penalties) and the Commission (with respect to the offense levels in the guidelines) should consider whether penalties need to be adjusted to reduce severity in some types of cases and also generally provide for better proportionality among all offense types. As a general matter, I agree with those from both political parties who have

²⁸ See, e.g., Stephanos Bibas, *The Feeny Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 298 (2004) (“Many judges believe the Sentencing Guidelines are too harsh and want to soften penalties they dislike.”).

²⁹ See, e.g., Douglas A. Berman, *Exploring the Theory, Policy, and Practice of Fixing the Broken Sentencing Guidelines*, 21 FED. SENT’G REP. 182, 182 (2009) (critical of the guidelines’ reliance on drug quantity and monetary loss as proxies for culpability).

stated that certainty of punishment rather than severity of punishment is paramount for an effective criminal justice system.³⁰ But such a colossal task is beyond the scope of this article. My aim is more modest: to propose a viable system that will reduce the complexity of the current guidelines while restoring the presumptive nature of the guidelines in a manner that comports with the Constitution.

I. The Sentencing Reform Act of 1984

Since 1984, when the SRA was enacted, there have been a series of shifts in the allocation of power among the three branches of the federal government vis-à-vis the Sentencing Commission and the sentencing guidelines,³¹ which I will discuss in Part II below. A proper

³⁰ See, e.g., Remarks by Attorney General Janet Reno To the National Biennial Convention of the American Jewish Congress, Federal News Service, Apr. 11, 1994 (“I think if we use our prisons as they should be, for the truly dangerous offenders, and keep them off the streets, while at the same time recognizing for other offenders that it is the certainty of punishment rather than the length of punishment that is so important, we can make a difference.”); Federal Surplus Property to be used by State and Local Governments for Correctional Facilities: Hearing before Subcomm. of the Government Operations, H.R., 97th Cong. 75 (1982) (Deputy Associate Attorney General Jeffrey Harris) (“[W]here I personally come out, I believe that swiftness of punishment and certainty of punishment are far more important than length. I think we could do with much shorter sentences.”).

³¹ See, e.g., Frank O. Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1333 (2005) (“The guidelines system was supposed to remedy the former system’s excessive reliance on judicial discretion by distributing sentence[ing] authority between the relevant institutional actors. This hoped-for institutional balance has broken down; the former unwarranted judicial and parole board hegemony over sentences has been replaced by an alliance of the Department of Justice and Congress at the rulemaking level, and [by] excessive control by prosecutors at the individual case level.”); Michael Goldsmith, *Reconsidering the Constitutionality of Federal Sentencing Guidelines After Blakely: A Former Commissioner’s Perspective*, 2004 BYU L. REV. 935, 943-44 (2004) (“Although Congress established the Sentencing Commission as an independent agency within the judicial branch, neither Congress nor the judiciary completely accepted the sentencing guidelines. At different times, both of these branches of government attempted to override the Commission’s authority.”); see also *infra* notes ___-___ and accompanying text.

understanding of this three-way tug of war among the branches begins, however, with a description of the circumstances that led to the enactment of the SRA. The historical underpinnings of the Commission and the guidelines actually appeared more than a decade before the enactment of the SRA when, in 1973, Judge Marvin E. Frankel published his brief but potent book, *Criminal Sentences: Law Without Order*. His monograph described the existing federal sentencing system, in which federal judges imposed sentences within broad statutory ranges of imprisonment without any uniform standards and typically with little transparency in the process by which a particular sentence was determined.³² Borrowing language from the Supreme Court’s death penalty jurisprudence,³³ he compellingly described “wanton and freakish disparities” that existed in federal non-capital sentencing, whereby defendants with similar records having committed similar offenses often received dramatically different sentences from different judges.³⁴ As described by Senator Patrick Leahy, one of the leading voices for sentencing reform during the past three decades, that era of federal sentencing constituted “the bad old days of fully indeterminate sentencing when improper factors such as race, geography, and the predilections of

³² Marvin E. Frankel, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5-49 (1973).

³³ *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring); *see also* *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (plurality opinion) (“The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily.”).

³⁴ Frankel, *supra* note ___, at 21-23, 104 (in one not atypical example, he noted that a check forger had received 30 days in jail from one federal judge while a similarly-situated defendant convicted of the same offense received a fifteen-year prison sentence from a different judge). Judge Frankel’s anecdotal account was corroborated by an influential study of inter-judge disparities in sentencing within the U.S. Court of Appeals for the Second Circuit conducted by the Federal Judicial Center. *See* Anthony Partridge & William B. Eldridge, *FEDERAL JUDICIAL CENTER, THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT* (1974).

the sentencing judge would drastically affect a defendant's sentence."³⁵

Judge Frankel reacted by proposing significant changes in the federal sentencing system, including three key reforms: (1) the creation by Congress of a permanent "sentencing commission" made up of a wide variety of experts in criminal justice (not only judges and lawyers but also social scientists and others with an interest and expertise in sentencing);³⁶ (2) the creation by such a commission of a "detailed profile or checklist of factors that would include, wherever possible, some form of numerical or other objective grading" of offense and offender characteristics (although he also stressed that "this does not envisage the replacement of people by machines");³⁷ and (3) the requirement of meaningful appellate review of such sentencing decisions to assure a reasonable degree of "consistency and uniformity."³⁸

Judge Frankel's proposals for reform resonated in judicial, congressional, executive, professional, and academic circles.³⁹ Beginning in 1975 and continuing virtually every year

³⁵ *Blakely v. Washington and the Future of the Federal Sentencing Guidelines: Hearing Before the Senate Judiciary Committee, 108th Cong. 8573 (2004)*, available at http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=2629.

³⁶ Frankel, *supra* note __, at 119.

³⁷ *Id.* at 114-15.

³⁸ *Id.* at 115. There was virtually no appellate review of sentences in federal criminal cases at that time. See, e.g., *Dorszynski v. United States*, 418 U.S. 424, 431 (1974) (stating "the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end"); see also *Appellate Review of Sentences: A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249 (1962).

³⁹ See, e.g., Pierce O'Donnell *et al.*, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM (1977); see also William W. Wilkins, Jr., *et al.*, *Competing Sentencing Policies in a "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305, 310 (1993) ("The [SRA] garnered broad, bipartisan cosponsorship as well as support from the Executive Branch."). Judge Frankel has been correctly described as the "father of the modern

thereafter, Senator Kennedy – joined by Senator Strom Thurmond and various other cosponsors from both parties – introduced bills proposing a federal sentencing commission and guidelines.⁴⁰ The SRA was finally enacted and signed into law by President Reagan on October 12, 1984.⁴¹

In enacting the SRA, Congress sought to achieve several noble purposes, including: (1) the reduction of “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors;”⁴² (2) truth in sentencing (primarily by abolishing parole);⁴³ and (3) transparency in sentencing (by creating a

sentencing movement.” Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 S. CT. REV. 233, 229-30 (2003).

⁴⁰ See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225-81 (1993); Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 292, 295 (1993); see also Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, 16 AM. CRIM. L. REV. 353, 355 (1979) (discussing the influence that Judge Frankel’s “now classic treatise” had on Senator Kennedy’s original sentencing reform legislation).

⁴¹ The Sentencing Reform Act is codified in scattered sections of Titles 18 and 28 of the United States Code. The most important provisions are 18 U.S.C. § 3553 (governing imposition of non-capital sentences in federal court) and 28 U.S.C. §§ 991-95 (creating the Sentencing Commission and mandating the creation of the sentencing guidelines).

⁴² 28 U.S.C. § 991(b)(B).

⁴³ Congress was concerned that the Parole Commission was arbitrarily shortening many defendants’ prisons sentences, with many serving only one-third of their sentences behind bars. See USSG Ch. 1, Pt. 1.3 (noting that, in enacting the SRA, Congress “sought honesty in sentencing” – “to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence and empowered the parole commission to determine how much of the sentence an offender would actually serve in prison,” which resulted in “defendants[’] often serving only about one-third of the sentence imposed by the court”); see also 18 U.S.C. § 3583 (instituting supervised release in lieu of parole); 18 U.S.C. § 3624 (abolishing parole and creating a limited amount of good-time credit). Unlike parole, defendants do not serve terms of supervised release as a substitute for a portion of

detailed, rational process for determining a sentence).⁴⁴ The main architects of the SRA – Senators Kennedy, Thurmond, Biden, and Hatch – were concerned primarily that the extant system of “indeterminate” sentencing produced arbitrary results and caused unwarranted disparities.⁴⁵ Under that system, which afforded sentencing judges virtually unbridled discretion to impose any (or no) amount of prison time for crimes within broad statutory ranges and also afforded the Parole Commission similar discretion in granting early release, similarly situated defendants often were receiving and serving vastly different sentences. This was due to the vagaries of the sentencing judges to which the defendants’ cases were assigned and the ad hoc, discretionary decisions of the Parole Commission.⁴⁶

The SRA envisioned the Sentencing Commission as an “independent,” “expert” agency

their sentences of imprisonment. *See* USSG, Ch. 7, Pt. A(2)(b) (“Unlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court.”).

⁴⁴ *See* 28 U.S.C. § 994 (instructing the Commission to create sentencing “guidelines” based a wide variety of offender and offense characteristics). In particular, 18 U.S.C. § 3553(a)(4)-(5), (b)(1), & (c) – another part of the SRA – requires a sentencing court to consider the guidelines and any pertinent policy statements in the *Guidelines Manual* before imposing sentence and also “state in open court its reasons for the imposition of the particular sentence” as well as provide a written “statement of reasons” (including a guidelines calculation) to the Sentencing Commission.

⁴⁵ The primary drafter of the SRA, Kenneth R. Feinberg, has stated that the Senators’ concern about disparities in sentencing was the primary motivating factor and “all other considerations were secondary.” Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 296 (1993); *see also* Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L. J. 1355, 1361 (1999) (“When liberals saw disparity, they pictured sentencing judges who discriminated on the basis of race, class, and gender; when conservatives saw disparity, they pictured [some] judges who imposed overly lenient sentences [while others did not]. . . . [This] shared distrust of judges was a major influence” in the passage of the SRA.).

⁴⁶ *See* *Mistretta v. United States*, 488 U.S. 361, 364-66 (1989) (describing pre-SRA federal sentencing practices).

responsible for creating a guidelines system that would account for the various purposes of punishment,⁴⁷ address aggravating and mitigating factors relevant to sentencing, and – most important – avoid unwarranted sentencing disparities.⁴⁸

By late 1985, the President had appointed, and the Senate had confirmed, the original slate of Commissioners – a distinguished group that included three federal appellate judges (including a future Supreme Court Justice), a law professor, and social scientists.⁴⁹ The original Commission spent more than a year crafting the first set of guidelines, which Congress allowed to go into effect without amendment on November 1, 1987.⁵⁰ As Justice Stephen Breyer, an original member of the Commission, has recounted, the guidelines were a product of significant compromises by the first commissioners.⁵¹

The sentencing guidelines that went into effect in 1987 provided detailed guidance for federal judges in the exercise of their sentencing authority. Superimposed on the existing, typically broad, statutory ranges of punishment were binding, narrower guideline provisions that

⁴⁷ The four primary purposes of punishment recognized in the SRA are retribution, deterrence, incapacitation, and rehabilitation, *see* 18 U.S.C. § 3553(a)(2), although the SRA also provides that “imprisonment is not an appropriate means of promoting . . . rehabilitation.” 18 U.S.C. § 3582(a). *See generally* Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413 (1992).

⁴⁸ *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 718, 737 (2005).

⁴⁹ *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5 (1988).

⁵⁰ *Id.*

⁵¹ *Id.* at 2 (“The spirit of compromise that permeates the Guidelines arose out of the practical needs of administration, institutional considerations, and the competing goals of the criminal justice system It is critical to understand the different institutional reasons for compromise, and to comprehend that, in guideline writing, ‘the best is the enemy of the good.’”).

in many cases were driven by extremely detailed sentencing factors.⁵² With respect to offense conduct, the guidelines provided that virtually all aspects of the offense of conviction, as well as any related (“relevant”) conduct before, during, and after the offense of conviction, were pertinent at sentencing, including relevant *uncharged* conduct that was proven by a preponderance of the evidence (rather than by proof beyond a reasonable doubt).⁵³ With respect to offender characteristics, however, the guidelines significantly restricted judges’ ability to consider many aspects, such as a defendant’s age and family circumstances, and instead focused on a defendant’s criminal record as the most important offender characteristic.⁵⁴

From the outset, many sentencing judges, practitioners, and academics criticized the guidelines as unfairly requiring consideration of uncharged “relevant conduct” (proved by a preponderance of the evidence) and limiting consideration of many relevant offender characteristics; as being too complex, rigid, and harsh; and as having replaced judges’ traditional sentencing discretion with a rigid mathematical formula that turned judges into computers.⁵⁵

⁵² See, e.g., USSG §2D1.1 (Drug Quantity Table) (providing for differing offense levels based on a long list of drug types and quantities).

⁵³ USSG §1B1.3 (“relevant conduct”); see also USSG §6A1.3, comment. (“The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.”).

⁵⁴ See, e.g., USSC §§ 5H1.1-5H1.6, 5H1.9-12; see also USSG § 4A1.1 (provisions concerning criminal history). The guidelines’ provisions that certain offender characteristics were irrelevant (such as socio-economic status) or “generally inappropriate” (such as family ties) were required by the SRA. See 28 U.S.C. § 994(d) & (e).

⁵⁵ See, e.g., William W. Schwarzer, *Judicial Discretion in Sentencing*, 3 FED. SENT’G REP. 339 (1991) (criticism of guidelines by district judge who also served as the Director of the Federal Judicial Center); see also Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1236-37 (2004) (noting the various criticisms levied at the sentencing guidelines by federal judges after the guidelines’ promulgation in 1987); Marc L.

Although, in 2005, the Supreme Court – for reasons, at least on the surface, unrelated to sentencing judges’ long-standing complaints about the guidelines⁵⁶ – rendered them “advisory” rather than “mandatory” in order to pass constitutional muster,⁵⁷ the Court still required sentencing judges to consider them as a “benchmark” for an appropriate sentence.⁵⁸ In most cases since *Booker*, judges have done so by imposing sentences within the applicable guidelines range.⁵⁹

Miller & Ronald F. Wright, *Your Cheatin’ Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 723 (1999); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L. J. 1681, 1685 (1992).

⁵⁶ *Booker*, 543 U.S. at 230-68 (invalidating the mandatory nature of the guidelines on the constitutional ground that factual findings raising mandatory guideline ranges must be found beyond a reasonable doubt by a jury rather than by a preponderance of the evidence by a judge).

⁵⁷ *Id.* at 265-66.

⁵⁸ *Kimbrough v. United States*, 552 U.S. 85, 108-09 (2007) (“While rendering the Sentencing Guidelines advisory [in *Booker*], we have nevertheless preserved a key role for the Sentencing Commission. . . . [D]istrict courts must treat the Guidelines as the starting point and the initial benchmark Congress established the Commission to formulate and constantly refine national sentencing standards. . . . Carrying out its charge, the Commission fills an important institutional role: It has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise. . . . We have accordingly recognized that, in the ordinary case, the Commission’s recommendation of a sentencing range will reflect a rough approximation of sentences that might achieve [18 U.S.C.] § 3553(a)’s objectives.”); *see also Rita v. United States*, 551 U.S. 338, 347 (2007) (holding that appellate courts may apply a presumption of reasonableness to a district court’s sentence imposed within the applicable guideline range).

⁵⁹ *See* U.S. Sent. Comm’n, *2009 Sourcebook of Federal Sentencing Statistics* 50 (Table N) (noting that, in Fiscal Year 2009, 56.8% of federal sentences were imposed within the applicable guidelines range; another 25.3% were the result of a government-sponsored downward departure, and only 17.9% were imposed outside of the applicable guidelines range without a government motion). By way of comparison, in the decade or so before *Booker*, defendants received within-range sentences in approximately two-thirds to three-fourths of cases. *See* U.S. Sent. Comm’n, *2004 Sourcebook of Federal Sentencing Statistics* 69 (Figure G) (noting varying percentages of within-range sentences from 1992-2004, which ranged from 64% to 78%).

II. The Sentencing Commission at the Crossroads of the Three Branches of Government

As noted, the SRA envisioned that the Commission, although located in the judicial branch, would be more like a traditional “independent” agency – one not dominated by any of the branches of government.⁶⁰ That expectation, unfortunately, has not been realized during the past twenty-five years. As discussed below, at various times, the different branches each have exerted disproportionate influences over the Commission in a manner that has hindered accomplishment of the degree of meaningful sentencing reform hoped for in 1984.

A. Legislative Branch

Although Congress theoretically afforded the Commission wide latitude concerning federal sentencing policy in the SRA, within two years of its enactment in 1984, Congress proceeded to co-opt a significant area of sentencing policy by enacting mandatory minimum *statutory* penalties in a large segment of federal criminal cases (in particular, drugs and firearms cases).⁶¹ In the ensuing years, Congress regularly exerted such authority by enacting new mandatory minimums.⁶² The effect of such mandatory statutory penalties extends beyond the immediate effect they have on those defendants whose offenses are subject to them. The SRA has been construed by the Commission to require incorporation of statutory minimums into guideline sentences – even for

⁶⁰ See *supra* note __ and accompanying text.

⁶¹ See, e.g., 18 U.S.C. § 924(c), (e) (mandatory minimums for certain firearms offenses); 28 U.S.C. § 841(b) (mandatory minimums for certain drug-trafficking offenses).

⁶² See, e.g., 18 U.S.C. § 2252A(b)(1) (mandatory minimums for certain child pornography offenses).

offenders not subject to mandatory minimums – by setting the “floor” of many guideline ranges at or near the statutory minimum.⁶³ In order to avoid disparities that would result from “sentencing cliffs,” the Commission structured entire guidelines (most notably, the drug-trafficking guideline) around statutory mandatory minimums and, thus, many offenders who are not subject to the statutory minimums receive high guideline sentences. Congress’s actions had the effect of creating disproportionality for those offenders vis-a-vis other offenders sentenced for offenses for which their corresponding guidelines have not been adjusted in response to the mandatory minimums.⁶⁴

In addition to, or sometimes in lieu of,⁶⁵ mandatory minimums, Congress has issued

⁶³ See *United States v. Williams*, 549 F.3d 1337, 1340 (11th Cir. 2008) (“The term ‘guideline range’ reflects the scope of sentences available to the district court, which could be limited by a statutorily imposed mandatory minimum ‘guideline sentence.’ Accordingly, when a mandatory minimum exceeds some portion of the range for the base offense level, the applicable ‘guideline range’ would be from that minimum to the upper end of the original guideline range.”).

⁶⁴ John S. Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 311, 314 (2004); see also Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decision-Maker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1152 (2005) (“[M]andatory minimums seriously interfere with the rational proportionality among offenses that the guidelines seek to introduce.”). For instance, a non-violent drug defendant with no criminal record convicted at a trial of selling a half of a pound of cocaine (approximately 235 grams) ordinarily would have a guidelines range of 33-41 months. See USSG § 2D1.1; see also USSG, Ch. 5, Pt. A (Sentencing Table). Such a sentencing range is higher than a defendant convicted at trial of aggravated assault involving the discharge of a firearm (but without any bodily injury); such a defendant’s guideline range ordinarily would be 30-37 months. See USSG § 2A2.2; see also USSG, Ch. 5, Pt. A (Sentencing Table).

⁶⁵ See Senator Orin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 196 (1993) (noting that Congress made increased use of “specific statutory directives to the Commission to set forth desired guidelines amendments” sometimes in lieu of enacting mandatory minimum statutory penalties).

countless “directives” to the Commission over the past twenty-five years.⁶⁶ There have been different species of directives – some general (requiring the Commission to consider adjusting penalties for certain types of offenses after a period of study) and some very specific (dictating precise changes in specific guidelines).⁶⁷ Some have been appropriate reflections of congressional oversight, such as the recent directive requesting the Commission to engage in study and determine whether the guidelines penalties for securities fraud should be increased.⁶⁸ However, other directives have dictated the detailed work of the Commission, such as the directive in the PROTECT Act in 2003 that directly amended specific offense level provisions in USSG §2G2.2, the child pornography guideline.⁶⁹ Even when directives have not dictated specific increases in guideline penalties, the Commission often has felt compelled to add additional aggravating factors and thereby increase guideline sentences in order to “ward off mandatory minimum penalties.”⁷⁰

⁶⁶ Frank O. Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1342 (2005) (“Beginning in the mid-1990s, . . . Congress began to intervene . . . more directly in the Commission’s work, and the relationship between Congress and the Commission began to assume a more adversarial tone. By the spring of 2003, congressional directives consumed the majority of the Commission’s agenda.”).

⁶⁷ Hatch, *supra* note __, at 196.

⁶⁸ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111—203, sec. 1079A(a) (2010) (“[T]he United States Sentencing Commission shall review and, if appropriate, amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of offenses relating to securities fraud or any other similar provision of law, in order to reflect the intent of Congress that penalties for the offenses under the guidelines and policy statements appropriately account for the potential and actual harm to the public and the financial markets from the offenses.”).

⁶⁹ See U.S. Sent. Comm’n, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 38-40 (Oct. 2009) (discussing the PROTECT Act’s direct amendment of the child pornography guidelines). The recent Fair Sentencing Act of 2010 contains a similar specific directive concerning the drug-trafficking guideline. See Pub.L. 111—220, 124 Stat. 2372 (2010).

⁷⁰ R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines:*

“[T]he system is inherently unstable because of continual factor creep.”⁷¹

The nadir of the Commission’s relationship with the legislative branch came during the mid- to late 1990s. In 1995, by a 4-3 vote, the Commission promulgated a guideline amendment and issued an accompanying report to Congress recommending that the penalties for powder and crack cocaine be equalized.⁷² Congress reacted vigorously to the divided Commission’s proposal on such a controversial political issue: not only did Congress (for the first time in the history of the Commission) reject a proposed amendment to the guidelines,⁷³ but the Senate later did not confirm any of the President’s nominees to the Sentencing Commission when the existing commissioners’ terms expired. By 1998, the Commission had no commissioners. For a year thereafter, the Commission operated solely with staff members – none of whom were presidentially-appointed – and could not promulgate guideline amendments.⁷⁴ Former Commissioner Michael Goldsmith commented: “In retrospect, the Commission majority might have been better served had it realized that, given the prevailing political climate, only a unanimous Commission resolution to modify crack penalties stood any chance of winning

Psychological and Policy Reasons for Simplification, 7 PSYCHOL. PUB. POL’Y & L. 739, 752 (2001).

⁷¹ *Id.* at 753.

⁷² See Steven L. Chanenson, *Booker on Crack: Sentencing’s Latest Gordian Knot*, 15 CORNELL J.L. & PUB. POL’Y 551, 563-54 (2006).

⁷³ See Federal Sentencing Guidelines, Amendment, Disapproval, Pub. L. No. 104-38, 109 Stat. 334 (1995).

⁷⁴ Diana E. Murphy, *Inside the United States Sentencing Commission: Federal Sentencing Policy in 2001 and Beyond*, 87 IOWA L. REV. 359, 395-96 (2002) (noting that, after Congress rejected the crack cocaine amendment, there was “a less favorable climate for the Commission” in Congress and that it was necessary to “rebuild[] a relationship with Congress”).

Congressional approval.”⁷⁵

Even after it confirmed a new slate of commissioners (including me) in 1999, Congress continued to exert strong influences on the Commission. In the fall of 2000, the Criminal Justice Oversight Subcommittee of the Senate Judiciary Committee conducted an oversight hearing on the issue of whether too many downward departures were being granted. The chair of the subcommittee, Senator Thurmond, warned that “[t]he Sentencing Commission . . . must address” the issue.⁷⁶ After a new administration assumed power, Congress enacted the Feeney Amendment (H.R. 1161) as part of the PROTECT Act in 2003 by a vote of 400-25 in the House and 98-0 in the Senate.⁷⁷ The bill, which passed in the House of Representatives without any input from the federal judiciary (which later objected to that failure and also to the legislation

⁷⁵ Michael Goldsmith, *A Former Sentencing Commissioner Looks Forward*, 12 FED. SENT’G REP. 98, 98 (1999); *see also* Murphy, *supra* note ___, at 362 (in January 2002, then-Commission Chair Murphy noted that: “We have learned the importance of . . . working together to arrive at consensus where possible. . . . As chair, it has been my utmost priority to keep us moving forward together as one body.”). Subsequent reports by the Commission concerning sentences for crack cocaine have been unanimous. *See* U.S. Sent. Comm’n, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2007) & *Report to the Congress: Cocaine and Federal Sentencing Policy: A Report to Congress* (May 2002). One of my proudest moments as a member of the Commission was the passage of the Fair Sentencing Act of 2010, which finally accepted the Commission’s recommendation to significantly reduce the ratio between crack and powder cocaine in the sentencing provisions of the federal drug-trafficking laws and also abolish the mandatory minimum for simple possession of crack cocaine.

⁷⁶ Senate Judiciary Committee, Criminal Justice Oversight Subcommittee, Hearing on “Oversight of the United States Sentencing Commission: Are the Guidelines Being Followed?,” 15 FED. SENT’G REP. 317, 318 (2003).

⁷⁷ Susan R. Klein & Sandra Guerra Thompson, *DOJ’s Attack on Federal Judicial “Leniency,” the Supreme Court’s Response, and the Future of Criminal Sentencing*, 44 TULSA L. REV. 519, 530-31 (2009); *see also* Bowman, *supra* note ___, at 1319-20 (contending that “the institutional balance” originally envisioned in the SRA has shifted disproportionately to “political actors in Congress” who often have aligned with “the central administration of the Department of Justice”).

itself),⁷⁸ reallocated power in the federal sentencing arena away from the judiciary.⁷⁹ Among other things, it required the Attorney General to report to Congress on downward departures and include the identities of sentencing judges who departed.⁸⁰ It also amended the SRA to provide for a *maximum* – rather than, as before, a *minimum* – of three federal judges as members of the Sentencing Commission.⁸¹ The legislation also dictated precise changes in the child pornography guidelines – mandating specific offense levels for certain conduct and severely restricting downward departures in such cases – and provided for *de novo* appellate review of downward departures in all types of federal criminal cases.⁸² Finally, it contained a directive to the Commission to “substantially reduce” the number of downward departures.⁸³ Although, as discussed *infra*, the Supreme Court’s subsequent 2005 decision in *Booker* reallocated significant influence in sentencing back to the judiciary, Congress continued after *Booker* to assert its authority respecting the Commission. Since 2005, dozens of directives have been issued to the Commission, including a detailed directive in the Fair Sentencing Act of 2010⁸⁴ that dictated the Commission’s guideline amendments with respect to the drug-trafficking guideline – USSG

⁷⁸ See *2003 Year-End Report on the Federal Judiciary by Chief Justice Rehnquist*, 16 FED. SENT’G REP. 143, 143 (2003) (“[T]he PROTECT Act was enacted without any consideration of the views of the judiciary.”); see also *U.S. Judicial Conference[’s] Statement on the Feeney Amendment*, 16 FED. SENT’G REP. 136 (2003).

⁷⁹ Klein & Thompson, *supra* note ___, at 531-32.

⁸⁰ *Id.* at 530.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 532.

⁸⁴ Pub. L. 111—220 (2010).

§2D1.1.⁸⁵ In addition, numerous new mandatory minimum statutory penalties have been enacted,⁸⁶ which the Commission necessarily must factor into setting guidelines ranges for such offenses.

Congress's specific directives to the Commission have prompted some judges categorically to refuse to follow certain guidelines promulgated pursuant to such directives (the child pornography guidelines being the primary but not only example). In particular, these judges have held that guidelines rooted in congressional mandates rather than in the traditional expertise of the Commission – and its reliance on empirical data⁸⁷ – are not entitled to the same type of deference as other guidelines.⁸⁸ Increasing numbers of judges accordingly refuse to follow congressionally-

⁸⁵ *Id.*, §§ 5-7.

⁸⁶ *See, e.g.*, 18 U.S.C. § 1389(a)(3) (mandatory minimum of six months in jail for assaulting serviceman); 18 U.S.C. § 1591(b)(1) (mandatory minimum of 15 years for sex trafficking a minor accomplished through force); 18 U.S.C. § 2241(c) (mandatory minimum of 30 years for aggravated forcible sexual abuse of minor under 12 years old); 18 U.S.C. § 2250(c) (mandatory minimum of 5 years in the case of a defendant who fails to register as a sex offender and who commits a crime of violence thereafter); 18 U.S.C. § 2260A (mandatory minimum consecutive 10 years for commission of specified felony offenses involving a minor by a registered sex offender); 18 U.S.C. § 3559(f)(2) (mandatory minimum of 25 years for kidnaping a minor); 46 U.S.C. § 58109(a) (one-year mandatory minimum for criminal violation of Merchant Marine Act). As Professors Luna and Cassell have observed, “Ironically, the [2010] congressional directive calling for a review of mandatory minimum sentencing itself contained a new mandatory minimum, and several recent bills would extend federal mandatory sentences.” Eric Luna & Paul Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV 1, 7 (2010).

⁸⁷ As discussed in *infra* note ___, one of the main functions of the Commission is to collect, code, and analyze an extremely large amount of empirical data concerning federal sentencing practices using complex computer programs. Several members of the Commission's staff are social scientists whose expertise includes statistical and econometric analysis.

⁸⁸ *See, e.g.*, *United States v. Dorvee*, 616 F.3d 174, 184-85 (2d Cir. 2010) (“Sentencing Guidelines are typically developed by the Sentencing Commission using an empirical approach based on data about past sentencing practices. . . . However, the Commission did not use this empirical approach in formulating the Guidelines for child pornography. Instead, at the direction

directed guidelines.⁸⁹ Ultimately, this has caused more sentencing disparity (as discussed further below).

B. Executive Branch

The SRA, as originally enacted, reallocated a significant amount of sentencing authority from sentencing judges (who had virtually unfettered and unreviewable sentencing discretion before 1987) to prosecutors. First, because the pre-*Booker* guidelines were binding on sentencing judges, prosecutors essentially could restrict judicial discretion by requiring judges to impose certain minimum prison sentences (even if a statutory mandatory minimum sentence were not applicable) by proving the relevant aggravating facts by a preponderance of the evidence and by appealing if the district court refused to sentence within the applicable guidelines' range.⁹⁰ Second, prosecutors also possessed the sole authority under the guidelines to file a motion for a

of Congress, the Sentencing Commission has amended the Guidelines under [USSG] §2G2.2 several times since their introduction in 1987, each time recommending harsher penalties.”); *id.* at 188 (describing “the irrationality in §2G2.2” and “encourag[ing] [district judges] to take seriously the broad discretion they possess in fashioning sentences . . . that can range from non-custodial sentences to the statutory maximum – bearing in mind that they are dealing with an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results”); *United States v. Grober*, ___ F.3d ___, 2010 WL 4188237 (3d Cir. Oct. 26, 2010).

⁸⁹ See U.S. Sentencing Commission, *Preliminary Quarterly Data Report: 3d Quarter Release (FY2010)* Table 5, available at http://www.usc.gov/sc_cases/USSC_2010_Quarter_Report_3rd.pdf (noting that 42.2% of cases under USSG §2G2.2 involved downward departures or variances, while only 41.2% involved within-range sentences).

⁹⁰ See, e.g., *United States v. Ho*, 311 F.3d 589, 608-10 (5th Cir. 2002) (on government appeal, vacating defendant’s sentence and remanding for district court to apply enhanced guidelines range because prosecution had proved by a preponderance a specific offense characteristic that increased the defendant’s sentencing range); see also 18 U.S.C. § 3742(b) (providing for the prosecution’s right to appeal a sentence).

downward departure – based on a defendant’s “substantial assistance” to the authorities or a defendant’s willingness to do a “fast-track” disposition of the case – so as to enable a judge to sentence a defendant below the bottom-end of the otherwise applicable guidelines’ sentencing range.⁹¹ Without such a motion, a sentencing judge did not have authority to depart *sua sponte* from the guidelines based on a defendant’s substantial assistance or willingness to participate in a “fast-track” program.⁹²

Under the terms of the SRA, the executive branch also is given a “seat at the table” at the Commission – literally and figuratively. As a non-voting *ex officio* commissioner, the Attorney General (or his designate) is privy to the Commission’s internal deliberative processes.⁹³ Some have suggested that, at various points during the Commission’s existence, the Department of Justice has exerted substantial influence on the Commission’s policy-making, beyond the influence of the non-voting *ex officio* commissioner’s role, through the Department’s ability to lobby Congress directly for statutory changes and directives to the Commission.⁹⁴ With rare exceptions,

⁹¹ See 18 U.S.C. § 3553(f) (substantial assistance departure); USSG §§5K1.1 (substantial assistance departure), 5K3.1 (early disposition departure); see also *Melendez v. United States*, 518 U.S. 120 (1996); *Wade v. United States*, 504 U.S. 181 (1992).

⁹² Before *Booker*, district courts had no authority to depart *sua sponte* based on a defendant’s substantial assistance. See, e.g., *In re Sealed Case*, 181 F.3d 128 (D.C. Cir. 1999). After *Booker*, a majority of circuit courts have permitted district courts to do so. See *United States v. Motley*, 587 F.3d 1153, 1158 n.2 (D.C. 2009) (citing cases).

⁹³ See Frank O. Bowman III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 248 (2005) (“[B]y giving the Justice Department a seat on the Sentencing Commission, even a nonvoting *ex officio* seat, the Sentencing Reform Act gave the Department an institutional presence in all public and private Commission meetings and deliberations, something that was not and could not be true of the relation of any executive branch agency to Congress.”).

⁹⁴ See, e.g., Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds – The Center Doesn’t*, 117 YALE L. J. 1374, 1388 (May 2008) (noting the influence of the Justice

and until recently, the Department of Justice strongly and consistently supported the “one-way upward ratchet” in a large number of amendments to the guidelines that occurred from 1987 until the recent amendments promulgated by the Commission in 2010.⁹⁵

The current leadership in the Department of Justice, however, has taken a noticeable turn away from a firm adherence to sentences within guideline range and has encouraged greater flexibility. In May of 2010, Attorney General Eric Holder issued a memorandum to “all federal prosecutors” entitled “Department Policy on Charging and Sentencing.”⁹⁶ In it, the Attorney General stated that, although in a “typical case” prosecutors should advocate for a sentence within the “applicable guidelines range” and that “prosecutors should generally continue to advocate for a sentence within that range,” prosecutors under the new policy are afforded more discretion than in

Department concerning the PROTECT Act) (citing Michael Gerber, *Down with Discretion*, LEGAL AFFAIRS, Mar./Apr. 2004, at 72, 74, and Jeffrey Rosen, *The Court's Fancy Footwork: Breyer Review*, NEW REPUBLIC, Jan. 31, 2005, at 10).

⁹⁵ Frank O. Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1340 (2005) (“The positions taken by the Department on sentencing . . . before the Sentencing Commission[] have been notable for their almost invariable advocacy of ever-tougher sentencing rules and virtually unyielding opposition to any mitigating of existing sentencing levels. . . . [T]he Justice Department’s consistent push for harsher sentencing laws . . . has been accompanied by decreasing deference to the U.S. Sentencing Commission as an authoritative source of sentencing law and policy.”); Klein & Thompson, *supra* note __, at 535 (noting “the Department’s reaction to the U.S. Sentencing Commission’s proposed changes to the Federal Guidelines between 1987 and 2008”: “The overwhelming majority of these amendments [which the Department supported] increased the offense level, changed a definition in the Guidelines Manual to one more favorable to the Department’s interpretation of the Guidelines, or added a base offense level to a new crime.”). A notable example of when DOJ has supported the amendment *reducing* guidelines penalties was when Attorney General Reno (and later Attorney General Eric Holder) supported the reduction of the crack cocaine/powder cocaine ratio. *See id.*; *see also* Statement of the Attorney General on Passage of the Fair Sentencing Act, July 28, 2010, available at <http://www.justice.gov/opa/pr/2010/July/10-ag-867.html>.

⁹⁶ The memorandum is available at <http://sentencing.typepad.com/files/holder-charging-memo.pdf>.

the past to seek sentences outside the applicable guideline ranges based on the broad factors set forth in 18 U.S.C. § 3553(a).⁹⁷ The memo specifically permits line prosecutors, with “supervisory approval,” to request *downward* variances from the guidelines⁹⁸ – something that heretofore was within the province of defense attorneys and sentencing judges. This new policy differs – both in letter and in spirit – from that of the Department in the prior administration, which firmly instructed prosecutors in the wake of *Booker* to advocate for sentences within the applicable guidelines ranges except for truly “extraordinary cases.”⁹⁹

Yet, at the same time that the current Justice Department has condoned greater flexibility in applying the guidelines (perhaps simply in recognition of the Supreme Court’s *Booker* jurisprudence), the Department has recognized that “federal sentencing practice is fragmenting into at least two distinct and very different sentencing regimes”:

On the one hand, there is the federal sentencing regime that remains closely tied to the sentencing guidelines. This regime includes the cases sentenced by federal judges who continue to impose sentences within the applicable guideline range for most offenders and most offenses. It also includes cases involving crimes for which sentences are largely determined by mandatory minimum sentencing statutes. These crimes include many drug trafficking offenses and certain violent and gun offenses. On the other hand, there is a second regime that has largely lost its moorings to the sentencing guidelines. This significant set of criminal cases includes those sentenced by judges who regularly impose sentences outside the applicable guideline range irrespective of offense type or nature of the offender. It also includes cases involving certain offense types for which the guidelines have lost the respect of a large number of judges. These offense types include some child

⁹⁷ *See id.* at 2.

⁹⁸ *See id.* at 3.

⁹⁹ *See* Memorandum to All Federal Prosecutors from Deputy Attorney General Comey, January 26, 2005, at 1-2, *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf (“[W]e must take all steps necessary to ensure adherence to the Sentencing Guidelines. . . . Federal prosecutors must actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases.”).

pornography crimes and some fraud crimes, including certain frauds involving high loss amounts.¹⁰⁰

In noting that some judges have “lost [their] moorings to the sentencing guidelines,¹⁰¹ the Department of Justice seems to be suggesting a need to reign in judicial discretion.

C. Judicial Branch

The judicial branch has resisted the Commission and the guidelines several times during the past twenty-five years. In the immediate wake of the passage of the SRA in the mid-1980s, a majority of district judges who heard constitutional challenges to the sentencing guidelines declared that they were unconstitutional¹⁰² before the Supreme Court, by an 8-1 vote, ultimately upheld the constitutionality of the Commission and guidelines.¹⁰³ The sole dissenter was Justice Scalia, who declared that the Commission was a “sort of junior-varsity Congress” that lacked the

¹⁰⁰ Letter to William K. Sessions III from Jonathan Wroblewski, Director, Office of Policy and Legislation, Department of Justice, June 28, 2010, *available at* http://sentencing.typepad.com/files/annual_letter_2010_final_062810.pdf; *see also* *United States v. Ovid*, ___ F. Supp.2d ___, 2010 WL 3940724 (E.D. N.Y. Oct. 1, 2010) (Gleeson, J.) (“[H]ere in the trenches where fraud sentences are actually imposed, there is a more nuanced reality than the DOJ Letter suggests. The letter describes two ‘dichotomous regimes’ in fraud cases—one moored to the Guidelines, the other adrift in the vast regions beneath the low end of the advisory Guidelines ranges. . . . But Ovid’s sentencing shows otherwise. Specifically, it shows how the fraud guideline, despite its excessive complexity, still does not account for many of the myriad factors that are properly considered in fashioning just sentences, and indeed no workable guideline could ever do so.”).

¹⁰¹ *See id.*

¹⁰² *See* *United States v. Brown*, 690 F. Supp. 1423, 1426 (E.D. Pa. 1988) (as of mid-1988, 116 district judges had invalidated the guidelines, while 78 had upheld them).

¹⁰³ *Mistretta*, 488 U.S. at 676.

constitutional authority to promulgate binding sentencing laws (in the form of the guidelines).¹⁰⁴

Many judges considered *Mistretta* to be an allocation of more sentencing authority to the executive branch.¹⁰⁵

After continuing to accord power to the Commission vis-à-vis the judiciary for several more years,¹⁰⁶ the Supreme Court in *Koon v. United States* reallocated to district court judges some of that authority.¹⁰⁷ In *Koon*, the Court held that a sentencing judge’s decision whether to depart from the sentencing guidelines was to be reviewed with “substantial deference” on appeal – for “abuse of discretion” – rather than *de novo* as the executive branch had advocated.¹⁰⁸ Within three years of *Koon*, district courts were exercising broader discretion and departing from the guidelines in significantly greater numbers.¹⁰⁹

¹⁰⁴ *Id.* at 427 (Scalia, J., dissenting).

¹⁰⁵ See Ricardo J. Bascuas, *The American Inquisition: Sentencing After the Federal Guidelines*, 45 WAKE FOREST L. REV. 1, 20 (2010).

¹⁰⁶ See *Stinson v. United States*, 508 U.S. 36 (1993) (holding that commentary in the *Guidelines Manual* – which need not be approved by Congress – is binding on federal courts unless it is unconstitutional or plainly inconsistent with statute or guideline itself); *Braxton v. United States*, 500 U.S. 344, 348 (1991) (holding that Court would not resolve circuit conflicts concerning application of the sentencing guidelines and, instead, allow the Commission to amend or clarify the guidelines so as to resolve such conflicts).

¹⁰⁷ 518 U.S. 81 (1996); see also Ian Weinstein, *The Discontinuous Tradition of Sentencing Discretion: Koon’s Failure to Recognize the Reshaping of Judicial Discretion Under the Guidelines*, 79 B.U.L. REV. 493, 495 (1999) (characterizing *Koon* as resulting in “the fundamental reallocation of sentencing power”).

¹⁰⁸ 518 U.S. at 91, 98.

¹⁰⁹ See 1999 *Sourcebook of Federal Sentencing Statistics* 51 (Figure G) (showing that the percentage of cases sentenced within the guidelines steadily had fallen from 71.1% in 1995 to 64.9% in 1999, while the number of non-government-sponsored downward departures had risen from 8.4% to 15.8% during that same period).

After the judiciary lost ground in the area of sentencing to the executive and legislative branches in 2003 as a result of the PROTECT Act,¹¹⁰ the Supreme Court, beginning with *Blakely v. Washington*, issued a series of decisions that reclaimed a great deal of discretion for sentencing judges.¹¹¹ In *Blakely*, which was rooted in the Court's earlier decision in *Apprendi v. New Jersey*,¹¹² the Court held that, if a guideline system ordinarily *requires* a sentence to be imposed within a certain guidelines range (which typically is well below the statutory maximum of the relevant penal statute), a jury must find beyond a reasonable doubt (unless a defendant admits in court) the facts justifying a sentence above the otherwise applicable guidelines range.¹¹³ The

¹¹⁰ See *supra* notes ___-___ & accompanying text.

¹¹¹ See *Blakely v. Washington*, 542 U.S. 296 (2004); see also *United States v. Booker*, 543 U.S. 220 (2005) (applying *Blakely* to the federal sentencing guidelines and, as a remedy, rendering them “advisory”); *Spears v. United States*, 129 S. Ct. 840 (2009) (per curiam) (approving district court’s rejection of guidelines’ 100:1 crack/powder cocaine ratio and substitution of court’s own 20:1 ratio); *Nelson v. United States*, 129 S. Ct. 890 (2009) (per curiam) (district court erred by applying a presumption of reasonableness to guidelines sentence; only appellate courts may apply such a presumption); see also *United States v. Irey*, 612 F.3d 1160, 1236-37 (11th Cir. 2010) (en banc) (Tjoflat, J., specially concurring in part and dissenting in part) (“*Booker* redistributed the roles in sentencing offenders between the Commission, the district courts, and the courts of appeals. The Commission no longer framed the district courts’ sentencing discretion with mandatory guidelines; instead, it would inform the district courts’ sentencing discretion with advisory guidelines. The district courts once again bore the responsibility of independently crafting sentences.”).

¹¹² 530 U.S. 466 (2000) (holding that any fact that raises the statutory maximum penalty, other than a defendant’s prior criminal convictions, must be submitted to a jury and proved beyond a reasonable doubt).

¹¹³ See *id.* at 303-04 (“In this case, [*Blakely*] was sentenced to more than three years above the 53-month statutory maximum of the standard [sentencing guidelines] range because he had acted with ‘deliberate cruelty.’ The facts supporting that finding were neither admitted by petitioner nor found by a jury. . . . [T]he ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury’s verdict

following year, in *Booker*, the Court applied *Blakely* to the federal guidelines – meaning, so long as the guidelines remained “mandatory,” a sentencing court would violate the Constitution by increasing an offender’s sentence above the guidelines range based on aggravating facts found by a preponderance of the evidence without a jury – but then obviated the constitutional issue by judicially rewriting the SRA to make the guidelines merely “advisory.”¹¹⁴

Two subsequent 2007 decisions reinforced *Booker*. In *Kimbrough v. United States*,¹¹⁵ the Court held that district courts are free to reject particular guidelines as a matter of “policy” differences with Congress’s and the Commission’s judgments and “vary” from the guidelines (even when a “departure” is not authorized), so as to impose what are now known as “non-guidelines sentence[s].”¹¹⁶ In *Gall v. United States*,¹¹⁷ the Court rejected the government’s argument that a district court may not impose a non-guidelines sentence except in an “extraordinary” case.

As the result of cases like *Booker* and *Kimbrough*, district courts are free to reject policy directives from Congress and the Commission in certain circumstances, a clear challenge to Congress’s role in sentencing. Courts have increasingly imposed sentences outside of the now “advisory” sentencing guidelines,¹¹⁸ and only in extreme cases have courts of appeals reversed

alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ . . . and the judge exceeds his proper authority.’”) (citations omitted).

¹¹⁴ See *Booker*, 543 U.S. at 230-68.

¹¹⁵ 552 U.S. 85 (2007).

¹¹⁶ *Rita v. United States*, 551 U.S. 338, 350 (2007).

¹¹⁷ 552 U.S. 38 (2007).

¹¹⁸ As noted in *supra* note ___, in Fiscal Year 2009, 56.8% of federal sentences were

such “variances” from the guidelines as “substantively unreasonable.”¹¹⁹

III. Where Are We Now, And Where Are We Heading?

As I have discussed above, the framers of the guidelines system envisioned an independent, bipartisan body staffed by experts in sentencing policy who would create, monitor, and modify, as warranted, a set of guidelines that would be followed by judges and practitioners. Ideally, Congress would establish statutory minimum and maximum penalties but would refrain from defining and adjusting individual guidelines. Congress envisioned that the guidelines would have a sufficient level of flexibility to permit judges to adjust sentences based upon individualized factors and that judges would respect the policy-making role of Congress in setting statutory penalty ranges.¹²⁰

Now the sentencing guidelines have been in place nearly a quarter century, and as I have explained, the system has gone through a series of seismic shifts. It is a suitable time to reflect upon the system as a whole, especially to assess it in comparison with the intentions and expectations of those who created the system. In particular, what changes have evolved, for better

imposed within the applicable guidelines range; another 25.3% were the result of a government-sponsored downward departure, and 17.9% were imposed outside of the applicable guidelines range without a government motion. By way of comparison, in the decade or so before *Booker*, defendants received within-range sentences in approximately two-thirds to three-fourths of cases. See U.S. Sent. Comm’n, *2004 Sourcebook of Federal Sentencing Statistics* 69 (Figure G) (noting varying percentages of within-range sentences from 1992-2004, which ranged from 64% to 78%). There has been a slow but steady decrease of within-guidelines sentences since *Booker*.

¹¹⁹ See, e.g., *United States v. Irely*, 612 F.3d 1160 (11th Cir. July 29, 2010) (en banc) (case involving a horrific pattern of child sexual abuse in the production of a large amount of child pornography).

¹²⁰ See Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 297 (1993).

or worse, which have advanced or impeded the role of the Sentencing Commission in setting sentencing policy?

A. Judges and the Guidelines Culture

In 1987, when the federal sentencing guidelines first went into effect, the notion of sentencing pursuant to guidelines and a numeric grid was foreign to everyone in the federal criminal justice system. More than anyone, federal district judges balked at the guidelines as anathema to the concept of “judging.”¹²¹ A quarter-century later, a different view of sentencing guidelines prevails among district judges – the vast majority of whom were appointed to the bench after the guidelines went into effect. Seventy-five per cent of responding judges in the Sentencing Commission’s recent survey preferred the *Booker* “advisory” system currently in place to the pre-*Booker* “mandatory” system.¹²² Yet most judges are supportive of the guidelines structure. In that same survey, 78% opined that the guidelines reduced disparity, and 67% felt the guidelines increased fairness.¹²³ Judges support the “real offense” sentencing model upon which the federal guidelines are based – including “relevant conduct” and the preponderance of evidence

¹²¹ See *supra* note __ and accompanying text.

¹²² See U.S. Sent. Comm’n, *Results of Survey of United States District Judges, January 2010 Through March 2010*, Question 19 (noting that 75% of judges questioned favor the “advisory” guidelines to the former “mandatory” system or to the system that existed before the SRA).

¹²³ See *id.*, Question 17 (78% of judges questioned “somewhat agree[d]” or “strongly agree[d]” that overall the federal sentencing guidelines have “reduced unwarranted disparities among defendants with similar records who have been found guilty of similar conduct”); *id.* (67% of judges questioned “somewhat agreed” or “strongly agreed” that overall the federal sentencing guidelines have “increased fairness in meeting the purposes of sentencing”).

standard applicable at sentencing.¹²⁴

With exceptions for child pornography and crack cocaine sentences, the average length of imprisonment for all other offenses has remained relatively constant over the past ten years, despite *Booker* and its progeny.¹²⁵ Even when judges depart or vary from applicable guideline ranges, the average length of those adjustments has remained consistent and relatively modest.¹²⁶ Essentially, then, the guidelines have become accepted as part of the “culture” of the federal criminal justice system.

That the vast majority of judges have accepted the guidelines suggests that they understand the need to reduce disparity in sentencing through the implementation of a national

¹²⁴ See *id.*, Questions 5 & 6 (79% of judges questioned believed that “all reasonably foreseeable acts and omissions of others in furtherance of a jointly undertaken criminal activity” should be considered relevant conduct for sentencing purposes; 69% agreed that facts establishing the base offense level should be found by a preponderance of the evidence; 85% believed that the preponderance standard was appropriate to establish facts supporting a departure from the otherwise applicable guideline range; and 87% believed that the preponderance standard was appropriate to establish facts supporting a variance); see also USSG §§1B1.3 (relevant conduct provision), 6A1.3, comment. (“The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of guidelines to the facts of a case.”).

¹²⁵ See generally U.S. Sent. Comm’n, *Sourcebook of Federal Sentencing Statistics*, Table 13 (2000 through 2009 editions). Compare, e.g., 2000 *Sourcebook of Federal Sentencing Statistics*, Table 13 (average sentence length for all crimes was 46.9 months and median sentence length was 24.0 months) with 2009 *Sourcebook of Federal Sentencing Statistics*, Table 13 (2009) (average sentence length for all crimes was 46.8 months and median sentence length was 24.0 months).

¹²⁶ See generally U.S. Sent. Comm’n, *Sourcebook of Federal Sentencing Statistics*, Tables 13, 31, 31A, 31B, 31C, 31D (2000 through 2009 editions). Compare, e.g., 2000 *Sourcebook of Federal Sentencing Statistics*, Table 31 (median decrease from the guidelines’ ranges for departures is 40%) with 2009 *Sourcebook of Federal Sentencing Statistics*, Tables 31A, 31B, 31C, 31D (median decrease from the guidelines for departures is 28.5% and median decrease from the guidelines for variances is 34.8%).

guideline structure. I sense most judges would embrace a guidelines system with rigorous appellate review, provided that there existed sufficient flexibility by way of broader ranges and some degree of departure authority (albeit limited authority) so that the individualized factors of an offense and characteristics of a defendant could be meaningfully considered – both components of the reformed system I propose below in Part IV.

Also notable is the reaction of the other two branches of government to signs of increasing disparities in sentencing in the post-*Booker* regime. As noted, the primary purpose of the SRA was to reduce unwarranted disparities in sentencing. If Congress concludes, based upon national statistics, that the current guidelines system fails to reduce unwarranted disparities because of inconsistent sentencing practices under the advisory guidelines, mandatory minimum sentences are the most obvious remedy. And signs of increased disparity are emerging. Reliable evidence suggests that, as a result of the decreasing adherence to the sentencing guidelines since the Supreme Court rendered them “advisory” in 2005, disparities in federal sentencing – both inter-judge and demographic disparities – have been increasing steadily.¹²⁷ One need only look at the

¹²⁷ See U.S. Sent. Comm’n, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report’s Multivariate Regression Analysis* (Mar. 2010); Ryan W. Scott, *The Effects of Booker on Inter-Judge Sentencing Disparity*, 22 FED. SENT. RPTR. 104 (Dec. 2009); see also Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. __ (forthcoming Dec. 2010). In 2004, James Felman, a leading member of the federal defense bar, predicted such disparities would increase in an advisory guidelines system. See James Felman, *How Should Congress Respond if the Supreme Court Strikes Down the Federal Sentencing Guidelines?*, 17 FED. SENT. REP. 97, 98-99 (2004) (predicting that, if advisory guidelines came into effect after *Booker* was decided, “unwarranted disparity in the near term would be considerably less than that which existed prior to 1987” but also that “there will be a minority of judges who will generate unwarranted disparity, and this number seems likely to increase as the years go by and the bench is filled with individuals who have no history with binding guidelines”).

Earlier studies showed that inter-judge sentencing disparities decreased from the pre-SRA

dramatically different rates of “within-range” sentences both among and within the federal circuits for proof of sentencing disparities on a national level.¹²⁸ Moreover, sentences within the guideline range have decreased from approximately 56.8% one year ago to 54% in October 2010.¹²⁹ Judge-initiated adjustments (i.e., downward departures and variances) have increased from 13.8% in 2008 to 18% in late 2010.¹³⁰ Although some of those changes are due to judges’ reactions to penalties for child pornography and crack cocaine offenses, it seems beyond

era under the then-mandatory federal guidelines. *See, e.g.*, James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Sentencing Guidelines*, 42 J. L. & ECON. 271, 303 (1999) (“The Guidelines have reduced the net variation in sentence attributable to the happenstance of the identity of the sentencing judge.”); Paul J. Hofer, Kevin Blackwell & R. Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 241 (1999) (“Together with other research reviewed below, [our] findings suggest that the sentencing guidelines have had modest but meaningful success at reducing unwarranted disparity among judges in the sentences imposed on similar crimes and offenders.”). The Commission’s recent study showed that demographic differences were significantly less when the guidelines were binding (particularly during the PROTECT Act period, when appellate review of departures involved *de novo* review). *See Demographic Differences in Federal Sentencing Practices*, at 22.

¹²⁸ *See* U.S. Sentencing Commission, *Preliminary Quarterly Data Report: 3d Quarter Release (FY2010)*, Table 2, available at http://www.usc.gov/sc_cases/USSC_2010_Quarter_Report_3rd.pdf (setting forth statistics concerning the within-range sentencing rate of district courts in the twelve federal circuits; the rates ranged from a low of 31.3% in the D.C. Circuit to a high of 71.3% in the Fifth Circuit); *id.* (noting that, within the First Circuit, within-range sentences in the District of Massachusetts represented only 28.3% of the total cases, while in the District of Puerto Rico, within-range sentences represented 72.1% of cases). In the quarter immediately before *Booker* was decided, the comparable rates were as follows: within-range rates in the circuits varied from a low of 58.8% (Ninth Circuit) to a high of 77.9% (Eleventh Circuit); the within-range rate in the District of Massachusetts was 71.8% and the within-range rate in the District of Puerto Rico was 96.9%. *See* U.S. Sent. Comm’n, *2005 Sourcebook of Federal Sentencing Statistics*, at 74-76 (Table 26).

¹²⁹ *See* U.S. Sentencing Commission, *Preliminary Quarterly Data Report: 4th Quarter Release (FY2010)*, at 1 (Table 1), available at [HYPERLINK], with U.S. Sentencing Commission, *2009 Sourcebook of Federal Sentencing Statistics*, at 50 (Table N).

¹³⁰ *See id.*

reasonable dispute that disparities are on the rise. Based on the slow but steady rate of decline of within-range sentences since *Booker*,¹³¹ I predict that the percentage of sentences within the applicable guidelines' ranges likely will fall below 50% in the near future. I also fear that, as within-range rates fall, the rates of sentencing disparities will increase in a corresponding manner.

B. Mandatory Minimum Sentences

The initial Sentencing Commission created a guideline structure that was “mandatory” (or “presumptive”), whereby judges were discouraged from departing from applicable guideline sentencing ranges absent exceptional circumstances. Mandatory minimum sentences were unnecessary in such a system, as the guidelines had adequate authority to direct that certain sentences be imposed. The Commission thus submitted a report to Congress in 1991 opposing

¹³¹ In the two years before *Booker* was decided, judges imposed sentences within the applicable guidelines in approximately 70% of cases; imposed sentences below the applicable guideline range as the result of a government-sponsored motion for downward departure in approximately 25% of cases; and imposed sentences below or above the applicable range as the result of a non-government-sponsored departure in only approximately 5% of cases. See U.S. Sent. Comm'n, *2005 Sourcebook of Federal Sentencing Statistics* 71 (Figure G). By way of comparison, in the decade or so before *Booker*, defendants received within-range sentences in approximately two-thirds to three-fourths of cases. See U.S. Sent. Comm'n, *2004 Sourcebook of Federal Sentencing Statistics* 69 (Figure G) (noting varying percentages of within-range sentences from 1992-2004, which ranged from 64% to 78%). By contrast, the data for FY2009 show that, although the percent of government-sponsored downward departures remained at around 25%, judges imposed within-range sentences in 56.8% cases and imposed sentences outside of the applicable guidelines range (without government sponsorship) in nearly 18% of cases. See U.S. Sent. Comm'n, *2009 Sourcebook of Federal Sentencing Statistics* 50 (Table N). The percentage of within-range sentences continues to fall slowly but steadily. The latest quarterly data for FY2010 released by the Sentencing Commission show within-range sentences were imposed in 54.8%. See U.S. Sent. Comm'n, *Preliminary Quarterly Data Report 1* (Sept. 3, 2010) (third quarter data; Table 1), available at http://www.ussc.gov/sc_cases/USSC_2010_Quarter_Report_3rd.pdf.

mandatory minimum sentences as inconsistent with a rational guideline structure.¹³² But Congress's commitment to the guideline system has been inconsistent. Since 1991, the number of criminal statutes which have mandatory minimum sentences has increased by more than 78%.¹³³ There are now over 170 provisions which bear mandatory minimum sentences.¹³⁴ Twenty-eight percent of the federal criminal cases subject to the sentencing guidelines in 2009 involved statutes that carried mandatory minimums.¹³⁵ That figure increases to 40% of the docket if immigration cases are excluded.¹³⁶ The impact of mandatory minimums is further exacerbated by the Commission's decision to tie the guidelines to mandatory minimum sentences¹³⁷ and Congress's directive in the PROTECT Act to require the Commission to adopt guidelines that are "consistent with all pertinent provisions of any Federal statute"¹³⁸ In practice, the Commission has increased guidelines penalties each time a new mandatory minimum sentence is passed by Congress. As a result, penalties have increased significantly over time, resulting in a dramatic

¹³² See U.S. Sent. Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (Aug. 1991).

¹³³ U.S. Sent. Comm'n, FY2009 Dataset.

¹³⁴ See *Statement of Ricardo H. Hinojosa, Chair, U.S. Sentencing Commission Before House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security* (June 26, 2007), available at http://www.ussc.gov/testimony/6_26_07.pdf.

¹³⁵ U.S. Sent. Comm'n, FY2009 Dataset.

¹³⁶ U.S. Sent. Comm'n, FY2009 Dataset.

¹³⁷ See *supra* note __ and accompanying text.

¹³⁸ 28 U.S.C. § 994(a).

increase in the federal prison population.¹³⁹

As both the chief architect of the SRA and the Sentencing Commission itself recognized in its early years of existence, mandatory minimum statutory penalties are fundamentally inconsistent with the sentencing guidelines system envisioned by the SRA (at least when guidelines are binding in nature and not merely “advisory,” as they are post-*Booker*).¹⁴⁰ Over the past quarter-century, many others – representing many points on the political spectrum – also have been critical of mandatory minimum statutory penalties as being inconsistent with the guidelines system, including the late Chief Justice William Rehnquist, Justice Breyer, and Senator Hatch.¹⁴¹

¹³⁹ See *supra* note __ and accompanying text.

¹⁴⁰ Senator Edward M. Kennedy, *Sentencing Reform—An Evolutionary Process*, 3 FED. SENT. RPTR. 271, 272 (1991) (“Mandatory minimum sentencing statutes have . . . hampered the guideline system and are becoming an increasingly serious obstacle to its success. . . . Mandatory minimums inevitably lead to sentencing disparity because defendants with different degrees of guilt and different criminal records receive the same sentence.”); U.S. Sent. Comm’n, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Aug. 1991); see also *United States v. Smith*, 10 F.3d 724, 732 (10th Cir. 1993) (discussing the “inconsistency” between the “carefully constructed, graduated scheme of sentencing reflected in the Guidelines” and “statutorily mandated sentencing thrust upon the Sentencing Commission by Congress”).

¹⁴¹ Letter from Senator Patrick J. Leahy to William K. Sessions, August 30, 2010, available at http://www.ussc.gov/pubcom_20100825/SenLeahy_2011PolicyPriorities.pdf (“I am concerned that the creation of mandatory minimum penalties too often ties the hands of judges and prosecutors and can result in unjust sentences. I also worry that mandatory minimum penalties undermine the integrity and consistency of the sentencing guidelines system.”); Grover G. Norquist, President, Americans for Tax Reform, written testimony submitted to the Subcommittee on Crime, Terrorism, and Homeland Security, House Committee on the Judiciary, July 14, 2009, available at <http://judiciary.house.gov/hearings/pdf/Norquist090714.pdf> (“The benefits, if any, of mandatory minimum sentences do not justify this burden to taxpayers. Illegal drug use rates are relatively stable, not shrinking. It appears that mandatory minimums have become a sort of poor man’s Prohibition: a grossly simplistic and ineffectual government response to a problem that has been around longer than our government itself.”); Judge Julie E.

Carnes, Chair of the Criminal Law Committee of the Judicial Conference of the United States, written testimony before the Subcommittee on Crime, Terrorism and Homeland Security of the U.S. House of Representatives Committee on the Judiciary, July 14, 2009, *available at* <http://judiciary.house.gov/hearings/pdf/Carnes090714.pdf> (“Unjust mandatory minimums . . . have a corrosive effect on our broader society. To function successfully, our judicial system must have the respect of the public. The robotic imposition of sentences that are viewed as unfair or irrational greatly undermines that respect. . . [S]ome of these statutes do not produce merely questionable results; instead, a few produce truly bizarre outcomes.”); Rachel E. Barkow, *Our Federal System of Sentencing*, 58 STAN. L. REV. 119, 134 (2005) (“Mandatory minimums result in more, not less, disparity, and they are prohibitively expensive. . . . Congress . . . should reconsider its use of mandatory minimums and allow the Sentencing Commission to set sentencing ranges without the interference of mandatory minimum legislation.”); Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (And a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004); *Speech Delivered by Justice Anthony M. Kennedy at the American Bar Association Annual Meeting*, 16 FED. SENT’G REP. 126, 127 (Dec. 2003) (“By contrast the guidelines, I can accept neither the necessity nor the wisdom of mandatory [minimum statutory] sentences.”); Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT’G REP. 180, ___ (1999) (“ . . . Congress, in simultaneously requiring Guideline sentencing and mandatory minimum sentences, is riding two different horses. And those two horses, in terms of coherence, fairness, and effectiveness, are traveling in opposite directions. . . . [Congress needs to] abolish mandatory minimums altogether.”); William H. Rehnquist, *Luncheon Address*, (June 18, 1993), in U. S. Sentencing Comm’n, DRUGS & VIOLENCE IN AMERICA: PROCEEDINGS OF THE INAUGURAL SYMPOSIUM ON CRIME AND PUNISHMENT IN THE UNITED STATES 286-87 (1993) (“These mandatory minimum sentences are perhaps a good example of the law of unintended consequences [T]he mandatory minimums have led to an inordinate increase in the federal prison population and will require huge expenditures to build new prison space Indeed, it seems to me that one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the sentencing guidelines were intended to accomplish.”); Senator Orin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 193-95 & n.72 (1993) (critical of mandatory minimum statutes because “their current lack of uniform application may be dramatically undermining sentencing certainty” and also “an inconsistent application [has] created substantial disparity in sentencing”; also stating that “[t]he compatibility of the guidelines system and mandatory minimums is also in question” because “they are structurally and functionally at odds with each other and with the SRA’s goals”); Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 303 (1993) (“Mandatory sentencing, or the more popular mandatory minimum sentence, is inconsistent with the presumptive sentencing theory [in the SRA].”); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L. J. 1681, 1752 (1992) (“These rigid [mandatory minimum] statutes are wholly at odds with the sort of principled guidance and

It is not my intention either to dwell on the wisdom of mandatory minimum sentencing as a matter of policy or to criticize the Commission's linkage of the guideline ranges to mandatory minimums. Congress has the constitutional authority to establish sentencing policy. It may be true that creating mandatory minimum sentences with penalties at relatively low levels could further a worthy goal by helping to ensure certainty of punishment while leaving to judges and practitioners the ultimate authority to determine appropriate sentences.¹⁴² The problem lies with mandatory minimums that require significant lengths of imprisonment. Those sentences are overly blunt instruments, bringing undue focus upon factors (such as drug quantities) to the exclusion of other important considerations, including role in the offense, use of guns and violence, criminal history, risk of recidivism, and many personal characteristics of an individual defendant. Mandatory minimum sentences set at severe thresholds increase disrespect for the guideline system. Moreover, they encourage practitioners to use techniques to circumvent their

permissible individualization of penalties that Congress described in the SRA.”); Ronald L. Wright, *The United States Sentencing Commission as an Administrative Agency*, 4 FED. SENT’G REP. 134, 136 (1991) (“Congress has consistently undermined the Commission’s capacity to coordinate sentencing policy . . . [by] resort[ing] time and again to mandatory minimum sentences”); *Study of the Federal Courts Study Committee*, 2 FED. SENT’G REP. 232, 232 (1991) (“Congress should repeal mandatory minimum sentencing provisions”). The most recent statement by the current Department of Justice recommends “some reforms” in mandatory minimum statutes. *Critics of Mandatory Minimums Urge Repeal; DOJ Says Only “Modest Reforms” Are Needed*, 87 CRIM. L. RPTR. 326 (BNA 2010).

¹⁴² Both prosecutors and law enforcement officials repeatedly have informed the Sentencing Commission that mandatory sentencing penalties are necessary to inspire meaningful cooperation from defendants (which allows for more effective law enforcement). *See, e.g.*, Written testimony of U.S. Attorney Patrick Fitzgerald before U.S. Sentencing Commission, Sept. 10, 2009, available at http://www.usc.gov/AGENDAS/20090909/Fitzgerald_testimony.pdf (“Mandatory minimum sentences have been a very effective tool in prosecuting particularly violent offenders. The threat of mandatory minimum sentences has caused many persons charged with these offenses to become cooperating witnesses, often testifying against persons with greater responsibility in the drug or gang organization. And the threat of mandatory minimum sentences also has caused some people not to commit such offenses and thus not go to jail at all.”).

implementation.¹⁴³

C. Specific Directives From Congress

As noted, Congress's use of "specific" directives to the Commission to amend guidelines provisions has increased significantly over the past decade. Prior to the passage of the PROTECT Act, a typical directive from Congress permitted the Commission to exercise varying degrees of flexibility in implementing changes to penalties. That flexibility permitted the Commission to incorporate changes in sentencing policy with precision in order to target criminal conduct of concern to policymakers in Congress while avoiding disproportionate or overbroad penalty increases. The Commission could note general concerns of Congress regarding penalties for individual offenses and conduct empirical research on the advisability of adopting particular ways of addressing those concerns. Such research is necessary to ensure that guidelines are consistent and coordinated throughout the guideline system.

The PROTECT Act marked a dramatic change in the nature of directives to the Commission. Congress directed the Commission to make specific changes to guidelines, including incorporating certain increases in enhancements based upon conduct Congress felt worthy of such changes. Congress did so without conducting the type of rigorous empirical research that the Commission undertakes before amending the guidelines and without ensuring

¹⁴³ Prof. Bowman has commented on the actions of front-line criminal justice actors to reduce the severity of drug sentences. See Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1330 (2005), Frank O. Bowman, III and Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 559-560 (2002).

consistency with other guideline provisions.¹⁴⁴ Congress has continued to issue the Commission specific directives to increase offense levels or enhancements by identified minimum amounts.¹⁴⁵

There are a number of difficulties created in the guideline structure by specific directives from Congress. First, such directives are addressed to the Commission without a clear description of the empirical research that Congress used in adopting those changes. The Commission then must adopt those changes without its own research. As I have noted, courts have begun to respond negatively to these directives by refusing to afford the traditional deference given to the guidelines.¹⁴⁶ Having judges assess the merits of particular guidelines provisions can only lead to a system in disarray.

Second, specific directives result in guidelines that are criticized for their complexity and often for inconsistency. The Commission attempts to use a coherent and proportionate system of punishment that is just. It uses consistent language and structure throughout the *Guidelines Manual* to tie provisions together. Directives from Congress that mandate changes in particular guidelines are done without a clear understanding of how these changes conform to or may even conflict with the existing guideline structure. As a result, changes to the guidelines based on

¹⁴⁴ See *supra* note ___ and accompanying text. The type of empirical research typically undertaken by the Commission is discussed in *infra* note ___.

¹⁴⁵ Frank O. Bowman III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 420 n. 262 (2010) (“Congress began to recognize the political utility of tweaking the Guidelines to raise sentences for the crime *du jour* . . .”). The Fair Sentencing Act of 2010, which contained numerous specific directives requiring increases in guideline levels in drug-trafficking cases, is a prime example. See *supra* note ___ and accompanying text; see also Patient Protection and Affordable Care Act, Pub. L. No. 111–148, § 10606 (2010) (specific directive to Sentencing Commission concerning health care fraud).

¹⁴⁶ See *supra* note ___ and accompanying text.

specific directives can result in disproportionate penalties.

More important, the Commissions's role is to perform as the expert body in sentencing policy. The Commission is supposed to respect Congress's role in sentencing policy but at the same time exercise independent judgment. Justice Scalia in *Mistretta* expressed concern that the Commission would act as a "junior varsity" Congress and that, constitutionally speaking, that should not be its role.¹⁴⁷ In an advisory guidelines system, the Commission's acceptance by the criminal justice community depends upon respect for the exercise of its expertise in sentencing policy. Specific directives from Congress requiring precise changes to guidelines without the Commission's notice and hearing procedures coupled with its empirical research usurp the Commission's role as the expert in the field and threaten its standing within the criminal justice community.

D. Offender Characteristics

During the past two years, the Commission traveled throughout the United States hearing from judges and practitioners their concerns and suggestions about sentencing policy. We heard consistently from judges suggestions to expand discretion at the lower offense levels on the Sentencing Table; to provide alternatives to imprisonment for low-level, non-violent offenders who would benefit from treatment; and to bring consistency between the guidelines and 18 U.S.C. § 3553(a) in how offender characteristics are considered.

The original Commission interpreted the SRA as discouraging the use of the vast majority

¹⁴⁷ *Mistretta*, 488 U.S. at 427 (Scalia, J., dissenting).

of offender characteristics at sentencing.¹⁴⁸ The original guidelines thus instructed that age, mental condition, and physical condition, among other factors, were not “ordinarily relevant” to a judge’s assessment of an appropriate sentence.¹⁴⁹ Such a limitation created confusion among judges, since they were instructed – without limitation – to consider “the history and characteristics of the defendant” in imposing sentence by § 3553(a)(1).¹⁵⁰ The tension between the guidelines and § 3553(a) resulted in disrespect for the guidelines system as it relates to offender characteristics.

In the past year, the Commission took an initial step to address constructively the inconsistency in the way offender characteristics are addressed in the guidelines and in § 3553(a). Certain characteristics (including age and mental condition) now “may be relevant” in granting a departure from the guidelines range if “present to an unusual degree.”¹⁵¹ The changes were modest, yet significant as signaling at least some change in direction. The Commission also assumed the responsibility of educating judges and practitioners on social science research that pertains to the relevance of particular offender characteristics in sentencing.¹⁵² Often there are

¹⁴⁸ See USSG, Pt. 5H (1989) (providing that offender characteristic such as age and education “are not ordinarily relevant in determining whether a sentence should be outside the guidelines”).

¹⁴⁹ *Id.*

¹⁵⁰ Compare 28 U.S.C. § 994(d), (e) (instructing the Sentencing Commission, in crafting sentencing guidelines, to limit consideration of numerous offender characteristics such as socioeconomic status, education, family ties, and employment record), with 18 U.S.C. §§ 3553(a)(1) & 3661 (instructing sentencing judges to consider *every* aspect of a defendant’s “background, character, and conduct”).

¹⁵¹ See, e.g., USSG §§5H1.1, 5H1.2; see also USSG, Pt. 5H (introductory commentary).

¹⁵² See USSG, Pt. 5H (introductory commentary) (“The Commission will continue to

volumes of research that address questions of the relevance of characteristics, such as age, to the risk of recidivism. In deciding whether to follow the guidelines, judges have considered specific characteristics of a defendant without sufficient understanding of the relevance of those factors to proper sentencing objectives. The Commission has taken a significant first step of encouraging judges to consider human characteristics in sentencing, and in doing so, has taken on the role of educating – rather than constraining – judges concerning offender characteristics. It is a new role that has been long in coming; it is vital for the Commission to maintain its expert role in the criminal justice community.

IV. A Proposal for a Reformed Guidelines System that Renews the Spirit of the Sentencing Reform Act of 1984

It is entirely reasonable – indeed, enlightened – to wish to avoid disparities in sentencing between different judges who sentence “similar” defendants with “similar” backgrounds (in particular, criminal backgrounds) who commit “similar” crimes. However, critics of the guidelines who decry what they deem “unwarranted uniformity” in guidelines sentences also have a point¹⁵³ – to an extent. A fair and rational sentencing system would not impose similar sentences on defendants who are dissimilar in significant, relevant respects (regarding either their own personal characteristics or the characteristics of their offenses or their criminal records). Yet determining what characteristics are relevant at sentencing for purposes of distinguishing among offenders who committed similar criminal offenses is the rub.

provide information to courts on the relevance of specific offender characteristics in sentencing . . .”).

¹⁵³ See, e.g., Kate Stith & Jose A. Cabranes, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 106 (1999).

In seeking to avoid both unwarranted disparity and unwarranted uniformity, the Sentencing Commission has promulgated and repeatedly amended guidelines that identify what the Commission and, in some situations, Congress¹⁵⁴ consider “relevant” characteristics of offenses and offenders. The process of identifying such relevant characteristics and concomitantly prohibiting or discouraging the consideration of other characteristics has been enormously time-consuming and has generated a great deal of controversy since the Commission’s inception in the mid-1980s. The current set of sentencing guidelines is an extremely detailed and complex collection of policy choices by the Commission and Congress, which has been continually monitored, informed by actual sentencing practices, and often adjusted accordingly.

Twenty-five years under the federal sentencing guidelines has taught that too much complexity in a guidelines system, while noble in the attempt to avoid disparities by cabining judicial discretion, has failed to achieve the appropriate balance between the three most important yet competing considerations in a rational, humane, and cost-effective sentencing system: (1) avoiding unwarranted sentencing disparities between similarly situated defendants, (2) treating defendants as unique human beings with unique personal characteristics (both good and bad) and unique criminal histories, and (3) protecting the public from future crimes of defendants in a cost-effective manner. We tend to ignore the fact that sentencing judges are thoroughly competent to exercise discretion in sentencing defendants based on the totality of these unique facts and

¹⁵⁴ Although Congress in the SRA afforded the Commission wide latitude to consider the relevance of most offender and offense characteristics, *see* 28 U.S.C. § 994(c) & (d)(1)-(11), Congress specifically decreed that the Commission make certain offender characteristics either “generally inappropriate[]” to be considered in sentencing (such as a defendant’s family ties or employment record) or entirely irrelevant (such as defendant’s socio-economic status, race, or gender). *See* 28 U.S.C. § 994(d) (final paragraph), (e).

circumstances. A sentencing guidelines system should strike a balance between limiting judges' ability to use their own subjective sense of justice in meting out punishment (so as to promote equality and certainty in sentencing) and affording sentencing judges the authority to consider the unique aspects of offenders and the offenses that they committed in fashioning an appropriate sentence. Too much complexity in guidelines, for the purpose of limiting sentencing judges' discretion, puts a thumb on the scales in favor of the former, while too much simplicity as a means of affording significant discretion puts a thumb on the scale in favor of the latter.

The worthy goals of the SRA of achieving an appropriate balance between the reduction of unwarranted sentencing disparities and taking relevant individual offender and offense characteristics into consideration in fashioning an appropriate sentence to protect the public are still worth pursuing. My reflections on the past quarter century have convinced me, however, that these aspirations have been frustrated by two things: (1) the undue complexity and rigidity of the sentencing guidelines and (2) the persistent efforts of all three branches of government to control the statutory mission of the Sentencing Commission. So what, if anything, can be done to achieve the type of sentencing reform envisioned by the bipartisan coalition that passed the historic legislation twenty-five years ago?

As an initial matter, I agree with Professor Reitz, the reporter for the ALI's Model Penal Code's Sentencing Revision, that "voluntary [guidelines] provisions are by definition unenforceable and thus allow for the emergence of sentencing disparities that motivated many American sentencing reforms in the first instance."¹⁵⁵ "Binding guidelines and searching

¹⁵⁵ Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1114 (2005). I also agree with him that "[e]ven if most judges give credence to advisory guidance, there is no systemic remedy for outlier

appellate review are needed to make sentencing decisions more consistent and legitimate.”¹⁵⁶ If the guidelines once again are presumptive, as they were before *Booker*, there will be little if any need for severe mandatory minimum statutory provisions, which, as discussed above, are contrary to a rational guidelines system.¹⁵⁷ In the words of Senators Kennedy, Hatch, and Feinstein, who filed an *amicus curiae* brief in *Booker*: presumptive guidelines “offer[] a middle-ground approach between sticking with the failed [pre-SRA] indeterminate system of sentencing and adopting a rigid system of determinate sentencing, in which Congress specific[s] applicable sentences for federal offenses and judges simply impose[] sentence without any individualized consideration of the offender or his criminal conduct.”¹⁵⁸ At the very least, Congress should promote “smart sentencing” by significantly reducing both the number and severity of the current set of mandatory minimum statutes and allow the Commission to recalibrate the guidelines to account for offender culpability.

I realize that many members of Congress and the vast majority of the federal judiciary may disagree with a presumptive guidelines structure (although many judges clearly would like to see mandatory minimums repealed).¹⁵⁹ I believe, however, that presumptive guidelines are

sentences.” *Id.*

¹⁵⁶ Stephanos Bibas *et al.*, *Policing Politics at Sentencing*, 103 NW. U. L. REV. 1371, 1396 (2009).

¹⁵⁷ *See supra* notes __ & __ and accompanying text.

¹⁵⁸ 2004 WL 1950640, at *4.

¹⁵⁹ *See* U.S. Sent. Comm’n, *Results of Survey of United States District Judges, January 2010 Through March 2010* (“Judges’ Survey”), Question 19 (reporting that 75% of judges surveyed preferred the current “advisory” system compared to only 3% of judges who preferred the pre-*Booker* “mandatory” system; 14% of judges preferred the type of system described in this article); *see also* Written Testimony of Judge Paul Cassell at the *Booker* Hearing Before the

necessary to achieve the goals of the SRA and, particularly if mandatory minimums are repealed or at least curtailed, that they would be a superior system both to the present advisory system and also to the system that existed before the SRA.

In the same spirit of compromise that produced the original sentencing guidelines in the mid-1980s, I set forth a proposal that meets the principle objectives of all three branches of government: presumptive guidelines (subject to meaningful appellate review) that are simpler than the current guidelines, that afford sentencing judges meaningful discretion within broader sentencing ranges, and that are subject to few or no mandatory minimum statutes.

A. Broader Presumptive Ranges with Advisory Sub-Ranges

The sentencing table (or “grid”) is the most important part of a sentencing guidelines system because it provides the mechanism for implementing the calculations that consider both offense and offender characteristics.¹⁶⁰ The current federal guidelines sentencing table is set forth here:

House Judiciary Committee’s Subcommittee on Crime, Terrorism, and Homeland Security, 18 FED. SENT’G REP. 198 (2006) (noting position of Criminal Law Committee of the Judicial Conference that Congress should repeal mandatory minimum statutes).

¹⁶⁰ See Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1324 (2005) (“The federal sentencing guidelines are, in a sense, simply a long set of instructions for one chart: the sentencing table.”).

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)						
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)	
	1	0-6	0-6	0-6	0-6	0-6	
	2	0-6	0-6	0-6	0-6	1-7	
	3	0-6	0-6	0-6	0-6	3-9	
Zone A	4	0-6	0-6	0-6	2-8	6-12	
	5	0-6	0-6	1-7	4-10	9-15	
	6	0-6	1-7	2-8	6-12	12-18	
	7	0-6	2-8	4-10	8-14	15-21	
	8	0-6	4-10	6-12	10-16	18-24	
	9	4-10	6-12	8-14	12-18	21-27	
Zone B	10	6-12	8-14	10-16	15-21	24-30	
	11	8-14	10-16	12-18	18-24	27-33	
	12	10-16	12-18	15-21	21-27	30-37	
Zone C	13	12-18	15-21	18-24	24-30	33-41	
	14	15-21	18-24	21-27	27-33	37-46	
	15	18-24	21-27	24-30	30-37	41-51	
	16	21-27	24-30	27-33	33-41	46-57	
	17	24-30	27-33	30-37	37-46	51-63	
	18	27-33	30-37	33-41	41-51	57-71	
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
Zone D	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

The current sentencing grid has 258 total “cells” containing an enormous variety of sentencing ranges (43 offense levels multiplied by six criminal history categories). Add to that complexity a vast array of different guidelines that have grown increasingly detailed over the years as a result of the “factor creep” discussed above,¹⁶¹ which has invited litigation over a great deal of sentencing minutiae. A simpler grid with fewer and broader sentencing ranges would be the most significant reform in the federal guidelines structure.

I recommend paring down the current sentencing grid from 258 ranges to something along the lines of 30 to 50 ranges. The sentencing table that I propose would resemble a typical state guidelines grid.¹⁶² To accomplish this simplification, significantly fewer cells would appear on the vertical axis of the grid and fewer criminal history categories on the horizontal axis. For such a revision in the current federal guidelines to occur, Congress would be required to amend the “25% rule.”¹⁶³

Although a simplified guidelines system could include a significant reduction in the number of offense levels, I do not recommend discarding – and, instead, recommend consolidating – the 43 offense levels that currently exist in the guidelines’ sentencing table. The

¹⁶¹ See *supra* note __ and accompanying text.

¹⁶² See Nat’l Center for State Courts, *State Sentencing Guidelines: Profiles and Continuum* (Pew Center on the States July 2008) (describing the simplified sentencing grids of the states with sentencing guidelines).

¹⁶³ The current “25% rule” – which provides that “[i]f a sentence specified by the guidelines includes a term of imprisonment, the maximum of range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or six months . . .” – is set forth in 28 U.S.C. § 994(b)(2).

existing guidelines in Chapter Two are based on those 43 levels. Severity and proportionality determinations have been made during the past quarter-century with those 43 levels in mind. As or more important, the Commission’s wealth of data about guideline application is structured on a 43-level system. Data analysis for future policy-making and research purposes would be facilitated by maintaining a 43-level system.¹⁶⁴ Thus, rather than discard the 43 levels, I recommend that those 43 levels simply be associated with broader sentencing ranges (or cells) in a simplified sentencing table.

Instead of having separate cells for each of the 43 offense levels, as currently exists, my proposal would tie groups of offense levels to a single, broader cell on the grid – *e.g.*, offense levels 10-18 would be associated with a single broader cell for each criminal history category on the horizontal axis of the grid. Because logically the ranges on a rational sentencing table get

¹⁶⁴ Relatively few people outside of the Sentencing Commission are aware how important data collection and analysis are to the statutory mission of the Commission. The Commission possesses detailed data on virtually all felony and class A misdemeanor cases in which federal courts have imposed sentences pursuant to the Sentencing Reform Act of 1984 – over a million cases as of late 2010. *See* U.S. Sent. Comm., *Analysis of the Impact of Amendment to Section 4A1.1 of the Sentencing Guidelines if the Amendment Were Applied Retroactively* 7, available at http://www.ussc.gov/general/20100901_Recency_Retro.pdf (noting that, as of the end of 2009, the Commission’s database contained information on over a million federal defendants). Such sentencing data is coded and analyzed – using complex computer programs – with respect to a wide variety of sentencing issues, including myriad guidelines application issues. *See* Christine Kitchens, *Federal Sentencing Data and Analysis Issues* (USSC Aug. 2010); Christine Kitchens, *Introduction to the Collection of Individual Offender Data by the United States Sentencing Commission* (USSC May 2009); *see also* U.S. Sent. Comm., *2009 Sourcebook of Federal Sentencing Statistics*. The members of the Commission, in deciding whether to adopt or amend a particular guideline, routinely receive detailed briefings on data issues by Commission staff before voting on whether to take a particular action. Any future decisions about amending the guidelines, particularly on a broad scale, clearly would benefit from a careful data analysis of how any amendments would affect the criminal justice system. Maintaining the 43 offense levels in a simplified guidelines system would facilitate an apples-to-apples comparison of “old” guidelines with “new” guidelines.

broader with the higher offense levels (which is a function of greater statutory punishment ranges for more serious offenses), my proposal groups larger numbers of offense levels at the lower severity levels and smaller numbers of offense levels at the higher severity levels. I also propose including three sub-ranges within each larger cell (an issue I will address further below), with a mid-range that would serve as an advisory range for a typical or “heartland” case. Similar to the current sentencing table, this simplified grid would include certain cells that would afford the court discretion to impose an alternative sentence (such as probation with the condition of home detention or community confinement).¹⁶⁵

In my proposal, rather than use “zones,” as the current sentencing table does,¹⁶⁶ I simply italicized those cells in the lower portions of the grid in which a sentencing judge would have the option of imposing some alternative to outright imprisonment. Although my proposed table is, as noted above, simply meant as a rough model of the type of simplified table that I hope to see adopted in the future, I have intentionally broadened the portions in the grid allowing for alternative sentences from the current Sentencing Table (where 18 months is the maximum sentence allowing for a “split” sentence in Zone C and 15 months is the maximum sentence

¹⁶⁵ *Cf.* USSG §§ 5B1.1, 5C1.1(b)-(e) (providing for alternatives to straight imprisonment for defendants who fall in Zones A, B, and C of the Sentencing Table). I note that my proposal would expand the availability of alternative sentences a small degree beyond the current Sentencing Table. To achieve further simplification, I also propose that a sentencing judge have the discretion to impose probation with the conditions of home confinement or community confinement in any case that falls in the italicized cells on my proposed sentencing table (in addition to the option of a split sentence of such alternative confinement coupled with some imprisonment).

¹⁶⁶ *See* USSG, Ch. 5, Pt. 1 (Sentencing Table).

allowing for a probationary sentence in Zone B).¹⁶⁷ As I have stated, I agree with Attorney General Holder that a “smart sentencing” regime is more open to alternative sentences in appropriate cases – in particular, in the case of a “first offender who has not been convicted of a crime of violence or an otherwise serious offense”¹⁶⁸ – and should afford sentencing judges that opportunity.

I believe that the current guidelines’ six criminal history categories are sound and are based on solid empirical evidence related to recidivism (which is a primary reason for considering a defendant’s criminal history as a basis for increasing his punishment).¹⁶⁹ However, for the sake of simplification, and without undercutting the predictive value of a defendant’s criminal history score, I propose that the six categories that currently exist could be reduced to four categories in a manner that would still adequately take recidivism into consideration.¹⁷⁰

¹⁶⁷ *See id.* Note that I am referring to the 2010 Sentencing Table, which expanded Zones B and C by one offense level from the Sentencing Table in effect since the sentencing guidelines were first adopted in 1987.

¹⁶⁸ *See* 28 U.S.C. § 994(j).

¹⁶⁹ *See* U.S. Sent. Comm’n, *Recidivism and the “First Offender”* (May 2004), available at http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf, and *Measuring Recidivism: The Criminal History Computations of the Federal Sentencing Guidelines* (May 2004), available at http://www.ussc.gov/publicat/Recidivism_General.pdf.

¹⁷⁰ *Measuring Recidivism*, *supra* note __, presented analyses that demonstrated the predictive accuracy of the guidelines’ Criminal History Categories (“CHCs”) while using both a broad and more narrow definition of recidivism. When using the broadest definition of recidivism (which included not only reconviction but any arrest or violation of supervised release or probation) a linear relationship was found between CHC and the percentage of offenders recidivating. That is, the greater the Criminal History Category, the larger the proportion of offenders recidivating. *See id.* at 6-7. Analyses focusing on the more narrow definition of recidivism – requiring a re-conviction of an offense – also demonstrated the linear relationship between CHC and percentage of offenders recidivating. However, in the latter analysis, differences between the six CHCs was smaller. *See id.*, Exhibits 2 & 4. Based on both these

My proposed sentencing grid would look something like this:

Criminal History Category

(Criminal History Points)

Italicized Ranges Permit Alternative Sentences

Offense Levels	I (0-1)	II (2-5)	III (6-9)	IV (10 or more)
1-12	<i>0-5</i>	<i>0-7</i>	<i>0-8</i>	<i>0-10</i>
	6-10	8-14	9-17	11-21
13-18	<i>10-16</i>	<i>15-22</i>	<i>18-27</i>	<i>22-32</i>
	20-26	23-31	28-38	36-50
	<i>27-33</i>	<i>32-40</i>	<i>39-48</i>	<i>51-66</i>
19-24	<i>30-41</i>	<i>33-46</i>	<i>37-54</i>	<i>41-69</i>
	42-52	47-61	55-73	70-98
25-30	<i>53-63</i>	<i>62-76</i>	<i>74-91</i>	<i>99-126</i>
	79-99	91-117	105-139	132-186
	<i>100-121</i>	<i>118-145</i>	<i>140-174</i>	<i>187-242</i>
31-34	<i>108-134</i>	<i>121-155</i>	<i>135-180</i>	<i>150-225</i>
	135-161	156-190	181-225	226-300
35-36	<i>162-188</i>	<i>191-226</i>	<i>226-271</i>	<i>301-376</i>
	191-213	220-250	253-295	317-393
	<i>214-235</i>	<i>251-282</i>	<i>296-338</i>	<i>394-470</i>
37-38	<i>210-238</i>	<i>235-273</i>	<i>262-315</i>	<i>300-395</i>
	239-265	274-312	316-368	396-490
39-42	<i>266-293</i>	<i>313-352</i>	<i>369-422</i>	<i>491-586</i>
	262-Life	292-Life	324-Life	360-Life
43	360-Life	360-Life	360-Life	360-Life

The specifics of my proposed simplified table – in particular, the precise relationship between the offense-level groupings and the corresponding cells on the grid – are merely

analyses, it appears that the number of CHCs could be reduced from six to four while maintaining the predictive utility of the Sentencing Table. Put another way, in my Sentencing Table’s four CHCs, each category corresponds to meaningful gradations in recidivism rates.

illustrative and are not intended to be definitive in terms of what I consider appropriate severity levels. As I noted above, this article does not address severity issues. Rather, I am simply offering an example of “thinking outside the box” in terms of guidelines simplification. If Congress were to amend the SRA and direct the Sentencing Commission to retool the sentencing guidelines and sentencing table to achieve simplification, the Commission would be required to calibrate appropriate sentencing ranges for different combinations of offense levels and criminal history categories. Obviously, hard policy choices about severity and proportionality would have to be made in determining appropriate sentencing levels for different offenses in view of the broader ranges in the cells. Much study and debate – and large amounts of empirical analysis based on the Commission’s vast datasets of cases since 1987 – would be necessary. I simply am proposing that the process begin and have offered a rough idea of what a simplified table would look like.

Central to my proposal is the resurrection of presumptive (formerly called “mandatory”) guidelines, which raises the constitutional concern addressed by the Supreme Court in *Blakely* about the state of Washington’s presumptive guidelines.¹⁷¹ My proposed guidelines system would pass constitutional muster under *Blakely* and *Booker*. In calculating a defendant’s offense level so as to determine in which cell on the grid a defendant would fall, a judge would be constrained by the constitutional principle in *Blakely* – meaning that any facts that would increase the base offense level in a manner that also would increase the maximum of the applicable cell on the grid would have to be submitted to a jury and proved beyond a reasonable doubt unless a

¹⁷¹ See *Blakely*, 542 U.S. at 299-300 (describing the presumptive nature of Washington’s guidelines, whereby a sentencing judge was required to impose a sentence within the applicable guidelines range absent a finding of “exceptional” circumstances).

defendant were to admit to such facts in court. Although many such facts could be proved at the same trial proceeding where a defendant's guilt of the underlying penal statute is proved, some additional aggravating facts might require a bifurcated jury trial proceeding so as to avoid potential prejudice to a defendant. Likewise, if a defendant pleads guilty to an underlying offense but disputes one or more aggravators that, if applicable, would have the effect of raising the maximum guidelines sentence, a jury would need to be empanelled to decide whether such aggravators were proved beyond a reasonable doubt. As Judge Richard Posner stated in the lower court opinion in *Booker*, "[t]here is no novelty in a separate jury trial with regard to the sentence, just as there is no novelty in a bifurcated trial" ¹⁷² Rule 23 of the Federal Rules of Criminal Procedure would need to be amended to provide for jury proceedings concerning aggravators that, if found, would raise the maximum available sentence under the guidelines.

My proposal includes an important "advisory" aspect to the otherwise "presumptive" nature of the guidelines. Within each cell on the grid, a judge would have discretion to impose a sentence within any of the three sub-ranges contained in each cell, although the mid-range would serve as the "benchmark" and "starting point" in the same manner the current narrower guideline ranges do in the post-*Booker* era. ¹⁷³ Because the three sub-ranges in each cell would be "advisory," a sentencing judge could impose, consistent with the Constitution, a sentence anywhere within the larger cell; aggravating factors that, in a judge's opinion, justify a higher sentence than the middle-range would not be subject to *Blakely*'s requirements. ¹⁷⁴ However, as a

¹⁷² See *Booker*, 375 F.3d at 514.

¹⁷³ See *Gall*, 552 U.S. at 49.

¹⁷⁴ See *Booker*, 543 U.S. at 258-69 (invalidating those portions of the SRA that made the

means of reducing unwarranted sentencing disparities *within* each cell on the simplified grid, the system that I envision would require judges, before selecting a sentence within the applicable cell, first to consider a series of aggravating and mitigating factors (discussed below) in deciding where within the applicable cell to impose a sentence. In other words, my system would be “*Blakely*-ized” with respect to the larger cells but “*Booker*-ized” with respect to the three sub-ranges within each cell.

B. Simpler Guidelines

Another proposal for simplification would reduce the number of numeric aggravating factors (as well as numeric mitigating factors¹⁷⁵) in the guidelines that result in increases (and occasional decreases) in the base offense level.¹⁷⁶ Several prominent critics of the sentencing

sentencing guidelines “mandatory,” thus rendering the guidelines “effectively advisory”).

¹⁷⁵ Simplification of mitigators (at least those in Chapter Two) would be much easier to accomplish than simplification of aggravators – in that there are very few mitigators that *reduce* a defendant’s offense level in the Chapter Two guidelines compared to the large number of aggravators that *increase* a defendant’s offense level. *Compare, e.g.,* USSG §2K2.1(b)(2) (in firearms guideline, court should reduce a defendant’s base offense level from 14 to 6 if the defendant illegally possessed the firearm “solely for lawful sporting purposes or collection”), *with* USSG §2K2.1(b)(4) (court should increase defendant’s base offense level by 2 or 4 if the firearm was stolen or had an obliterated serial number at the time of its illegal possession).

¹⁷⁶ The applicable base offense level would be based on the most serious offense of conviction and any relevant conduct charged in the indictment and proved beyond a reasonable doubt to a jury (or admitted by a defendant under oath in court). Such a requirement would obviate the oft-expressed prediction that the Supreme Court eventually may overrule *Harris v. United States*, 536 U.S. 545 (2002) – which, if that were to occur, would require facts that trigger “mandatory minimum” sentences, including presumptive guideline “floors,” to be proved beyond a reasonable doubt to a jury (or admitted by a defendant under oath in court). *See* Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L. REV. 377, 417-18 (2005) (discussing whether the Court may overrule *Harris*).

guidelines have called for such simplification.¹⁷⁷ As Professor Bowman has observed, the current guidelines' complex scheme of aggravating factors "has provided an opening for continued congressional intervention in the details of sentencing law."¹⁷⁸ Put another way, if the guidelines' treatment of aggravating factors were not so complex, Congress would have less of an incentive to issue directives suggesting that (and occasionally requiring that) the Commission add new aggravators.

As a means of achieving meaningful simplification, the system would distinguish between two types of aggravating factors – the first type, of which there would be relatively few, would be set forth within the individual Chapter Two guidelines themselves and would be subject to the *Blakely/Booker* constitutional requirement of being pleaded in the indictment and proved to a jury beyond a reasonable doubt (unless a defendant were to admit to such facts under oath in court).¹⁷⁹ The second type of aggravator would be an advisory consideration (thus not subject to the *Blakely/Booker* requirement) and would be relegated to the application notes following the

¹⁷⁷ See, e.g., Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT. REP. 180 (1999) (“[T]he Guidelines are simply too long and too complicated. There are too many words, too many provisions, too many distinctions. . . . I do believe simplification is possible.”); Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 303-04 (1993) (“Certainly, Congress never intended the Commission to promulgate such meticulous guidelines which substitute an almost computerized process of sentencing in place of previous sentencing practice. . . . The Commission made a considered blunder in concluding that the type of detail found in its guidelines was mandated by Congress [in the SRA]. . . .”).

¹⁷⁸ Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines*, 105 COLUM. L. REV. 1315, 1341 (2005).

¹⁷⁹ Certain offense-specific mitigating factors also could remain in the Chapter Two guidelines (and would be subject to proof by a preponderance of the evidence by the defendant), but most would appropriately be moved into application notes as advisory considerations.

relevant Chapter Two guideline. The former type of aggravators would continue to have numeric values (*e.g.*, a certain number of additional offense levels for monetary losses caused by fraud)¹⁸⁰ that would determine in which cell a defendant would fall. The latter type of aggravators would not have numeric values and would be the basis (alone or together with other such factors) for a judge’s exercise of discretion to impose a sentence in a higher sub-range within a particular cell. For instance, in a fraud case, in addition to a base offense level, the relevant guideline would include enhancements for differing loss amounts – as USSG §2B1.1 currently does – but would not have the many other numeric enhancements for aggravators such as number of victims or a misrepresentation that the defendant was acting on behalf of a charity.¹⁸¹ Rather, such other aggravators would be removed from the guideline itself and placed in the application notes as advisory factors to consider in imposing a sentence within a particular cell.

Most if not all Chapter Three adjustments that are not offense-specific, such as obstruction of justice and role adjustments,¹⁸² would become advisory considerations for choosing a sub-range within a cell, rather than numeric factors that adjust a defendant’s offense level. One exception would be acceptance of responsibility,¹⁸³ which should still reduce a defendant’s offense level where applicable. However, because each of the broader cells is associated with several offense levels (as opposed to a sentencing range associated with a single offense level, as

¹⁸⁰ See USSG § 2B1.1(b)(1) (loss table).

¹⁸¹ See USSG § 2B1.1(b)(2) (enhancement for number of victims) & (b)(8) (enhancement if defendant misrepresented that he “was acting on behalf of a charitable . . . organization”).

¹⁸² See USSG §3C1.1.

¹⁸³ See USSG §3E1.1.

in the current sentencing table), credit for acceptance of responsibility (assuming it remains at a maximum of three offense levels) would not necessarily reduce a defendant's offense level to the next lower cell on the grid. In such a case, in order to give a defendant credit for acceptance of responsibility, it would be appropriate for the guidelines to advise the court ordinarily to sentence the defendant within at least one sub-range below where the judge would otherwise have sentenced the defendant or at the bottom of the cell if the court wished to sentence the defendant in the lowest sub-range.

In retooling the guidelines in the manner I have described here, the Sentencing Commission would be required to make difficult policy choices in deciding which aggravators would remain in the guidelines and which would become advisory considerations in the application notes.¹⁸⁴ But that potential difficulty should not bar this type of simplification reform. Perhaps the easiest path to follow – as Justice Breyer has suggested – would be to examine the empirical data concerning which enhancements are most commonly applied and keep the primary ones in the Chapter Two guidelines, and to remove the less commonly-applied factors and place them in the application notes as non-numeric advisory considerations.¹⁸⁵

I have several observations about this proposed restructuring of the sentencing guidelines.

¹⁸⁴ One area of consensus, I predict, would be aggravating factors related to violence and the use of firearms or other dangerous weapons in connection with an offense. Such factors should remain in the guidelines themselves, as violence and use of weapons during or in relation to a criminal offense clearly warrants harsher punishment.

¹⁸⁵ See Breyer, *supra* note __, at __ (“ . . . I believe the Commission should review the present Guidelines, acting forcefully to diminish significantly the number of offense characteristics attached to individual crimes. The characteristics that remain should be justified for the most part by data that shows their use by practicing judges to change sentences . . . ”).

First, uncharged “relevant conduct”¹⁸⁶ would play a more limited role. This would appeal to most federal district judges.¹⁸⁷ In a *Blakely*-ized system, an offense level could not be adjusted upwardly based on conduct that is not charged in an indictment and proved to a jury beyond a reasonable doubt (unless a defendant admitted to such conduct under oath in court). Uncharged relevant conduct could only be used to sentence *within* a larger cell on the simplified grid (and then only if found by the court by a preponderance of the evidence). Acquitted conduct, a highly controversial topic in the post-SRA era,¹⁸⁸ could not increase a defendant’s offense level.

Second, the new system would significantly affect the practice of “departures” and “variances”¹⁸⁹ – both the upward and downward varieties. “Variances” (as that term has come to mean in the post-*Booker* era) and departures would be merged since the guidelines would be presumptive. Upward departures would no longer be available for two reasons. First, because sentences *above* the applicable guidelines ranges have been so uncommon under the current guideline structure compared to sentences *below* the guideline ranges (in both the guidelines’

¹⁸⁶ See USSG § 1B1.3; see also William W. Wilkins, Jr., *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8-12 (1988) (discussing how original Commission created original guidelines as a compromise between a “real offense” and a “charge offense” system).

¹⁸⁷ See U.S. Sent. Comm’n, *Results of Survey of United States District Judges, January 2010 Through March 2010* (“Judges’ Survey”), Question Three (only 32% of judges believed that “uncharged conduct referenced only in the presentence report” should be considered, as opposed to 77% who believed that it was appropriate to consider “uncharged conducted that is presented at trial or admitted by the defendant in court”).

¹⁸⁸ See *id.*, Question 3 (only 16% of judges surveyed believed that acquitted conduct should be considered at sentencing).

¹⁸⁹ See *Irizarry v. United States*, 553 U.S. 708 (2008) (discussing the difference between a “departure” and a “variance” in the post-*Booker* federal sentencing scheme).

“mandatory” and “advisory” iterations),¹⁹⁰ the existence of broader ranges in a simplified sentencing grid would appear to make upward departures virtually unnecessary. Second, thorny constitutional questions about upward departures under a *Blakely*-ized system¹⁹¹ will be avoided if they simply are not available.

Downward departures would still be possible but infrequent. For the presumptive system to be meaningful – so as to reduce unwarranted disparities – sentences outside of the applicable cells would need to be based on truly extraordinary mitigating circumstances. Although the vast majority of offender characteristics would be relevant to deciding where a defendant falls *within* the broader cells, the presumptive nature of the guidelines would be undermined if courts had discretion to depart based on anything but truly extraordinarily offender characteristics.¹⁹² (And,

¹⁹⁰ See U.S. Sent. Comm’n, *2009 Sourcebook of Federal Sentencing Statistics* 50 (Table N) (only 2.0% of cases sentenced above applicable guidelines range); U.S. Sent. Comm’n, *2004 Sourcebook of Federal Sentencing Statistics* 72 (Table N) (only 0.8% of cases sentenced above applicable guidelines range).

¹⁹¹ For instance, if the government sought an upward departure based on facts that were not alleged in the original indictment and the motion were made only after the defendant had been convicted of the charged offense, a double jeopardy issue could arise. See, e.g., *United States v. Booker*, 375 F.3d 508, 514 (7th Cir. 2004) (“[I]f the facts that the government would seek to establish in the sentencing hearing [to support a greater sentence under the then-mandatory sentencing guidelines] are [functionally] elements of a statutory offense, . . . they would then have to be alleged in the indictment, and to re-indict at this stage would present a double-jeopardy issue.”), *aff’d on other grounds*, 543 U.S. 220 (2005).

¹⁹² In the past year, the Commission has amended Chapter Five of the guidelines to permit broader consideration of certain offender characteristics. See Proposed Guidelines Amendments, May 3, 2010, *available at* http://www.usc.gov/FEDREG/20100511_Federal_Register_Notice.pdf. The Commission also has stated its intent to continue its study of Chapter Five to consider additional amendments allowing for broader consideration of other offender characteristics. See U.S. Sent. Comm’n, “Notice of Final Priorities” (July 2010) (Priority No. 10), *available at* http://www.usc.gov/FEDREG/20100902_FinalPriorities.pdf. Although broader consideration of certain offender characteristics is permitted under the recently amended provisions in Chapter

correspondingly, as I discuss below, the standard of appellate review of departures would need to have teeth in assessing such departures.) Setting such a hurdle to jump to impose departures should be palatable to sentencing judges if they possess greater discretion to sentence within the broad ranges in each of the cells on the simplified grid and also if mandatory minimum statutory penalties do not exist.

Third, the new system would not change the current rules concerning a sentencing court's consideration of a defendant's prior convictions. *Blakely* – which was simply an application of *Apprendi v. New Jersey*¹⁹³ – does not limit a sentencing judges' consideration of a defendant's prior criminal convictions as an aggravating factor.¹⁹⁴ Thus, not only would a defendant's prior convictions remain an important consideration under Chapter Four of the guidelines,¹⁹⁵ but also, in appropriate cases, an upward departure under USSG §4A1.3 would be constitutionally permissible if based on prior *convictions* as opposed to uncharged prior criminal conduct. Uncharged prior criminal conduct, if proven by a preponderance of the evidence, would remain a valid consideration for an increase in a defendant's sentence within the relevant sentencing cell on the grid.

Finally, the current practice of downward departures based on a defendant's "substantial

Five, the guidelines still contemplate relatively few departures based on offender characteristics. *See* USSG § 5K2.0.

¹⁹³ 530 U.S. 466 (2000).

¹⁹⁴ *See* *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *see also* *United States v. O'Brien*, 130 S. Ct. 2169, 2174 (2010) (reaffirming *Almendarez-Torrez* "exception" to the *Apprendi* rule).

¹⁹⁵ *See* USSG §4A1.1 (assigning criminal history points for certain types of prior convictions and sentences).

assistance” to the authorities under USSC §5K1.1 would continue. As in the pre-*Booker* era, a downward departure would not be permitted without a motion from the prosecutor. If the government were to refuse to file a motion for downward departure but a defendant contended that the court should nonetheless reward the defendant with a reduction in his sentence *within* the applicable cell on the grid, then a court could consider such cooperation assuming the defendant offered sufficient evidence of such.

Many distinguished authorities in criminal justice representing different points across the ideological spectrum – including judges, leading practitioners, and academics – have proposed the same basic components of the simplified guidelines system that I have set forth above,¹⁹⁶ including most recently the Constitution Project’s Sentencing Initiative.¹⁹⁷ Furthermore, several

¹⁹⁶ See, e.g., Edwin Meese III *et al.*, *The Constitution Project Sentencing Initiative Recommendations for Federal Criminal Sentencing in a Post-Booker World*, 18 FED. SENT’G REP. 310, ___-___ (2006) (recommending a “simplified sentencing system” with a reduced number of offense levels; a reduction in the number of aggravating factors to a “carefully chosen subset of the sentencing factors now employed by the Guidelines”; and the requirement that aggravating factors that raise the guideline range be submitted to a jury and proven beyond a reasonable doubt); Frank O. Bowman, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149, 205-09 (2005) (proposing a similar simplified guideline system with 8 sentencing levels, some containing three sub-ranges); R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL’Y & L. 739, 770-74 (2001) (proposing a simplified guideline table with 8-12 levels rather than 43 levels; within each range, there would be three sub-ranges); Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587, 612-13 (1992) (proposed simplified sentencing table with a seven-level grid).

¹⁹⁷ The Constitution Project Sentencing Initiative included not only former Attorney General Edwin Meese III (co-chair) but also Professor Philip B. Heymann (co-chair), Zachary Carter, then-Judge Paul Cassell, James Felman, Judge Nancy Gertner, Isabel Gomez, Federal Public Defender Thomas W. Hillier II, Miriam Krinsky, Norman Maleng, Judge Jon Newman, Professor Thomas Perez, Barbara Toombs, and Professor Ronald Wright. The reporters of the Sentencing Initiative were Professor Frank Bowman III and Dean David N. Yellen. 18 FED. SENT’G REP. 310. Justice Alito was originally a member of this distinguished panel (before he withdrew after being nominated to be on the Supreme Court) and expressed agreement with an

states in the post-*Blakely/Booker* era have used similar simple, presumptive guidelines whereby juries must find beyond a reasonable doubt an aggravator that raises the guideline range (unless a defendant admits to the relevant facts in court).¹⁹⁸ Professor Bowman has observed that, in the states with binding sentencing guidelines that have followed the dictates of *Blakely* since 2004, there have not been significant increases in the rates of jury trials or other major disruptions in their justice systems.¹⁹⁹ The sky would not fall if the federal system adopted simplified *Blakely*-ized guidelines, as I have proposed.

C. Heightened Appellate Scrutiny

earlier, more general statement calling for guidelines simplification. *See id.* at __ n.3 (citing http://www.constitutionproject.org/pdf/sentencing_principles2.pdf).

¹⁹⁸ Douglas A. Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 HOU. L. REV. 341, 368 (2006) (“Notably, state systems so far have successfully navigated some of these choppy legal waters in large part because most states have a simple charge-based sentencing structure and relatively straight-forward sentencing codes.”); Ronald F. Wright, *The Power of Bureaucracy in Response to Blakely and Booker*, 43 HOU. L. REV. 389, 395 (2006) (discussing North Carolina’s post-*Blakely* presumptive guidelines that use juries to find aggravators).

¹⁹⁹ *See* Frank O. Bowman III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Be Mended*, 77 U. CHI. L. REV. 367, 461 (2010). (“Among the nine states that altered their sentencing regimes [by requiring juries to find certain aggravating factors beyond a reasonable doubt], the real world effects on jury participation seem to be de minimis.”). In the time period between *Blakely* and *Booker*, numerous federal district judges used juries to render special verdicts on sentencing issues such as the amount loss in a fraud case. *See, e.g., United States v. Alfonzo-Reyes*, 592 F.3d 280, 292-93 (1st Cir. 2010) (“On June 24, 2004, during the middle of the trial, the Supreme Court issued *Blakely v. Washington* It was unclear at the time whether *Blakely* applied to the Federal Sentencing Guidelines. . . . To resolve the issue, the parties agreed to rely on the *Apprendi* standard. As a prophylactic measure, the judge asked the jurors to fill out a special verdict form. . . . [The] jury[] consider[ed] whether [defendant] had a leadership role in the offense; the amount of loss; whether he applied more than minimal planning; and whether he abused the public trust.”).

Finally, the issue of appellate review in such a simplified system is critical.²⁰⁰ To put it bluntly, as others have, “[t]he threat of reversal [on appeal] is a key component of [effective] guidelines.”²⁰¹ Post-*Booker*,²⁰² there is a good deal of confusion and uncertainty about whether there is any meaningful appellate review of guidelines sentences.²⁰³ Appellate review in the system that I propose would promote the legitimacy of the new presumptive guidelines. Appeals by defendants and the government of guideline sentences would be reviewed, just as they are today, to determine whether judges correctly applied the guidelines in determining the cell in which the defendant fell. District courts’ choices of sentences *within* the applicable cells on the grid would be essentially unreviewable on appeal so long as the courts *considered* all of the relevant aggravating and mitigating factors identified in the application notes and all other relevant factors in the *Guidelines Manual* before imposing a particular sentence. An appellate court could reverse the sentence only if a district court refused to consider all relevant factors or instead considered a prohibited factor, such as a defendant’s race or gender. In addition, under *Blakely*, appellate courts would engage in sufficiency-of-the-evidence review to determine whether factual findings that caused a defendant to be sentenced in a higher cell (such as the

²⁰⁰ Frank O. Bowman III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149, 184 (2005) (“A critical point about post-*Booker* sentences imposed outside of the Guidelines is the place of appellate review.”).

²⁰¹ Stephanos Bibas *et al.*, *Policing Politics at Sentencing*, 103 NW. U. L. REV. 1371, 1371 (2009); *see also* Michael M. O’Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 WM. & MARY L. REV. 2123 (2010).

²⁰² *See, e.g., Gall, supra; Kimbrough, supra.*

²⁰³ *See* Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 3-4 (2008) (noting “the confusion that the Court’s sentencing review cases has created” since *Booker*).

existence of a specific offense characteristic or other numeric aggravating factors in the guidelines themselves) were either admitted by the defendant in court or proved to a jury beyond a reasonable doubt.²⁰⁴

Government appeals of downward departures²⁰⁵ would involve relatively strict scrutiny by the appellate court. Otherwise, the presumptive nature of the simplified guidelines would be undermined.

Other than the type of appellate review concerning guidelines calculations and departures described above, there would be no general “substantive reasonableness” review,²⁰⁶ just as there was no such review in the pre-*Booker* era. I predict that, if the guidelines are simplified in the manner I propose, the number of sentencing appeals would decrease significantly from the current number – for the simple reason that there would be fewer issues to litigate.²⁰⁷

D. Benefits of My Proposal Over the Current System

The presumptive system discussed above is aimed at reducing unwarranted sentencing

²⁰⁴ Presumably, appeals courts would employ the “rational jury” standard in *Jackson v. Virginia*, 443 U.S. 307 (1979), used to determine whether the evidence supporting a defendant’s conviction at a trial met the beyond-a-reasonable-doubt standard.

²⁰⁵ I use the traditional term “departure” rather than “variance” because, under the system that I propose, the guidelines would be binding on district judges, who would not be free to “vary” from them as judges can currently do from the advisory guidelines pursuant to *Booker*.

²⁰⁶ See *Gall*, 552 U.S. at 51 (discussing post-*Booker* “reasonableness” appellate review).

²⁰⁷ For instance, in FY2009, the vast majority of appeals in federal criminal cases involved disputes about the sentencing guidelines. See U.S. Sent. Comm’n, *2009 Annual Report* 44-45 (noting that 74.2% of all criminal appeals in the federal court system in FY2009 were “sentencing appeals” and the vast majority of those involved guidelines application issues or “reasonableness” appeals implicating *Booker* and 18 U.S.C. § 3553(a)).

disparities, yet it also seeks to afford sentencing judges meaningful discretion within broader ranges to consider a wide range of relevant offense and offender characteristics. It would be much simpler to implement than the current guidelines and thus would preserve judicial resources except for those cases in which a jury is required to make the pertinent factual findings related to sentencing issues. Broader ranges and fewer decisions in the guidelines calculus actually can have the effect of reducing the disparity that results from varying applications of complicated guidelines.²⁰⁸ This system also would be constitutional under *Blakely* and respectful of the important role of juries in our democratic form of government.²⁰⁹

I recognize that there have been critics of the *Blakely*-ized model, including some members of the Supreme Court.²¹⁰ The problems they point out would not be nearly as

²⁰⁸ See William W. Wilkins, *The Federal Sentencing Guidelines: Striking an Appropriate Balance*, 25 U.C. DAVIS L. REV. 571, 575 (1992) (“[A]s the number and complexity of required decisions increase, the risk that different judges will apply the guidelines differently to situations that are in fact similar also increases. As a result, the very disparity that the guidelines are designed to eliminate would be reintroduced.”). Judge (and former Commission Chair) Wilkins made that observation in 1992, when the sentencing guidelines were considerably less complex than they currently are. His observation seems particularly apposite today.

²⁰⁹ See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33 (2003) (contending that an increased role of juries in criminal sentencing process would have a salutary effect).

²¹⁰ See *Booker*, 543 U.S. at 254-55 (Justice Breyer’s opinion joined by four other Justices) (“[T]he sentencing statutes, read to include the Court’s Sixth Amendment requirement, would create a system far more complex than Congress could have intended. How would courts and counsel work with an indictment and a jury trial that involved not just whether a defendant robbed a bank but also how? Would the indictment have to allege, in addition to the elements of robbery, whether the defendant possessed a firearm, whether he brandished or discharged it, whether he threatened death, whether he caused bodily injury, whether any such injury was ordinary, serious, permanent or life threatening, whether he abducted or physically restrained anyone, whether any victim was unusually vulnerable, how much money was taken, and whether he was an organizer, leader, manager, or supervisor in a robbery gang? . . . How could a judge expect a jury to work with the Guidelines’ definitions of, say, ‘relevant conduct’ How would a jury measure ‘loss’

significant as feared, however, if the guidelines themselves were simplified as I have proposed.²¹¹

As I have noted already, the biggest hurdles that I foresee would be the many difficult policy choices that the Sentencing Commission would be required to make regarding severity and proportionality in tying offense conduct to the appropriate cells in the simplified sentencing grid.

I predict that, once those choices are made and the sentencing guidelines and sentencing table are

in a securities fraud case—a matter so complex as to lead the Commission to instruct judges to make ‘only ... a reasonable estimate?’); *see also* Douglas A. Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 HOU. L. REV. 341, 365 (2006) (“[A] *Blakely*-ization approach to ‘fixing’ *Booker* is not without its own set of legal, policy, and practical problems. Enactment of [such a] guideline system would create an array of complicated legal questions concerning the relationship between trial procedures and sentencing procedures. In addition, there are also policy and practical reasons to question whether a *Blakely*-ized guideline system would be workable, fair, and effective.”); *but see Booker*, 543 U.S. at 277-78 (Stevens, J., dissenting, joined by Scalia & Souter, JJ.) (“I am confident that those charged with complying with the Guidelines – judges, aided by prosecutors and defense attorneys – could adequately protect defendants’ Sixth Amendment rights [in a *Blakely*-ized system]. In many cases, prosecutors could avoid an *Apprendi* . . . problem simply by alleging in the indictment the facts necessary to reach the chosen Guidelines sentence. Following our decision in *Apprendi*, and again after our decision in *Blakely*, the Department of Justice advised federal prosecutors to adopt practices that would enable them ‘to charge and prove to the jury facts that increase the statutory maximum—for example, drug type and quantity for offenses under 21 U.S.C. 841.’ Enhancing the specificity of indictments would be a simple matter, for example, in prosecutions under the federal drug statutes (such as *Booker*’s prosecution). The Government has already directed its prosecutors to allege facts such as the possession of a dangerous weapon or ‘that the defendant was an organizer or leader of criminal activity that involved five or more participants’ in the indictment and prove them to the jury beyond a reasonable doubt.”) (citations omitted).

²¹¹ *See* Berman, *supra* note ___, at 367 (“Of course, these complex and intricate questions about how to integrate jury fact-finding into the existing guideline structure result in part from the complex and intricate nature of the existing Guidelines.”); *see also Booker*, 543 U.S. at 248 (“It is, of course, true that the numbers show that the constitutional jury trial requirement [in a mandatory guidelines system] would lead to additional decisionmaking by juries in only a minority of cases. . . . Prosecutors and defense attorneys would still resolve the lion’s share of criminal matters through plea bargaining, and plea bargaining takes place without a jury. . . . Many of the rest involve only simple issues calling for no upward Guidelines adjustment. . . . And in at least some of the remainder, a judge may find adequate room to adjust a sentence within the single Guidelines range to which the jury verdict points, or within the overlap between that range and the next highest.”).

retooled, implementation of the simplified system would not be difficult.

V. Conclusion

My proposal is fully consistent with original bipartisan goals of the SRA, which were championed by all three branches of the federal government.²¹² In particular, it would strike the right balance between reducing unwarranted disparities and affording sentencing judges meaningful discretion to avoid unwarranted uniformity. It also is more likely than both the current system and the one that was in effect before *Booker* to achieve a healthy equilibrium among the three branches, which is necessary for the original goals of the SRA to be achieved.²¹³

²¹² I acknowledge that there are some who believe the goals of the SRA inspired by Judge Frankel and championed by Senator Kennedy should be abandoned. *See, e.g.*, Judge Lynn Adelman & Jon Deitrich, *Marvin Frankel's Mistakes and the Need to Rethink Federal Sentencing*, 13 BERKELEY J. CRIM. L. 239, 258 (2008) (“We do not advocate returning to the pre-guidelines regime but favor a different type of guideline system [which would not include numbers but would specify the types of punishment available for an offense . . . , the goals sentencers should seek to accomplish, and the criteria and considerations relevant to such goals. However, they would leave to individual judges the task of determining precisely how to weigh the relevant goals, criteria and considerations in individual cases.”) I respectfully disagree and believe that the original goals of the SRA are worthy and that a numerical guidelines system, while not perfect, is the best human mechanism available for imposing just sentences. I also recognize that others advocate maintaining the present “advisory” system as being an appropriate way to achieve the goals of the SRA. *See, e.g.*, Judge Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. J. L. POL’Y REV. 261 (2009). As I have explained above, I believe that advisory guidelines increasingly have failed to achieve the primary purpose of the SRA, *namely*, avoiding unwarranted sentencing disparities.

²¹³ *See* Frank O. Bowman III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 235-36 (2005) (“Careful analysis of the twenty-five year experiment with structured sentencing suggests one overriding conclusion about the design of sentencing systems: a sentencing system that sensibly distributes power . . . among the institutional sentencing actors is likely to work pretty well. Conversely, a system that concentrates sentencing power disproportionately in the hands of one or even two institutional actors is headed for trouble.”); Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1259 (2004) (“The fundamental lesson of the [history of the]

First, judges would possess a significant amount of discretion at sentencing (within the broader ranges set forth in the cells), and juries would play their constitutional role regarding important facts. Second, prosecutors would see “certainty” in sentencing (because of the presumptive nature of guidelines). Even if in some cases the severity of sentences would be reduced because certain judges would gravitate to the low-end of the broader ranges in the cells, in those cases involving serious aggravating facts, prosecutors would be permitted to seek (and generally could *require* judges to impose) stiff penalties in appropriate cases when they could prove the relevant aggravating factors beyond a reasonable doubt.²¹⁴ And finally, Congress would play a role in the sentencing process by reviving presumptive guidelines and thereby reducing unwarranted disparities in sentencing. As I have noted, the simplified system I propose is similar to what exists in several states in this post-*Blakely* era. One of the main benefits of our federalist system is to permit the states to serve as “laboratories” which can provide examples of success that the federal government can embrace where appropriate.²¹⁵ Congress and the Commission should

federal guidelines system . . . is that sentencing authority must be shared across several actors to be just. Absolute power in sentencing, as in so many other areas, invites abuse.”).

²¹⁴ For my proposal to achieve justice, prosecutors should be prohibited from engaging in misrepresentative “fact bargaining” with defendants in a manner that distorts the true factual nature of the offense (as opposed to engaging in legitimate plea bargaining about the facts relevant to sentencing when the prosecutor has a good-faith basis to believe that she cannot prove certain aggravating facts). See Frank O. Bowman, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217, 236-37 (2004) (noting the potential for factual manipulation in plea bargaining in a *Blakely*-ized system and noting, in particular, the need for Main Justice to control “illegitimate ‘fact bargaining’”); Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge’s Perspective*, 30 SUFFOLK U. L. REV. 1027, 1054-62 (1997) (discussing the problem of “fact bargaining” and “manipulation” of the guidelines); Berman, *supra* note __, at 370-71; Douglas A. Berman, *Is Fact Bargaining Undermining the Sentencing Guidelines*, 8 FED. SENT’G REP. 300 (1996).

²¹⁵ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J.,

look to the states that have performed this role and adopted *Blakely*-ized guidelines.

The Supreme Court, Congress, and the Sentencing Commission have all recognized that the federal guidelines system is “evolutionary.”²¹⁶ The past twenty-five years have involved a tug of war between the three branches – with the Sentencing Commission in the middle – that has resulted in a system in need of some thoughtful changes to realize the lofty goals of the Sentencing Reform Act of 1984 and to provide stability in the future. With that goal in mind, I encourage all stake-holders in the system to give serious consideration to my proposals.

dissenting).

²¹⁶ See *Rita*, 551 U.S. at 350 (“The Commission’s work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution”); S. Rep. No. 98—225, at 63-64 (1984), reprinted in 1984 U.S.C.C.A.N 3182, 3246-47; USSG, Ch. 1, Pt. A.3.