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The Failure of the Federal Sentencing System: A Structural Analysis

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THE FAILURE OF THE FEDERAL SENTENCING GUIDELINES: A STRUCTURAL ANALYSIS

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While recent Supreme Court decisions in Booker *and* Blakely *have shaken the foundations of the federal sentencing guidelines system, careful analysis of the guidelines remains important. This Essay contends the federal guidelines have failed due to structural flaws that cannot be mended without fundamental reform. The failures of the guidelines can be traced to the breakdown of the institutional balance the Sentencing Reform Act was supposed to create. Power has consolidated in the hands of prosecutors at the case level and an alliance of the Department of Justice with Congress at the policy level. The inordinately complex sentencing table has given Congress and the Justice Department a vehicle for constant intervention into the process of making sentencing rules. Because of the lack of budgetary constraints, this intervention has caused a one-way upward ratchet, in which sentences are raised easily and often and lowered only rarely and with difficulty. Likewise, the complexity and rigidity of the guidelines have severely constrained judicial sentencing discretion while conferring on prosecutors a vastly increased ability to influence a defendant's sentence. At the case level, there is an increasing disconnect between the sentences the rules ostensibly require and the sentences actually imposed as the front-line sentencing actors employ ever more mechanisms for evading the rules. All these problems are integral to the existing guidelines system and would not be materially alleviated by a post-*Booker *system of "advisory" guidelines.*

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INTRODUCTION

Criminal sentencing in the United States is in tumult. The most obvious sources of disruption have been the Supreme Court's decisions in *Blakely v. Washington*[1] and *United States v. Booker*.[2] In June 2004, *Blakely* declared unconstitutional an important procedural component of roughly half of all state sentencing regimes.[3] In January 2005, *Booker* found the federal guidelines unconstitutional as previously applied, but upheld them as a system of "effectively advisory" sentencing rules.[4]

1. 124 S. Ct. 2531 (2004).

2. 125 S. Ct. 738 (2005).

3. *Blakely*, 124 S. Ct. at 2537–38 (finding judicial imposition of sentence higher than statutory maximum on basis of facts not submitted to a jury unconstitutional); Jon Wool & Don Stemen, Aggravated Sentencing: *Blakely v. Washington*—Practical Implications for State Sentencing Systems, Pol'y & Prac. Rev. (Vera Inst. of Justice), Aug. 2004, at 1, 2, available at http://www.vera.org/publication_pdf/242_456.pdf (on file with the *Columbia Law Review*) (noting that roughly half of all state sentencing systems may be impacted by *Blakely v. Washington*).

4. 125 S. Ct. at 757 (Breyer, J., opinion of the Court).

Blakely has been hailed[5] and damned,[6] and called a "Number 10 earthquake" by no less an authority than Justice Sandra Day O'Connor.[7] The meaning and real effect of *Booker* are only beginning to be debated.[8] Nonetheless, the Court's constitutional rulings in *Blakely* and *Booker*, though dramatic, unexpected, and plainly disruptive of both state and federal sentencing practice, are less a cause than a symptom of a broader ongoing debate about the state of sentencing in America.

The last three decades witnessed a revolution in sentencing and corrections practice. Two general trends were observable. On the one hand, the country undertook a national experiment in mass incarceration as a response to crime.[9] During this same period, the federal government and many states embarked on a course of procedural innovation. The procedural model that largely dominated American sentencing practice through the first three quarters of the twentieth century gave considerable theoretical importance to the objective of rehabilitation and conferred substantial discretion on judges to impose sentences at the front

5. See, e.g., Douglas A. Berman, Examining the *Blakely* Earthquake and Its Aftershocks, 16 Fed. Sent'g Rep. 307, 308 (2004) (describing the opinion as "majestic and mysterious").

6. See, e.g., Frank O. Bowman, III, Function over Formalism: A Provisional Theory of the Constitutional Law of Crime and Punishment, 17 Fed. Sent'g Rep. 1, 1 (2004) (offering numerous criticisms of *Blakely*, including that "it created a godawful and unprecedented mess which . . . will require or induce legislatures to create sentencing systems markedly less attractive than those we now have"); Frank O. Bowman, III, 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, 219 (2004) [hereinafter Bowman, Train Wreck] ("*Blakely* has created a ghastly mess, bringing the federal criminal justice system to a virtual halt and putting a number of state systems in disarray.").

7. In July 2004, Justice O'Connor told the Ninth Circuit Judicial Conference that she was "disgusted" with the *Blakely* decision and that, "it looks like a Number 10 earthquake to me." Bill Mears, Supreme Court at Odds in Key Cases, CNN.com, Oct. 2, 2004, at http://www.cnn.com/2004/LAW/09/29/scotus.preview/index.html (on file with the *Columbia Law Review*).

8. An excellent source for news and commentary about the effects of both *Blakely* and *Booker* is a weblog maintained by Professor Douglas Berman entitled Sentencing Law and Policy, at http://sentencing.typepad.com (last visited Mar. 1, 2005).

9. Between 1974 and 2003, the number of inmates in federal and state prisons increased nearly seven-fold, from 216,000 to 1.4 million, while the rate of imprisonment rose nearly five-fold, from 149 inmates to 715 inmates per 100,000 population. Thomas P. Bonczar, U.S. Dep't of Justice, NCJ 197976, Prevalence of Imprisonment in the U.S. Population, 1974–2001, at 1, 2 tbl.1 (2003), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf (on file with the *Columbia Law Review*); Paige M. Harrison & Jennifer C. Karberg, U.S. Dep't of Justice, NCJ 203947, Prison and Jail Inmates at Midyear 2003, at 1–2 (2004), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim03.pdf (on file with the *Columbia Law Review*) [hereinafter BJS, Prison and Jail]. Between 1985 and 2003, the number of inmates in local jails nearly tripled, from 255,000 to 691,000. BJS, Prison and Jail, supra, at 2; Tracy L. Snell, U.S. Dep't of Justice, NCJ 156241, Correctional Populations in the United States, 1993, at 5 tbl.1.1 (1995), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cpop93bk.pdf (on file with the *Columbia Law Review*). By midyear 2003, the combined number of inmates in federal and state prisons and jails exceeded two million. BJS, Prison and Jail, supra, at 1.

end, often coupled with substantial authority vested in parole boards to control release dates at the back end.[10] Reformers doubted that rehabilitation worked, were skeptical of both the expertise and fairness of parole boards, and rebelled against the seeming arbitrariness of standardless judicial sentencing discretion. In place of the old sentencing model, many jurisdictions moved to regimes of structured sentencing featuring varying combinations of statutory minimum mandatory sentences, presumptive sentences, sentencing guidelines, and other mechanisms designed to channel or constrain judicial sentencing discretion. These modifications were often, though by no means always, accompanied by abandonment of parole release mechanisms in favor of "truth-in-sentencing" rules requiring defendants to serve the vast majority of the judicially imposed sentence before becoming eligible for release.[11]

Although the phenomenon of mass incarceration has coincided with the gradual movement towards structured sentencing, there is no necessary correlation between structured sentencing and increased prison populations. Many pioneers of the structured sentencing movement conceived of it as a way to rein in the punitive instincts of individual judges.[12] In recent years, some states have employed the techniques of structured sentencing to control prison populations and thereby regulate the drain on state resources of corrections expenditures.[13] It is nonetheless true that many jurisdictions have used the tools of structured sentencing more to guard against judicial leniency than judicial severity. In consequence, the debate about mass incarceration has become intertwined with the debate over procedures of structured sentencing.

The federal government has been a leader—for good or ill—both in its increased reliance on incarceration as a crime control mechanism and in its embrace of structured sentencing.[14] The Sentencing Reform Act of

10. For a brief historical discussion of American sentencing practices, see Frank O. Bowman, III, Fear of Law: Thoughts on *Fear of Judging* and the State of the Federal Sentencing Guidelines, 44 St. Louis U. L.J. 299, 300–05, 310–16 (2000) [hereinafter Bowman, Fear of Law].

11. See Frank O. Bowman, III, The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines, 1996 Wis. L. Rev. 679, 680–92 [hereinafter Bowman, Quality of Mercy] (discussing history of sentencing reform movement of 1970s and 1980s).

12. See, e.g., Andrew von Hirsch, Doing Justice: The Choice of Punishments 107–17 (1976) (advocating significant restrictions on use of incarceration as method of criminal punishment).

13. See, e.g., Daniel F. Wilhem & Nicholas R. Turner, Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?, Issues in Brief (Vera Inst. of Justice), June 2002, at 1, 4, available at http://www.vera.org/publication_pdf/167_263.pdf (on file with the *Columbia Law Review*). See generally Ronald F. Wright, Counting the Cost of Sentencing in North Carolina, 1980–2000, 29 Crime & Just. 39 (2002).

14. Between 1980 and 2003, the number of inmates in federal prisons increased by 700%, from 24,000 to 170,000. Allen J. Beck & Darrell K. Gilliard, U.S. Dep't of Justice, NCJ 151654, Prisoners in 1994, at 1 (1995), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/pi94.pdf (on file with the *Columbia Law Review*) [hereinafter BJS, Prisoners in 1994]; BJS, Prison and Jail, supra note 9, at 1. This increase was integrally related to the

1984 (SRA) created the U.S. Sentencing Commission, which in due course promulgated the federal sentencing guidelines, the most comprehensive system of structured sentencing ever devised. For most of the last decade, I numbered myself among the guidelines' supporters and wrote extensively in their defense,[15] while chronicling their defects.[16] In the past year, I have, with the greatest reluctance, concluded that the federal sentencing guidelines system has failed. I have reached this conclusion not merely because the system too often produces bad outcomes in individual cases and sometimes in whole classes of cases, but more importantly because the basic structure of the guidelines-centered system has evolved in a way that makes self-correction virtually impossible.

The SRA was intended to distribute the power to make sentencing policy and rules and to control individual sentencing outcomes among a range of national and local actors—the U.S. Sentencing Commission, Congress, the federal appellate courts, and the Department of Justice at the national level, and district courts, probation officers, U.S. Attorneys' Offices, and defense counsel at the local level. Equally importantly, the Sentencing Commission was intended to gather feedback about how the system worked and serve as an authoritative (though not final) body of neutral experts who would translate the feedback into sensible revisions of the rules. This vision was never perfectly realized, but in recent years it has collapsed altogether. Basic structural features of the SRA and the guidelines, in combination with a series of choices by the Commission, Congress, the judiciary, and the Department of Justice, have shifted the institutional balance of power. To an ever-increasing degree, the power to make and influence sentencing rules has migrated away from the judiciary, from the U.S. Sentencing Commission, and even from local federal prosecutors, toward political actors in Congress and the central administration of the Department of Justice. The resulting institutional imbalance has made the guidelines a one-way upward ratchet increasingly di-

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adoption of a series of federal sentencing laws, most notably the Sentencing Reform Act of 1984, part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1837, 1976 (codified as amended in scattered sections of 18 U.S.C. (2000)), and a number of statutes imposing mandatory minimum sentences for drug and firearms offenses, e.g., Anti-Drug Abuse Act of 1986 (ADAA), Pub. L. No. 99-570, 100 Stat. 3207 (codified at 21 U.S.C. § 841(b)(1) (2000)).

15. See, e.g., Frank O. Bowman, III, Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline, 29 Stetson L. Rev. 7, 42–63 (1999) [hereinafter Bowman, Departing Is Such Sweet Sorrow] (responding to common criticisms of guidelines' substantial assistance departure mechanisms, but criticizing Department of Justice practice regarding such departures); Bowman, Fear of Law, supra note 10, at 300 ("At worst, the Guidelines are a predictably flawed work-in-progress and a notable improvement over the system they replaced."); Bowman, Quality of Mercy, supra note 11, at 680 ("[The guidelines] are, at worst, a marked improvement over the system they replaced and are, on balance, a notable, albeit certainly imperfect, success.").

16. See, e.g., Bowman, Quality of Mercy, supra note 11, at 740–45 (criticizing length of federal drug sentences under guidelines).

vorced from considerations of sound public policy and even from the commonsense judgments of frontline sentencing professionals who apply the rules. Although I had long thought that the guidelines' worst defects could in time be corrected through incremental reform, I am now convinced that the basic structure of the federal guidelines system is flawed in ways that cannot be corrected without fundamental change.

A careful analysis of the strengths and weaknesses of the federal sentencing guidelines experiment is particularly critical at this historical moment. The *Blakely* and *Booker* decisions, with their peculiar and shifting alignments of the liberal, conservative, and moderate pragmatist wings of the Court, cannot be fully understood without appreciating the background of rising discontent, particularly among federal judges, with recent developments in the federal sentencing system.[17] In addition, it is not yet clear that the "advisory" guidelines called for by *Booker* will be so very different than the mandatory guidelines they replaced.[18] Furthermore, if Congress concludes that *Booker* has altered the guidelines regime in such undesirable ways that remedial legislation is required, then a detailed analysis of the strengths and weaknesses of the guidelines is essential. If the pre-*Booker* guidelines system was fundamentally sound, then legislation should involve only minimal revisions sufficient to make the system pass constitutional muster. But if the guidelines are fundamentally flawed, the response to *Booker* should be fundamental reform. Finally, since *Blakely* is forcing revisions of many state sentencing systems, states may find it useful to understand exactly how the federal system has succeeded and failed as they work on post-*Blakely* revisions. As the largest and only national sentencing regime,[19] the federal system inevitably acts as a model, both positive and negative, for developments in the states.

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17. See Bowman, Train Wreck, supra note 6, at 219, 255–56, 261–62, 264–65 (contending that *Blakely* decision, though concerned with state sentencing regime, was driven in part by concern among federal judiciary about evolution of federal sentencing practices).

18. See, e.g., United States v. Crosby, No. 03-1675, 2005 U.S. App. LEXIS 1699, at *24–*26 (2d Cir. Feb. 2, 2005) (finding that, although Guidelines are now advisory, "consideration of the Guidelines will normally require determination of the applicable Guidelines range, or at least identification of the arguably applicable ranges, and consideration of applicable policy statements," judges will continue to find guidelines facts, and after *Booker*, Guidelines are not merely "a body of casual advice"); United States v. Wilson, No. 2:03-CR-00882 PGC, 2005 U.S. Dist. LEXIS 744, at *5–*9 (D. Utah Jan. 13, 2005) (finding that adherence to sentencing range called for by guidelines rules should be a primary consideration in determining reasonableness of sentence under advisory guidelines created by *Booker*).

19. As of midyear 2002, federal prisons housed 148,783 inmates, or seven percent of the total prison population of the U.S., making it the largest single prison system in the country. Paige M. Harrison & Jennifer C. Karberg, U.S. Dep't of Justice, NCJ 198877, Prison and Jail Inmates at Midyear 2002, at 1–2 (2003), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim02.pdf (on file with the *Columbia Law Review*).

1. The Design and Operation of the Federal Sentencing Guidelines

Understanding the successes and failures of the current federal sentencing regime requires some grounding in the history, structure, and effects of the federal sentencing guidelines and associated federal sentencing laws.

A. *Federal Sentencing Before the Guidelines*

For most of the twentieth century prior to the SRA, the rehabilitative or "medical" model of sentencing prevailed in the federal (and state) courts.[20] This model held that, through a combination of deterrence motivated by the fearful prospect and unpleasant experience of incarceration, and personal renewal spurred by counseling, drug treatment, job training and the like, criminal deviance could be treated like any other disorder.[21] Therefore, sentences were supposed to be "individualized," in the way that medical treatment is individualized, according to the symptoms and pathology of the offender.[22]

Before the guidelines, federal sentences were both "indeterminate" and heavily dependent on the discretion of district court judges.[23] In an indeterminate sentencing system, the judge sentences a defendant either

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20. See Pamala L. Griset, Determinate Sentencing: The Promise and the Reality of Retributive Justice 11 (1991) (discussing rise of "Rehabilitative Juggernaut" from 1877 to 1970 and noting that "[a] medical analogue was frequently invoked"). See generally Francis A. Allen, The Decline of the Rehabilitative Ideal (1981).

21. However, the system recognized that some defendants were, in effect, "incurable" and thus could only be quarantined through lengthy sentences, and that some crimes were so egregious that the public demand for retribution outweighed rehabilitative considerations. See Dane Archer et al., Homicide and the Death Penalty: A Cross-National Test of a Deterrence Hypothesis, 74 J. Crim. L. & Criminology 991, 991 (1983) (attributing use of death penalty, in part, to disbelief in rehabilitation); cf. Hugo Adam Bedau, The Death Penalty in America: Yesterday and Today, 95 Dick. L. Rev. 759, 762–64 (1991) (describing widespread use of death penalty in America throughout twentieth century for crimes including murder, armed robbery, rape, and kidnapping).

22. See, e.g., Williams v. New York, 337 U.S. 241, 248 (1949) (referring to "[t]oday's philosophy of individualizing sentences"); Burns v. United States, 287 U.S. 216, 220 (1932) ("It is necessary to individualize each case, to give that careful, humane, and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion.").

23. Although judges had discretion to determine the sentences assigned, the length of the sentence actually served was heavily dependent upon the discretion of parole boards. In 1910, Congress mandated that each federal prison have its own parole board. Act of June 25, 1910, ch. 387, § 2, 36 Stat. 819, 819. The parole board of each prison had the discretionary power to release any prisoner who had served one-third of his original stated sentence if the board was satisfied that "there is a reasonable probability that [the prisoner] will live and remain at liberty without violating the laws," and that release "is not incompatible with the welfare of society." Id. § 3. The United States Board of Parole, which later became the United States Parole Commission, was created by Congress in 1930. Don M. Gottfredson et al., Guidelines for Parole and Sentencing 2 (1978). The legal powers of the Parole Commission as they existed immediately before the adoption of the sentencing guidelines are set out at 18 U.S.C. §§ 4201–4218 (2000) (repealed 1984).

to a specified term or to a range of years, but the number of years the defendant actually serves is determined later by an administrative body like a parole board.[24] Furthermore, federal judges had virtually unlimited discretion to sentence a convicted defendant anywhere within the range created by the statutory maximum and minimum penalties for an offense.[25] There was no limitation on either the type or quality of information a judge could consider at sentencing.[26] Moreover, none of this information was subject to filtering by the rules of evidence,[27] and the judge was required to make no findings of fact. So long as the final sentence was within statutory limits, it was essentially unreviewable by a court of appeals.[28]

In the 1970s and 1980s, this model of sentencing fell into increasing disfavor in state and federal courts for a variety of reasons, including rising crime, mounting evidence that prisoners were not being rehabilitated, and increasing concern that indeterminate sentencing produced unjust disparities between similarly situated offenders. Critics doubted the claims of both judges and parole boards to special sentencing exper-

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24. The Parole Commission, an executive branch agency, not only created its own guidelines for determining release dates, but retained discretionary power to set individual release dates within the broad parameters dictated by those guidelines. The creation of parole guidelines was mandated by 18 U.S.C. § 4203(a)(1). For a discussion of the federal parole guidelines and their operation, see Gottfredson et al., supra note 23, at 22–37; see also Kate Stith & Steve Y. Koh, The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines, 28 Wake Forest L. Rev. 223, 228–29 (1993) (discussing genesis of parole guidelines). For a historical discussion on the development of parole in Europe and the United States, see Todd R. Clear & George F. Cole, American Corrections 377–79 (6th ed. 2003); Reid Montgomery, Jr. & Steven Dillingham, Probation and Parole in Practice 25–32 (1983).

25. See Stanley A. Weigel, The Sentencing Reform Act of 1984: A Practical Appraisal, 36 UCLA L. Rev. 83, 89 (1988) (explaining that before SRA, judges had discretion to extent that the sentence did not exceed statutory maximum); David Fisher, Note, Fifth Amendment—Prosecutorial Discretion Not Absolute: Constitutional Limits on Decision Not to File Substantial Assistance Motions, 83 J. Crim. L. & Criminology 744, 745 (1993) ("Prior to the passage of the Sentencing Reform Act, federal judges enjoyed extremely broad discretion in sentencing. A judge could impose any sentence she thought was proper as long as it did not exceed the statutory maximum.").

26. 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); see also *Williams*, 337 U.S. at 249–51 (holding that due process is consistent with providing judges broad discretion as to sources and types of information relied upon at sentencing).

27. See Fed. R. Evid. 1101(d)(3) (stating that Federal Rules of Evidence do not apply at sentencing). This rule was adopted in 1975 as part of the original Federal Rules of Evidence, Act of Jan. 2, 1975, Pub. L. No. 93-595, art. XI, rule 1101(d), 88 Stat. 1926, 1947, and thus was in effect both before and after the creation of the federal sentencing guidelines. See also *Williams*, 337 U.S. at 250–51 (due process does not require confrontation or cross-examination in sentencing or passing on probation).

28. Koon v. United States, 518 U.S. 81, 96 (1996) ("Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal.").

tise, and many called for "truth in sentencing," by which they meant assurance that defendants would really serve all or most of the sentence imposed by courts. The collapse of the discretionary rehabilitative model and a fortuitous alignment of political forces from the congressional right and left produced the SRA, and three years later, the federal sentencing guidelines.[29]

B. *The Federal Sentencing Guidelines*

1. *The Sentencing Reform Act and the Sentencing Commission.* — The SRA transformed federal sentencing into a determinate system. Parole was abolished,[30] and defendants sentenced to prison were required to serve at least eighty-five percent of the sentence imposed by the court.[31] The SRA also constrained judicial sentencing discretion by creating the U.S. Sentencing Commission,[32] charged with creating, studying, and amending mandatory sentencing guidelines which district courts would henceforth be bound to follow in imposing sentences.[33]

The Sentencing Commission is an "independent commission in the judicial branch of the United States," whose members are nominated by the President and confirmed by the Senate.[34] It consists of seven voting members, no more than four of whom may be members of the same political party.[35] Until 2003, the law required that at least three commissioners be federal judges.[36] In 2003, the PROTECT Act abolished the requirement that there be any judges on the Commission and restricted the number of judges who might serve at any one time to no more than three.[37] Since the inception of the Commission, the Attorney General or

29. The best historical description of the genesis of the SRA and the guidelines is probably Stith & Koh, supra note 24, *passim*; see also Bowman, Quality of Mercy, supra note 11, at 686–89 (discussing fall of rehabilitative model and rise of federal sentencing guidelines).

30. U.S. Sentencing Guidelines Manual § 1A1.1, cmt.3 n.3 (2004).

31. Indeed, the actual percentage will be higher in almost all cases. By statute, federal inmates can receive a maximum of fifty-four days good time credit for each year imposed (a 14.7% credit); however, defendants serving a year or less receive no good time credit, and those serving longer terms do not begin accruing credit until the second year of confinement. 18 U.S.C. § 3624(b). One study places the proportion of the imposed sentence that defendants must actually serve at eighty-seven percent. Paul J. Hofer & Courtney Semisch, Examining Changes in Federal Sentence Severity, 1980–1998, 12 Fed. Sent'g Rep. 12, 13 (1999).

32. 28 U.S.C. § 991(a) (2000).

33. 18 U.S.C. § 3551(a) (requiring that federal criminal defendants "be sentenced in accordance with the provisions of this chapter").

34. 28 U.S.C. § 991(a).

35. Id.

36. Id.

37. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(n)(1), 117 Stat. 650, 676 (amending 28 U.S.C. § 991(a)).

his designee has been a nonvoting ex officio member of the Commission, but the defense bar has no institutional representative.[38]

Congress created the Sentencing Commission for three basic reasons. First, the substantive federal criminal law is sprawling and unorganized, with hundreds of overlapping and often oddly drafted provisions and no system for classifying the relative seriousness of offenses. Congress tried and repeatedly failed throughout the 1970s to bring order to this chaos by writing a rationalized federal criminal code.[39] Fresh from this frustration, the legislators recognized that a body of experts was needed to draft reasonable sentencing rules.[40] Second, Congress realized that the first set of rules would certainly be imperfect and would require monitoring, study, and modification over time. For this task, too, a body of experts was required.[41] Third, creating sentencing rules requires not only expertise, but some insulation from the distorting pressures of politics.[42] Thus, the Sentencing Commission was situated outside both of the political branches of government and made independent even of the normal chain of command in the judicial branch in which it formally resides.[43]

2. *The Guidelines and the Complex Sentencing Table.* — The federal sentencing guidelines are, in a sense, simply a long set of instructions for one chart: the sentencing table.[44] The sentencing table is a two-dimensional grid which measures the seriousness of the current offense on its vertical axis and the defendant's criminal history on its horizontal axis. The goal of guidelines calculations is to determine an offense level and a criminal history category, which together generate an intersection in the body of the grid. Each intersection designates a sentencing range expressed in

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38. 28 U.S.C. § 991(a).

39. See Ronald L. Gainer, Federal Criminal Code Reform: Past and Future, 2 Buff. Crim. L. Rev. 45, 92–135 (1998) (reviewing historical efforts to revise federal criminal code).

40. See Mistretta v. United States, 488 U.S. 361, 379 (1989) ("Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate.").

41. See 28 U.S.C. § 994(o) (mandating Commission to consult with expert authorities when reviewing guidelines); see also Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest, 17 Hofstra L. Rev. 1, 7–8 (1988) ("[T]he Commission remained aware throughout the drafting process that Congress intended it to be a permanent body that would continuously revise the Guidelines over the years.").

42. See Dale G. Parent, What Did the United States Sentencing Commission Miss?, 101 Yale L.J. 1773, 1775 (1992) (noting that Minnesota Sentencing Commission, in contrast to U.S. Sentencing Commission, realized that "[t]he creation of a guidelines commission merely shifted the politics of sentencing reform from the legislature to the commission").

43. See *Mistretta*, 488 U.S. at 393 (noting that Sentencing Commission "is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch").

44. U.S. Sentencing Guidelines Manual § 5A (2004).

months. Most American sentencing guidelines systems use some form of sentencing grid or table similar to the federal model, at least insofar as they employ measurements of offense seriousness and criminal history to place defendants within a sentencing range.[45] The federal system, however, is unique in the complexity of its sentencing table, which has 43 offense levels, 6 criminal history categories, and 258 sentencing range boxes.

The criminal history category reflected on the horizontal axis of the sentencing table attempts to quantify the defendant's disposition to criminality.[46] The offense level reflected on the vertical axis of the sentencing table is a measurement of the seriousness of the present crime. The offense level has three components: (1) the "base offense level," which is a seriousness ranking based purely on the fact of conviction of a particular statutory violation, (2) a set of "specific offense characteristics," which are factors not included as elements of the offense that cause us to think of one crime as more or less serious than another,[47] and (3) additional adjustments under chapter three of the guidelines.[48]

A unique and controversial aspect of the guidelines is "relevant conduct."[49] The guidelines require that a judge calculating the applicable offense level and any chapter three adjustments must consider not only a defendant's conduct directly related to the offense or offenses for which he was convicted, but also the foreseeable conduct of his criminal partners,[50] as well as his own uncharged, dismissed, and sometimes even acquitted conduct[51] undertaken as part of the same transaction or common scheme or plan as the offense of conviction.[52] The primary purpose of the relevant conduct provision is to prevent the parties (and to a lesser

45. Richard S. Frase, State Sentencing Guidelines: Still Going Strong, 78 Judicature 173, 176 (1995) ("Most states have promulgated guidelines in the form of a two-dimensional grid, but a few employ narrative rules for each offense or offense group.").

46. U.S. Sentencing Guidelines Manual § 4 (containing rules regarding calculation of criminal history category).

47. For example, the guidelines differentiate between a mail fraud in which the victim loses $1,000 and a fraud with a loss of $1,000,001. Id. § 2B1.1(b)(1). A loss of $1,000 would produce no increase in the base offense level for fraud of seven, while a loss of $1,000,001 would add sixteen levels and thus increase the offense level from seven to twenty-three. Id.

48. Chapter three adjustments include the defendant's role in the offense, id. § 3B1.1.; whether the defendant engaged in obstruction of justice, id. § 3C1.1.; commission of an offense against a particularly vulnerable victim, id. § 3A1.1.; and the existence of multiple counts of conviction, id. § 3D. A defendant's offense level may be reduced based on factors such as his "mitigating role" in the offense, id. § 3B1.2, or on "acceptance of responsibility," id. § 3E1.1.

49. Id. § 1B1.3.

50. Id. § 1B1.3(a)(1)(B).

51. See United States v. Watts, 519 U.S. 148, 155, 157 (1997) (finding that sentencing court was not barred from considering acquitted conduct because burden of proof at sentencing is preponderance of evidence, rather than trial standard of beyond a reasonable doubt).

52. U.S. Sentencing Guidelines Manual § 1B1.3(a)(2).

degree the court itself) from circumventing the guidelines through charge bargaining or manipulation.[53]

3. *The Guidelines and Judicial Discretion.* — Just as a characteristic feature of preguidelines sentencing was the nearly unfettered authority of the judge to set the initial sentence, the defining characteristic of the guidelines regime is its systematic restraint of district court sentencing discretion. Once a district court has determined a defendant's sentencing range, the judge retains effectively unfettered discretion to sentence within that range.[54] However, to sentence outside the range, the judge must justify the departure on certain limited grounds.[55] Critically, both the rules determining the guideline range and those governing the judge's departure authority are made enforceable by a right of appeal given to both parties.[56]

II. THE SUCCESSES (OR NEAR SUCCESSES) OF THE SRA AND THE GUIDELINES

In many important respects, the federal sentencing system fulfilled the objectives of its framers. First, the SRA abandoned the rehabilitative or medical model of punishment as the primary organizing principle of federal sentencing. Second, the SRA accomplished its goal of achieving "truth in sentencing" by abolishing parole and requiring that federal defendants sentenced to incarceration serve at least eighty-five percent of the term imposed by the court before becoming eligible for release.[57] Third, the SRA addressed the problem of unwarranted disparity by mandating the creation of sentencing guidelines and a Sentencing Commission to write, study, and amend them. The available evidence suggests that the guidelines have succeeded in reducing judge-to-judge disparity within judicial districts.[58] On the other hand, researchers have found sig-

53. See William W. Wilkins, Jr. & John R. Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C. L. Rev. 495, 499–500 (1990) (describing how guidelines have "significantly decreased the impact of charge selection and charge bargaining").

54. U.S. Sentencing Guidelines Manual § 5C1.1(a) ("A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.").

55. See infra notes 88–96 and accompanying text (discussing scope of departure power).

56. 18 U.S.C. § 3742 (2000).

57. See supra note 31 and accompanying text.

58. See U.S. Sentencing Comm'n, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform 94 (2004), available at http://www.ussc.gov/15_year/15year.htm (on file with the *Columbia Law Review*) [hereinafter U.S. Sentencing Comm'n, Guidelines 15-Year Study] ("The results of the latest analyses indicate that the guidelines have significantly reduced inter-judge disparity compared to the preguidelines era."); James M. Anderson et al., Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines, 42 J.L. & Econ. 271, 273 (1999) (finding decrease in sentencing disparity between randomly selected judges during early years of guidelines); Paul J. Hofer

nificant disparities between sentences imposed on similarly situated defendants in different districts and different regions of the country,[59] and interdistrict disparities appear to have grown larger in the guidelines era, particularly in drug cases.[60] The question of whether the guidelines reduced or exacerbated racial disparities in federal sentencing remains unresolved.[61]

Finally, the SRA and the guidelines brought law and due process to federal sentencing by requiring that sentencing judges find facts and apply the guidelines' rules to those findings, and by making the guidelines legally binding and enforceable through a process of appellate review. Not all forms of guidelines accomplish this end. Some states have voluntary guidelines systems in which judges need not apply the rules at all.[62] Other states have advisory guidelines systems in which judges are required to perform guidelines calculations, but are not required to sentence in conformity with the result.[63] In neither voluntary nor advisory guidelines systems is the judge's sentencing decision subject to meaningful appellate review. In theory, bringing law to sentencing makes sen-

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et al., The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity, 90 J. Crim. L. & Criminology 239, 241 (1999) (finding that "the guidelines have significantly reduced overall inter-judge disparity in sentences imposed").

59. See Hofer et al., supra note 58, at 241 (noting that such disparities remain despite modest headway made by sentencing guidelines in reducing them); see also Frank O. Bowman, III & Michael Heise, Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data From the District Level, 87 Iowa L. Rev. 477, 530–34 (2002) (discussing wide variation in average drug sentences between federal circuits).

60. See U.S. Sentencing Comm'n, Guidelines 15-Year Study, supra note 58, at 94 ("The available evidence suggests that regional disparity remains under the guidelines, and some evidence suggests it may have even increased among drug trafficking offenses."); Hofer et al., supra note 58, at 280–82 (relying on statistical analyses of Southern and Eastern Districts of New York and Eastern District of Pennsylvania to demonstrate particular disparities in drug crime sentencing). Moreover, there is reason to be concerned that the legitimation of "fast-track" programs under the PROTECT Act of 2003 will increase interdistrict disparity by giving the Justice Department discretion to create geographic zones in which special sentencing rules are adopted to facilitate case management concerns of prosecutors and courts. See infra notes 113–115 and accompanying text for further explanation of "fast-track" programs.

61. Considerations of space preclude even an attenuated discussion of this complex issue. For examples of competing views, compare David B. Mustard, Racial, Ethnic and Gender Disparities in Sentencing: Evidence from U.S. Federal Courts, 44 J.L. & Econ. 285, 308 (2001) (finding disparities in 1991 to 1995 sentencing data), with Panel 1: Disparity in Sentencing—Race and Gender, 15 Fed. Sent'g Rep. 160, 161 (2003) (Kevin Blackwell's paper, developed with Paul Hofer) (criticizing Mustard and other similar studies for failing to control for effects of minimum mandatory sentences and departures, and finding that, while certain racial disparities in federal sentencing data are statistically significant, they are small in comparison to legally relevant considerations).

62. See, e.g., Luttrell v. Commonwealth, 592 S.E.2d 752, 754–55 (Va. Ct. App. 2004) (holding that application of Virginia sentencing guidelines by sentencing judge is "voluntary").

63. See, e.g., Ark. Code Ann. §§ 16-90-801 to -804 (Michie 1993) (establishing an Arkansas Sentencing Commission and advisory sentencing guidelines or standards).

tencing outcomes more predictable and gives the parties a fair opportunity to present and dispute evidence bearing on legally relevant sentencing factors. Relatedly, bringing law to sentencing promotes transparency, such that one can ascertain from the record many, if not all, of the factors which were dispositive in generating the final sentence.

III. The Failure of the Federal Sentencing System

Despite some undeniable successes, the current regime has only partially achieved the objectives of the SRA and suffers from serious, and I now sadly believe, irremediable substantive defects. These defects include sentences which are too often more severe than necessary and an institutional imbalance of power.

A. *Federal Sentence Severity in the Guidelines Era*

At or near the root of virtually every serious criticism of the guidelines is the concern that they are too harsh, that federal law requires imposition of prison sentences too often and for terms that are too long. It is notoriously difficult to determine how much punishment is enough, either in individual cases or across an entire population of offenders, but by any standard the severity and frequency of punishment imposed by the federal criminal process during the guidelines era is markedly greater than it had been before. Incarcerative sentences are imposed far more often than they were before the guidelines,[64] and the length of imposed sentences has nearly tripled.[65] Furthermore, because the SRA abolished parole and requires defendants to serve at least eighty-five percent of the prison term imposed, the amount of time actually spent in prison has increased even more than the length of the sentences nominally im-

64. The percentage of federal defendants sentenced to a purely probationary sentence declined from roughly 48% in 1984, U.S. Sentencing Comm'n, 2 The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining 376 fig.14 (1991) [hereinafter U.S. Sentencing Comm'n, 1991 Study], to 9.1% in 2002, U.S Sentencing Comm'n, 2002 Sourcebook of Federal Sentencing Statistics 27 fig.D (2002), available at http://www.ussc.gov/ANNRPT/2002/SBTOC02.htm (on file with the *Columbia Law Review*) [hereinafter U.S. Sentencing Comm'n, 2002 Sourcebook].

65. From 1984 to 1990, the mean sentence imposed by judges for all federal crimes increased from 24 months to 46 months. U.S. Sentencing Comm'n, 1991 Study, supra note 64, at 378. By 1993, the mean sentence imposed increased by almost another fifty percent to 66.9 months. U.S. Sentencing Comm'n, 1995 Annual Report 61 fig.F (1996), available at http://www.ussc.gov/annrpt/1995/annual95.htm (on file with the *Columbia Law Review*).

posed.[66] As a consequence, since the 1980s, federal inmate populations have increased by more than 600%.[67]

1. *Drug Sentences, Drug Mandatory Minimums, and Their Effect on Overall Federal Sentence Severity.* — No discussion of sentence severity under the federal sentencing guidelines would be complete without consideration of drug sentences. Federal drug defendants are numerous and their sentences long.[68] The terms being served by these defendants are long both in absolute terms and by comparison with sentences for other federal crimes and with state drug sentences.[69] However, the mushrooming numbers of federal drug prisoners and the increased severity of their sentences were not a necessary result of the SRA. Rather, the current structure of federal drug sentencing was heavily influenced by a second piece of legislation, the Anti-Drug Abuse Act of 1986 (ADAA).[70]

The ADAA created a system of quantity-based mandatory minimum sentences for federal drug offenses that were, by design, significantly longer than the prevailing norm, signaling Congress's intent to prosecute the anti-drug effort through a strategy of aggressive law enforcement and tough punishment. When the ADAA was enacted in 1986, the original Sentencing Commission had not yet completed its task of drafting the sentencing guidelines. It was thus obliged to integrate the long mandatory minimum sentences of the ADAA into the original guidelines. Rightly or wrongly, the Commission chose to create a primarily quantity-

66. For example, a federal defendant sentenced to ten years in 1986 would, on average, have served slightly less than six years before release on parole. Today, a defendant sentenced to 10 years will serve 8.5 years before release. Hofer & Semisch, supra note 31, at 13.

67. From 1980 to 2002, the number of federal prison inmates increased from 24,363 to 163,528. BJS, Prisoners in 1994, supra note 14, at 1; Paige M. Harrison & Allen J. Beck, U.S. Dep't of Justice, NCJ 200248, Prisoners in 2002, at 1 (2003), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf (on file with the *Columbia Law Review*).

68. In 2002, more than forty percent of all defendants sentenced in federal court were sentenced for a drug crime, U.S. Sentencing Comm'n, 2002 Sourcebook, supra note 64, at 11 fig.A, 12 tbl.3, and 70,000 people, constituting fifty-five percent of the federal prison population, were serving time for a drug offense. Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics—2002, at 516 tbl.6.54 (Kathleen Maguire & Ann L. Pastore eds., 2004) [hereinafter BJS, Sourcebook].

69. In 2001, the average federal drug trafficking sentence was 72.7 months. By contrast, in 2001, the average federal manslaughter sentence was 34.3 months, the average assault sentence was 37.7 months, and the average sexual abuse sentence was 65.2 months. U.S. Sentencing Comm'n, 2001 Sourcebook of Federal Sentencing Statistics 30 tbl.14 (2002), available at http://www.ussc.gov/ANNRPT/2001/SBTOC01.htm (on file with the *Columbia Law Review*) [hereinafter U.S. Sentencing Comm'n, 2001 Sourcebook]. A comparison of federal and state drug sentences reveals that, in 2000, the average imposed felony drug trafficking sentence in state courts was thirty-five months, while the average imposed federal drug trafficking sentence was seventy-five months. Matthew R. Durose & Patrick A. Langan, U.S. Dep't of Justice, NCJ 198821, Felony Sentences in State Courts, 2000, at 3 (2003), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc00.pdf (on file with the *Columbia Law Review*) [hereinafter BJS, State Courts].

70. Pub. L. No. 99-570, 100 Stat. 3207 (codified at 21 U.S.C. §§ 801–802, 841 (2000)).

based drug guideline built on the framework of fixed points provided by the statutory minimum sentences of the ADAA.[71]

The ADAA not only constrained the Sentencing Commission's initial choices about drug sentence severity, but had at least two other important effects. First, mandatory minimum sentences have erected a continuing barrier to reconsideration of the drug sentence lengths set by the original Commission. The severity of drug sentences has been a consistent source of complaint about the guidelines.[72] More importantly, frontline sentencing actors have apparently acted on their belief that federal drug sentences may often be longer than necessary by exercising their discretion to reduce those sentences.[73] The available evidence strongly suggests that the Sentencing Commission, had it been free to exercise its independent judgment, would have responded to the feedback from guideline critics and frontline sentencing actors by making ameliorating changes to the drug guidelines.[74] The Commission's persistent inability to accomplish the undoubted desire of a solid, politically

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71. See Stephen J. Schulhofer, Excessive Uniformity—And How to Fix It, 5 Fed. Sent'g Rep. 169, 169 (1992) (defending Commission's decision to integrate drug mandatory sentences into guideline levels).

72. See, e.g, Frank O. Bowman, III, Playing "21" With Narcotics Enforcement: A Response to Professor Carrington, 52 Wash. & Lee L. Rev. 937, 981 (1995) (observing that "many drug sentences under the guidelines are of lengths far longer than necessary to achieve maximum deterrence"); Jack B. Weinstein, Standing Down from the War on Drugs, N.Y. State Bar Ass'n J., Feb. 2003, at 55, 55 (listing "rigid federal guidelines" as causal factor for United States' "monstrous" prison population); see Debate, Mandatory Minimums in Drug Sentencing: A Valuable Weapon in the War on Drugs or a Handcuff on Judicial Discretion?, 36 Am. Crim. L. Rev. 1279 (1999) (debate between Judge Stanley Sporkin and Congressman Asa Hutchinson regarding efficacy of mandatory minimum and guidelines sentencing regime); Debate, The War on Drugs: Fighting Crime or Wasting Time, 38 Am. Crim. L. Rev. 1537 (2001) (debate between Congressman Bob Barr and Mr. Eric Sterling regarding whether war on drug's focus on criminal sanctions has been successful in mitigating social costs of drug abuse).

73. Between 1991 and 2001, the average prison sentence imposed on a federal drug offender declined from 95.7 months to 71.7 months, a drop of two years. In a pair of recent studies, Michael Heise and I concluded that this decline was, in significant part, a product of discretionary choices by judges, prosecutors, defense attorneys, and probation officers, and somewhat more tentatively that these discretionary choices were influenced by a widespread, though regionally irregular, perception that drug sentences are often longer than necessary. Bowman & Heise, supra note 59, at 528–30, 556, 558.

74. See Fairness in Sentencing Act of 2002: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 107th Cong. 7, 10 (2002) (statement of Charles Tetzlaff, General Counsel, U.S. Sentencing Comm'n), reprinted in 14 Fed. Sent'g Rep. 233, 233 (2002) (noting that Commission "seriously considered promulgating an amendment to the guidelines and submitting it for congressional review"); Federal Cocaine Sentencing Policy: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary, 107th Cong. 142, 144 (2002) (statement of Diana E. Murphy, Chair, U.S. Sentencing Comm'n), reprinted in 14 Fed. Sent'g Rep. 236, 236–37 (2002) (discussing a "three-pronged approach to revis[ing] federal cocaine sentencing policy"); Frank O. Bowman, III, The Geology of Drug Policy in 2002, 14 Fed. Sent'g Rep. 123, 129–30 (2002) (recounting efforts by Commission to revise crack cocaine guidelines during 2001–2002 guideline amendment cycle).

bipartisan majority of its membership is attributable both to the structural obstacle presented by statutory minimum mandatory sentences and to the active opposition of Congress and the Justice Department. The most notable example of these phenomena has been the Commission's repeated, unsuccessful efforts to amend the crack cocaine guidelines.[75]

Second, drug mandatory sentences and the resultant overall high level of drug sentences have exerted upward pressure on sentences for other federal offenses. Whether drug sentences of the length now pre-

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75. The ADAA created different quantity-based mandatory minimum sentences for crack and powder cocaine. Specifically, the amount of powder cocaine required to trigger the five-year and ten-year minimum mandatory sentences prescribed by the ADAA is 100 times greater than the amount of crack cocaine required to trigger those sentences. 21 U.S.C. § 841(b)(1)(A)(ii)–(iii). Moreover, the quantities of crack required to trigger mandatory sentences are quite small. See, e.g., id. § 841(b)(1)(A)(iii) (ten year minimum mandatory sentence for possession of fifty grams of cocaine base); § 841(b)(1)(B)(iii); (five-year minimum mandatory sentence for possession of five grams of cocaine base). The crack-powder differential has proven controversial for two reasons. First, there has long been heated debate over whether the differences in pharmacological potency or socially destructive effects of the two chemical cousins are sufficient to justify their differential sentencing treatment. See U.S. Sentencing Comm'n, Report to the Congress: Cocaine and Federal Sentencing Policy 91 (2002), available at http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm (on file with the *Columbia Law Review*) [hereinafter 2002 Cocaine Report] ("The 100-to-1 drug quantity ratio was established based on a number of beliefs about the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that more recent research and data no longer support."). Second, doubts about the desirability of the crack-powder distinction have been exacerbated by the fact that the overwhelming majority of crack defendants are black, while the overwhelming majority of powder cocaine defendants are white or Hispanic. Id. at 62.

In February 1995, the Commission prepared a comprehensive report to Congress recommending changes to then-current cocaine sentencing policy, including modification of the crack-powder ratio. U.S. Sentencing Comm'n, Special Report to Congress: Cocaine and Federal Sentencing Policy 196 (1995), available at http://www.ussc.gov/crack/exec.htm (on file with the *Columbia Law Review*). In May 1995, the Commission passed an amendment that would have equalized crack and powder cocaine penalties at the level applicable to powder cocaine. Congress responded by rejecting the amendment. Act of Oct. 30, 1995, Pub. L. No. 104-38, 109 Stat. 334, 334. In 1997, the Commission once again reported to Congress that the 100-to-1 ratio could not be justified. U.S. Sentencing Comm'n, Special Report to Congress: Cocaine and Federal Sentencing Policy 9–10 (1997), available at http://www.ussc.gov/r_congress/NEWCRACK.PDF (on file with the *Columbia Law Review*). Finally, in May 2002, the Commission studied the question a third time, reiterated its earlier findings that the existing crack-powder ratio cannot be justified based on available evidence, strongly recommended repeal of the mandatory minimum penalties for simple possession of crack, and recommended a series of amendments that would ameliorate, if not eliminate, the sentencing distinction between the two drugs. 2002 Cocaine Report, supra, at 103–11. On each occasion, the Department of Justice opposed any change. See, e.g., Hearing Before U.S. Sentencing Comm'n (Mar. 19, 2002), at http://www.ussc.gov/bearings/031902.htm (on file with the *Columbia Law Review*) (testimony of Larry D. Thompson, Deputy Attorney General, U.S. Dep't of Justice) ("[W]e believe the current federal sentencing policy and guidelines for crack cocaine offenses are proper. And that it would be more appropriate to address the differential . . . by recommending that penalties for powder cocaine be increased."). Congress has never acted on the 1997 or 2002 reports.

scribed by federal law are good or bad in themselves, they are unquestionably longer on average than federal sentences for any other type of crime, save the most serious violent offenses.[76] Because long drug sentences are a common, entrenched, and apparently ineradicable feature of federal criminal practice, it has often seemed that the only solution to the problem of sentence disparity between different crime types of comparable seriousness is to raise non-drug sentences rather than lower sentences for drug crime. This dynamic was plainly at work in the debate over economic crime sentences leading to the passage of the Sarbanes-Oxley Act and the sentencing increases that followed.[77]

2. *Sentence Severity and Crime Control.* — One primary objective of any sentencing system is crime control. Thus, the present federal sentencing regime might be fully justified if it produced demonstrable reductions in crime commensurate with its human and economic costs.[78] Increasing the number of persons in prison appears to reduce crime to some extent, though the extent of the resulting reduction is the subject of heated debate.[79] The correlation between increased imprisonment and decreased crime is even more difficult to determine in the federal system than it is in the states. Most nondrug state felony cases are so-called "index crimes"—crimes of a sort that are reported to police by victims or other interested persons.[80] We have reasonably good statistical measurements of crime trends over time for these sorts of offenses and thus can make

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76. See supra note 69 and accompanying text.

77. See Penalties for White Collar Crime: Hearings Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary, 107th Cong. 46–48 (2003) (response of Frank O. Bowman, III to written questions from Sen. Charles Grassley following hearing of June 19, 2002) (noting that valid comparisons of drug and white collar sentences are difficult and that "even if one can show that some undesirable disparities exist between some pairs of economic and drug criminals, that does not necessarily establish that all drug sentences are too high relative to economic crime sentences or that all economic crime sentences are too low relative to drug sentences"). See generally, Frank O. Bowman, III, Pour Encourager les Autres?: The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed, 1 Ohio St. J. Crim. L. 373, 399–400, 411–13, 417–19 (2004) [hereinafter Bowman, Pour Encourager les Autres].

78. The Justice Department, for example, claims a direct causal connection between the adoption of the SRA, the ADAA, and other federal sentencing legislation and the overall decline in the U.S. crime rate. See Implications of the *Booker/Fanfan* Decision for the Federal Sentencing Guidelines: Oversight Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 109th Congress, at 7–8 (2005), available at http://judiciary.house.gov/media/pdfs/Wray021005.pdf (on file with the *Columbia Law Review*) (testimony of Christopher A. Wray, Assistant Attorney General) ("Another significant impact of sentencing reform has been the steep decline of crime in the United States, currently at a 30-year low.").

79. See Frank O. Bowman, III, Murder, Meth, Mammon & Moral Values: The Political Landscape of American Sentencing Reform, 44 Washburn L.J. (forthcoming 2005) (manuscript at 3, on file with the *Columbia Law Review*) (summarizing debate over effectiveness of mass incarceration as anticrime tool).

80. For example, in 2000, 18.7% of state felonies were violent crimes such as murder, assault, rape, and robbery; 28.3% were property crimes such as burglary, larceny, fraud,

reasonable, if not indisputable, assessments of the cause and effect relationships between changes in sentencing policy and changes in crime rates for these kinds of crime. By contrast, we have much less reliable measurements of the prevalence of offenses such as drug crimes, immigration violations, and white collar fraud and regulatory crime—offenses that embrace some seventy-five percent of all federal felony convictions.[81] Moreover, with the exception of immigration offenses, all of the most commonly prosecuted federal offenses are also prosecuted by state authorities.

In consequence, for most crimes it is difficult, and perhaps impossible, to isolate the effect of federal prosecutorial and sentencing policies from effects of state policies and practices, not to speak of the broader economic, demographic, and social trends that influence crime rates. This is not to say that federal law enforcement has no beneficial effect. However, the nature of federal law enforcement makes objective measurement of its results very difficult, and there is little direct evidence that the harsher federal sentencing regime of the past twenty years has produced benefits in proportion to its costs.

B. *The Loss of Institutional Balance in Federal Sentencing*

The federal process of making sentencing rules and imposing sentences on individual defendants has gone astray. The guidelines system was supposed to remedy the former system's excessive reliance on judicial discretion by distributing sentence authority between the relevant institutional actors. This hoped-for institutional balance has broken down; the former unwarranted judicial and parole board hegemony over federal sentences has been replaced by an alliance of the Department of Justice and Congress at the rulemaking level, and excessive control by prosecutors at the individual case level.

1. *Judicial Sentencing Discretion, Guidelines Complexity, and the Departure Power.* — The guidelines were undeniably intended to restrict, though never to eliminate, judicial sentencing discretion. The degree to which fact-based guidelines actually restrict judicial sentencing discretion depends on two factors: the structure of the sentencing grid and the nature of the judicial departure power. As a general matter, the more complex the grid, the more constraints are placed on judicial discretion. With relatively few exceptions, the felony sentences authorized by federal statutes range from probation to roughly thirty years.[82] The guidelines' sentencing grid breaks this thirty-year expanse into bounded ranges outside of which a court can sentence only with difficulty. The size of the

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and forgery; 15.3% were nonviolent offenses such as vandalism and receiving stolen property; and 3.1% were weapons offenses. BJS, State Courts, supra note 69, at 2.

81. U.S. Sentencing Comm'n, 2002 Sourcebook, supra note 64, at 11 fig.A.

82. There is only one class of federal offenders whose median sentence exceeds thirty years: murderers with a criminal history category of VI. U.S. Sentencing Comm'n, 2001 Sourcebook, supra note 69, at 31 tbl.14.

range—and thus the extent of the judge's unbounded discretionary sentencing authority—decreases as the number of intersections on the grid increases. Precisely because the federal sentencing table has 258 such intersections, the size of the ranges hemming in judicial discretion can be quite small.

The complexity of the sentencing table stems from both the SRA and later choices of the Commission. The drafters of the SRA sought to limit judicial discretion by including a provision known as the "25% rule," which requires that the top of a guideline sentencing range be no more than the greater of six months or twenty-five percent higher than the bottom of the range.[83] Given this statutory constraint, the Sentencing Commission could not have constructed a sentencing table with fewer than eighteen offense levels.[84] The fact that the Commission adopted a table with forty-three offense levels was primarily a result of its conclusion that offender culpability could be measured in fairly small, discrete increments.[85] Examples of this approach include the drug quantity table of the drug guideline, which assigns offense level increases based on drug amount in two-level increments from six to thirty-eight levels,[86] and the loss table of the economic crime guideline, which assigns offense level increases based on the amount of loss caused by a fraud in two-level increments from two to thirty levels.[87]

A complex guidelines sentencing table is not an insuperable barrier to a generous exercise of judicial sentencing discretion so long as sentencing judges are granted significant authority to sentence outside the ranges produced by guideline calculations—to "depart." However, both the congressional drafters of the SRA and the original Sentencing Commission were determined to place substantial restraints on the departure

83. 28 U.S.C. § 994(b)(2) (2000).

84. At least it could not have done so if the table was to provide continuous coverage from zero months to thirty years to life and provide for sentences of thirty or more years for first offenses such as murder, hijacking, and the like. To see why eighteen levels is the mathematical minimum, start with an Offense Level 1 with a sentencing range of 0–6 months, then add offense levels with the maximum possible sentencing range until you reach a range with a minimum sentence of 360 months (30 years) or more. The result is that Levels 1 through 5 have six-month sentencing ranges (0–6 months, 6–12 months, and so on), then beginning at Level 6, the top of the range is increased by 25% over the top of the next lower range (30–37 months, 37–46 months, and so on), until 30 years is reached. At least eighteen offense levels are required to cover the entire range.

85. In addition, the Commission wanted to create overlapping sentencing ranges so that the high end of each sentencing range was at roughly the midpoint of the range above it. The idea was to diminish the impact of one-level differences in guideline calculations.

86. U.S. Sentencing Guidelines Manual § 2D1.1(c) (2004).

87. Id. § 2B1.1(b). The current economic crime guideline contains a loss table with sixteen two-offense-level enhancements. This actually represents a simplification of the original loss table, which contained eighteen one-offense-level enhancements. U.S. Sentencing Guidelines Manual § 2F1.1(b) (1987).

power.[88] The guidelines originally provided two types of departure.[89] A "substantial assistance" departure is awarded for cooperation with the government in the investigation or prosecution of another person and may only be granted on motion of the government.[90] A "nonsubstantial assistance" departure may be awarded on motion of either party or sua sponte by the court.

Under the original guidelines, the judge was required to justify a nonsubstantial assistance departure on the record by reference to factors specified in the guidelines as appropriate grounds for departure,[91] or by finding "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into account by the Sentencing Commission" that should result in a different sentence.[92] The guidelines specifically excluded from departure consideration many factors which were used preguidelines by judges to "individualize" sentences.[93] The U.S. Supreme Court, in *Koon v. United States*,[94] adopted a deferential standard of review of district court departure decisions, which signaled that district judges could exercise their discretion to depart somewhat more generously than had previously been the case. In 2003, Congress responded to complaints from the Justice Department about an alleged overuse of the departure power by district judges by enacting the Feeney

88. For a legislative history of the departure provisions of the SRA, see U.S. Sentencing Comm'n, Report to the Congress: Downward Departures from the Federal Sentencing Guidelines B-5 to B-13 (2003).

89. U.S. Sentencing Guidelines Manual § 5K1.1 (2004) (substantial assistance departures); id. § 5K2.0 (nonsubstantial assistance departures).

90. The requirement of a government motion is contained in both the SRA, 18 U.S.C. § 3553(e) (2000), and the guidelines, U.S. Sentencing Guidelines Manual § 5K1.1, and has been upheld by the courts against repeated challenges. See In re Sealed Case, 181 F.3d 128, 132 (D.C. Cir. 1999) (en banc) ("[I]t is clear that by authorizing departures with government motions, the Commission did intend to preclude departures without motions."); see also Bowman, Departing Is Such Sweet Sorrow, supra note 15, at 13–15, 21–31 (discussing government motion requirement and substantial assistance departures).

91. See U.S. Sentencing Guidelines Manual ch. 5, pt. K (detailing approved grounds for upward or downward departure).

92. 18 U.S.C. § 3553(b); U.S. Sentencing Guidelines Manual § 5K2.0.

93. The guidelines list factors the Commission determined to be "not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." U.S. Sentencing Guidelines Manual ch. 5, pt. H. These include age, id. § 5H1.1; educational and vocational skills, id. § 5H1.2; mental and emotional conditions, id. § 5H1.3; physical condition, id. § 5H1.4; history of substance abuse, id. § 5H1.4; employment record, id. § 5H1.5; family or community ties, id. § 5H1.6; socio-economic status, id. § 5H1.10; military record, id. §5 H1.11; history of charitable good works, id. § 5H1.11; and "lack of guidance as a youth," id. § 5H1.12. In theory, most of these factors nonetheless can justify a departure, but such a departure is permissible only where the excluded factor is present to a degree so unusual that the Commission would not have anticipated its impact and thus did not "adequately [take it] into consideration" when formulating the guidelines. 18 U.S.C. § 3553(b).

94. 518 U.S. 81, 97–100 (1996).

Amendment to the PROTECT Act.[95] The Amendment congressionally overruled the *Koon* decision, instituted a stricter standard for appellate review of departures, and directed the Sentencing Commission to adopt guidelines amendments to "substantially reduce" rates of judicially initiated departures.[96]

There is considerable debate over whether the Justice Department's concern about judicial overuse of the departure power was well founded.[97] For its part, the federal judiciary was plainly of the view that the effort to reduce its departure authority was ill advised. In September 2003, the United States Judicial Conference voted to urge repeal of most of the elements of the Feeney Amendment related to the judicial departure power.[98] Congress did not respond to this plea. However, one effect of the *Booker* decision was to invalidate that portion of the Feeney Amendment requiring de novo review of downward departures.[99]

2. *The Rise of Prosecutorial Sentencing Power*

a. *Prosecutorial Power in Individual Cases.* — Prior to the advent of the federal sentencing guidelines, prosecutors exercised relatively little direct influence on precise sentencing outcomes. Prosecutorial charging and plea bargaining decisions determined the offense of conviction and thus influenced minimum and maximum sentences, but judges exercised unfettered authority over the imposed sentence within statutory minima and maxima, and parole officials controlled the percentage of the judicially imposed sentence that would actually be served. The relationship of prosecutors to sentencing changed markedly in the guidelines era. The original guidelines retained for prosecutors their charging discretion and gave them two new forms of sentencing power.

First, in a fact-driven guideline system, prosecutors gain tremendous influence over sentences inasmuch as prosecutors are the masters of the facts—the primary sources of the evidence necessary to trigger application of guideline rules. If every offense characteristic and criminal his-

95. PROTECT Act of 2003, Pub. L. No. 108-21, § 401(d)(1), 117 Stat. 650, 670 (amending 18 U.S.C. § 3742(e)(3)). For an overview of the Feeney Amendment and reactions to it, see generally Douglas A. Berman, Locating the Feeney Amendment in a Broader Sentencing Reform Landscape, 16 Fed. Sent'g Rep. 249 (2004).

96. In response, the Commission passed amendments effective October 27, 2003, designed to effect such reductions. U.S. Sentencing Guidelines Manual appx. C, amend. 649 (Supp. 2003).

97. See, e.g., Letter from James E. Brown, Acting Assistant Attorney General, to Senator Orrin Hatch (Apr. 4, 2003), reprinted in 15 Fed. Sent'g Rep. 355, 355–57 (2003) (supporting Feeney Amendment as remedying deficiencies in federal sentencing policy with respect to offenses against children); Letter from Alfred P. Carlton, Jr., President of the American Bar Association, to Senator Orrin Hatch (Apr. 1, 2003), reprinted in 15 Fed. Sent'g Rep. 346, 347–48 (2003) (expressing concern that balancing system of SRA would be endangered by overrule of *Koon*).

98. See U.S. Judicial Conference Statement on the Feeney Amendment, Sept. 23, 2003, 16 Fed. Sent'g Rep. 136, 136 (2003).

99. United States v. Booker, 125 S. Ct. 738, 763 (2005) (Breyer, J., opinion of the Court).

tory point were subject to negotiation between the parties, prosecutors could use the combination of their charging authority and their plea bargaining power to dictate the precise sentencing range of every defendant who did not go to trial. To prevent complete prosecutorial hegemony over sentencing outcomes, the Commission created the "relevant conduct" rules, which require judges to sentence defendants based on all the available evidence about the defendant's criminal conduct rather than merely on the crime of conviction or the facts agreed to by the parties.[100] In theory, prosecutors are not supposed to "fact-bargain," i.e., to negotiate precise sentencing outcomes by making plea agreements pursuant to which sentence-affecting evidence is withheld from the court.[101] As officers of the court (and pursuant to Department of Justice policy[102]), prosecutors are to act primarily as conduits for sentencing information by presenting the court with all the relevant facts they possess, as well as appropriate legal analysis and sentencing recommendations. But even if prosecutors never struck a fact bargain, the guidelines give prosecutors more influence than relevant conduct theory implies. The process of determining what facts are relevant to sentencing and formulating sentencing recommendations inevitably involves making judgments about what facts are provable and which guideline category best fits the provable facts. The exercise of such judgment translates into powerful influence on sentencing outcomes.

Second, by giving prosecutors a monopoly on the power to make substantial assistance motions, the guidelines made prosecutors the gatekeepers of downward departures for cooperation.[103] This government motion requirement has been of immense practical significance because by statute, substantial assistance departures are virtually the only legally sanctioned avenue of relief from stiff mandatory minimum drug and firearm sentences.[104] The combination of high guideline and statutory sentences and the government motion requirement has given prosecutors tremendous leverage in negotiations with defendants from whom it seeks cooperation.

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100. See supra notes 49–53 and accompanying text.

101. See Frank O. Bowman, III, To Tell the Truth: The Problem of Prosecutorial "Manipulation" of Sentencing Facts, 8 Fed. Sent'g Rep. 324, 324 (1996).

102. See, e.g., 8 The Department of Justice Manual 9-27.430, pt. B.2 (Supp. 11 1993) ("[T]he Department's policy is only to stipulate to facts that accurately represent the defendant's conduct. If a prosecutor wishes to support a departure from the guidelines, he or she should candidly do so and not stipulate to facts that are untrue. Stipulations to untrue facts are unethical."); Memorandum from Janet Reno, Attorney General, to Holders of U.S. Attorneys' Manual, Title 9 (Oct. 12, 1993), reprinted in 6 Fed. Sent'g Rep. 352, 352 (1994) (emphasizing that one purpose of Principles of Federal Prosecution is to assure charging and plea bargaining practices do not undermine SRA goal of reducing unwarranted sentencing disparity).

103. U.S. Sentencing Guidelines Manual § 5K1.1 (2004).

104. 18 U.S.C. § 3553(e) (2000).

These two new forms of prosecutorial sentencing power excited comment and criticism.[105] Nonetheless, both are integral components of the original guidelines design and, if employed as intended, arguably do not confer undue sentencing influence on prosecutors.[106] There are indications that federal prosecutors in many districts across the country have succumbed to the temptation to use their monopoly on the facts and on substantial assistance motions to manipulate sentencing outcomes,[107] but standing alone, some degree of fact bargaining and some overuse of substantial assistance departures would be of little genuine concern. The true problem is that fifteen years of accumulated experience with the nuances of practice under the guidelines have given prosecutors an increasing array of tools for controlling sentencing outcomes.

Under current law federal prosecutors possess express authority to influence sentencing outcomes through (a) initial selection of charges in the indictment, particularly charges carrying minimum mandatory sentences;[108] (b) selection of discretionary sentencing enhancements such as the second offender information in drug cases, which doubles the applicable minimum sentence;[109] (c) charge bargaining after indictment, including the ability to place a de facto cap on the defendant's sentence by accepting a plea to a charge with a statutory maximum sentence lower than the defendant's guideline exposure;[110] (d) the prosecutorial motion requirement for substantial assistance departures under § 5K1.1; (e) the prosecutorial motion requirement for the third level of the acceptance of responsibility reduction under § 3E1.1;[111] and (f) most pervasively, through the prosecutor's power to assess the evidence and equities of a

105. See, e.g., Am. Coll. of Trial Lawyers, Report and Proposal on Section 5K1.1 of the U.S. Sentencing Guidelines 15–22 (1999), available at http://www.actl.com/PDFs/ReportProposalSentencingGuidelines.pdf (on file with the *Columbia Law Review*) (criticizing government monopoly on substantial assistance motions).

106. See Bowman, Departing Is Such Sweet Sorrow, supra note 15, at 53–58 (defending government monopoly on substantial assistance motions).

107. There is no hard data on the prevalence of fact bargaining (unsurprising given that it is not supposed to occur), but anecdotal evidence suggests that the practice is not unknown and is in some districts quite common. Data on substantial assistance motions strongly suggests that many U.S. Attorneys' Offices have used substantial assistance as a caseload management device. Substantial assistance departure rates in some districts have approached fifty percent, with no evidence that the government demanded much in the way of assistance from many defendants beyond an early plea of guilty. See, e.g., id. at 59.

108. See, e.g., 18 U.S.C. § 924(c) (imposing additional five-year mandatory sentence for use of firearm in connection with drug trafficking offense consecutive to drug penalty).

109. 21 U.S.C. § 851 (2000). This provision is triggered only upon filing of the information by the government. Filing such information is discretionary. United States v. Cespedes, 151 F.3d 1329, 1333–35 (11th Cir. 1998).

110. One common vehicle to accomplish this end in drug cases is a so-called "phone count" under 21 U.S.C. § 843(b), which carries a four-year maximum sentence for using interstate telecommunications in the course of a drug trafficking offense.

111. This requirement was added by the PROTECT Act of 2003, Pub. L. No. 108-21, § 401(g)(1)(A), 117 Stat. 650, 671 (amending U.S. Sentencing Guidelines Manual § 3E1.1(b)).

case and to bargain with the defendant about the applicability of debatable aggravating and mitigating guideline provisions or the appropriateness of a nonsubstantial assistance departure (which the government cannot block, but which is far more likely to be granted with a prosecutorial endorsement). This is not to suggest that all U.S. Attorneys' Offices routinely use all these mechanisms of sentence manipulation. However, all these mechanisms are used by some U.S. Attorneys' Offices some of the time, and available evidence suggests that the incidence of discretionary sentence manipulation increased during the 1990s.[112]

Moreover, in 2003, the PROTECT Act and the ensuing guidelines amendments gave the Justice Department significant new authority to dictate sentencing outcomes. The Act legitimized the controversial "fast-track" programs created by U.S. Attorneys' Offices along the Mexican border in the mid-1990s[113] based on the claim that their burgeoning drug and immigration caseloads could not be managed without providing extraordinary inducements to plead gnilty not previously authorized by the guidelines.[114] The PROTECT Act accepted this view and directed the Commission to enact a guideline amendment creating an early dispo-

112. See Bowman & Heise, supra note 59, *passim* (describing steady increases in various indicators of discretionary sentence manipulation in drug cases).

113. "Fast-track" programs are created to speed case processing in high-volume types of cases or in high-volume districts by offering extraordinary sentencing discounts in return for early pleas. They require an initiative by the prosecution to create the program and make the plea offers and the cooperation of judges in accepting the resulting pleas. Such programs were formerly unsanctioned by the guidelines and were a source of friction between local U.S. Attorneys' Offices and Department of Justice officials in Washington, D.C. The PROTECT Act confers power on the Attorney General to authorize such programs and mandates a special guidelines provision for them. PROTECT Act § 401(m)(2)(B), 117 Stat. at 675. In response to this mandate, the Sentencing Commission created an "early disposition" departure. U.S. Sentencing Guidelines Manual § 5K3.1 (2004). For a discussion of fast-track programs in a number of Mexican border districts, see Implementing Requirements of the PROTECT Act: Hearing Before U.S. Sentencing Comm'n 117–19 (Sept. 23, 2003), available at http://www.ussc.gov/hearings/9_23_03/092303PH.pdf (on file with the *Columbia Law Review*) [hereinafter Implementing PROTECT Hearing] (testimony of Frank O. Bowman, III); Bowman & Heise, supra note 59, at 550.

114. See Implementing PROTECT Hearing, supra note 113, at 44–50 (testimony of Lourdes G. Baird, U.S. District Judge, C.D. Cal.) (describing process as providing for "waivers of indictment . . . waiver of statute of limitations . . . waiver of venue . . . [and] waiver of appeal . . . [a]t the time of the arraignment"); id. at 69–73 (testimony of Paul K. Charlton, U.S. Attorney, D. Ariz.) (noting that fast-track program was attempt to "efficiently prosecute the large number of cases . . . [by] encourag[ing] defendant[s] to plead gnilty before significant prosecutorial resources are expended in the case"); id. at 4–12 (testimony of Marilyn L. Huff, U.S. District Judge, S.D. Cal.) (noting that by encouraging defendants to plead gnilty early, "it saves jury time . . . interpreter time . . . [and] federal defender time); see also id. at 117–19 (testimony of Frank O. Bowman, III) (questioning whether border districts' claim of necessity was entirely valid).

sition departure for districts with fast-track programs authorized by the Attorney General.[115]

In sum, the increasing power local U.S. Attorneys and their assistants exercise over sentencing outcomes in individual cases derives in part from changes to the federal guidelines since 1987, but much of that power and its progressive expansion is a consequence of a fundamental attribute of guidelines systems. That is, increasing the complexity of a sentencing guidelines system tends to confer power on prosecutors while limiting the power of judges. This is particularly true if the guidelines are overlaid on a complex criminal code containing an array of fact-dependent statutory minimum sentence provisions. As the number of fact-dependent rules increases, so too does the number of opportunities for a prosecutor to control each defendant's sentence by charging or not charging crimes or statutory enhancements, proving or not seeking to prove facts determinative of guideline adjustments, or moving or not moving for various types of departures.

b. *Justice Department Power over Sentencing Rulemaking.* — The Justice Department also plays an institutional role in the formulation of statutory and guideline sentencing rules. The Department communicates its concerns and policy preferences to Congress and has a formal representative at the Sentencing Commission in its ex officio member of the Commission. The positions taken by the Department on sentencing, both in Congress and before the Sentencing Commission, have been notable for their almost invariable advocacy of ever-tougher sentencing rules and virtually unyielding opposition to any mitigation of existing sentencing levels.[116] This aggressive stance has not been confined to the current administration, although it certainly seems more pronounced since 2000. At the same time that the Justice Department has pressed for tougher and more mandatory sentencing laws, it has carried on an equally vigorous campaign to confer on prosecutors exclusive power to make exceptions to those laws when doing so facilitates prosecutorial objectives or comports with prosecutors' sense of justice. Finally, the Justice Department's consistent push for harsher sentencing laws and the progressive diminution of the Department's traditional respect for the role of the judiciary at sentencing has been accompanied by decreasing deference to the U.S. Sentencing Commission as an authoritative source of sentencing law and policy.[117]

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115. U.S. Sentencing Guidelines Manual § 5K3.1 (creating new four-level downward departure available only upon motion of government in district with DOJ-authorized fast-track program and noting explicitly that authority of Attorney General to authorize fast-track program is not limited to border districts).

116. See, e.g., Bowman, Pour Encourager les Autres, supra note 77, at 399–400, 411–13, 417–19 (detailing Justice Department's efforts to secure higher economic crime sentences before and after enactment of Sarbanes-Oxley Act of 2002).

117. See id. at 431 (describing Justice Department's threats to seek additional legislation if Sentencing Commission did not acquiesce in its demand for across-the-board sentence increases for all economic crime offenders in wake of Sarbanes-Oxley Act).

3. *The Role of Congress in Making and Monitoring Federal Sentencing Law.* — Congress has the undoubted power to make and modify federal sentencing law. The question is whether it has wrought wisely in creating and overseeing the present federal sentencing system. While the SRA itself is in many respects an admirable piece of legislation, much of what Congress has done since 1984 has been less laudable. The severity of federal sentences is primarily attributable to the actions of Congress rather than the preferences of the Sentencing Commission. Furthermore, the complexity of the federal sentencing guidelines has provided an opening for continued congressional intervention in the details of sentencing law. Finally, Congress frequently increases and scarcely ever decreases the severity of federal sentences in large measure because budgetary considerations do not affect Congress in the same way they affect state legislatures.

a. *Congressional Intervention in Setting Guidelines.* — At the heart of the SRA was the idea that a politically neutral body of sentencing professionals—the Sentencing Commission—should set sentencing levels based on careful study of past practice and the best available learning on criminology and corrections. The Commission's product would, of course, be subject to review and modification by Congress, but the idea was to begin by letting the Commission create guidelines that embodied its best judgment. Unfortunately, this vision was only imperfectly realized. For example, while the Commission was still drafting the original guidelines, Congress passed the Anti-Drug Abuse Act of 1986 with its lengthy quantity-based minimum mandatory sentences. The Commission was therefore obliged to set drug sentences higher than it would have liked, with distorting effects on the rest of the guidelines system that have already been recounted.[118]

For a number of years after the advent of the guidelines in 1987,, Congress largely left sentencing matters to the Sentencing Commission. This may have been in part because members of Congress who had labored so hard to produce the SRA, particularly those on the Judiciary Committees, understood and were protective of the Commission they had created. But for whatever reason, an attitude of cooperation and mutual respect prevailed. Congress not only accepted without demur the guidelines amendments approved by the Commission,[119] it enacted relatively few specific directives to the Commission. Beginning in the mid-1990s, however, Congress began to intervene ever more directly in the Commission's work, and the relationship between Congress and the

118. See supra notes 76–77 and accompanying text. Congress also enacted other statutes mandating lengthy mandatory minimum sentences, notably for gun crimes. See, e.g., 18 U.S.C. § 924 (2000).

119. Since 1987, Congress has legislatively overruled the Sentencing Commission on only 2 of the more than 650 amendments to the original guidelines approved by the Commission. See, e.g., Act of Oct. 30, 1995, Pub. L. No. 104-38, 109 Stat. 334 (rejecting Commission amendments to crack cocaine and money laundering guidelines).

Commission began to assume a more adversarial tone. By the spring of 2003, congressional directives consumed the overwhelming majority of the Commission's agenda.[120]

Not only has the frequency of congressional directives increased, but their content has pushed progressively deeper into the core functions of the Sentencing Commission. The most recent example of this trend was the Feeney Amendment to the PROTECT Act.[121] As noted above, the Feeney Amendment legislatively overrode a decision of the Supreme Court,[122] directed the Sentencing Commission to substantially reduce downward departures,[123] and limited to three the number of judges who can serve on the Sentencing Commission—the first modification of the structure and membership requirements of the Commission in its history.[124] The Feeney amendment went further still. Whereas all previous guidelines-era legislation had couched expressions of congressional will as requests or directives to the Sentencing Commission to study issues or draft guidelines to achieve a stated objective, the Feeney Amendment directly amended the guidelines text for the first time since the guidelines became law in 1987.[125]

b. *The Vehicle for Increased Congressional Intervention: Guidelines Complexity.* — If the preceding discussion of the operation of the guidelines has provided any one insight, it is surely that the complexity of the sentencing table and accompanying rules is an important cause of many

120. On May 1, 2003, the Sentencing Commission submitted to Congress amendments in nine major subject areas. Five of the nine were directly responsive to statutory mandates, and a sixth arose from concerns expressed by "the Department of Justice, some members of Congress, and an ad hoc advisory group formed by the Commission." U.S. Sentencing Comm'n, Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary amend. 1 (2003), available at http://www.ussc.gov/2003guid/2003cong.pdf (on file with the *Columbia Law Review*). The Commission's 2003–2004 agenda was also heavily weighted toward responding to Congress. See, e.g., Notice of 1) Amendments to the Sentencing Guidelines Made Pursuant to the Directive in Section 401(m) of the PROTECT Act, Public Law 108-21; and (2) Conforming Amendments to the Congressional Amendments to the Guidelines Made Directly by the PROTECT Act and Effective on May 30, 2003, 68 Fed. Reg. 60,154 (proposed Oct. 21, 2003).

121. PROTECT Act of 2003, Pub. L. No. 108-21, § 401(d)(1), 117 Stat. 650, 670 (amending 18 U.S.C. 3742(e)(3)).

122. See supra text accompanying note 96.

123. PROTECT Act § 401(m)(2)(A), 117 Stat. at 675.

124. See supra note 37 and accompanying text.

125. See PROTECT Act § 401(b)(1)–(5), 117 Stat. at 668–69 (amending various sections of U.S. Sentencing Guidelines Manual ch. 5 (relating to grounds for departure)); id. § 401(g), 117 Stat. at 671 (amending U.S. Sentencing Guidelines Manual § 3E1.1(b) (Acceptance of Responsibility)); id. § 401(i)(1)(A), 117 Stat. at 672 (amending U.S. Sentencing Guidelines Manual § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors)); id. § 401(i)(1)(B), 117 Stat. at 672 (amending U.S. Sentencing Guidelines Manual § 2G2.4(b) (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct)); id. § 401(i)(1)(C), 117 Stat. at 673 (amending U.S. Sentencing Guidelines Manual § 2G2.2(b) (Trafficking in Material Relating to Exploitation of a Minor)).

common complaints about federal sentencing. Complexity makes the sentencing process protracted and tecbnically demanding and tends to constrain judicial sentencing discretion while enhancing prosecutorial power. Tbe complexity of the federal guidelines has also had a significant, if unappreciated, effect on the relationship of Congress to the postguidelines development of sentencing law. Put simply, the complexity of the guidelines and the federal sentencing table encourage continuing congressional intervention in the particulars of federal sentencing law.

In the preguidelines era, Congress could not readily translate its concern about a class of high-profile crimes into specific sentencing outcomes. Faced with a real or perceived outbreak of criminal activity, Congress had four basic legislative options: (1) increase appropriations to law enforcement agencies so more offenders could be caught and prosecuted, which might prove effective, but which is inevitably expensive and therefore requires raising taxes or the deficit or reallocating resources currently dedicated to fighting some other type of crime; (2) create a new crime covering the activity causing concern, but given the breadth of existing federal criminal law, there are few crimes not already covered by the federal code;[126] (3) raise the statutory maximum penalty for existing statutory crimes covering the activity, but neither before nor after the guidelines did an increased statutory maximum have any necessary effect on actual sentences (and in any case one can only raise statutory maximums so many times); (4) legislate a statutory minimum sentence for the activity, but Congress has been reluctant to impose minima except in drug and gun cases (and, once again, one can only impose mandatory sentences so many times). However, once the Sentencing Commission gave birth to a 258-box sentencing table with detailed instructions for placing defendants in the boxes, the options available to Members of Congress seeking a legislative response to a specific type of crime mushroomed.

To see why this is so, imagine a very simple sentencing table:

	Crim. Hist. Category I	Crim. Hist. Category II
Offense Level 1	0–2 years	1—3 years
Offense Level 2	2–7 years	3–10 years
Offense Level 3	7–15 years	10–20 years
Offense Level 4	15–30 years	20–30 years
Offense Level 5	30 years to LIFE	LIFE

Assume that guidelines were written for this table setting an offense level of 2 for frauds causing a loss of $25,000–$250,000, and an offense level of

126. See, e.g., Bowman, Pour Encourager les Autres, supra note 77, at 403–04 (describing Congress's struggles to find aspects of white collar crime not already covered by existing law during debate over Sarbanes-Oxley Act).

3 for frauds of $250,001–$1 million. Imagine that the year after the guidelines were enacted Congress became convinced that crimes against banks should be punished more severely and passed a statute mandating a one-offense-level increase for such crimes. Then imagine that during the next year, following a spate of high-profile telemarketing cases, Congress passed a one-level increase for frauds affecting more than two victims. By year three, a defendant who committed a $25,000 check kite involving three victim banks—and who under the original guidelines would serve two to seven years—would be subject to a fifteen to thirty year sentence. A $260,000 three-bank kite would draw a sentence of thirty years to life. Not only would these sentences seem unduly harsh, thus reducing the likelihood that Congress would intervene in the guidelines process to enact them in the first place, but should it elect to do so, it would effectively bar itself from inserting any further upward adjustments in the future. However, if the guidelines sentencing table has forty-three offense levels rather than five, both the Congress and the Commission can add a wide variety of narrowly targeted upward adjustments to a guideline before the cumulative enhancements start to generate sentences that seem facially absurd. So long as the sentencing table and the guidelines remain complex, Congress will have an easy vehicle for detailed intervention in sentencing policy.

c. *Substance of Congressional Intervention: Increased Severity.* — Of course, one might argue that Congress *should* be primarily responsible for making the law of criminal punishment. After all, a central constitutional criticism of the Sentencing Commission was that it represented an improper delegation of congressional authority.[127] But the SRA created a Sentencing Commission and delegated to it the power to draft sentencing rules precisely because Congress believed a Commission would have two attributes Congress lacked itself: expertise and political neutrality.

So long as sentencing was conducted in something akin to the old preguidelines way, with Congress setting broad sentencing ranges and leaving the imposition of sentence in individual cases to judges and parole officials, Congress was acting within its competence. When a legislature defines conduct as a crime and sets general parameters for punishment of that crime, it does what it does best—it expresses the collective moral judgment of the community by selecting the categories of conduct that deserve the label of crime and, in setting penalty ranges, makes rough cut determinations about desert, crime control, and the allocation of public resources. However, in the SRA, Congress designedly set the original Sentencing Commission on the path to guidelines which narrowly constrain judicial discretion in a web of complex fact-dependent rules. Congress lacks the time, criminological expertise, and knowledge of the history, structure, and context of guidelines language to make

127. See Mistretta v. United States, 488 U.S. 361, 371 (1989) (rejecting delegation argument).

guideline-specific decisions at this level of detail.[128] Of course, the same might be said for congressional action in many areas of law and policy—in an increasingly complex society governed by increasingly complex and technical laws, non-specialist legislators will often have occasion to amend complicated, even arcane, rules created by specialist agencies.

What makes the case of sentencing law unusual is the conjunction of guidelines complexity and the degree to which the political forces acting on Congress are so uniformly aligned in one direction—that of increasing penalties. The public is justifiably concerned about crime. Vigorous law enforcement, including the punishment of criminals, is indisputably an important component of crime prevention. Moreover, being (or at least being seen to be) "tough on crime" has obvious electoral advantages. And unlike most other issues in public life, there is no significant lobby for the group most directly affected by sentencing legislation—convicted criminals.

d. *Explanation for Congressional Action: Politics, Complexity, and Absence of Budgetary Discipline.* — Neither the short-term political incentives favoring sentencing increases nor the complexity of the federal sentencing guidelines can entirely explain the behavior of Congress. Political incentives favoring sentence increases operate in state legislatures as well, and many states have guidelines systems, albeit less complex ones, which their legislatures can amend. Yet the current trend in the states is toward moderation of penalties.[129] Why the difference?

The most obvious difference between the federal and state situations is budgetary.[130] State legislatures operate under two constraints that Congress lacks. First, states are customarily obliged to balance their budgets, usually by command of state law.[131] Second, the proportion of state budgets devoted to law enforcement and corrections expenditures is far higher than is true of the federal budget.[132] In consequence, state

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128. For examples of congressional incapacity to draft detailed sentencing provisions, see Bowman, Pour Encourager les Autres, supra note 77, at 405–11 (discussing defects of sentencing provisions of Sarbanes-Oxley Act).

129. See Jon Wool & Don Stemen, Changing Fortunes or Changing Attitudes?: Sentencing and Corrections Reform in 2003, Issues in Brief (Vera Inst. of Justice), Mar. 2004, at 1, 10–14, available at http://www.vera.org/publication_pdf/226_431.pdf (on file with the *Columbia Law Review*) (discussing moderation of sentencing regimes in various states due to influence of proportionality principle and renewed focus on rehabilitation).

130. See Robin Campbell, Legislators' Views on Prisons, Punishment, and the Budget Crisis, Dollars and Sentences (Vera Inst. of Justice), July 2003, at 3, 3–9, available at http://www.vera.org/publication_pdf/204_398.pdf (on file with the *Columbia Law Review*) (discussing influence of budgetary concerns on state law enforcement policies and spending); Wilhem & Turner, supra note 13, at 1–3 (same).

131. See Ronald K. Snell, State Balanced Budget Requirements: Provisions and Practice, National Conference of State Legislatures, at http://www.ncsl.org/programs/fiscal/balbuda.htm (last visited Mar. 2, 2005) (on file with the *Columbia Law Review*) (outlining nature of balanced budget requirements in all fifty states and Puerto Rico).

132. For example, in fiscal year 2003, the total federal law enforcement budget was approximately $36 billion, BJS, Sourcebook, supra note 68 at 14 tbl.1.10, out of a federal

legislators can only pursue a course of ever higher sentences and ever more prisoners for so long before the pure economic cost of such a program begins to force unpleasant choices between building more prisons and either cutting budgets for public goods, such as education, health care, and road construction, or raising taxes. Because the federal government need not balance its budget and because federal correctional spending is such a tiny fraction of the budget, Congress does not perceive itself to be faced with the same stark choice between prisons and schools that has begun to haunt its colleagues in America's statehouses.

The lack of economic constraint on federal sentencing policy has led to a failure by Congress to perform its role of balancing national priorities. Legislatures are supposed to make resource allocation choices. Cost plays an important role. There is a tendency to discount legislative considerations of cost as small minded, crass, or cynical. Though it may be so in particular cases, one of the hallmarks of democratic legislative deliberation is allocating inevitably limited available public resources among competing social needs. Budgetary discipline not only encourages parsimonious choices, but forces legislators to study issues more carefully.[133] Many of the problems in federal sentencing stem from the fact that Congress has never worried about the costs of the criminal laws it passes and therefore tends to see criminal legislation purely in terms of political effects. Increasing penalties is almost always perceived as conferring political benefit. Thus, there is no governor on the gradual upward ratchet of harsher penalties made attractive by politics and made possible by the guidelines' complex structure.

C. *The Role of the U.S. Sentencing Commission in Federal Sentencing Policy*

Unsurprisingly, the Sentencing Commission is responsible for many of the guidelines' strengths and weaknesses. Faced with the task of rationalizing the sentencing of the hundreds of crimes in the sprawling federal criminal code, the Commission produced a set of guidelines that are in many respects a marvel of the legislative art. The guidelines address, in one way or another, virtually all of the factors that lawyers and sentencing judges have thought relevant to imposing sentences.[134] Accordingly,

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budget of over $2.2 trillion, Office of Mgmt. & Budget, Budget of the United States Government, Fiscal Year 2005 tbl.24-12, available at http://www.whitehouse.gov/omb/budget/fy2005/pdf/ap_cd_rom/24_12.pdf (on file with the *Columbia Law Review*), or only about 1.7% of the total federal budget. By contrast, the state of Michigan spends "one out of every six dollars from the general fund" on corrections. Marc Mauer, State Sentencing Reforms: Is the "Get Tough" Era Coming to a Close?, 15 Fed. Sent'g Rep. 50, 51 (2002).

133. For a first-rate discussion of how budgetary constraints can improve the quality of state decisionmaking on sentencing and corrections, see Rachel E. Barkow, Federalism and the Politics of Sentencing, 105 Colum. L. Rev. 1276, 1291–99 (2005).

134. See, e.g., Frank O. Bowman, III, Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines, 51 Vand. L. Rev. 461, 497–502 (1998) (describing degree to which guidelines account for factors important to sentencing economic crime offenders).

they have brought sentencing decisionmaking into the light in an unprecedented way. Not only do judges now impose sentences that correlate directly to identified sentencing factors, but the Commission's ongoing work in gathering and disseminating sentencing data has made informed discussion about those factors possible. Moreover, many of the Commission's judgments about sentence severity have been, if not indisputably correct, at least defensible.[135] In any case, many federal sentences that are routinely criticized as being too long are largely the product of statutory commands or political constraints that have limited the Commission's ability to act on its own best judgment.

On the other hand, many of the commonly criticized features of the guidelines are attributable, wholly or in part, to the Commission's own choices. For example, while the SRA's "25% rule" made a fairly complex sentencing table unavoidable, the Commission's choices produced a table with more than double the number of sentencing ranges mathematically required by the Act.[136] Having created the complex table, the Commission, too, has been seduced by it, falling prey to the temptation facing all rulemakers of drawing ever more subtle distinctions. Consequently, the guidelines rules for applying the sentencing table have literally doubled in length since 1987.[137] Likewise, in drafting the guidelines, the Commission might have focused somewhat less exclusively on the seriousness of the offense and permitted more sentence mitigation based on the personal circumstances of the defendant. As matters stand, the guidelines identify a host of offense-related aggravating factors (use of a weapon, injury to a victim, size of the loss, role in the offense) that almost always increase the offense level, but they restrict judicial consideration of the most common mitigating factors (age, family and community ties, drug addiction, good works in the community, and the like) to determination of what sentence should be imposed within the applicable guideline range, or, on rare occasions, whether a grant of departure is appropriate.[138]

Still, these would be relatively venial sins if the Commission had been able to perform its most vital function, that of translating the information it gathers about the functioning of the guidelines system into significant ongoing reforms and adjustments of the original structure. The Commission does collect information, of course, and tweaks the guidelines constantly, but particularly during the past few years, it has become less and

135. See Paul G. Cassell, Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums), 56 Stan. L. Rev. 1017, 1020–43 (2004) (arguing that "assessed against the standard of just desserts, the Guidelines have not proven to be too harsh").

136. See supra notes 83–84 and accompanying text.

137. The 1987 Sentencing Guideline Manual was 259 pages in length. U.S. Sentencing Guidelines Manual (1987). The 2003 Sentencing Guidelines Manual is 491 pages in length. U.S. Sentencing Guidelines Manual (2003).

138. See U.S. Sentencing Guidelines Manual § 5H (2004) (listing numerous factors "not ordinarily relevant" to awarding departure).

less an initiator of policy change and more and more a responder to executive branch initiatives and congressional directives.[139] One should not overstate the case here. At least to the extent that the guidelines themselves retain meaningful legal force after *Booker*, the Commission remains the primary source of independent rulemaking authority for many federal sentencing questions. But to an ever-increasing degree, Congress (often at the behest of the Justice Department) has intervened either to block initiatives the Commission would like to undertake[140] or to order the Commission to do things it certainly would not do if left to its own counsels.[141]

The undeniable fact is that the Commission is, to a very large extent, impotent to make major changes in the federal sentencing system. Meaningful simplification of the current guidelines would require repeal of the "25% rule" of the SRA. Meaningful change in drug sentencing policy would require repeal, or at least significant modification, of the mandatory minimum sentences and crack cocaine provisions in the Anti-Drug Abuse Acts of 1986 and 1987. Even changes to guidelines not directly mandated by statute require a modicum of congressional deference to the Commission in the form of mute congressional acquiescence in guideline amendments. But even this degree of institutional deference is increasingly wanting in the case of any proposed amendment that would either lower sentences directly or grant judges additional discretion to do so in individual cases.

The peculiar position of the Sentencing Commission in the federal government makes it powerless to resist a combination of the legislative and executive branches. Though the Commission is formally within the judicial branch and has judges among its members, it lacks the signature power of the judiciary in interbranch competition—the power to rule an executive act unlawful or a congressional enactment unconstitutional. In the Commission setting, the judge-commissioners have the personal independence that comes with a lifetime appointment to the bench, but in all other respects they are indistinguishable from any other political appointee to a federal agency, board, or commission. The nonjudge sentencing commissioners lack even the protection of life tenure.

It has been argued that the Sentencing Commission could be more politically effective than it has historically been. Various observers have suggested that the Commissioners and their staff should be more active

139. See supra notes 119–125 and accompanying text (detailing rising tide of congressional directives to Sentencing Commission).

140. An example of this phenomenon is the repeated unsuccessful efforts by the Commission to amend the controversial guideline governing crack cocaine. See supra note 75.

141. An example of this phenomenon is the sentencing guidelines amendments following the Sarbanes-Oxley Act of 2002. See Bowman, Pour Encourager les Autres, supra note 77, at 411–20 (discussing how Congress required U.S. Sentencing Commission to promulgate guidelines responsive to Sarbanes-Oxley Act).

in the legislative and public arenas, more willing to stake out independent positions and debate them, more willing to lobby, educate, and engage fully in the inevitably political process of making sentencing policy.[142] There may be some truth to this observation, but the very presence of the Commission in the judicial branch makes this prescription doubtful of success. The prescription that the Commission must become an overtly political body in order to succeed requires that a judicial branch agency and that agency's most prominent members—its judges—step fully, robustly, and publicly into the political arena, prepared to use the tools of politics to achieve specific legislative objectives.

In the end, the dilemma for the U.S. Sentencing Commission is this: The current Commission is bound by its enabling legislation and the choices of its founding membership to a series of undesirable structures and rules. These structures and rules produce undesirable sentencing outcomes in some classes of cases. They also have given Congress unprecedented opportunities to micromanage sentencing policy and the Justice Department unprecedented opportunities to control both individual sentencing outcomes and sentencing policy. The Commission cannot change the original flawed structures or significantly improve the existing sentencing rules unless the two political branches of government agree to abstain indefinitely from acting in what those branches perceive to be their own political interest. Not only is such a prolonged abstention highly improbable, but the Commission cannot even hope to counteract the combination of the two political branches unless the Commission and its judge members stop acting like judges and start acting politically—something neither the judges nor the Commission as an entity are either inclined or well suited to do.

IV. THE FEDERAL GUIDELINES, THE STATES, AND THE POST-*BOOKER* WORLD

What does this analysis of the federal guidelines teach us, particularly in the wake of *Blakely* and *Booker*? There are some happy lessons for the states, and some not-so-happy implications for federal sentencing. For the states, the basic lessons are that simplicity and budgetary discipline are the secrets to sentencing happiness. They can rest assured that the relative simplicity of their criminal codes and of the structured sentencing systems they have built or may consider building will inoculate them to some degree from the worst defects of the federal sentencing system. They can reflect that the pain of tight budgets carries the benefit of encouraging sensible legislative behavior, while vowing to remember the lessons now being learned when money becomes less scarce. The federal

142. See, e.g., Frank O. Bowman, III, Practical Magic: A Few Down-to-Earth Suggestions for the New Sentencing Commission, 12 Fed. Sent'g Rep. 101, 103–04 (1999) (arguing that "next phase of Guidelines development . . . demands a more open, transparent, participatory, 'political' process").

picture is grimmer. If the foregoing analysis is correct, the federal system in anything like its present configuration is doomed to dysfunction. One might argue that *Booker* has changed all that. But for two reasons, I doubt it.

What *Booker* has done depends on what *Booker* means. If Justice Breyer is prescribing "advisory" guidelines in the pure sense of helpful, but legally nonbinding advice to sentencing judges, this ruling would certainly transform the nature of federal sentencing and vitiate much of the critique offered here.[143] On the other hand, purely advisory guidelines would be no more institutionally balanced than the existing system of complex mandatory guidelines. Purely advisory guidelines would not reinstitute the situation that existed preguidelines, which was itself flawed because it gave a sentencing monopoly to the combination of judges and parole boards. Instead, since federal parole is gone, there would now be no back-end constraint on front-end judicial sentencing discretion. Judicial sentencing discretion would be absolute.

However, I think the key portion of the *Booker* opinion is not the part that talks about making the guidelines advisory, but the part that creates appellate review on a reasonableness standard.[144] If the guidelines calculation and adherence to a guideline sentence become primary considerations in reasonableness review, then Justice Breyer has succeeded in reinstituting the guidelines much as they were. The only theoretical difference is that the guidelines will now best be characterized as presumptive rather than mandatory. The only functional difference would be that we would still have guidelines with the force of law, but judges would have an expanded departure power.

If the foregoing analysis of the basic structural flaws in the federal system is correct, even a situation in which the guidelines become presumptive rather than absolutely mandatory will not fix those flaws. Presumptive guidelines would be better insofar as they permit added judicial flexibility in individual cases, but the structural features of the guidelines system that promote upward ratcheting of national rules would be unaffected, with the result that increasing local evasion of those rules would continue. Advisory guidelines with something like presumptive force would only make long-term sense if the increased flexibility afforded judges under such a system were coupled with a dramatically enhanced willingness on the part of Congress and the Justice Department to treat the behavior of judges and other frontline sentencing actors as valuable feedback, rather than intolerable rebellion. For all the reasons set out above, such a response seems unlikely. Real federal sentencing reform may thus only be possible if the guidelines in anything like their current form are scrapped.

143. See United States v. Booker, 125 S. Ct. 738, 757 (Breyer, J., opinion of the court).
144. See id. at 765–66 (Breyer, J., opinion of the Court).