

# Supporting Advisory Guidelines

---

*Judge Nancy Gertner\**

## INTRODUCTION

At first glance, advisory sentencing guidelines may seem wholly unrelated to the problem with which this Issue is concerned—the unprecedented and failed experiment in mass incarceration. But the link is stronger than one might expect. While there have always been some mandatory minimum federal sentencing statutes, by the 1980s, the number of such sentencing statutes and their severity exploded, fueled largely by popular pressure to “get tough on crime” and a chorus of criticism about judges. The Federal Sentencing Guidelines—promulgated to create a more rational punishment system in the face of political pressure to increase sentences arbitrarily—exacerbated the problem. Because Guideline sentences were built on top of the mandatory minimum sentences, and because they implemented only two of the purposes of sentencing, retribution and incapacitation, they only drove sentence lengths ever higher. The aim of minimizing judicial disparity in sentencing ensured that whatever their label, the “guidelines” would be mandatory.

When the United States Supreme Court held mandatory guidelines unconstitutional in *United States v. Booker*<sup>1</sup>, it arguably paved the way for a different kind of sentencing regime, one that would put the brakes on mass incarceration and allow for more rational sentences. These improvements would occur not merely because advisory guidelines allow for more discretion; more judicial discretion does not necessarily mean that a sentencing system will be more rational, nor more just. What makes a better sentencing system possible is precisely the mix of discretion and structure that the intersection of *Booker* on the one hand and a two-decade-long system of guideline sentencing on the other, has produced.

The post-*Booker* system is a hybrid, integrating the framework of the existing and still powerful Federal Sentencing Guidelines with the judicial discretion to hand down individualized and proportional sentences. Federal sentencing now reflects more than the exclusive concern for the rote avoidance of disparity in sentencing, and instead includes meaningful consideration of other sentencing purposes, like rehabilitation and minimization of recidivism. The result is not only a system that is more just, but one that is more likely to promote public safety.

With mandatory guidelines, too often all that mattered was whether federal judges were imposing similar—and harsh—sentences in similar cases, even if those sentences failed to promote fairness, minimize recidivism, or

---

\* Judge, U.S. District Court, District of Massachusetts.

<sup>1</sup> 543 U.S. 220 (2005).

promote rehabilitation. Too often a judge would add up a column of Guideline figures and acknowledge that the result was far too onerous, but claim he or she had no choice but to impose the Guideline sentence. Conversely, advisory guidelines give judges a choice—the choice to reject Guidelines that are not based on any data and are not reasonably related to any sentencing purposes. They also allow judges to consider alternative sentencing frameworks based on standards apart from the Guidelines, such as those derived from empirical studies about drug addiction or recidivism, and evidence-based programs aimed at reducing both. Thus, rather than grudgingly accept the current advisory regime as the mere leftovers of *Booker*, federal judges should welcome it as an opportunity to improve criminal justice policy.

To be sure, there are potential pitfalls. Critics will no doubt claim that the new system represents a return to the bad old days of unfettered judicial discretion. They will rightfully decry any racial bias in sentencing or the return of substantial intra-judge disparities. But the concerns are vastly overstated. There is every reason to believe that judicial discretion in the post-*Booker* era will be considerably different from the discretion exercised before the promulgation of the Guidelines. Among other factors, after twenty years of strict enforcement, the Federal Sentencing Guidelines have a gravitational pull on sentencing and are likely to shape the way judges view sentencing, even if they are now only advisory. Indeed, the greatest danger is not that judges *will* exercise their new discretion, but that they *will not*.

More importantly, it is time to recognize that judicial discretion in sentencing is not a spigot to be turned on or off. The alternatives are not binary—total discretion or none at all. In the related contexts of police or prosecutorial discretion, scholars debate how to increase consistency and transparency rather than how to eliminate discretion entirely. In response to racial profiling in arrests, for example, we seek to identify the cause of the bias and to better train officers to minimize or eliminate it. Likewise, our goal here should be to help federal judges make *better* discretionary decisions—decisions that are more reasoned, more transparent, more persuasive, more effective, more just.

The purpose of this Essay is to identify the tools needed to harness judicial discretion in the service of rational sentencing policies that ought to replace the mindless sentences of the past two decades. First, I briefly review the history of federal sentencing in order to demonstrate just how far “Guideline-thinking” has transformed the federal bench and how different post-*Booker* discretion will look. I then suggest a new role for the United States Sentencing Commission. I call on the Commission to function as more than sentencing police, monitoring the judiciary’s compliance with the Guidelines. The Commission should become a repository of studies on recidivism, alternatives to incarceration, and evidence-based practices. It should gather information on the developing common law of sentencing, analyzing the reasons for and results of judges’ departures from the Guidelines. Finally, I suggest ways for judges to deliver reasoned sentencing opin-

ions to serve as precedents for their peers. In order for a coherent body of sentencing law to emerge, new types of judicial training and new means of sharing sentencing information will be necessary.

Of course, if the Commission and judges are to move in this new direction, Congress must provide institutional support. Critically, it must first repeal all mandatory minimum sentences. In addition, Congress must give the Commission and courts the time and resources to allow this mixed system—part guideline-based, part discretionary—to evolve. Some disparity in the treatment of offenders is inevitable under this more robust advisory system. Disparity persisted even in the mandatory guidelines era in the charging practices of prosecutors and the regional differences in criminal justice enforcement. Disparity necessarily inheres in any system that seeks to provide proportional punishments tailored not just to the crime, but also to the criminal. But it is only tolerable if grounded in real differences between offenders measured by considerations that reflect all the purposes of sentencing—offenders' culpability, the likelihood they will recidivate, or their amenability to rehabilitation.

## I. THE WINDING HISTORY OF FEDERAL SENTENCING

### A. *The Era of Indeterminate Sentencing*

Until the 1980s, federal criminal sentencing operated under an indeterminate sentencing regime.<sup>2</sup> The judge's role was essentially therapeutic, much like a physician's. Judges supposedly served as experts who knew how best to individualize sentences to reflect the goals of punishment, including rehabilitation and deterrence. The standards of proof and evidentiary rules used at sentencing were different from those used in trials, reflecting the different roles of judges and juries.<sup>3</sup> Trials safeguarded rights with strict evidentiary rules and the demanding standard of proof of beyond a reasonable doubt. In contrast, sentencing hearings were conducted without regard to the rules of evidence and with the lowest standard of proof in the criminal justice system, a fair preponderance of the evidence. Under this system, it made no more sense to limit the kind of information available to help a judge exercise his or her clinical role in sentencing than to limit the information available to a doctor determining a medical diagnosis. Consistent with the view of judges as the sentencing experts, Congress prescribed a broad range of punishments for each offense, intervening only occasionally to increase the maximum penalty for specific crimes in response to public de-

---

<sup>2</sup> This paragraph borrows heavily from Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 570, 571 (2005) (describing the evolution of federal sentencing and the role of the institutional players: judges, Congress, and the jury).

<sup>3</sup> See Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 431 (1999) (describing the impact of mandatory guidelines on the jury).

mand.<sup>4</sup> Thus, procedural and substantive criminal law granted judges discretion to impose whatever sentences they saw fit.

Such broad discretion caused some unwarranted sentencing disparities among similarly situated offenders and offenses. The problem partly stemmed from the fact that judges received very little training about how to exercise their considerable discretion. Law schools typically did not offer courses on the subject, but rather taught criminal procedure as if there was nothing to study after the jury's verdict or the guilty plea. Other efforts aimed at guiding judicial discretion, such as sentencing councils that mimicked the clinical rounds of physicians, also proved to be ineffective at reducing disparities in sentences.<sup>5</sup> Furthermore, unlike in other common law countries, there was no appellate review of sentences in American courts.<sup>6</sup> Because the trial judge's discretion over sentences was so open-ended, appellate courts could not meaningfully review their sentencing decisions.<sup>7</sup> This lack of appellate review and lack of sentencing standards were mutually reinforcing. Judges had little incentive to generate standards for sentencing which might be applied in future cases, so few bothered to write sentencing opinions at all. Sentencing advocacy was largely nonexistent because defendants and defense attorneys had no basis on which to formulate requests. With no standards, much less written decisions, there was no meaningful way to compare sentencing data and uncover patterns, especially on the national level.<sup>8</sup>

---

<sup>4</sup> See MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 9 (1972).

<sup>5</sup> Shari Seidman Diamond & Hans Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. CHI. L. REV. 109, 147 (1975); see also FRANKEL, *supra* note 4, at 63–67.

<sup>6</sup> England, Canada, Australia, and Israel, for example, combine judicial discretion in sentencing with appellate review.

<sup>7</sup> See Kevin R. Reitz, *Sentencing Guideline Systems and Sentencing Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1445 (1997). Reitz describes the situation as follows:

The absence, or near absence, of appellate input into the law of criminal punishment was due in part to the embarrassment that there was no substantive law of sentencing to be applied at the trial level. Under indeterminate sentencing schemes, trial judges were given discretion to fix any penalty within the ceiling provided by the statutory maximum. In so doing, judges were instructed to consult any and all factors having to do with the crime itself or the offender—including the offender's whole life, character, and background. With such a free-form thought process in gear, there were effectively no legal principles against which a sentence could be tested on review.

*Id.* (footnotes omitted).

<sup>8</sup> It was for this reason that the new Sentencing Commission had to create a sentencing database out of whole cloth. They looked at gross sentencing outcomes, analyzed presentence reports written by probation officers, and determined the significance of certain factors. They did not review judicial opinions; there were none. KATE STITH & JOSÉ CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 61 (1998).

B. *From Mandatory Guidelines to Advisory Guidelines in Booker*

In response to widespread calls to reform the problematic and indeterminate system, Congress passed the Sentencing Reform Act of 1984, creating the United States Sentencing Commission.<sup>9</sup> Congressmen from both sides of the aisle hoped that the Commission would be more successful than Congress had been in appropriately punishing the “crime du jour,” by dispassionately reviewing sentences rather than responding impulsively. Conservatives wanted to ensure that sentences were sufficiently severe, while liberals wanted to minimize racial bias in sentencing. To these ends, the Commission was empowered to craft guidelines within the existing broad statutory sentencing ranges. Reformers hoped its work would be accepted by all of the sentencing players—the public, Congress, and judges—because the Commission had independence from the political process and an expertise the other players lacked.<sup>10</sup>

Clearly, the Commission was supposed to do more than just codify existing sentences. The sentencing guidelines were supposed to reflect the latest scientific studies as well as to implement all the purposes of punishment, including deterrence and rehabilitation.<sup>11</sup> In addition, the Commission was to rationalize punishments across offense categories, using the philosophy of limited retribution.<sup>12</sup> Since the reformers assumed that sentences would remain roughly equal to their pre-Guideline lengths—sadly, a false assumption—limited retribution was supposed to ensure proportionality of punishment.<sup>13</sup>

The question was whether the new expert Commission would *supplant* or *supplement* the judicial experts—that is, whether the Guidelines would become a mandatory or an advisory system. When the Commission first promulgated the Guidelines, both outcomes looked possible.<sup>14</sup> Some reformers were persuaded that the Commission’s expertise would be used to

<sup>9</sup> Sentencing Reform Act of 1984, 28 U.S.C. §§ 991–998 (2006).

<sup>10</sup> Nancy Gertner, *The United States Sentencing Commission*, in *PENAL POPULISM, SENTENCING COUNCILS AND SENTENCING POLICY* 103 (Arie Freiberg & Karen Gelb eds., 2008).

<sup>11</sup> See 28 U.S.C. § 991(b)(1)(C) (requiring the Commission to develop Guidelines that will “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.”).

<sup>12</sup> 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* 14 (2004) (“This approach places primary emphasis on punishment proportionate to the seriousness of the crime and, within the broad parameters of this retributivism, lengthier incarceration for offenders who are most likely to recidivate.”).

<sup>13</sup> See, e.g., Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 932 (1990) (discussing the role of proportionality in sentencing).

<sup>14</sup> Judge Nancy Gertner, Blackmun Lecture at the Ohio State University Moritz College of Law Barrister Club: *From Omnipotence to Impotence: American Judges and Sentencing* (Sept. 27, 2006), in 4 OHIO ST. J. CRIM. L. 523, 529 (2007) [hereinafter *From Omnipotence to Impotence*].

parallel that of judges.<sup>15</sup> After all, the Guidelines authorized judges to depart from their confines whenever they concluded there was a factor “of a kind, or to a degree, not adequately taken into consideration” by the Commission.<sup>16</sup> Others saw the Guidelines as a mandatory sentencing scheme from the outset, with the expertise of the Commission trumping that of judges. According to the Commission, the Guidelines were meant to determine sentencing outcomes in the vast majority of cases, and judges’ power to depart was intended to be exercised sparingly.<sup>17</sup>

As a result of various factors which continue to shape the debate over sentencing today, the Commission’s more onerous and mandatory vision of the system quickly took hold. By the 1988 presidential election, the politicization of criminal justice had become a national phenomenon.<sup>18</sup> Congress responded by passing mandatory minimum statutes at a greater pace than ever before, wholly inconsistent with the Sentencing Reform Act and its new expert Commission. While mandatory minimum sentences were widely criticized, particularly in cases involving crack cocaine,<sup>19</sup> the Commission has consistently used them as base levels in sentencing ranges for specific conduct.<sup>20</sup> Indeed, the Commission has rarely passed up an opportunity to increase the severity of punishments. In effect, the Guidelines have amplified the political din calling for increasingly severe punishments, rather than dampened it.

Federal judges at both the trial and appellate levels could have played a critical role in mitigating the harsh effects of this Guideline system, but they did not. They could have exercised their power to depart when the Commission added Guideline enhancements on top of onerous mandatory minimums. Or they could have critically evaluated the Guidelines instead of enforcing them mechanically. To be sure, more judicial discretion does not necessarily mean more lenient sentences; departures obviously could have gone in either direction. But given the extraordinarily punitive nature of the

<sup>15</sup> The Senate Judiciary Committee instructed judges to examine the characteristics of each specific offender thoughtfully and comprehensively. S. REP. NO. 98-225, at 52 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235 (“The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.”).

<sup>16</sup> However, the Sentencing Reform Act also admonished the Commission to avoid “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.” 28 U.S.C. § 991(b)(1)(B) (2006).

<sup>17</sup> U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 cmt. n.4(b) (2003).

<sup>18</sup> See Sara Sun Beale, *What’s Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 49–51 (1997).

<sup>19</sup> BARBARA S. VINCENT & PAUL J. HOFER, FED. JUDICIAL CTR., *THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS* 23 (1994).

<sup>20</sup> Although the Sentencing Reform Act was passed before the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 18-21 U.S.C.), the Guidelines were not promulgated until later. Thus, the Commission based the Guidelines for drug-related crimes on the new statute’s mandatory minimums. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.10 (2008).

Guidelines, where sentences of ten, fifteen, or twenty years for minor drug offenses were not uncommon, more judicial discretion would likely have put a downward pressure on sentences.

But the courts' reactions were anomalous, and may well predict where the new advisory regime will go. Judges who had overwhelmingly opposed the Guidelines, who had touted their own special expertise in sentencing, and who had even claimed that the Guidelines were a threat to judicial independence, suddenly became wholly "passive" in their sentencing decision-making.<sup>21</sup> They enforced the Guidelines with a rigor required by neither the Sentencing Reform Act nor the Guidelines.<sup>22</sup>

This response was due in part to a continuation of conditions that existed prior to the promulgation of the Guidelines, and which persist to this day. Judges *still* lacked training on how to sentence, backgrounds in criminal justice, and time. Many judges—especially those who arrived on the bench after the Guidelines were promulgated—had no perspective independent of the Guidelines and no context in which to evaluate Guidelines outcomes. Thus, they could not confidently exercise their discretion to depart from the Guidelines-imposed ranges and were unwilling to depart from the Guidelines without a coherent theory to justify their drift and to shield them from public ire.

In part, judges slavishly followed the Guidelines because of a civil code-oriented ideology of sentencing reform created by the Sentencing Reform Act and the Guidelines—an ideology that endures today.<sup>23</sup> Judges believed that experts promulgated the comprehensive Guidelines based on empirical data, and that any gaps in the Guidelines' coverage were best filled by the Commission. They believed that the Guidelines embodied what the public wanted, and further, that strict enforcement would promote crime control. Finally, because the Sentencing Commission had done all the thinking about sentencing, judges were relegated to the role of "expert clerks."<sup>24</sup>

In fact, these assumptions about the Guidelines were deeply flawed. The Guidelines' Introduction recognized that they were not comprehensive,

---

<sup>21</sup> Gertner, *From Omnipotence to Impotence*, *supra* note 14, at 530–31 (citing Douglas Berman, *A Common Law for the Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 *STAN. L. & POL'Y REV.* 93, 93–94 (1999)).

<sup>22</sup> See Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 *YALE L.J.* 1681, 1719 n.199 (1992).

<sup>23</sup> Gertner, *From Omnipotence to Impotence*, *supra* note 15, at 533.

<sup>24</sup> JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: INTRODUCTION TO THE LEGAL SYSTEM OF WESTERN EUROPE AND LATIN AMERICA* 36 (3d ed. 2007). Merryman and Pérez-Perdomo described the civil code system as follows:

[T]he judge becomes a kind of expert clerk. . . . [His] function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union. The whole process of judicial decision is made to fit into the formal syllogism of scholastic logic. The major premise is the statute, the facts of the case furnish the minor premise, and the conclusion inevitably follows.

*Id.*

but rather had gaps intended to be filled in by judges' power to depart.<sup>25</sup> Nor were the Guidelines drafted by sentencing experts, at least not the kind of experts envisioned by the Sentencing Reform Act. The Commission, rather than being independent of the politics of the times, reflected them.<sup>26</sup> It did not study the effectiveness or deterrent value of sentences. It merely calculated the average length of sentences in the United States and then increased them. Nor did the Guidelines reflect what the public wanted.<sup>27</sup> The Guidelines, in particular, had little or no impact on the crime rate.<sup>28</sup>

The Commission invented new criteria for sentencing without explanation, public hearings, or legislative history. Unlike rules promulgated by other administrative agencies, the Guidelines were not subject to judicial review.<sup>29</sup> Congress explicitly exempted the Commission from the procedures required by the Administrative Procedure Act, except for the notice

<sup>25</sup> U.S. SENTENCING GUIDELINES MANUAL ch.3, pt. D, intro. cmt.

<sup>26</sup> The Commission's membership tilted almost immediately in favor of prosecution interests. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 764–65 (2005). Indeed, as Michael Tonry describes, while “[m]ost proponents of guidelines have seen its one-step-removed-from-politics character as a great strength . . . [t]he U.S. commission, by contrast, made no effort to insulate its policies from law-and-order politics and short term emotions.” MICHAEL TONRY, SENTENCING MATTERS 63 (2006).

<sup>27</sup> While there was some agreement between the Guidelines and the way the public perceived crimes, that consensus did not extend to the length of sentence in an individual case. As the authors of the Commission's study note, “on the level of sentences given to individual vignettes, there was only a very modest amount of agreement between the sentences given by individual respondents and those prescribed by the guidelines.” PETER H. ROSS & RICHARD A. BERK, JUST PUNISHMENT: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED 208 (1997). In addition, there were “major departures” from “close agreement” with respect to certain crimes, like drug trafficking, that the Commission determined required lengthy sentences. See KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 108 (1997) (“The more exposure people have to nonsensationalistic accounts of real criminal incidents (from court documents rather than media accounts), the less punitive they become.”), cited in Rachel Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 751 n.113 (2005). These observations comport with my experience as well as the experience of other trial judges. See Judge James S. Gwin, Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?, 4 HARV. L. & POL'Y REV. (forthcoming 2010) (describing survey conducted by author revealing that jurors would generally recommend sentences considerably below those imposed by the author according to the Guidelines and mandatory minimum statutes).

<sup>28</sup> As I noted in *United States v. Jaber*, 362 F. Supp. 2d 365, 375 (D. Mass. 2005) (internal citations and formatting omitted):

Even assuming that incarceration contributes heavily to the drop in crime, federal sentencing comprises only a fraction of the sentences meted out in courts around the country every year. In 2001, 59,363 defendants were convicted of felonies in federal court. Furthermore, state sentencing policies vary widely from federal sentencing policy. Some states have guideline systems, some do not, and others use hybrid structures. Indeed, most studies attribute falling crime rates to factors other than incarceration rates, much less to the Federal Sentencing Guidelines. In fact, although drug offenders are incarcerated for longer and longer periods, the drug crime rate has increased.

<sup>29</sup> See 28 U.S.C. § 994(x) (2006); see also S. Rep. No. 98-225, at 181 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3364 (“It is . . . not intended that the guidelines be subject to appellate review . . . . There is ample provision for review of the guidelines by the Congress and the public; no additional review of the guidelines as a whole is either necessary or desirable.”).

and comment provisions. The result was a set of Guidelines that failed to live up to the Commission's mandate to consider all the purposes of sentencing and our ever-increasing understanding of human nature. The Commission elevated two sentencing goals—retribution and the minimization of disparity—above all other goals, such as deterrence or rehabilitation.<sup>30</sup>

The final blow to those who argued for advisory rather than mandatory Guidelines came in 2003 when Congress passed the PROTECT Act.<sup>31</sup> The Act sought to eliminate virtually all departures from the Guidelines by creating a mechanism for reporting judges who were not “compliant.” In so doing, the Act sowed the seeds of a new constitutional challenge to the Guidelines, based not on the non-delegation doctrine as in the past,<sup>32</sup> but rather on the Sixth Amendment. With mandatory Guidelines, the jury found only those facts necessary to delineate the outer limits of punishments within broad statutory sentencing ranges. At the sentencing stage, the judge made additional findings to determine exactly where the offender fit in the range. Given the breadth of these ranges, it was clear that judges—not juries—were trying the issues of real consequence, without the procedural standards and legitimacy of a jury trial. The judge, now nothing more than another fact-finder, rather than a sentencing expert, was usurping the jury's role.

In 2005, the United States Supreme Court held in *United States v. Booker* that the Guidelines were unconstitutional because of their treatment of the jury.<sup>33</sup> The Court found that the Guidelines violated the Sixth Amendment precisely because they compelled judges to find facts with determinate consequences, increasing a defendant's sentence beyond the range required by a jury's verdict or a guilty plea. This constitutional defect required severance of the provisions of the Sentencing Reform Act that made the Guidelines mandatory. Now that the Guidelines were “advisory”—judges were to “consider” Guideline ranges but were permitted to tailor sentences in light of other statutory concerns. In particular, in section 3553(a) of the Act, the sentencing judge was instructed to follow the Sentencing Reform Act's directive to weigh a number of factors, including “the nature and circumstances of the offense and the history and characteristics of the defendant.”<sup>34</sup> The sentencing court was also advised to consider the purposes of sentencing listed in the Act, which included not only retribution based on the seriousness of the offense, but also preventing recidivism, deterring future criminality, and rehabilitating the offender. Thus, *Booker* appeared to toll the death knell for passive, mechanical sentencing and to reintroduce judicial discretion into the equation.

---

<sup>30</sup> Gertner, From Omnipotence to Impotence, *supra* note 14, at 534–35.

<sup>31</sup> Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003).

<sup>32</sup> *Mistretta v. United States*, 488 U.S. 361 (427).

<sup>33</sup> 543 U.S. 220, 244 (2005).

<sup>34</sup> 18 U.S.C. § 3553(a).

C. *From Booker through Spears and Nelson*

Unfortunately, the habits ingrained during twenty years of mandatory Guideline sentencing and the flaws of the preceding hundred years endured. Before the Sentencing Reform Act (SRA), judges had no training in the exercise of sentencing discretion and no coherent sentencing theories or standards, and after the SRA, judges were trained only in the Guidelines. The void of sentencing practice was replaced by the 800-pound gorilla of the Guidelines. It should have come as no surprise, then, that even after *Booker* many judges continued to believe in the ideology of the Guidelines, however flawed. Many urged that, *Booker* or not, the Sentencing Guidelines should receive considerable deference.<sup>35</sup> Some were simply no longer used to exercising discretion, and worse, they did not believe that they knew how. As one judge explained:

We are likely to muck things up even more if we do our own thing . . . . Unlike Congress or the Commission, we judges lack the institutional capacity (and frankly, the personal competence) to set up and then enforce one new, well-chosen, theoretically coherent, national standard. As opposed to uniform albeit flawed Guidelines, it would make things far worse to have a bunch of different standards for . . . sentencing.<sup>36</sup>

Judges continued to use the numbers in the Guideline framework as a significant, even dispositive, point of reference, illustrating the phenomenon known to cognitive researchers as anchoring.<sup>37</sup> At the time, many were concerned that unless the Supreme Court was vigilant, Federal Sentencing Guidelines would be advisory in name only.<sup>38</sup>

The Supreme Court stepped into the breach. In four cases after *Booker* the Court made it quite clear that it meant what it said: “Advisory” meant *advisory*.

In *Gall v. United States*,<sup>39</sup> the Supreme Court sustained a sentence of probation, which was a substantial departure from the Guideline range recommended for the underlying crime. *Gall* involved a young man who had joined an ongoing ecstasy conspiracy while he was in college and addicted

---

<sup>35</sup> Compare *United States v. Jaber*, 362 F. Supp. 2d 365 (D. Mass. 2005) (rejecting the view that the Guidelines were presumptively reasonable after *Booker*) with *United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005) (concluding that the Guidelines are presumptively reasonable after *Booker*), and *United States v. Wilson*, 355 F. Supp. 2d 1269 (D. Utah 2005) (same).

<sup>36</sup> *United States v. Tabor*, 365 F. Supp. 2d 1052, 1060–61 (D. Neb. 2005) (capitalization modified). This attitude contrasts sharply with the attitudes of judges of other common law countries, like Australia, Canada or Israel, who have never been exposed to a mandatory Guidelines system. See Gertner, *From Omnipotence to Impotence*, *supra* note 14, at 538.

<sup>37</sup> Gertner, *From Omnipotence to Impotence*, *supra* note 14, at 535.

<sup>38</sup> Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 *YALE L.J. POCKET PART* 137, 137 (2006), available at <http://www.thepocketpart.org/2006/07/gertner.html>.

<sup>39</sup> 128 S. Ct. 586 (2007).

to drugs, but who later withdrew entirely on his own to lead a crime-free life. The Guideline range was thirty to thirty-seven months, but the judge sentenced Gall to probation and issued a careful opinion explaining why. The trial court's decision was reversed by the Eighth Circuit, which, in turn, was reversed by the Supreme Court.

The Court found the sentence to be reasonable and did not require a district court departing from the Guidelines to find its case somehow unusual or outside the heartland of what the Guidelines had contemplated.<sup>40</sup> This was particularly significant given the extent of the departure; many courts had been requiring "extraordinary justification" when the departure was a substantial one. Not having to explain why the sentence was unusual—and having to show only that it was justified by the facts of the case—was critical. Pre-*Booker*, sentencing choices were dictated by the facts of each case, and the facts that could be considered were limited to those the *Guidelines* made relevant—a constrained set of facts, to be sure. But post-*Booker*, the range of choices allowed by the facts of each case was significantly broadened. Thus, alternative frameworks for evaluating facts—addiction and recidivism studies, for example—had the potential to stand on an equal footing with the Guidelines. Indeed, in *Gall*, the judge was permitted to take into account characteristics that the Guidelines had explicitly rejected—offender characteristics like age or drug addiction—and could apply sentencing alternatives, like probation, which the Guidelines had largely disparaged.<sup>41</sup>

Moreover, the Court recognized an earlier vision of the sentencing judge's expertise. By underscoring a deferential abuse of discretion standard and deferring to the "experienced District judge," the Court gave credence to the notion of district court expertise supplementing that of the Commission. The district court, it recognized, has an "institutional advantage" because it has seen so many more cases than the appellate court.<sup>42</sup> The sentencing judge is "in a superior position to find facts and judge their import under § 3553(a) in the individual case."<sup>43</sup>

With *Kimbrough v. United States*<sup>44</sup> and *Spears v. United States*,<sup>45</sup> the Court made it even clearer that sentencing courts could directly reject the

---

<sup>40</sup> The judge considered the defendant's age at the time he was engaged in an ecstasy distribution conspiracy and the fact that his offenses stemmed from addictions to drug and alcohol, both factors which the Guidelines would have prohibited the judge from considering. The judge also considered the fact that he had withdrawn from the conspiracy after seven months, long before he became aware of the government's investigation, and his law-abiding post-offense conduct, factors which formerly had to be extraordinary to warrant a departure.

<sup>41</sup> Prior to the Guidelines, nearly fifty percent of federal defendants were sentenced to probation; afterwards, it was only fifteen percent. The Guideline drafters had intentionally reduced the number of defendants who might qualify. In *Gall*, the Court agreed that probation was a "substantial restriction of freedom" and not a meaningless gesture of leniency. *Gall*, 128 S. Ct. at 595.

<sup>42</sup> *Id.* at 598 (quoting *Koon v. United States*, 518 U.S. 81, 98 (1996)).

<sup>43</sup> *Id.* at 597 (quoting the Amicus Curiae Brief for Federal Public and Community Defenders).

<sup>44</sup> 128 S. Ct. 558 (2007).

advisory guidelines, this time with regard to offense characteristics, not only as applied in a given case but across the board. Indeed, read together, *Kimbrough*, *Gall*, and *Spears* suggest a fuller administrative procedure-like review of the Guidelines, finally testing them to see what statutory purpose they embody and whether there is a sufficient administrative record to support application of the Guidelines. While *Kimbrough* and *Spears* both involved offenders convicted of crack cocaine offenses, the rationale of the decisions is broader, applying to other Guideline provisions in which the Commission did not “exercise its characteristic institutional role”<sup>46</sup>—namely provisions without empirical support or without a clear connection to the statutory sentencing purposes.

*Kimbrough* involved the imposition of a non-Guidelines sentence at least in part because of the judge’s disagreement with the guideline addressing a particular offense, crack cocaine distribution. Kimbrough pled guilty to distributing more than fifty grams of crack and faced a term of fifteen years to life, with an even Guideline range of nineteen to twenty-two-and-a-half years. The range was high because of the interaction between the statutory mandatory minimums, which treated an individual gram of crack cocaine as equivalent to 100 grams of powder, and the Guidelines, which exacerbated this differential. The judge, rejecting the Guidelines increase, sentenced Kimbrough to the mandatory minimum. He based his decision in part on the facts of Kimbrough’s situation—taking an as-applied approach—and in part on the unfairness of the disparity between crack and powder cocaine that had been documented in national sentencing data and empirical research—establishing a more categorical challenge as well.<sup>47</sup> The Fourth Circuit reversed on the ground that a district court judge could not sentence based on a categorical disagreement with the Guidelines as opposed to facts specific to a defendant. The Supreme Court reversed again, expressly legitimizing the district court’s consideration of the Guidelines’ fairness: “[I]t would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence ‘greater than necessary’ to achieve § 3553(a)’s purpose, *even in a mine-run case*,” where there are no special facts that traditionally would have warranted a departure.<sup>48</sup>

In *Spears*, the Court made its point even clearer: “We now clarify that district courts are entitled to reject and vary categorically from the crack cocaine guidelines based on a policy disagreement with those Guidelines.”<sup>49</sup> *Spears* was found guilty of conspiracy to distribute at least 50 grams of cocaine base and at least 500 grams of powder cocaine. At sentencing, the district court determined that the drug quantities attributable to him yielded an offense level of 38, a criminal history of IV, and a sentencing range of

---

<sup>45</sup> 129 S. Ct. 840 (2009).

<sup>46</sup> *Kimbrough*, 128 S.Ct. at 575.

<sup>47</sup> *Id.* at 570, 573–74.

<sup>48</sup> *Id.* at 575.

<sup>49</sup> 129 S. Ct. at 843–44.

324 to 405 months imprisonment. The district court rejected the range because, in its view, the 100:1 ratio between powder cocaine and crack cocaine quantities yielded an excessive sentence in light of the sentencing factors outlined in 18 U.S.C. § 3553(a). The court then recalculated Spears's offense level based on a 20:1 crack-to-powder ratio, relying on decisions from other courts and the Commission's own reports.<sup>50</sup>

After *Gall*, *Kimbrough*, and *Spears*, the case law was allowed to proceed in two directions. For those judges willing to take *Booker*'s approach—that is, to treat the Guidelines as truly advisory and often flawed—appellate review became more and more forgiving. At the same time, for those judges who chose to stay within the lines, who accepted the ideology of the Guidelines in all cases without criticism, appellate review was not particularly searching. In *Nelson v. United States*,<sup>51</sup> the Court changed all of that. In a per curiam decision, the Court reversed a *within*-Guidelines sentence that had been upheld by the Fourth Circuit. Nelson was convicted of one count of conspiracy to distribute and to possess with intent to distribute more than 50 grams of cocaine base. The district court calculated the Guidelines range and imposed a sentence of 360 months—the bottom of that range. The Supreme Court concluded that the district court judge had remained within the range because he had treated the Guidelines as “presumptively reasonable” and had presumed he could not go outside them unless there was a “good reason” to do so. The Court explicitly denounced that reasoning, stating that its cases “do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable.”<sup>52</sup> If that is so, then the Guidelines are just another framework. As the Court explained, “[t]he Guidelines are not only *not mandatory* on sentencing courts; they are not to be *presumed* reasonable.”<sup>53</sup>

To be sure, the Court continued to talk about the significance of the Guidelines—which must be given “serious consideration,” and departures from which must still be supported “with sufficient justifications.”<sup>54</sup> But littered throughout the post-*Booker* decisions are comments directly challenging the ideology of the Guidelines. The Guidelines have been uncovered as only a “rough approximation” of 3553(a)'s objectives; they do not fully embody them.<sup>55</sup> There is no rigid mathematical formula, nor a strict proportionality test, that requires “extraordinary circumstances” to justify a sentence outside the Guidelines range. Indeed, the Court in *Nelson* seemed to question the false mathematical clarity that anchors the Guidelines, because this false clarity wrongly “assumes the existence of some ascertainable method of assigning percentages to various justifications.”<sup>56</sup> While the

---

<sup>50</sup> U.S. SENTENCING COMM'N, Report to Congress: Cocaine and Federal Sentencing Policy 106–07 & app. A., pp. 3–6 (May 2002).

<sup>51</sup> 129 S. Ct. 890 (2009).

<sup>52</sup> *Id.* at 892.

<sup>53</sup> *Id.* at 891 (emphasis in original).

<sup>54</sup> *Gall*, 128 S. Ct. at 594.

<sup>55</sup> *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007).

<sup>56</sup> *Gall*, 128 S. Ct. at 596.

Court acknowledged that some guidelines were based on empirical evidence, it conceded that some were not.<sup>57</sup> And the court decried the false uniformity that had governed Guidelines sentencing for nearly two decades. Harsh punishment that does not take into account individual facts and circumstances promotes disrespect for the law. District courts are obliged to consider not just the need to avoid “unwarranted disparities,” which had driven American sentencing for two decades, but also “the need to avoid unwarranted similarities among other co-conspirators not similarly situated.”<sup>58</sup>

## II. RETRAINING FOR DISCRETION: CRITIQUING THE GUIDELINES AND ALTERNATIVE FRAMEWORKS

*Booker* and its progeny now require scholars, judges, lawyers, and law students to participate in a new, multilayered discussion about federal sentencing. On the one hand, the decisions have prompted a long overdue judicial review of the Sentencing Commission’s decision-making. *Booker* stripped the Guidelines of the force of law, transforming the Commission into a more traditional administrative agency subject to review akin to that required by the Administrative Procedure Act.<sup>59</sup> On the other hand, to make the Guidelines truly advisory, there is a growing need for sentencing decision-makers to identify alternative sentencing frameworks independent of the Federal Sentencing Guidelines, its policies, and its ideology. While courts have begun to treat the Guidelines with skepticism—*Booker* and its progeny have begun to examine cases in which the Guidelines are *not* appropriate—more work needs to be done constructing an alternative framework. If judges are to look to substantive standards apart from the Guidelines, such as evidence-based studies about drug addiction or recidivism programs,<sup>60</sup> what should those standards be, and who should generate them? What role should the Sentencing Commission play in producing or at least identifying such studies or reports? With the legitimacy of some of the Guidelines questionable at best, these issues have never been more urgent.

---

<sup>57</sup> *Id.* at 594 n.2.

<sup>58</sup> *Id.* at 600.

<sup>59</sup> See Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217 (2005); cf. Administrative Procedure Act § 10, 5 U.S.C. § 701–06 (describing the scope of judicial review of administrative decisions). Congress only selectively imposed the Administrative Procedure Act on the United States Sentencing Commission. The APA’s judicial review provisions were not included. Compare 28 U.S.C. § 994(x) (2006) with 5 U.S.C. § 701–706 (2006).

<sup>60</sup> See, e.g., Justice Michael A. Wolff, Justice William J. Brennan Lecture at the N.Y.U. School of Law: Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform (Feb. 20, 2008), in 83 N.Y.U. L. REV. 1389 (2008).

A. *The Administrative Critique: When the Guidelines Don't Apply*

Several of the lower courts have begun to create a robust body of law that critically evaluates the Guidelines. There is nothing extraordinary about these decisions. They reflect traditional judicial evaluations of administrative rules—in this case, the Guidelines—the statutory purposes behind them, and the record explaining their promulgation.<sup>61</sup> As one commentator has noted:

Whether a judge may draw any useful advice from a guideline depends first on whether the Commission, in promulgating or amending it, acted in “the exercise of its characteristic institutional role.” As described in *Rita*, the exercise of this role has two basic components: (1) reliance on empirical evidence of pre-guidelines sentencing practice, and (2) review and revision in light of judicial decisions, sentencing data, and comments from participants and experts in the field.<sup>62</sup>

In some instances, the reports issued by the Commission staff itself provide the basis for challenging the Guidelines. For example, the Commission has published reports that strongly criticize the crack cocaine guidelines,<sup>63</sup> as *Kimbrough* and *Spears* noted, and the relationship between recidivism, career offender guidelines, and criminal history scores.<sup>64</sup> Indeed, after a recent conference, the Commission issued a report that cast doubt on the Guidelines' preference for imprisonment and called for increased use of alternative sanctions to deter crime and rehabilitate offenders more effec-

---

<sup>61</sup> See, e.g., *United States v. Vanvliet*, 542 F.3d 259, 271 (1st Cir. 2008) (holding that a district court can justify a sentence below the Guidelines' sentencing ranges by citing disagreement with Guidelines policy); *United States v. White*, 551 F.3d 381, 386 (6th Cir. 2008) (finding that a district court may choose a sentence outside of the Guidelines if the Guidelines range is too high or too low to accomplish the purposes of punishment); *United States v. Garrison*, 560 F. Supp. 2d 83, 87 (D. Mass. 2008) (finding that the Guidelines overemphasized the quantity of drugs possessed by the offender and underemphasized the offender's minor role in the drug distribution organization); *United States v. Grober*, 595 F. Supp. 2d 382, 412 (D.N.J. 2008) (holding that the Guidelines sentencing range was inapplicable in a case involving child pornography); *United States v. Ennis*, 468 F. Supp. 2d 228, 238 (D. Mass. 2006) (finding that the Guidelines' career offender provisions inadequately addressed the purposes of punishment).

<sup>62</sup> AMY BARON-EVANS, FED. PUB. & CMTY. DEFENDERS OFFICE, SENTENCING BY THE STATUTE 17 (2009), [http://www.fd.org/pdf\\_lib/Sentencing&20By%20the%20Statute.2.28.09.pdf](http://www.fd.org/pdf_lib/Sentencing&20By%20the%20Statute.2.28.09.pdf) (quoting *Kimbrough v. United States*, 128 S. Ct. 558, 575 (2007) (citations omitted)).

<sup>63</sup> See U.S. SENTENCING COMM'N, COCAINE AND FEDERAL SENTENCING POLICY (2007), available at [http://www.ussc.gov/r\\_congress/cocaine2007.pdf](http://www.ussc.gov/r_congress/cocaine2007.pdf).

<sup>64</sup> See U.S. SENTENCING COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATIONS OF THE FEDERAL SENTENCING GUIDELINES (2004), available at [http://www.ussc.gov/publicat/Recidivism\\_General.pdf](http://www.ussc.gov/publicat/Recidivism_General.pdf); see also U.S. SENTENCING COMM'N, RECIDIVISM AND THE “FIRST OFFENDER” (2004), available at [http://www.ussc.gov/publicat/recidivism\\_firstoffender.pdf](http://www.ussc.gov/publicat/recidivism_firstoffender.pdf); U.S. SENTENCING COMM'N, A COMPARISON OF THE FEDERAL SENTENCING GUIDELINES CRIMINAL HISTORY CATEGORY AND THE U.S. PAROLE COMMISSION SALIENT FACTOR SCORE (2005), available at <http://www.ussc.gov/publicat/RecidivismSalientFactorCom.pdf>.

tively and efficiently.<sup>65</sup> But once a court finds that the Guidelines framework is inadequate, what should follow? The Commission, the courts, and the criminal justice community should look to alternative sentencing frameworks.

### B. Alternative Frameworks

Judges currently have the greatest quantity and quality of information about sentencing practices that has ever been available, and finally an opportunity to act on that information. Alternative sentencing frameworks were rejected during the old indeterminate regime because of the widespread belief that rehabilitation-based methods *never* worked; but that is not the case today. Research shows that drug treatment, education, and job training may be more cost-effective and better at reducing crime than lengthy incarceration.<sup>66</sup> Credible studies and reports suggest that many offenders with little risk of recidivating are serving lengthy prison terms despite research showing the adverse impact of incarceration on children, families, communities, and the offenders' ability to lead law-abiding lives in the future.<sup>67</sup> Others have analyzed the suitability of intermediate sanctions for members of immigrant populations and the effectiveness of drug courts and mental health courts for all offenders.<sup>68</sup> In an extraordinary talk given as NYU's annual Brennan lecture, Judge Michael Wolff highlighted some of these developments:

The preference for incarceration became influential after rehabilitation fell from favor during the 1970s. Many believed that offenders could not be rehabilitated: "Nothing works," was the

---

<sup>65</sup> See U.S. SENTENCING COMM'N, ALTERNATIVE SENTENCING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 20 (2009), available at [http://www.ussc.gov/general/20090206\\_Alternatives.pdf](http://www.ussc.gov/general/20090206_Alternatives.pdf).

<sup>66</sup> See, e.g., Susan L. Ettner et al., *Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment "Pay for Itself"?*, 41 HEALTH SERVICES RES. 192, 205-06 (2006) (noting that, for every \$1 spent on drug treatment, \$7 is saved in general social savings, primarily in reduced offending and also in medical care); Stephen J. Morse, *Addiction, Genetics, and Criminal Responsibility*, 69 LAW & CONTEMP. PROBS. 165, 205 (2006) ("The criminal justice system response should be limited and reformed to enhance the potential efficacy of treatment approaches."); DON STEMEN, VERA INSTITUTE OF JUSTICE, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME (2007) (discussing diminishing returns of increased incarceration on crime rate and cost effectiveness of investment in education and employment).

<sup>67</sup> See, e.g., RYAN S. KING ET AL., THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 8 (2005), available at <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>; ROSS D. PARKE & K. ALISON CLARKE-STEWART, Effects of Parental Incarceration on Young Children (2001) (presented at the U.S. Dep't of Health & Human Services National Policy Conference, "From Prison to Home: The Effect of Incarceration and Reentry on Children, Families and Communities" (Jan. 30-31, 2002)); U.S. DEP'T OF JUSTICE, AN ANALYSIS OF NON-VIOLENT DRUG OFFENDERS WITH MINIMAL CRIMINAL HISTORIES (1994), available at [http://www.fd.org/pdf\\_lib/1994%20DoJ%20study%20part%201.pdf](http://www.fd.org/pdf_lib/1994%20DoJ%20study%20part%201.pdf).

<sup>68</sup> See Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 STAN. L. REV. 338, 353 (2005).

answer at that time. That answer was a “big idea” that appears to be influential to this day. But it was wrong. There is . . . a large body of rigorous research conducted over the last 20 years that shows that treatments are effective in reducing offender recidivism. And importantly, the public no longer believes, if it ever did, that nothing works.<sup>69</sup>

In addition to research and newfound confidence concerning evidence-based practices, courts now have the means to monitor themselves. Thanks to twenty years of mandatory sentencing Guidelines and the existence of a Sentencing Commission, a wealth of data about average sentences for particular offenses is now available. Judges can look to those statistics to better understand where a given offender fits in the larger national or regional picture and thus can make better sentencing decisions in each individual case.<sup>70</sup>

### C. *The New Critique*

Nevertheless, critics insist that the return of judicial discretion will bring a return to sentencing disparity among judges and across the country. Those fears are vastly overstated. For the following reasons, judicial discretion in the post-*Booker* era is—or should be—different from judicial discretion in any other era:

1. *Persistence of the Guidelines*: The existence of the Guidelines framework, however flawed, frames the sentencing debate and gives judges a common set of standards by which they can measure their sentencing choices.

2. *Sentencing Commission’s Data*: The Sentencing Commission maintains a database of sentencing statistics that has grown continuously since the introduction of the Guidelines. With this tool, the Commission can monitor trends and identify racial or geographical differences in sentencing, akin to a police department’s use of statistics to monitor racial profiling. If problematic patterns appear in the sentencing data, they can be dealt with in the courts. We do not call for mandatory guidelines for police because racial profiling *sometimes* occurs; we call for retraining or monitoring to identify the factors contributing to the phenomenon.<sup>71</sup>

3. *Evidence-Based Practices*: As Judge Wolff observed, there is a growing body of literature about “what works”—new evidence-based sen-

---

<sup>69</sup> Michael A. Wolff, *Brennan Lecture: Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389, 1402 (2008) (internal quotation marks omitted).

<sup>70</sup> See, e.g., *United States v. Garrison*, 560 F. Supp. 2d 83, 92–95 (D. Mass. 2008) (comparing the case of one defendant to similarly situated defendants in the District of Massachusetts); see also *United States v. Thompson*, 74 F. Supp. 2d 69 (D. Mass. 1999) (pre-*Booker* decision reviewing statistics to determine which other defendants were similarly situated to the defendant in the case at bar), *rev’d*, 234 F. 3d 74 (1st Cir. 2000).

<sup>71</sup> See David A. Harris, *The Stories, The Statistics and the Law: Why ‘Driving While Black’ Matters*, 84 MINN. L. REV. 265, 322–23 (1999).

tencing practices.<sup>72</sup> The challenge is how to make that body of work available to judges, defense attorneys, and probation officers who can encourage their adoption in individual cases.

4. *Appellate Review of Sentencing*: Unlike in the indeterminate era, there is now appellate review of sentencing, at least at the margins. This ensures judicial monitoring of outlier sentences implemented wholly without support.

Despite these safeguards, many are concerned about what the post-*Booker* era holds in store. These concerns can be addressed without major legislative or Guidelines change, but they will require new institutional support and training.

### III. Tools to Harness Discretion

#### A. *The Courts*

If judges are to effectively use their *Booker* discretion to improve federal sentencing practices, they must be trained. Currently, the Commission offers instruction exclusively on sentencing under the Guidelines, with *Booker* discretion almost an afterthought. In addition, the data that the Commission maintains and circulates only pertains to its monitoring of Guidelines compliance. The Commission still behaves as though it were the sentencing police, enforcing guidelines however flawed, rather than acting as real sentencing experts. For judges to learn how to sentence in an advisory regime, the Commission must reform these practices and look beyond the Guidelines. Judges should be taught how to tell when the Guidelines *do not* apply and what to do then. The Commission also should collect and distribute data about departures from the Guidelines, which would help direct judges' individual sentencing decisions. Access to such data would help judges to ensure that they depart only when appropriate.

The courts can also provide their own training by instituting practices that will foster a common law of sentencing. Currently, sentencing decisions—whether full opinions, transcripts of sentencing hearings, or standardized forms stating the reasons for a sentence—are rarely publicly available, searchable, or otherwise accessible to judges and advocates.<sup>73</sup> In fact, few judges write formal sentencing opinions at all. The sentencing form that transmits the court's explanation for the sentence to the Commission is confidential in all districts except Massachusetts. Under the mandatory Guidelines regime, the availability of sentencing explanations was arguably less important than it is now. When the Guidelines were binding, judges had little need for additional information about how to calculate

---

<sup>72</sup> See Wolff, *supra* note 70, at 1397–99.

<sup>73</sup> Indeed, the Judicial Conference of the United States has taken the position that the document that embodies the sentence, the judgment and commitment order, should be confidential in order to protect the identities of cooperating witnesses.

a sentence. With advisory guidelines, judges need to see what other judges are doing when the Guidelines are found to be inapplicable. In order to avoid inter-judge disparities, judges must be able to see the decisions made in the courtroom next door. Wider use and availability of formal sentencing opinions is therefore critical to developing a common law of sentencing and to cabinining discretion.<sup>74</sup>

More robust appellate review would also contribute to the development of a common law of sentencing. Prior to *Booker*, the federal appeals courts enforced the Federal Sentencing Guidelines with a rigidity that surprised many commentators.<sup>75</sup> In one sense, the reaction was predictable. Since appellate review of sentencing did not exist at all in the indeterminate era before the Sentencing Reform Act, the detailed, code-like framework of the Guidelines was all that appellate courts knew. Now that the Guidelines are advisory, the same problem persists. Appellate judges still have no alternative framework and no perspective independent of the Guidelines by which to review sentencing decisions made by lower courts. Efforts to develop a common law of sentencing at both levels will be mutually reinforcing. As lower courts begin to apply alternative sentencing frameworks to individual cases, post-*Booker* appellate review will begin to have more content. In turn, meaningful appellate review will help guide lower courts to make future sentencing decisions.

### B. *The Commission*

The United States Sentencing Commission has extraordinary resources. Its staff has collected data and written reports on a number of important topics. However, most of the Commission's resources are consumed by a plethora of congressional directives and congressional pressure to monitor compliance with the Guidelines. Even before *Booker*, many commentators criticized congressional directives—statements in which Congress directs the Commission to “consider” increasing a given Guidelines range—as inconsistent with the Commission's independent expert role.<sup>76</sup> Critics have argued the directives unduly burden the Commission with Congress's politicized agenda.

Aside from congressional directives, the Commission is also obsessed with monitoring judicial compliance with the Guidelines. It closely tracks whether judges are following the Guidelines, using Guidelines-authorized

---

<sup>74</sup> See Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 82–83 (2003) (describing the theory that a common law of sentencing would supplement the Guidelines).

<sup>75</sup> See Reitz, *supra* note 7, at 1458 (describing the approach of appellate courts as taking a “dim view of attempted exercises of discretion by district court judges,” and as “excessively deferential to the pronouncements of the U.S. Sentencing Commission”).

<sup>76</sup> See U.S. SENTENCING COMM'N, *supra* note 13, at B1–B9 (listing congressional directives to the U.S. Sentencing Commission subsequent to the enactment of the Sentencing Reform Act).

departures, or varying from the Guidelines entirely. This focus may have been appropriate when the Guidelines were mandatory, but it is anachronistic in the current advisory system. Today, the Commission should be focused on *why* judges depart: Did the case involve a nonviolent crack offender or an immigrant? On what grounds did the judge determine that the Guidelines did not apply? Was the sentence imposed based on new studies about recidivism, drug treatment, or some other framework? In so doing, the Commission will uncover patterns in departures and be able to better guide judges in the use of their *Booker* discretion.

But the post-*Booker* era demands even more than passive data collection. In order to remain relevant in today's advisory system, the Commission should actively participate in the search for alternative sentencing frameworks. This does not entail jettisoning the Guidelines. Rather, it suggests providing guidance for judicial discretion when the Guidelines are not adequate to the task at hand. If the Commission is worried about a reemergence of the problems of unwarranted disparities and leniency that pervaded the indeterminate era, it will do no good simply to ignore the fact that judges are looking beyond the Guidelines. The Commission should help give them other places to look.

The Commission could use its website to cull reports that could inform the new judicial discretion. It could function as a clearinghouse for the best studies on a wide variety of topics, such as the effect of particular sentences on recidivism rates and reentry, and racial and gender disparities in sentencing.<sup>77</sup> Although the Commission has not taken on such an active role in the past, it does have experience serving as a moderator in the debate on sentencing issues, just as it did with its conference on alternatives to incarceration.

#### CONCLUSION

If one purpose of the Sentencing Reform Act, and the Commission it created, was to provide the voice of reason in sentencing in order to put the brakes on mindless punishment increases, then it has failed. Congress simply ignored the new Commission sentencing experts when it enacted ever more onerous mandatory minimum statutes and ordered the Commission to increase punishments based on the crime du jour.

But *Booker* has given the federal sentencing regime a new beginning. With *Booker*, the Supreme Court paved the way for a hybrid system—mixing discretion and the Guidelines. With advisory guidelines, the various sen-

---

<sup>77</sup> Wolff, *supra* note 70, at 1395. Missouri data suggest that recidivism rates are higher when states incarcerate large numbers of non-violent "marginal" offenders. "The higher recidivism rates for prison sentences may not prove that prison causes increased recidivism (because the more dangerous offenders are probably more likely to be sentenced to prison), but they are cause for concern. If prison is criminogenic—that is, if it encourages or teaches offenders to commit further offenses—then we need to find effective punishments that do not make the problem worse." *Id.* at 1394.

tencing players must do more than just create unsupported rules and monitor compliance with them. They have to critically evaluate the Guidelines for their fealty to the purposes of sentencing and for their grounding in data. And where the Guidelines are found wanting, sentencing players have to consider non-Guidelines frameworks, creative alternatives to incarceration, and evidence-based practices. Rather than prioritizing retribution and incapacitation above all, as the American criminal justice system has done, courts and the Commission must also consider rehabilitation, deterrence, and the minimization of recidivism.

