FEDERAL PUBLIC DEFENDER
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9/7/2011

Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Attention: Public Affairs – Priorities Comment

Re: Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2012

Dear Judge Saris:

Attached to this letter are the comments of the Federal Public and Community Defenders regarding the Commission's Proposed Priority #3, an anticipated report on the impact of the Supreme Court's decisions in *Booker v. United States*, 543 U.S. 220 (2005) and subsequent cases on federal sentencing. We believe that sound advisory guidelines that are based on empirical evidence and judicial experience, and that permit fair and individualized sentencing best fulfill the goals Congress described in the Sentencing Reform Act (SRA).

Our comments contain a seven part analysis of the impact of the Supreme Court's decisions on: (1) achievement of the goals of the SRA; (2) the Commission's role as a neutral expert body; (3) disparities; (4) the rate and extent of sentences outside the guideline range, and sentence length; (5) the financial and human costs of over-incarceration; (6) appellate review; and (7) the advisability of sentencing legislation.

Part I begins by reviewing the four stated goals of the Sentencing Reform Act: (1) providing guidance for judges in imposing sentences, including the purposes of sentencing, the kinds of sentences available to serve those purposes, and the factors to consider in imposing sentence, including the guidelines; (2) fairness in sentencing, including individualized sentencing and reduction of unwarranted disparity; (3) certainty that the sentence imposed would be the sentence served and certainty about the reasons for the sentence; and (4) greater availability of sentencing options to reduce the use of imprisonment. (p. 1).

Congress intended that fairness would be accomplished, unwarranted disparity reduced, and individualized sentencing enhanced, because the Commission would include in the

guidelines factors that were relevant to the purposes of sentencing, both aggravating and mitigating, as directed by 28 U.S.C. § 994(c) and (d); the Commission would permit individualized sentences based on factors not taken into account in the guidelines, as directed by 28 U.S.C. § 991(b)(1)(B); and judges would impose sentences outside the guideline range if they found, after considering the circumstances of the offense, the characteristics of the offender, and the purposes of sentencing, as directed by § 3553(a), that relevant factors were not adequately reflected in the guideline range, as directed in § 3553(b). (p. 1-5).

This plan was not implemented. The guidelines were constructed of many aggravating factors, while omitting most mitigating factors that Congress viewed as potentially relevant and that were relevant to the purposes of sentencing. Mitigating factors were not only omitted from the guideline range but were prohibited or discouraged from consideration for departure by unexplained policy statements. Together, the restrictive policy statements, a last minute amendment to § 3553(b) limiting the judicial inquiry to the four corners of the Guidelines Manual at the Commission's request, and the "heartland" standard, rendered § 3553(a) and even § 3553(b) as originally enacted a nullity. Judges could not question the "adequacy" of the guidelines or policy statements or whether a different sentence "should result" to satisfy the purposes of sentencing. Individualized sentencing was not accomplished, unwarranted uniformity resulted, unfair and irrational sentences were required, and judges were unable to play an important role in the constructive evolution of the guidelines. (p. 5-12).

The advisory guidelines system has brought much needed balance, permitting judges to impose sentences that fit the offense and the offender and that best achieve the purposes of sentencing. The correctly calculated guideline range plays a critical role as the starting point and initial benchmark, and the sentencing decision is otherwise intricately guided by § 3553(a). Judges are now able to impose sentences that are individualized and fair, and to avoid unwarranted disparities by treating dissimilarly situated offenders differently. (p. 13-16).

Part I also discusses the SRA's goal of certainty in sentencing, meaning that the reasons for the sentence should be publicly stated (transparency) and that sentence length was fixed at the time of sentencing rather than being subject to a future parole board decision (honesty). Here too, we conclude that the advisory guidelines system, which requires judges to thoroughly explain in open court their reasons for a sentence, better meets these goals than the mandatory system, where the reasons for the guidelines, and hence the reason for the sentence, were largely unknown to judges, lawyers, defendants or the public. The advisory system has also increased the transparency of prosecutors' reasons for seeking sentences below the guideline range. And the Commission has begun to better explain amendments to the guidelines. (p. 16-20).

Part I closes with an analysis of how the mandatory guidelines utterly failed to accomplish the goal of providing a greater range of sentencing options in order to reduce reliance on imprisonment. Notwithstanding congressional intent, decades of criticism, and an abundance of research showing that imprisonment is not needed in a large percentage of cases to accomplish the purposes of sentencing, the mandatory guidelines required imprisonment over probation and intermediate sanctions in the vast majority of cases. The Commission recently took a modest step toward reversing the overuse of imprisonment. (p. 20-25).

Part II demonstrates that the advisory guidelines system has given the Commission the opportunity to act as the neutral expert body it was created to be. The hope of an expert body, drawing on the experience of judges and empirical research rather than politics, was the foundation of the Commission's existence and the basis for its constitutional legitimacy, as reflected in the SRA's key directives. (p. 25-28). This part traces the history of the Commission's role during the mandatory guidelines era, and briefly explains how the political branches undermined the Commission's independence, and how the Commission failed to attend to the views of the neutral Judiciary and succumbed to political pressure and the "tough on crime" views of the Department of Justice, making the guidelines a one-way upward ratchet, increased easily and often and very difficult to reduce. The missing institutional check was an effective and public voice for the neutral Judiciary through departures and feedback to the Commission, the absence of which was acutely felt since the Commission's rulemaking is not subject to most laws applicable to other agencies designed to ensure impartiality, transparency, and rationality. (p. 28-33). Part II ends with an analysis of how the Supreme Court's decisions have resurrected the judicial feedback mechanism and the Commission's neutral expert role. The Commission has begun to base its amendments on judicial feedback and empirical research, earning the respect of judges, prosecutors, defense attorneys, members of Congress, probation officers, and the public. Judges provide especially useful information to the Commission when they find that the guideline itself fails to satisfy § 3553(a)'s objectives, and the Commission is using this information. This type of variance was specifically encouraged by Senators Kennedy, Hatch and Feinstein in an *amicus* brief to the Court. (p. 34-39).

Part III tackles the many facets of unwarranted disparity, defined most succinctly as "different treatment of individual offenders who are similar in relevant ways," and "similar treatment of individual offenders who differ in characteristics that are relevant to the purposes of sentencing."[1] We conclude, with extensive supporting analysis, that the advisory guidelines system reduces unwarranted disparity in ways the mandatory system did not attempt to do and never could. During the mandatory era, "disparity" was seen as just a code word for increasing severity and prosecutorial power. This Commission should begin to undo that perception.

Part III (A)-(C) discusses disparities that were created and masked by the mandatory guidelines, including by demanding excessive uniformity among defendants regardless of differences in their level of culpability, dangerousness, risk of recidivism, or need for rehabilitation; by requiring punishment that was not justified by the purposes of sentencing and having an adverse impact on certain racial and ethnic groups; by resulting in very different guideline calculations based on different interpretations of the rules, the evidence, or varying prosecutorial practices; and by being subject to manipulation by prosecutors and law enforcement agents. (p. 39-43, 51-52). The mandatory guidelines transferred sentencing power from judges to prosecutors by strictly curtailing judicial discretion on the one hand, and giving prosecutors control over both the facts that drove severe guideline ranges and the most readily available mechanism for leniency. Prosecutors and law enforcement agents produce disparity through charging decisions, plea bargaining practices, use of substantial assistance motions, and manipulation of facts, particularly those establishing "relevant conduct." Judges had no power to

[1] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 113 (2004) (emphases omitted).

prevent prosecutors from alleging or threatening to allege uncharged conduct, from seeking or threatening to seek a sentence based on acquitted conduct, or from overcharging, count stacking, or charging or threatening to charge mandatory minimums. (p. 43-49). *Booker* has helped right the imbalance. Judges can now correct for unwarranted disparity, whatever its source. As they do, they provide the Commission with invaluable data to help it revise the guidelines in a way that further decreases disparity, thereby achieving this important goal of the SRA. (p. 49-50).

The Department appears to recognize the need for greater balance, flexibility, and individualized sentences, but continues to attempt to stigmatize judicial discretion, claiming that it creates two "regimes," and denigrates consideration of mitigating offender characteristics as improper. Part III (D) takes a close look at these claims and concludes that they are not grounded in the SRA, are not supported by the facts, and are not credible. (p. 50, 52-61). The Commission should reject all distorted versions of the SRA and the facts.

Part III (E-F) demonstrates, through statistical analysis and case examples, that differences among judges are modest and best reduced by revision of problematic guidelines, and that regional differences are contemplated by the SRA, are part of DOJ policy, ad cannot be understood by bare statistics. Specific examples demonstrate in order to understand regional differences, complex interactions must be examined. (p. 61-68).

In the last section of Part III, section G, we caution the Commission against reliance on its report on demographic differences. The Commission's study did not and cannot control for many legally relevant factors, but has nonetheless been used, now repeatedly, to suggest that judges act on racial bias once freed of mandatory guidelines, something the Commission's analysis does not in fact establish. Moreover, independent well-respected researchers, using the Commission's dataset, reached different and more nuanced conclusions, that disparities in sentence length based on race, ethnicity, and gender have not increased after *Booker* or *Gall*. Unproven allegations of racial bias by judges divert attention from proven sources of unfairness, and the fact that judicial discretion helps to correct these problems. (p. 68-75).

Part IV demonstrates that even by superficial measures, change has been exceedingly modest, and the system is stable. Given the near-absence of mitigating factors in the guidelines and the excessive weight assigned to many aggravating factors and judicial dissatisfaction with many guidelines, the increase in the rate of below guideline sentences has been remarkably modest. That rate has now begun to drop, likely in response to the reduction in the crack guidelines and somewhat because of the elimination of recency points. The average extent of below-guideline sentences has not increased over time and is less than it was when the guidelines were mandatory. Average sentence length, after increasing for the first few years after *Booker*, has now begun to drop, but this is almost wholly because of the reduction in the crack guidelines and an increase in immigration cases with lower guideline ranges. (p. 75-81).

Part V demonstrates that, without *Booker*, sentence lengths would have been even longer and rates of imprisonment even higher, and that by a conservative estimate, *Booker* has prevented tens of thousands of years of unnecessary incarceration and saved the taxpayers nearly $2 billion at today's cost of incarceration. As the Commission knows, due to the ever-increasing severity of the guidelines and mandatory minimums, the Bureau of Prisons is dangerously

overcrowded, at a cost of well over $6 billion a year. This is not justified by recidivism rates, and current scientific evidence does not support the claim that crime has dropped "dramatically" as a result of severe sentences. Judges have helped to slow this trend in individual cases, and the Commission can help slow it further by lowering guideline penalties that are currently too severe. (p. 81-82).

Part VI discusses the standard of appellate review. We conclude on the basis of evidence that the standard of review is working appropriately. We also conclude on the basis of the Court's decisions that the standard could not be made to enforce the guidelines more strictly without running afoul of the Sixth Amendment. (p. 82-90).

In Part VII, we urge the Commission not to propose legislation to curtail judicial discretion, as there is no reason to do so, it would disrupt a workable system that has the broad support of judges, defense lawyers, sentencing policy advocates, and even many prosecutors, and proposals we have seen or heard of have serious policy problems and constitutional problems as well. (p. 90).

As always, we appreciate the opportunity to submit comments on this proposed priority. We look forward to continuing our work with the Commission to improve federal sentencing policy. Because the Commission has indicated that it may develop recommendations for legislation, we also request an opportunity to comment on any language the Commission may be supporting or proposing.

Very truly yours,

/s/ *Thomas W. Hillier, II*
Thomas W. Hillier, II, Co-Chair, Defender Legislative Expert Panel
Michael Nachmanoff, Co-Chair, Defender Legislative Expert Panel
Marjorie Meyers, Chair, Defender Sentencing Guidelines Committee
Miriam Conrad, Vice-Chair, Federal Defender Sentencing Guidelines Committee

Enclosure
cc (w/encl.): William B. Carr, Jr., Vice Chair
Ketanji Brown Jackson, Vice Chair
Hon. Ricardo H. Hinojosa, Commissioner
Dabney Friedrich, Commissioner
Hon. Beryl A. Howell, Commissioner
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Proposed Priority #3: Impact of *Booker* on Federal Sentencing

I. The Advisory Guidelines System Best Accomplishes the Goals of the Sentencing Reform Act.

The advisory guideline system presents the Commission with the opportunity to take a fresh look at the goals of the Sentencing Reform Act. The stated goals of the SRA were: (1) to provide guidance to judges with a "comprehensive and consistent statement" of law outlining the purposes of sentencing, the kinds of sentences available to serve those purposes, and the factors to be considered in imposing sentence, including but not limited to the guidelines; (2) "fairness" in sentencing, meaning individualized sentencing and reduction of "unwarranted disparity;" (3) "certainty" that the sentence imposed would be the sentence served and certainty about the reasons for the sentence; and (4) to provide a full range of sentencing options from which to choose the most appropriate sentence in a particular case in order to reduce the use of imprisonment.[1]

These goals were misunderstood, distorted, or forgotten during the mandatory guidelines era. For example, the goal of fair, individualized sentencing based on a "comprehensive examination of the characteristics of the particular offense and the particular offender" was not implemented.[2] The goal of expanding the "availability of sentencing options" was ignored.[3] In this Part, we outline the goals of the SRA as Congress described them, how the mandatory guidelines system failed to accomplish them, and how the advisory guideline system best fulfills the purposes of sentencing and the goals of the SRA.

A. Statutory Guidance for Judges; Fairness in Sentencing

1. Congress intended to reduce *unwarranted* disparities and to enhance *individualized* sentencing.

The source of the unwarranted disparity that Congress sought to reduce was not consideration of individualized circumstances, but a problem created by the "coercive rehabilitation" model in effect before the SRA. Under that system, judges were expected to impose fairly long terms of imprisonment and parole authorities determined release dates when they concluded prisoners were sufficiently rehabilitated. But prison was not rehabilitative, and there was no statutory guidance for judges or parole authorities regarding the purposes of sentencing, the kinds of sentences available, or the factors to be considered in determining sentences. Congress believed that second-guessing between judges and parole authorities and a lack of any statutory guidance had resulted in unwarranted disparities in sentences imposed and in sentences served.[4] Congress also believed that sentencing was the province of the Judiciary

[1] S. Rep. No. 98-225, at 39, 50-59 (1983).

[2] *Id*. at 51.

[3] *Id*. at 59.

[4] *Id*. at 38, 40, 49, 74-75.

and disapproved of the determination of sentences by parole authorities in private meetings rather than in open court.[5]

In order to reduce *unwarranted* disparities and *enhance* individualized sentencing, Congress set as the first two goals of the SRA to provide comprehensive and consistent statutory guidance for judges and to assure fairness in sentencing.[6]

To provide guidance to judges that was formerly lacking, Congress set forth the purposes of sentencing and factors to be considered in sentencing, 18 U.S.C. § 3553(a), described the kinds of sentences that may be imposed to carry out the purposes of sentencing, 18 U.S.C. § 3551, and created the Sentencing Commission to promulgate guidelines. Defendants would be treated more consistently because the guidelines would "recommend to the sentencing judge an appropriate kind and range of sentence for a given category of offense committed by a given category of offender," and judges would sentence "outside the guidelines" when they found a circumstance "that was not adequately considered in the formulation of the guidelines and that should result in a sentence different from that recommended in the guidelines."[7]

The Senate Report stated that "fairness" would be accomplished as follows:

> The bill requires the judge, before imposing sentence, to consider the history and characteristics of the offender, the nature and circumstances of the offense, and the purposes of sentencing. He is then to determine which guidelines and policy statements apply. Either he may decide that the guideline recommendation appropriately reflects the offense and offender characteristics or he may conclude that the guidelines fail to reflect adequately a pertinent aggravating or mitigating circumstance.[8]

Thus, even when § 3553(b) was in effect, § 3553(a) would frame the sentencing decision: whether factors present in the case were "adequately" taken into consideration in the guideline range and whether a different sentence "should result" would be determined by the judge by examining whether the applicable "range" referred to in § 3553(a)(4) produced a sentence consistent with the purposes and other factors set forth in § 3553(a). "All of these considerations [set forth in § 3553(a)] and others the judge believed to be appropriate would . . . help the judge to determine whether there were circumstances or factors that were not taken into account in the sentencing guidelines and that call for the imposition of a sentence outside the applicable guideline."[9]

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[5] *Id*. at 54-55.

[6] *Id*. at 39.

[7] *Id*. at 51-52.

[8] *Id*. at 52; 18 U.S.C. § 3553(a) and (b).

[9] *Id*. at 75.

Even under § 3553(b), Congress did "not intend that the guidelines be imposed in a mechanistic fashion."[10] To the contrary, it believed "that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case."[11] The purpose of the guidelines was "not to eliminate the thoughtful imposition of individualized sentences," but would "enhance the individualization of sentences."[12] Judges would "impose sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender," and would themselves "make informed comparisons between the case at hand and others of a similar nature."[13]

Congress directed the Commission to provide "*fairness* in meeting the purposes of sentencing, avoiding *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*."[14] In describing this directive, the Senate Report emphasized that "[t]he key word in discussing unwarranted disparities is 'unwarranted,'" and that the intent was *not* to "eliminate justifiable differences between the sentences of persons convicted of similar offenses who have similar records."[15] "The Commission is, in fact, required [by § 994(d)] to consider a number of factors in promulgating sentencing guidelines to determine what impact, if any, would be warranted by differences among defendants with respect to those factors."[16]

Just as § 994(c) directed the Commission to create "categories of offenses" based on a non-exhaustive list of mitigating and aggravating factors, § 994(d) directed the Commission to consider a non-exhaustive list of eleven mitigating and aggravating factors in establishing "categories of offenders . . . for use in the guidelines and policy statements governing . . . the nature, extent, place of service, or other incidents of an appropriate sentence": age, education, vocational skills, mental and emotional condition, physical condition, drug dependence, employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence on criminal activity for a livelihood.

Congress considered all eleven factors to be potentially relevant to all aspects of the sentencing decision, with one narrow exception. Congress directed the Commission in 28 U.S.C. § 994(e) to "assure that the guidelines and policy statements, *in recommending a term of*

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[10] *Id*. at 52.

[11] *Id*.

[12] *Id*. at 52-53.

[13] *Id*. at 53.

[14] 28 U.S.C. § 991(b)(1)(B) (emphasis added).

[15] *Id*.

[16] *Id*. (citing 28 U.S.C. § 994(d)).

imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering" five of those factors: "the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." The Senate Report stated: "The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties." S. Rep. No. 98-225, at 175 (1983). Section 994(e) was one of three provisions reflecting Congress's judgment that prison was not an effective means of rehabilitation and should not be used to warehouse the disadvantaged.[17]

Thus, the Commission was not to recommend imprisonment over probation or a longer prison term based on the defendant's lack of education, vocational skills, employment, or stabilizing ties, but "each of these factors may play other roles in the sentencing decision." S. Rep. No. 98-225, at 174 (1983). "[T]hey may, in an appropriate case, call for the use of a term of probation instead of imprisonment."[18] The Senate Report gave several specific examples of how these characteristics may be relevant to mitigate sentences.[19]

Congress "emphasized" that it had "describe[d] these factors as 'generally inappropriate,' rather than always inappropriate to the decision *to impose a term of imprisonment or determine its length*, in order to permit the Sentencing Commission to evaluate their relevance, and to give them application in particular situations found to warrant their consideration,"[20] and "encourage[d] the Sentencing Commission to explore the *relevancy to the purposes of sentencing* of *all* kinds of factors, whether they are obviously pertinent or not; to subject those factors to intelligent and dispassionate analysis; and on this basis to recommend, *with supporting reasons*, the fairest and most effective guidelines it can devise."[21]

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[17] *See* 28 U.S.C. § 994(k); 18 U.S.C. § 3582(a); S. Rep. No. 98-225, at 31, 38, 40, 76-77, 95, 119, 171 & n.531 (1983); *Tapia v. United States*, 131 S. Ct.2382, 2390 (2011) ("Section 994(k) bars the Commission from recommending a 'term of imprisonment'—a phrase that again refers both to the fact and to the length of incarceration—based on a defendant's rehabilitative needs. And§ 3582(a) prohibits a court from considering those needs to impose or lengthen a period of confinement when selecting a sentence from within, or choosing to depart from, the Guidelines range.").

[18] S. Rep. No. 98-225, at 174-75 (1983).

[19] *See id.* at 172-73 ("need for an educational program might call for a sentence to probation" with a program to provide for rehabilitative needs if imprisonment was not necessary for some other purpose of sentencing); *id.* at 173 (same regarding vocational skills); *id.* (same regarding employment); *id.* at 171 n. 531 ("if an offense does not warrant imprisonment for some other purpose of sentencing, the committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training"); *id.* at 173 n.532 ("a defendant's education or vocation would, of course, be highly pertinent in determining the nature of community service he might be ordered to perform as a condition of probation or supervised release"); *id.* at 174 (family ties and responsibilities may indicate, for example, that the defendant "should be allowed to work during the day, while spending evenings and weekends in prison, in order to be able to continue to support his family").

[20] *Id.* at 175 (emphasis added).

[21] *Id*. (emphasis added).

While Congress contemplated that the guidelines would include most relevant and frequently occurring aggravating and mitigating factors,[22] it also recognized that it would be impossible to anticipate every possible situation and every offender that might be sentenced under a general rule. The Senate Report explained:

> [E]ach offender stands before the court as an individual, different in some ways from other offenders. The offense, too, may have been committed under highly individual circumstances. Even the fullest consideration and the most subtle appreciation of the pertinent factors – the facts in the case; the mitigating or aggravating circumstances; the offender's characteristics and criminal history; and the appropriate purposes of the sentence to be imposed in the case – cannot invariably result in a predictable sentence being imposed. Some variation is not only inevitable but desirable.[23]

In sum, fairness would be accomplished, unwarranted disparity would be reduced, and individualized sentences would be imposed because (1) the Commission would include in the guidelines factors that were relevant to the purposes of sentencing, both aggravating and mitigating, (2) the Commission would permit individualized sentences based on factors not taken into account in the guidelines, and (3) judges would impose sentences outside the guideline range if they found, after considering the circumstances of the offense, the characteristics of the offender, and the purposes of sentencing, that relevant factors were not adequately reflected in the guideline range.

2. The Commission prevented fair and individualized sentencing and created unwarranted uniformity.

The first Commission maintained that § 3553(b) required judges to sentence within the guideline range except in an unusual case in which it had not spoken and regardless of whether its consideration was "adequate." It asserted that "in principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure."[24] The first Commission took a number of steps to make this so.

First, while the Commission constructed the guidelines of a wide and heavily weighted array of aggravating factors, it included two mitigating factors with relatively little weight in the guidelines.[25] The Commission not only omitted from the guideline rules all offender

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[22] *Id*. at 52, 169-75.

[23] *Id*. at 150.

[24] 52 Fed. Reg. 18,046, 18,050 (May 13, 1987).

[25] The two mitigating factors in the original guidelines were role in the offense, USSG §3B1.2, and acceptance of responsibility, USSG § 3E1.1, each of which is small in extent and often dwarfed by the impact of aggravating factors like drug quantity, loss, and relevant conduct. A few mitigating offense circumstances were added later. *See* USSG §§2D1.1(b)(11) (2-level decrease if defendant meets safety valve criteria), 2D1.8(a)(2) (four-level decrease based on role in the offense), 2D1.11(a) (decrease by 2, 3

characteristics listed in § 994(d) other than role in the offense and criminal history, but used policy statements to prohibit and discourage those and other factors as grounds for departure. It deemed age, educational and vocational skills, mental or emotional conditions, physical condition, employment record, family ties and responsibilities, and community ties to be "not ordinarily relevant" as grounds for downward departure.[26] Drug dependence, alcohol abuse, personal financial difficulties, and economic pressures on a trade or business were completely prohibited.[27]

Then-Judge and Commissioner Breyer explained that the Commission did not include in the guidelines all of "the offender characteristics which Congress suggested that [it] should,"[28] but instead "compromised" by promulgating offender characteristic rules based only on "past record of convictions" to increase punishment.[29] This "compromise" admittedly deviated not only from § 994(d) but "deviated from average past practice," when judges routinely considered mitigating offender characteristics.[30] Later, Justice Breyer said that the decision to omit mitigating offender characteristics was "intended to be provisional and [] subject to revision in light of Guideline implementation experience."[31]

Thereafter, in direct response to court decisions approving departures, the Commission added to the disfavored list "physical appearance, including physique," "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing," military, civic, charitable and public service, employment-related contributions, prior good works, and post-sentencing rehabilitation.[32] The Commission narrowed departures based on diminished capacity,[33] and aberrant conduct,[34] then eliminated or limited many additional mitigating factors

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or 4 levels if defendant receives mitigating role adjustment), 2L1.1(b)(1) (3-level decrease if alien smuggling offense involved only defendant's spouse or child), 2L2.1(b)(1) (same for immigration document offense).

[26] USSG §§5H1.1, 5H1.2, 5H1.3, 5H1.4, 5H1.5, 5H1.6, p.s. (Nov. 1, 1987).

[27] USSG §§5H1.4, 5K2.12, p.s. (Nov. 1, 1987).

[28] Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19-20 & n.98 (1988).

[29] *Id*. & n.96.

[30] *Id*. at 18-19.

[31] Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent'g Rep. 180, 1999 WL 730985, at *5 (Jan./Feb. 1999)

[32] USSG §5H1.4 p.s. (Nov. 1, 1991); USSG § 5H1.12 p.s. (Nov. 1, 1992); USSG § 5H1.12 p.s (Nov. 1, 1991); USSG § 5K2.19, p.s. (Nov. 1, 2000).

[33] USSG §5K2.13, p.s.; USSG App. C, amend. 583 (Nov. 1, 1998).

[34] USSG §5K2.20, p.s.; USSG App. C, amend. 603 (Nov. 1, 2000).

in response to the PROTECT Act's directive to "ensure that the incidence of downward departures are substantially reduced."[35]

None of these policy statements was accompanied by "supporting reasons,"[36] except the prohibition against post-sentencing rehabilitation, which rested on "wholly unconvincing policy rationales."[37] Congress clearly believed that mitigating offender characteristics were relevant to sentencing, and three is no indication that Congress intended the Commission to use policy statements to place them off limits even as grounds for departure. The provision authorizing the Commission to issue policy statements listed several specific uses for policy statements but preventing departures was not among them,[38] and policy statements were not subject to notice, comment or hearing procedures, or congressional approval.[39] The policy statements were

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[35] Pub. L. No. 108-21, § 401(m)(2)(A) (Apr. 30, 2003). The Commission issued policy statements prohibiting departures based on gambling addiction, USSG §5H1.4, p.s.; role in the offense, USSG §5H1.7, p.s.; acceptance of responsibility, USSG §5K2.0(d)(2), p.s.; decision to plead guilty or enter into a plea agreement, USSG §5K2.0(d)(4), p.s.; and fulfillment of restitution obligations to the extent required by law, USSG §5K2.0(d)(5), p.s.; and limiting departure from the "career offender" guideline to one criminal history category, *see* USSG §4A1.3(b)(3)(A), p.s. *See generally* USSG App. C, amend. 651 (Oct. 27, 2003).

[36] S. Rep. No. 98-225, at 175 (1983). *See, e.g.*, USSG App. C, amend. 386 (Nov. 1, 1991) (amending § 5H1.4 to provide that physical "appearance, including physique" is not "ordinarily relevant in determining whether a sentence should be outside the applicable guideline range," stating as the reason that it "sets forth the Commission's position that physical appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range"); USSG App. C, amend. 466 (Nov. 1, 1992) (adding § 5H1.12 to provide that "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted," stating as the reason that "[t]his amendment provides that the factors specified are not appropriate grounds for departure"); USSG App. C, amend. 651 (Oct. 27, 2003) (amending § 5H1.4 to provide that addiction to gambling is not a reason for a downward departure in any case, stating as the reason that "addiction to gambling is never a relevant ground for departure").

[37] *Pepper v. United States*, 131 S. Ct. 1229, 1247 (2011).

[38] 28 U.S.C. § 994(a)(2). Section 994(a)(2) authorizes "general policy statements regarding application of the guidelines or any aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, including the appropriate use of" statutory provisions regarding (A) forfeiture, notice to victims, restitution, (B) conditions of probation and supervised release, (C) sentence modifications, (D) fines, (E) plea agreements, and (F) temporary release and prelease custody. The list does not include disapproval of departures, and the policy statements disfavoring departure in all cases do not address "application of the guidelines," nor do they contain any indication that they "would further the purposes of sentencing in section 3553(a)(2)."

[39] *See* 5 U.S.C. § 553 (exempting "interpretive rules" and "general statements of policy" from notice, comment and hearing procedures); 28 U.S.C. § 994(x) ("The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines."); 28 U.S.C. § 994(p) (requiring the Commission to submit amendments to "guidelines" to Congress, to take effect no earlier than 180 days later and no later than the first day of November unless disapproved by Congress).

nonetheless binding on sentencing judges by operation of § 3553(b),[40] and prevented the individualized sentences that § 991(b)(1)(B), § 994(d), § 3553(a) and § 3661 required.

Second, the Commission sought and obtained an amendment to § 3553(b) to further suppress judicial discretion. On October 22, 1987, before the first set of guidelines and policy statements took effect, the Chair of the Commission testified before the Senate Judiciary Committee that the departure standard set forth in § 3553(b) as already enacted,[41] was too "indefinite, subjective, and impractical" because courts would have to "wrestle with" whether a factor had been "adequately considered" by the Commission, and that it might result in the Commission's members and records being subpoenaed in order for the courts "to make the necessary determinations."[42]

The Commission proposed that § 3553(b) be amended to replace the courts' authority to determine whether the Commission had "adequately considered" a factor with a provision that would permit departure only on a ground "not expressly addressed in the guidelines, policy statements, or official commentary of the Sentencing Commission," unless the Commission had "specifically invited, or suggested the appropriateness of, a departure if the factor was present,"[43] and would limit the departure inquiry to the "'four corners' of the officially promulgated guidelines, policy statements, and commentary of the Sentencing Commission."[44]

Congress declined to explicitly confine departures to factors "not expressly addressed" unless "specifically invited" by the Commission, and at the insistence of the House in an effort to maintain judicial discretion independent of the Commission, added language directing courts to depart if they found a circumstance "of a kind, or to a degree" not adequately considered by the Commission in formulating the guidelines.[45] But the following sentence was added: "In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." The bill was enacted on December 7, 1987, after the guidelines went

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[40] *See Williams v. United States*, 503 U.S. 193, 200-01 & n.2 (1992); *Stinson v. United States*, 508 U.S. 36, 41 (1993); *Koon v. United States*, 518 U.S. 81, 92-93, 106 (1996).

[41] As enacted in the Sentencing Reform Act of 1984 on October 12, 1984, 18 U.S.C. § 3553(b), stated: "The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described." Pub. L. No. 98-473 § 212(a) (Oct. 12, 1984).

[42] *Sentencing Commission Guidelines: Hearing Before the S. Comm. on the Judiciary*, 100th Cong., 1st Sess., at 29-30 (Oct. 22, 1987).

[43] *Id*. at 30-31.

[44] *Id*. at 32.

[45] *See* 133 Cong. Rec. H10014-02, 1987 WL 947069 (Cong. Rec.), Section-By-Section Analysis, Section 3 & Statement of Mr. Conyers (Nov. 16, 1987).

into effect on November 1, 1987, and § 3553(b) read as it did until it was excised by the Supreme Court in 2005.[46]

Third, the Commission promoted a departure standard not found in the statute which further prevented reasoned judicial discretion. Rather than judges departing when they found a mitigating or aggravating circumstance of a kind or to a degree not adequately taken into account in the guideline range, the "heartland" standard required judges to impose sentences within the guideline range except in "atypical" cases: "In the absence of a characteristic or circumstance that distinguishes a case as *sufficiently atypical* to warrant a sentence different from that called for under the guidelines, a sentence outside the guideline range is not authorized. *See* 18 U.S.C. § 3553(b). For example, dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range"[47] even if based on the purposes of sentencing and relevant factors under 18 U.S.C. § 3553(a).

The "heartland" standard worked in tandem with the sentence added to § 3553(b) confining the departure inquiry to the four corners of the Guidelines Manual to mean that any factor mentioned in the Manual, even implicitly by omission, was by definition "adequately considered." The "heartland" standard was adopted by the Supreme Court in *Koon v. United States*, 518 U.S. 81 (1996), where the Court confirmed that the statutes directed to the courts in the SRA as enacted in 1984 had been displaced: "To determine whether a circumstance was adequately taken into consideration by the Commission, Congress instructed courts to 'consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." Turning its attention, "as instructed," to commentary in the Guidelines Manual, the Court "learn[ed] that the Commission did not adequately take into account cases that are, for one reason or another, 'unusual,'" as compared to the Commission's intended "heartland."[48] The courts were "not adrift," however, because the Commission had decided which factors were within or outside the "heartland" by forbidding, discouraging or encouraging them in policy statements.[49]

Although many hoped that *Koon* would broaden judicial discretion,[50] it did not because the policy statements, commentary, and "heartland" standard still provided the departure

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[46] Pub. L. No. 100-182, § 3 (Dec. 7, 1987).

[47] USSG § 5K2.0, comment. (backg'd.) (1994) (emphasis added); USSG App. C, amend. 508 (Nov. 1, 1994).

[48] 518 U.S. at 92-93 (citing the Commission's "Introductory Commentary" introducing the "heartland" standard) (emphasis supplied).

[49] *Id*. at 93-95.

[50] *See, e.g.*, Honorable Patti B. Saris, *Below the Radar Screens: Have the Guidelines Eliminated Disparity? One Judge's Perspective*, 30 Suffolk U. L. Rev. 1027, 1040-41, 1043-44 (1997) (noting that before *Koon*, "departures were disapproved deviations from the standard and would be subject to tough scrutiny on appeal," but *Koon* recognized that departures "provide sentencing courts with the flexibility of promoting the express congressional goal of enhancing 'the individualization of sentences'").

framework. While the standard of review was "abuse of discretion," the interstices where discretion could be exercised were narrow and difficult to understand.[51] Moreover, the Court confirmed that under the "heartland" standard, judges were not permitted to "test potential departure factors against" the purposes of sentencing.[52]

For the "heartland" standard to make sense, all "typical" and "usual" factors would have to be included in the guidelines, but the guidelines omitted, prohibited, or discouraged a wide range of mitigating factors that were not "atypical" but were nonetheless highly relevant to the purposes of sentencing. Since the Commission did not explain its guidelines or policy statements, the intended "heartland" was in the eye of the beholder, as reflected in *Koon* itself.[53] The appellate case law was rife with circular statements, such as "circumstances within the heartland of conduct encompassed by the applicable guideline are deemed to have been adequately considered by the Commission while conduct falling outside the heartland is not."[54] The "heartland" standard produced absurd and unfair results. As just a few examples:

- The racial disparity caused by the powder/crack quantity ratio was not a permissible ground for departure because that circumstance was not "atypical."[55]

- A departure was impermissible for a young man who pled guilty to being a felon in possession for his brief possession of an unloaded handgun lawfully owned by his father solely to temporarily pawn it in order to pay child support because, although these relatively innocent circumstances did not appear in the offense guideline, the case could not be "outside the heartland" because the defendant was motivated by financial difficulties, a factor prohibited by a policy statement.[56]

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[51] If a factor was forbidden, the court "cannot use it." If a factor was "encouraged," the court could depart but only "if the applicable Guideline does not already take it into account," explicitly or implicitly. As to "discouraged" factors or "encouraged" factors already taken into account explicitly or implicitly, the court could depart if the factor was "present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present." Departure based on an "unmentioned" factor was permissible only if, after considering the "structure and theory of both the relevant individual guidelines and the Guidelines taken as a whole," *which were unstated*, the factor is "sufficient to take the case out of the Guideline's heartland." *Koon*, 518 U.S. at 95-96.

[52] *Id*. at 107-08.

[53] The majority applied upheld or reversed several departures in the case, based on its own view of what the intended "heartland" was, which differed in various ways from the views of the district court, the court of appeals, and other members of the Court. *Id*. at 101-14; *id*. at 114 (Stevens, J., concurring in part and dissenting in part); *id*. at 114-19 (Souter & Ginsburg, JJ., concurring in part and dissenting in part).

[54] *United States v. Wilson*, 114 F.3d 429, 433 (4th Cir. 1997).

[55] *See In re Sealed Case*, 292 F.3d 913, 916 (D.C. Cir. 2002); *United States v. Canales*, 91 F.3d 363, 369-70 (2d Cir. 1996); *United States v. Fike*, 82 F.3d 1315, 1326 (5th Cir. 1996).

[56] *United States v. Bristow*, 110 F.3d 754, 755, 757-58 (11th Cir. 1997).

- A departure was impermissible for a young man who became involved in selling crack after a childhood in which "drug-induced parental neglect" forced him and his younger brother "to fulfill their basic subsistence needs by . . . hustling money" in the streets beginning at age 10, but who had managed to demonstrate a degree of "admirable" responsibility in parenting his own child, "something he as a child never experienced."[57]

- There was "nothing about" an eighteen-year-old girl's age "that removes her situation from the heartland of cases involving comparable drug crimes," since drug importers often use "young, naive men and women without extensive criminal experience."[58]

- Departure was impermissible because lack of knowledge of the amount or type of contraband was not "unusual" in cases involving drug couriers, even though court believed the guideline range driven by drug type and quantity was "too harsh," especially when the defendant was a first offender coming from a "depressed area" with a continuous work history and a wife and two children with whom he lived and whom he supported, also impermissible reasons for departure.[59]

- A case was not "extraordinary" and so a departure was impermissible for a young woman with no prior arrests and a consistent work history ("it does not appear to be exceptional for someone her age"), who during a deep depression and after a chance meeting with a man on the street who was able to quickly exploit her, agreed to be a drug courier in order to repay overdue student loans so she could complete college, though she quickly turned herself in, had "accomplished much in her life" before and after her arrest, and a non-prison sentence would permit her to continue her successful rehabilitation.[60]

- The district court improperly considered EPA and DOJ agency memoranda and the legislative history of the Clean Water Act to determine what the "heartland" offense was, and it was impermissible under the guidelines, their official commentary, and policy statements to depart for a first-time offender who diverted a creek without a permit, causing the creek to temporarily dry and require clean up, though he had already been prosecuted in state court and paid a fine (not a sufficiently "negative consequence") and though his probationary sentence required him to serve three months of community confinement and three months of house arrest.[61]

- A departure was impermissible for a young single mother convicted of distributing two grams of cocaine because "[i]t is apparent that in many cases the other parent may be

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[57] *United States v. Wilson*, 114 F.3d 429 (4th Cir. 1997).

[58] *United States v. Rodriguez*, 107 Fed. App'x 295, 298 (3d Cir. 2004).

[59] *United States v. Dias-Ramos*, 384 F.3d 1240, 1241-42 (10th Cir. 2004).

[60] *United States v. Dickerson*, 381 F.3d 251 (3d Cir. 2004).

[61] *United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004).

unable or unwilling to care for the children, and that the children will have to live with relatives, friends, or even in foster homes," and though she was attempting to remain employed and to be a good mother despite an unfortunate upbringing and lack of parental guidance, and though separating her from her children would have a "devastating effect" on her children, "[a] sole, custodial parent is not a rarity in today's society, and imprisoning such a parent will by definition separate the parent from the children."[62]

- That a guideline sentence was unjust and unnecessary to achieve any purpose of sentencing was not a ground for departure.[63]

After the Commission was forced by the PROTECT Act to restrict departures even further, the Commission reported that Congress had been mistaken in its belief, underlying the PROTECT Act, that judicial leniency had increased because of *Koon*. What had appeared in the Commission's data as an increase in judicial departures was actually an increase in government-sponsored "fast track" departures. Excluding these departures, "the national rate of increase in the departure rate is substantially the same during the pre-*Koon* and post-*Koon* eras, and actually declines during the most recent year for which such data is available."[64]

Together, the restrictive policy statements, the limitation in § 3553(b) to the four corners of the Guidelines Manual, and the "heartland" standard, rendered § 3553(a) and even § 3553(b) as originally enacted a nullity. Judges could not question the "adequacy" of the guidelines or policy statements or whether a different sentence "should result" to satisfy the purposes of sentencing.[65] "As a result, judges never became seriously involved in developing a common law of sentencing," and they "never played an important role in improving the supposedly evolutionary guidelines."[66]

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[62] *United States v. Brand*, 907 F.2d 31, 33 (4th Cir. 1990).

[63] *See, e.g.*, *United States v. Tucker*, 386 F.3d 273, 277 (D.C. Cir. 2004) ("To the extent the district court based the departure on its belief that the sentence was unjust, it relied on a factor that is clearly impermissible under the Guidelines."); *In re Sealed Case*, 292 F.3d 913, 916 (D.C. Cir. 2002) ("Disproportionality does not, in itself, provide an appropriate basis for a downward departure."); *United States v. Barber*, 93 F.3d 1200, 1203 (4th Cir. 1996) ("A sentencing court may not depart from an otherwise applicable guideline range simply because its own sense of justice would call for it.").

[64] USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 55 (2003). Until 2003, the Commission had included all government-sponsored departures other than substantial assistance departures in the "other downward departure" rate. After the PROTECT Act was passed, the Commission reported that at least 40% of these "other downward departures" were sought by the government. *Id*. at 54-56, 60.

[65] *See* Joseph W. Luby, *Reining in the "Junior Varsity Congress": A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 Wash. U.L. Q. 1199, 1255-67 (1999); Kate Stith, *The Hegemony of the Sentencing Commission*, 9 Fed. Sent'g Rep. 14 (1996).

[66] Ronald F. Wright & Marc L. Miller, *Empty Heart, Vibrant Corpus*, 12 Fed. Sent'g Rep. 86, 88 (1999).

3. Judges may now impose fair and individualized sentences.

The Supreme Court's decisions have brought balance, allowing judges for the first time to impose sentences that fit the offense and the offender. The courts are not without guidance as they were before the SRA. "Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing."[67] Section 3553(a)(1) requires courts to consider "the history and characteristics of the defendant," and section 3661 requires that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing an appropriate sentence."

The question is no longer whether the case exhibits "extraordinary" or "unusual" circumstances as compared to other cases that exhibit those circumstances but are nonetheless sentenced under guidelines that do not take account of them,[68] but whether the circumstances of the offense and characteristics of the defendant are relevant to the purposes of sentencing and bear on the overarching duty to impose a sentence that is sufficient, but not greater than necessary, to satisfy those purposes.[69] The judge must "make an individualized assessment based on the facts presented" and determine their appropriate weight in light of the purposes of sentencing.[70]

Judges can now impose sentences that better promote the purposes of sentencing. For example, in *Pepper*, it was "highly relevant" to the need for deterrence, incapacitation and rehabilitation, rather than impermissible or not ordinarily relevant, that Pepper was an unemployed drug addict estranged from his family at the time he sold methamphetamine, then attended college and achieved high grades, was a top employee at his job slated for promotion, re-established a relationship with his father, got married and supported his wife's daughter.[71] In *Gall*, it was significant to the need for deterrence and incapacitation, rather than "not ordinarily relevant," that Gall withdrew from a drug conspiracy, abstained from drugs, completed college, was steadily employed, and ran a business in which he employed others.[72]

Lesser known examples abound in which judges have appropriately varied from the guideline range based on circumstances the policy statements deem never or not ordinarily relevant. For example:

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[67] *Booker*, 543 U.S. at 261.

[68] *Gall*, 552 U.S. at 47-48, 52.

[69] *See Pepper*, 131 S. Ct. at 1242-43; *Gall*, 552 U.S. at 53-59.

[70] *Id*. at 50, 51-52.

[71] 131 S. Ct. at 1242-43.

[72] 552 U.S. at 53-59.

- In *United States v. Shull*, the judge took into account that Shull, "another drug user without an education or a job who started selling drugs," completed a drug education program, obtained his GED, completed courses and obtained certifications in refrigeration, electrical, EPA and OSHA safety standards, and was currently enrolled in college taking business classes.[73]

- In *United States v. McMannus*, the judge appropriately considered that while on pretrial release, McMannus put himself through community college, was employed and highly commended by his employer, and was a model citizen in his community.[74]

- In *United States v. Edwards*, the judge appropriately considered that, after selling small amounts of crack cocaine for his cousin for a year and well before he was prosecuted, Edwards married a law-abiding woman with a career as a nurse, the couple parented and supported five of his children from a former relationship, one child of the wife from a former relationship, and an infant of their own, he was holding down two jobs and was active on the board of his church.[75]

- In *United States v. Hernandez*, the judge should have considered that Hernandez was once a young drug addict who had had a difficult childhood, but had since succeeded at numerous vocational and educational efforts, including earning an associate degree with honors and a diploma for financial planning, had tutored other inmates, and received positive performance reports for work in a variety of prison jobs.[76]

- In *United States v. Munoz-Nava*, the judge appropriately considered that Munoz-Nava had a long and consistent work history, and was the primary caretaker and sole support of his eight-year old son, as well as the sole support of his ailing, elderly parents, and that his brief stint smuggling drugs in the soles of his boots was "highly out of character," and he was "committed to supporting his family by returning to his pattern of working hard at a legitimate job."[77]

- In *United States v. Davis*, it was appropriate to consider that keeping Davis in prison would be "disastrous" to his six young children and wife of fifteen years, who had together "worked night and day" to provide for their family and move them out of a homeless shelter, and who, though unemployed after suffering an injury that required surgery and regular physical therapy, still did whatever he could to supplement the family's public assistance funds while devoting himself to the health and education of his

[73] *United States v. Shull*, __ F. Supp. 2d __, 2011 WL 2559426 at *13 (S.D. Ohio June 29, 2011).

[74] *United States v. McMannus*, 262 Fed. App'x 732 (8th Cir. 2008).

[75] *United States v. Edwards*, slip op., 2009 WL 424464 (N.D. Ill. 2009).

[76] *United States v. Hernandez*, 604 F.3d 48, 53-54 (2d Cir. 2010).

[77] *United States v. Munoz-Nava*, 524 F.3d 1137 (10th Cir. 2008).

children and working toward a college degree in radiology when he made the "foolish mistake" of selling a gun due to financial hardship.[78]

- In *United States v. Wright*, the judge appropriately considered that Wright's mother was a heroin addict who squandered their welfare checks on drugs and turned their home into a "shooting gallery" where drugs were regularly used and sold before dying of liver disease when he was still a teenager, that his father abandoned the family when he was eight years old, and that his grandparents, to whom he turned for protection and support, were generally drunk and unemployed, resulting in a childhood of sustained trauma and neglect that undermined his maturity and ability to make sound decisions as a young adult and led to a brief psychotic episode at age 21, but who would be capable of turning his life around with appropriate therapy and vocational training.[79]

These defendants and others like them represent all races and socioeconomic backgrounds. A wealth of research, including some of the Commission's own research, demonstrates that the mitigating factors the Commission disapproves are highly relevant to the purposes of sentencing. It is patently obvious that mitigating factors are at least as relevant as many of the aggravating factors given heavy or incremental weight in the guidelines, such as offenses that were never charged or of which the defendant was acquitted,[80] a quantity of a mixture or substance containing a detectable amount of a drug owned by someone else,[81]

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[78] *United States v. Davis*, slip. op., 2008 WL 2329290 (S.D.N.Y. 2008).

[79] *United States v. Wright*, No. 3:CR-04-100 (M.D. Pa. June 30, 2006) (Docket Nos. 73, 84).

[80] *United States v. White*, 551 F.3d 381 (6th Cir. 2008) (*en banc*) (affirming sentence of 22 years for defendant convicted of offense subject to 8-year guideline sentence based on conduct of which he was acquitted); *United States v. Rashaw*, 170 Fed. App'x 986 (8th Cir. 2006) (affirming statutory maximum sentence of 30 years for defendant convicted of firearms offenses based on uncharged double homicide to which firearms were unrelated); *United States v. Price*, 418 F.3d 771 (7th Cir. 2005) (affirming 360-month sentence for defendant convicted of drug trafficking offense subject to 27-33 month guideline sentence based on conduct of others in conspiracy of which he was acquitted); *United States v. Jardine*, 364 F.3d 1200 (10th Cir. 2004) (affirming 108-month sentence for defendant convicted of firearms possession subject to 18-24 month guideline sentence based on uncharged drug trafficking offense to which the firearm was unrelated); *United States v. Lombard*, 72 F.3d 170, 178 (1st Cir. 1995) (affirming life sentence for defendant convicted of firearms offense based on a murder of which he was acquitted in state court); *see also United States v. Concepcion*, 983 F.2d 369, 389 (2d Cir. 1992) (affirming increase in guideline range from a maximum of 18 months to a maximum of 22 years based on conduct of which the defendant was acquitted, and holding that downward departure would be permissible to correct the severity of the increase).

[81] *United States v. Stanley*, 405 Fed. App'x 662 (3d Cir. 2010) (affirming guideline sentence of 97 months based on quantity of heroin contained in bag belonging to someone else that defendant, a ferry crew member, agreed to take past customs); *United States v. Salazar*, 5 F.3d 445 (9th Cir. 1993) (affirming sentence driven by base offense level of 42 based on quantity of cocaine belonging to others where defendant allowed cars to pass through border inspection); *see United States v. Dickerson*, 381 F.3d 251 (3d Cir. 2004) (unsophisticated drug courier, who was deeply depressed and had never been arrested, responsible for over 100 grams of heroin that belonged to others); *United States v. Isaza-Zapata*, 148 F.3d

quantities of drugs determined by confidential informants,[82] speculative "intended" loss amounts that bear no relationship to what the defendant actually intended or personal gain,[83] a weapon that "was possessed" by someone else,[84] or an obliterated serial number that was unknown to the defendant.[85]

Fortunately, judges must now give appropriate weight to all relevant characteristics and circumstances, and disregard policy statements to the contrary.[86] In doing so, they avoid truly unwarranted disparities and unfairness, and move the system closer to the SRA's purposes.

B. Certainty: Transparency, Honesty

Congress was also concerned that the length of the sentence to be served was uncertain at the time of sentencing, since parole authorities determined the actual release date, and about

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236, 237 (3d Cir. 1998) (drug courier who agreed to transport heroin to pay for a foot operation responsible for entire amount of drugs transported but belonging to others).

[82] *United States v. Williams*, 403 Fed. App'x 707, 708 (3d Cir. 2010) (affirming district court's reliance on testimony of confidential informant, a drug dealer whose testimony of estimated weekly sales contained "some inconsistencies" but was not "entirely non-credible" to determine that the offense involved 1.1 kilograms of heroin, resulting in a base offense level of 32); *United States v. Oliveras*, 359 Fed. App'x 257, 259 (2d Cir. 2010) (in crack case, where district court sentenced defendant based on lower guideline for powder cocaine because court found it "so disturbing" that the confidential informant insisted on buying crack when defendant initially wanted to sell powder cocaine, remanding for court to calculate guideline range based on crack guideline, which will result in 12-level increase to base offense level); *United States v. Smith*, 2011 WL 1897685 (4th Cir. May 19, 2011) (affirming 6-level increase in base offense level based on information provided by confidential informant).

[83]USSG § 2B1.1(B)(1) comment. (n.3(A)); *United States v. Ravelo*, 370 F.3d 266 (2d Cir. 2004) (affirming 2-level increase to offense level based on "intended loss" where defendant tried unsuccessfully multiple times to draw money on credit cards, and it "would have been impossible" for the defendant to have actually succeeded at obtaining the money); *United States v. Stockheimer*, 157 F.3d 1082, 1092 (7th Cir. 1998) (affirming 18-level increase in offense level based on "intended loss" of over $80 million where defendants' actual gain was approximately $200,000 and where "not even the government was willing to say that $ 80 million was a fair estimate of the seriousness of [the] conspiracy").

[84] USSG § 2D1.1(b)(1); *United States v. Anderson*, 618 F.3d 873 (8th Cir. 2010) (affirming 2-level increase under § 2D1.1(b)(1), adding three years to the sentence, where gun was found locked in a safe in a storage unit defendant's girlfriend rented and not near drugs seized or any drug paraphernalia).

[85] USSG § 2K2.1(b)(4) & comment. (n.8(B)); *see United States v. White*, 61 Fed. App'x 832, 833 (4th Cir. 2003) (affirming 4-level enhancement for possession of a firearm with an obliterated serial number for conviction under 18 U.S.C. § 922(g) where defendant was acquitted of knowingly possessing a firearm with an obliterated serial number under § 922(k)); *see also United States v. Brown*, 514 F.3d 256, 269 (2d Cir. 2008) (affirming four-level enhancement for obliterated serial number where defendant did not know the firearm had an obliterated serial number).

[86] *See Pepper*, 131 S. Ct. at 1249-50 (if a prohibitive policy statement is raised, court may reject it, may not elevate it above other factors, and must give appropriate weight to relevant facts).

uncertainty as to the reasons for the sentence.[87] Judges were not required to state reasons in open court, and parole boards made decisions in private meetings.[88] This concern was essentially about transparency and honesty.

Congress ensured certainty that the sentence imposed would be the sentence served by abolishing parole. It has been suggested that there is less certainty about what sentence will be imposed under the advisory guidelines and therefore less deterrence of future crime.[89] This is not what Congress meant by "certainty" and it is not supportable on its own terms. Even if would be offenders attempted to ascertain in advance what sentence might follow from a crime, they could not do so. Sentences under the mandatory guidelines depended on many unknowable factors, primarily what guideline "facts" prosecutors would pursue or bargain away.[90] Moreover, it is well-established that neither severity nor rigidity deters crime,[91] and that lengthy prison sentences increase recidivism.[92]

Congress sought transparency as to the *reasons* for the sentence imposed. The Commission would "recommend, with supporting reasons, the fairest and most effective guidelines it can devise."[93] Judges would state their reasons "in open court," including reasons for a sentence within or outside the applicable guideline range. Judges' statement of reasons would be important for purposes of appeal, to inform the defendant and the public of the reasons for the sentence, to provide "information to criminal justice researchers evaluating the

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[87] S. Rep. No. 98-225, at 39, 56 (1983).

[88] *Id*. at 48, 55.

[89] Letter from Jonathan Wroblewski to Hon. William K. Sessions III, Chair, U.S. Sent'g Comm'n at 2 (June 28, 2010).

[90] Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1340 (2005) ("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.").

[91] *See* Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime and Justice: A Review of Research 1 (2006); Gary Kleck *et al.*, *The Missing Link in General Deterrence Theory*, 43 Criminology 623 (2005); Andrew von Hirsch *et al.*, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); David Weisburd *et al.*, *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 Criminology 587 (1995).

[92] *See* Valerie Wright, The Sentencing Project, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* at 6-8 (Nov. 2010).

[93] S. Rep. No. 98-225, at 175 (1983); *see also* 28 U.S.C. § 994(p) (requiring submission of amendments to Congress "accompanied by a statement of reasons therefor").

effectiveness of various sentencing practices in achieving their stated purposes," and to "assist[] the Commission in its continuous reexamination of its guidelines and policy statements."[94]

The Commission did not explain how the guidelines in general or any particular guideline or policy statement was meant to achieve any purpose of sentencing, and provided no evidence upon which any of the guidelines or policy statements were based.[95] "If the federal sentencing system were a true administrative system, where courts reviewed the commission's decisions under traditional administrative law principles, this failure of explanation would have invalidated the guidelines from the get-go."[96] But there was no pressure on the Commission to explain. Judges were required to follow the guidelines whether they understood them or not.

The Commission's failure to explain or justify its guidelines made it difficult for judges to meaningfully explain the sentences they imposed. Mechanical application of unexplained guideline rules is not a meaningful explanation to a defendant or the public, nor is an apology for a sentence the judge firmly believes is too high.[97] Such explanations "work[ed] to promote not respect, but derision, of the law," because the law was "viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing."[98]

The Commission heard from many judges and Defenders at its regional hearings in 2009 and 2010 that if the Commission wants the guidelines to be respected, it needs to explain them and provide evidence to support them. The extent of explanation a judge must give for a guideline sentence depends in part on whether it rests "upon the Commission's own reasoning,"[99] but such reasoning rarely exists. The true reason is often that an amendment was

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[94] *Id*. at 79-80.

[95] "Nowhere in the forest of directives that the Commission has promulgated . . . can one find a discussion of the rationale for the particular approaches or definitions adopted by the Commission; nor can one find any efforts to justify the particular weights it has elected to assign to assign to various sentencing factors. Finally, the Commission has never explained why it chose to exclude a variety of factors (especially those relating to the personal history of the defendant) from the sentencing calculus. As a result, in applying the Guidelines, the courts are often without information regarding the underlying policies or objectives that the Commission is seeking to achieve through its sentencing rules." Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 56 (1998).

[96] Ronald F. Wright & Marc L. Miller, *Empty Heart, Vibrant Corpus*, 12 Fed. Sent'g Rep. 86, 87 (1999).

[97] *See, e.g.*, *Gilbert v. United States*, 609 F.3d 1159, 1161 (11th Cir. 2010) (quoting district court judge as stating in 1997: "The fact that I think the [career offender] sentence is too high is immaterial . . . I don't see any authority under the law for me to downwardly depart. . . . I would if I could."); *United States v. Dillon*, 572 F.3d 146, 148 (3d Cir. 2009) (in a crack case sentenced under mandatory guidelines, stating "I don't say to you that these penalties are fair. I don't think they are fair. I think they are entirely too high for the crime you have committed even though it is a serious crime. . . . But I feel I am bound by those Guidelines.").

[98] *Gall*, 552 U.S. at 54.

mandated or expected by Congress or urged by the Department of Justice, and any other explanation would be *post hoc* rationalization.[100] The Commission has begun to improve explanations for its more recent amendments.

Judges must now state their reasons for a sentence outside the guideline range in light of the facts presented and § 3553(a)'s objectives. When they impose a guideline sentence, they not only calculate the guideline range, but must explain why they rejected non-frivolous arguments for a different sentence and explain the sentence in light of the purposes and factors set forth in § 3553(a).[101] This promotes respect for law, and also helps the guidelines evolve. When judges articulate reasons, they provide "relevant information to both the court of appeals and ultimately the Sentencing Commission," which "should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw."[102]

Booker also increased the transparency of the reasons the government gives for seeking sentences below the guideline range. When the guidelines were mandatory, prosecutors filed motions for substantial assistance departures to grant leniency, in their discretion, when they viewed the guideline sentence to be unjust.[103] These decisions were not made openly or explained on the record, depended on individual prosecutors, and not all defendants who deserved lower sentences received them.[104] In 2010, the Attorney General issued a memorandum allowing prosecutors to seek individualized sentences under § 3553(a) with supervisory approval.[105] The memorandum validates what was already happening. While there has been little change in the total rate of government-sponsored below range sentences since

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[99] *Rita*, 551 U.S. at 357.

[100] *See* Transcript of Hearing Before the U.S. Sent'g Comm'n, Denver, Colo., at 39-40 (Oct. 20, 2009) (Judge Sessions inquiring: "I guess is there a conflict between a Commission that actually considers the politics and then the necessity of actually describing empirically how you arrived at a guideline amendment, or can those two be meshed in such a way as to be honest?").

[101] *Rita*, 551 U.S. at 357; *Gall*, 552 U.S. at 49-50.

[102] *Rita*, 551 U.S. at 357-58.

[103] *See* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 522-24, 526, 531-32, 547, 550, 556-57 (1992); Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 Iowa L. Rev. 1043, 1117-18 (2001); USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 87 (2004) [hereinafter *Fifteen Year Review*].

[104] "[C]ircumventing applicable guidelines may result in sentences, in some cases, that are better suited to achieve the purposes of sentencing than the sentence that would result from strict adherence to every applicable law," but "unlike judicial departures," this "can undo the transparency and uniformity intended by the SRA." *Fifteen Year Review* at 82, 141-42.

[105] Memorandum to All Federal Prosecutors from Attorney General Eric H. Holder Jr. regarding Department Policy on Charging and Sentencing, at 1 (May 19, 2010).

Booker,[106] there has been a downward trend in substantial assistance motions accompanied by an equal upward trend in motions for below guideline sentences for "other" reasons, *i.e.*, reasons under § 3553(a).[107]

C. Greater Use of Probation and Intermediate Sanctions, Less Use of Imprisonment

Congress believed, at a time when probation was imposed in 33% of cases,[108] that there was "too much reliance on terms of imprisonment when other types of sentences would serve the purposes of sentencing equally well without the degree of restriction on liberty that results from imprisonment."[109] Congress therefore set a goal of "assur[ing] the availability of a full range of sentencing options from which to select the most appropriate sentence in a particular case,"[110] including probation with meaningful conditions, and alternatives to all or part of a prison term such as fines, community service, and intermittent confinement.[111]

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[106] The rate has moved from 23.8% in 2005, to 24.6% in 2006, to 25.6% in 2007, to 25.6% in 2008, to 25.3% in 2009, to 25.4% in 2010, to 26.5% in 2011. *See* USSC, 2005 Sourcebook of Federal Sentencing Statistics, tbl.26; USSC, 2006-2010 Sourcebook of Federal Sentencing Statistics, tbl.N; USSC, Preliminary Quarterly Data Report, 2d Quarter Release, tbl 1 (2011).

[107] There has been a decrease of 10 percentage points in substantial assistance motions and an increase of 10 percentage points in government sponsored variances for other reasons. "Fast track" departures, which have increased because of the increase in the percentage of immigration cases, *see* USSC, 2005-10 Sourcebook of Federal Sentencing Statistics, tbl.3, are excluded.

	§ 5K1.1 Departures	Other Govt Spon Below Range
2005	83.5%	16.5%
2006	83.7%	16.3%
2007	79.6%	20.4%
2008	76.3%	23.7%
2009	77.2%	22.8%
2010	74.2%	25.2%
2011	73.4%	26.6%

USSC, 2005 Sourcebook of Federal Sentencing Statistics, tbl.26; USSC, 2006-2010 Sourcebook of Federal Sentencing Statistics, tbl.N; USSC, Preliminary Quarterly Data Report, 2d Quarter Release, tbl 1 (2011)

[108] *Fifteen Year Review* at 43; U.S. Sent'g Comm'n, Staff Discussion Paper, *Sentencing Options under the Guidelines* 10 (Nov. 1996).

[109] S. Rep. No. 98-225, at 59 (1983). *See also id*. at 50 (finding that the law "is not particularly flexible in providing the sentencing judge with a range of options," such that "a term of imprisonment may be imposed in some cases when it would not be if better alternatives were available" or a "a longer term than would ordinarily be appropriate simply because there were no available alternatives that served the purposes he sought to achieve with a long sentence.").

[110] *Id*. at 39.

[111] *Id*. at 50, 59.

To implement this goal, Congress directed the Commission to promulgate a guideline for the use of the courts in determining whether to impose a sentence of probation or a term of imprisonment.[112] It directed the Commission to ensure "that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."[113] And it suggested that the Commission recommend probation or intermediate sanctions to rehabilitate defendants who were in need of education, employment skills, or vocational training, to provide drug treatment, mental health treatment, or medical care, and to allow defendants to work to support their families, so long as prison or straight prison was not required to protect the public.[114]

Congress authorized judges to impose probation for most offenses, *i.e.*, any offense with a statutory maximum below 25 years unless expressly precluded for the offense,[115] and directed them to consider probation, fines, imprisonment, and any combination thereof.[116] The judge was required by § 3553(a)(3) "to consider all sentencing possibilities,"[117] and before imposing a particular kind of sentence, whether imprisonment or probation or an intermediate option, was to consider and balance the circumstances of the offense, the characteristics of the defendant, the purposes to be served by the sentence, and the guidelines.[118]

The first Commission did not promulgate a guideline for the use of the courts in determining whether to impose a sentence of probation or a term of imprisonment, and it did not implement the first offender directive. To the contrary, it created zones that allowed straight probation only for offenders with a guideline range of 0-6 months, required some kind and length of confinement for offenders with a guideline range greater than 0-6 months and up to 10-16 months, and required straight prison for the other 75% of offenders. The only explanation given was the Commission's "view" that certain economic crimes were "serious" and that these offenders had been sentenced to probation "in an inappropriately high percentage" of cases.[119]

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[112] 28 U.S.C. § 994(a)(1)(A).

[113] 28 U.S.C. § 994(j).

[114] S. Rep. No. 98-225, at 171-175 (1983).

[115] 18 U.S.C. § 3561(a), § 3559(a).

[116] *See* 18 U.S.C. § 3551, § 3561(a), § 3562-3564; S. Rep. No. 98-225, at 59 (1983) (encouraging judges and the Commission to use fines, probation with meaningful conditions, intermittent confinement, community confinement, and participation in programs); *id.* at 67 (§ 3551 "is designed to focus the sentencing process on the objectives to be achieved . . . and to encourage the employment of sentencing options, such as probation, fines, imprisonment, or combinations thereof").

[117] S. Rep. No. 98-225, at 77 (1983).

[118] *Id*. at 92, 119.

[119] USSG Ch. 1, Pt. A(4)(d); 52 Fed. Reg. 18,046, 18,051 (May 13, 1987).

No evidence was offered for this view, and no explanation was given as to why the "solution" was to "write guidelines that classify as 'serious' (and therefore subject to mandatory prison sentences)" virtually all offenses.[120]

The criminal justice community strongly objected. Judge Gerald Heaney of the Eighth Circuit opposed the diminishment of probation without supporting rationale. He pointed out that "[e]very study conducted by the United States Probation Office indicates that there has been no recidivism among 90 percent of the persons that are placed on probation in the Federal system."[121] Judge Thomas A. Wiseman, Jr., testifying on behalf of the Federal Judges Association, demonstrated with empirical evidence drawn from statistics over the course of several years that probationary sentences were effective at preventing future crimes by defendants.[122] Judge Marvin Frankel also questioned the diminution of probation.[123] The American Bar Association criticized the limits on probation as unprecedented and without support in the SRA.[124] The National Association of Criminal Defense Lawyers similarly opposed these limits as contrary to congressional directives and intent.[125] The Defenders argued that the guidelines failed to implement congressional directives and intent regarding the availability of probation and pointed out that the Commission's view that probationary sentences were ineffective was contrary to available empirical data.[126] These objections were to no avail and were not even answered.

Four years after the guidelines went into effect, in October 1991, Commission staff proposed to implement the intent of 28 U.S.C. §994(j) by permitting first offenders access to probation or prison alternatives, or with a two-level reduction for offenders who had zero criminal history points and used neither violence nor weapons during the instant offense.[127] In 1996, staff again laid the groundwork for implementation of §994(j), finding that "[m]any federal offenders who do not currently qualify for alternatives have relatively low risks of

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[120] *Id.*

[121] *Sentencing Guidelines: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 100th Cong. 475-80 (July 22, 1987).

[122] *Id.* at 206-17 (July 15, 1987) (written statement of Thomas A. Wiseman, Jr., Chief Judge, Middle District of Tennessee) (offenders placed on probation had only a 7% rate of recidivism).

[123] *Id.* at 543-53 (July 22, 1987) (testimony and statement of Hon. Marvin E. Frankel).

[124] *Id.* at 554-87 (July 22, 1987) (testimony and statement of Samuel J. Buffone).

[125] *Id.* at 591-601 (July 22, 1987) (testimony and statement of Alan Ellis).

[126] *Id.* at 413-71 (July 15, 1987) (testimony and written statement of Tom Hillier); *see Sentencing Commission Guidelines: Hearing Before the S. Comm. on the Judiciary,* 100th Cong. 326-77 (Oct. 22, 1987) (statement of Edward F. Marek).

[127] USSC, *Recidivism and the First Offender* 3 (2004).

recidivism compared to offenders in state systems and to federal offenders on supervised release," that "alternatives divert offenders from the criminogenic effects of imprisonment which include contact with more serious offenders, disruption of legal employment, and weakening of family ties," and that "[a]lternatives are less expensive than imprisonment."[128] And while the Zones link the availability of alternatives to an offender's offense level, staff reported that "[t]here is no correlation between recidivism and guidelines' offense level. Whether an offender has a low or high guideline offense level, recidivism rates are similar."[129]

A wealth of other research has shown that imprisonment is not needed in a large portion of cases to achieve the purposes of sentencing and is often counterproductive.[130] No particular amount of imprisonment or any imprisonment is necessary for deterrence.[131] There is no difference in deterrence of white collar offenders, presumably the most rational offenders, between imprisonment and probation.[132] Prison contributes to increased recidivism and does not prepare prisoners for successful re-entry. "The persistent removal of persons from the community to prison and their eventual return has a destabilizing effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality."[133]

As shown in the graph, the goal of ensuring that probation and intermediate sanctions were used more often and that imprisonment was used less often was not implemented.

PERCENTAGE OF DEFENDANTS RECEIVING VARIOUS TYPES OF SENTENCES
All Felonies 1984 - 2010 4th Quarter

[128] USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* 17-19 (Nov. 1996).

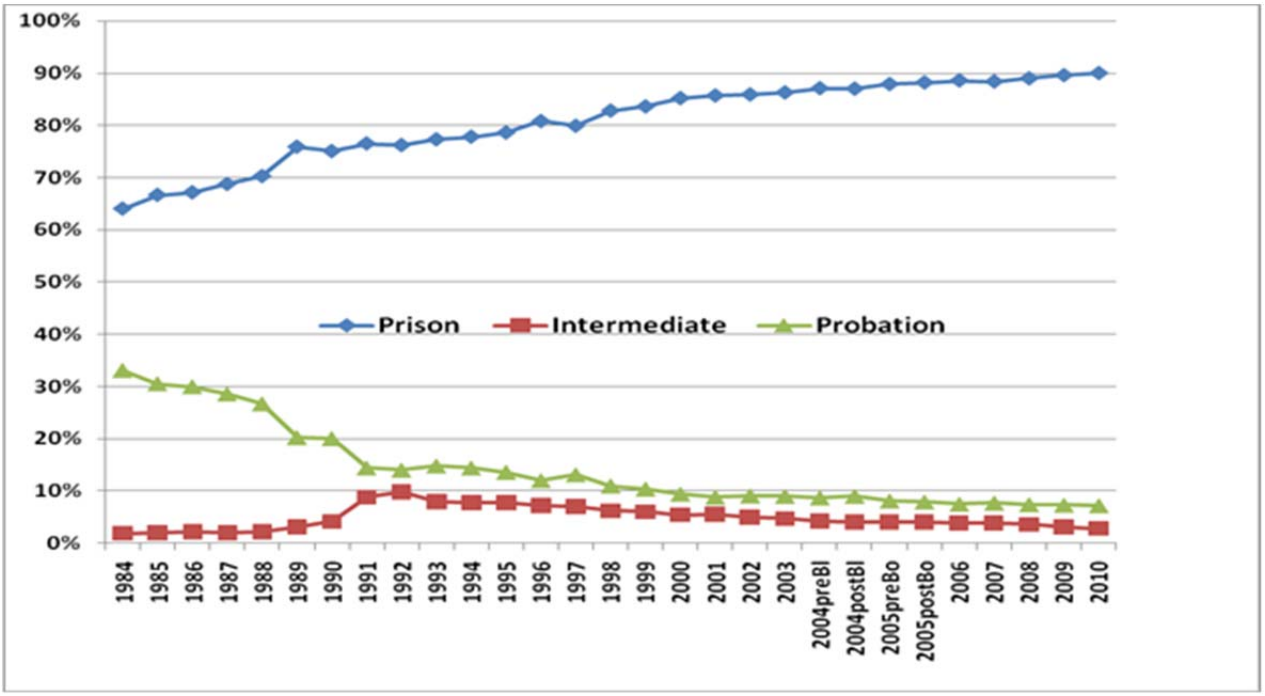
[129]U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 15 (2004).

[130] *See, e.g.*, Miles D. Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent'g Rep. 22 (1994); Lynne M. Vieraitis *et al.*, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Criminology & Pub. Pol'y 589 (2007); Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005), http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf.

[131] Andrew von Hirsch *et al.*, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime and Justice: A Review of Research 1, 28-29 (2006).

[132] *See* David Weisburd *et al.*, *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 Criminology 587 (1995).

[133] *See* The Sentencing Project, *Incarceration and Crime*, *supra* note 130, at 7-8.



Sources: 1984-1990 FPSSIS Datafiles, Administrative Office of U.S. Courts; USSC, *Sourcebook of Federal Sentencing Statistics*, tbl.12 (1991-2009); USSC, *Preliminary Quarterly Data Report, Fourth Quarter FY 2010*, tbl.18.

After *Booker*, the goal still has not been implemented. Even for offenses that do not include large numbers of non-citizens, who are often not eligible for probation, use of probation and other alternatives is declining. Among drug traffickers, 2.2% received probation in 2003, but only 2.1% received probation in the first two quarters of 2011. For firearms offenses, 4.8% received probation in 2003, but only 2.8% received probation in 2011. For fraud offenses, 20.1% in 2003, 14.5% in 2011.[134] When it comes to the SRA's goal of increasing the use of alternatives to imprisonment, the federal system is going backward. Why is this so even after *Booker*? Because the sentencing zone still "ultimately determines whether offenders are sentenced to alternatives."[135]

To its credit, after *Booker*, the Commission began a multi-year study of alternatives to incarceration in recognition of increased interest in alternatives, renewed public debate about the size of the federal prison population, the need for greater availability of alternatives, and the directives to minimize prison overcrowding, 28 U.S.C. § 994(g), and to make imprisonment generally inappropriate for first offenders who are not dangerous, § 994(j).[136] The Commission

[134] U.S. Sent'g Comm'n, 2003 Sourcebook of Federal Sentencing Statistics, tbl.12; U.S. Sent'g Comm'n, Preliminary Quarterly Data Report, 2d Quarter Release, tbl.18 (2011).

[135] U.S. Sent'g Comm'n, *Alternative Sentencing in the Federal Criminal Justice System* 12 (2009).

[136] USSG App. C, amend. 738 (Nov. 1, 2010) (Reason for Amendment).

heard from numerous experts and participants in federal and state criminal justice systems at its 2008 symposium. The Commission reviewed sentencing data, public comment and testimony, scholarly literature, federal and state practices, and judicial feedback.[137] The Commission conducted a survey in which the majority of federal judges stated that straight probation, probation with community or home confinement, or split sentences "should be made *more* available" for all offenses except murder, manslaughter, heroin trafficking, child pornography production and distribution, offenses involving direct exploitation of children, firearms offenses, and immigration offenses.[138]

In 2010, the Commission took a first modest step toward reversing the underuse of probation and intermediate sentencing options and the overuse of prison.[139] Chair Sessions expressed hope that this was "only the first step" in expanding alternatives to incarceration.[140] Given that neither the modest 2010 amendments nor increased judicial discretion after *Booker* has moved the system closer to the SRA's goal of ensuring that probation and intermediate sanctions are used more often, we hope that the Commission will soon renew its efforts to achieve this core goal of the SRA.

II. The Supreme Court's Decisions Have Given the Commission the Opportunity to Gain Respect on the Merits of its Work, Drawing on Judicial Experience and Empirical Research.

A. The Commission's Intended Role

The Supreme Court has described the Commission's "characteristic institutional role" as its capacity "to base its determinations on empirical data and national experience."[141] Indeed, the hope of an expert body, drawing on the experience of judges and empirical research rather than

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[137] *Id*.

[138] U.S. Sent'g Comm'n, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl.11.

[139] The Commission expanded Zones B and C by one level each, and invited a departure from Zone C to Zone B to "to accomplish a specific treatment purpose," if the defendant is a substance abuser or suffers from a significant mental illness, and if the defendant's "criminality is related to the treatment problem to be addressed." According to FY 2008 data, and excluding non-citizens and those who already received probation or a split sentence, if the zone amendment had been in place in 2008, it would have potentially benefited 1,272 defendants, 1.7% of 2008 offenders. *See* Testimony of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm'n, at 14-15 (Mar. 17, 2010). Only 8% of offenders fall in Zone C and thus could be potentially eligible for the zone departure if they met the other requirements. *See* U.S. Sent'g Comm'n, 2010 Sourcebook of Federal Sentencing Statistics, tbl.16.

[140] U.S. Sent'g Comm'n, Public Meeting Minutes (April 13, 2010).

[141] *Kimbrough v. United States*, 552 U.S. 85, 109-10 (2007) (internal citations and quotation marks omitted).

politics was the very foundation of the Commission's existence.[142] This role was also the basis for the Commission's constitutional legitimacy.[143] As Senators Kennedy, Hatch and Feinstein said in an *amicus* brief to the Court in 2007:

> Congress created the Commission to encourage reality-based sentencing policies: *i.e.*, policies based on objective data - not, for example, political debates "centering around the harsher versus more lenient punishment." . . . Indeed, Congress intended that the work of the Commission, as well as the responses of judges, lawyers, and Congress, would enable the sentencing system to evolve over time, so that its rules and policies would reflect, "to the extent practicable, advancement in human knowledge of human behavior as it relates to the criminal justice process."[144]

The Commission's neutral expert role is reflected in the SRA's key directives. The Commission's core purpose was to establish policies that "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)."[145] These policies were to "reflect, to the extent practicable, advancement in knowledge of human behavior."[146] The Commission was to "develop means of measuring the effectiveness of sentencing policies in meeting the purposes of sentencing set forth in section 3553(a)(2)."[147]

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[142] *See* Marvin Frankel, *Criminal Sentences: Law Without Order* 53-60, 118-23 (1973); Leonard Orland, *From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation*, 7 Hofstra L. Rev. 29, 46-51 (1978) (advocating creation of a sentencing commission insulated from political pressures to develop guidelines based on research and expertise); Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 Wake Forest L. Rev. 291, 297 (1993) (Special Counsel to the Senate Judiciary Committee from 1975 through 1980, stating that Congress delegated promulgation of guidelines to Commission because it had "neither the necessary time nor expertise," and would be "unable or unwilling to avoid the temptation to increase criminal sentences substantially" when faced with "politically volatile issues."); Richard P. Conaboy, *The United States Sentencing Commission: A New Component in the Federal Criminal Justice* System, 61 Fed. Probation 58, 62 (1997) ("The creation of the Sentencing Commission and its placement within the judicial branch of government was intended to insulate sentencing policy . . . from the political passions of the day. As an independent, expert agency, the Commission's role is to develop sentencing policy on the basis of research and reason.").

[143] *Mistretta v. United States*, 488 U.S. 361, 407-08, 412 (1988) (Commission would act as an "expert body," engaging in an "essentially neutral endeavor," drawing on "judicial experience and expertise," and following the SRA's policymaking directives).

[144] *See* Brief of *Amici Curiae* Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein in Support of Affirmance at *20-21, *Claiborne v. United States*, No. 06-5618 (Jan. 22, 2007).

[145] 28 U.S.C. § 991(b)(1)(A).

[146] 28 U.S.C. § 991(b)(1)(C).

[147] 28 U.S.C. § 991(b)(2).

To carry out this mission, the Commission would collect, study, and disseminate data and research regarding sentences actually imposed, their relationship to the purposes of sentencing, and their effectiveness.[148] It would continually "review and revise" the guidelines after consultation with the frontline participants in the criminal justice system and "in consideration of data and comments coming to its attention."[149]

Perhaps the most important information the Commission would use in revising the guidelines were data and reasons generated by judges when departing from the guidelines.[150] District courts would state their reasons,[151] the Commission would collect and study those reasons,[152] and appellate courts would uphold "reasonable" departures having regard for the sentencing court's reasons and the factors set forth in § 3553(a).[153] The Commission would not "second-guess[] individual judicial sentencing actions either at the trial or appellate level," but instead would learn "whether the guidelines are being effectively implemented and revise them if for some reason they fail to achieve their purposes."[154] In this way, the guideline system would "reflect current views as to just punishment, and take account of the most recent information on satisfying the purposes of deterrence, incapacitation, and rehabilitation."[155]

According to then-Judge Breyer, "the very theory of the guidelines system is that when courts, drawing upon experience and informed judgment in cases, decide to depart, they will explain their departures," the "courts of appeals and the Sentencing Commission, will examine, and learn from, those reasons," and "the resulting knowledge will help the Commission to

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[148] 28 U.S.C. § 995(a)(13)-(16). "The Sentencing Commission can and should continually revise its guidelines and policies to assure that they are the most sophisticated statements available and will most appropriately carry out the purposes of sentencing. 28 U.S.C. 991(b)(1)(C) and 995(a) contain specific statutory direction and authority for such continual refinement." S. Rep. No. 98-225, at 77 (1983).

[149] 28 U.S.C. § 994(o).

[150] "The statement of reasons . . . assists the Sentencing Commission in its continuous reexamination of its guidelines and policy statements." S. Rep. No. 98-225, at 80 (1983). "Appellate review of sentences is essential . . . to provide case law development of the appropriate reasons for sentencing outside the guidelines," which "will assist the Sentencing Commission in refining the sentencing guidelines." *Id*. at 151.

[151] 18 U.S.C. § 3553(c) (statement of reasons).

[152] 28 U.S.C. § 994(w) (judges shall submit statement of reasons to the Commission), § 995(a)(15) (Commission shall collect "information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a)").

[153] 18 U.S.C. § 3742(e) (1990).

[154] S. Rep. No. 98-225, at 178 (1983).

[155] *Id.*

change, to refine, and to improve, the Guidelines themselves."[156] The first Commission acknowledged that the guidelines were not perfect, but they would evolve "as practical experience, analysis, and logic dictate."[157]

The SRA contemplated that the Commission would set its own agenda and develop the guidelines based on empirical data and consultation, and *after* that careful process, would send the results to Congress.[158]

B. The Commission's Role During the Mandatory Guidelines Era

The SRA's vision of expert policymaking, informed by input from the neutral Judiciary, soon faded in favor of "tough on crime" politics.[159] Many of the SRA's principles and procedures were overridden or ignored.[160] The political branches began to undermine the Commission's independence from the outset, Congress through mandatory minimums and specific directives, and the Department of Justice through political pressure. The Commission did not insulate itself from political influences, and failed to integrate the views and experience of the Judiciary.[161] The result was declared a "disaster," a "mess," and "a cure worse than the

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[156] *United States v. Rivera*, 994 F.2d 942, 949-50 (1st Cir. 1993) (Breyer, C.J.). *See also* Edward M. Kennedy, *Sentencing Reform—An Evolutionary* Process, 3 Fed. Sent'g Rep. 271 (1991) ("the structure of the guidelines system draws upon the expertise of the judiciary in addressing [key] issues," departures "will lead to a common law of sentencing," and "the guideline system [will] be evolutionary in nature.").

[157] "Guideline sentencing is an evolutionary process. We are developing a working framework for a system of guidelines that, over time, will be refined and amended as practical experience, analysis, and logic dictate. The Commission realizes that it cannot produce a perfect system." 52 Fed. Reg. 3920, 3921 (Feb. 6, 1987). *See also* USSG, Ch. 1, Pt. A(1)(3) (The Basic Approach).

[158] *See* 28 U.S.C. §§ 994(x), 994(o), 994(p).

[159] *See* Edward M. Kennedy, *Sentencing Reform—An Evolutionary Process*, 3 Fed. Sent'g Rep. 271 (1991) (stating that as compared to the inception of sentencing reform in the late 1970s, "today's rhetoric is hotter, the politics of crime more cynical, and our goal of a rational, effective criminal justice system more elusive"); Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 Stan. L. Rev. 37, 41 (2005) ("When the U.S. Sentencing Commission began its work, Frankel's aims for the Commission (political insulation and specialist expertise) and for the Guidelines (procedural fairness and reduced disparities) were no longer in vogue.").

[160] The Commission's Fifteen Year Review notes that "[t]he Commission's priorities and policymaking agenda have been greatly influenced by congressional directives and other crime legislation" which "bypass the processes of policy development outlined in the SRA." *Fifteen Year Review* at 145. "[T]he results of research and collaboration [among the Commission and other stakeholders] have been overridden or ignored in policymaking in the guidelines era through enactment of mandatory minimums or specific directives to the Commission." *Id.* at xvii.

[161] *See* Michael Tonry, *Federal Sentencing Can Be Made More Just, If the Sentencing Commission Wants to Make It So*, 12 Fed. Sent'g Rep. 83 (1999) (the Commission "chose . . . to view the Department of Justice and conservative members of Congress as its primary constituency," while "federal judges were not well-integrated into the [guideline] development process").

disease."[162] Judge Frankel, the "father of sentencing reform," criticized the severity and rigidity of the guidelines and called upon the Commission to identify "what we mean to achieve, and what we may in fact achieve, as we continue to mete out long prison sentences."[163]

According to the SRA, the aim of the entire enterprise – the development of the guidelines and sentencing in individual cases – was to fulfill the statutory purposes of sentencing.[164] The Commission could not agree on which purposes of sentencing should underlie the guidelines, so it used an "empirical approach" based on data "estimating pre-guidelines sentencing practice."[165] This, the Commission said, would reflect what the criminal justice community had determined over time to be important from either a just deserts or crime control perspective.[166] But the Commission deviated from past practice in significant ways, all in favor of severity. It tied the drug guidelines to mandatory minimums, although it was not required to do so.[167] It overstated sentence length by averaging time served only for defendants sentenced to prison, excluding 33% of offenders sentenced to probation, and made probation unavailable for most offenders. [168] It did not estimate the impact of mitigating offender

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[162] *See* Michael Tonry, *Sentencing Matters* (1998) (summarizing criticism of the guidelines by judges and academic commentators and noting that federal reform had proven a drag on the reform movement in the state courts); Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stan. L. Rev. 85 (2005); Judy Clarke, *The Sentencing Guidelines: What a Mess*, 55 Fed. Probation 45 (1991); Gerald F. Uelman, *Federal Sentencing Guidelines: A Cure Worse than the Disease*, 29 Am. Crim. L. Rev. 899 (1992); American College of Trial Lawyers, *United States Sentencing Guidelines 2004: An Experiment That Has Failed* (2004); Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heartland: The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim. L. Rev. 723 (1999); Erik Luna, CATO Institute, *Misguided Guidelines: A Critique of Federal Sentencing*, Policy Analysis, No. 458 (2002).

[163] Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 Yale L.J. 2043, 2051 (1992).

[164] *See* 28 U.S.C. § 991(b)(1)(A), (B), (b)(2); S. Rep. No. 98-225, at 161-62.

[165] USSG, Ch. 1, Pt. A(1)(3) (Original Introduction to the Guidelines Manual, The Basic Approach) (2010).

[166] *Id*.

[167] USSG, Ch. 1, Pt. A(1)(3) (Original Introduction to the Guidelines Manual, The Basic Approach) (2009).

[168] USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 23-24 (1987) ("sentence levels" were based on average time served by defendants "sentenced to a term of imprisonment"); *id*. at 27-34 (Table 1(a) showing "sentence levels" for various offenses and percentages sentenced to prison). Approximately 33% of offenders were sentenced to probation in 1984. *Fifteen Year Review* at 43.

characteristics on past sentences,[169] though judges routinely considered these factors in the past,[170] to ensure that the sentence fit the offender and not just the crime.[171] According to then-Judge and Commissioner Breyer, the Commission deviated from the data based on "'trade-offs' among Commissioners with different viewpoints."[172] The Commission later acknowledged that "either on its own initiative or in response to congressional actions," it had "established guideline ranges that were significantly more severe than past practice [for] the most frequently sentenced offenses in federal court."[173]

Two of the original Commissioners resigned over what they said was unprincipled policy development and an inability to explain or defend the guidelines.[174] Commissioner Block described amendments adopted in 1989 as "overtly political and inexpert," the result of the Justice Department's *ex officio* persuading four of six Commissioners that Congress "had given oblique 'signals' to the Commission" to increase guideline ranges when Congress "said no such

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[169] Kate Stith & Jose Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 61 (1998). Except for drug use and role in the offense, all of the factors whose impact was estimated were aggravating factors about the crime. *See* USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 27-39 (1987) (tables listing factors); *id*. at 18 n.59 ("not all relevant data items were requested and coded"); *id*. at 22-23 n.64 (acknowledging that a "factor's relative importance for sentencing" was estimated only for factors related to the offense).

[170] *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 18-19 (1988); Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heartland: The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim. L. Rev. 723, 757 (1999).

[171] *See Williams v. New York*, 337 U.S. 241, 247 (1949) (the "fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant – if not essential" to sentencing, because "the punishment should fit the offender and not merely the crime.")

[172] *See* Breyer, *supra* note 170, at 19-20 (Commission's decisions deviating from past practice were the product of).

[173] *Fifteen Year Review* at 47.

[174] Paula Yost, *Sentencing Panel Member Resigns over Research*, Wash. Post, Aug. 23, 1989, at A25. Commissioner Michael K. Block resigned on August 22, 1989 "over what he said is a lack of commitment by commissioners to base decisions on research and scientific data when amending sentencing guidelines." *Id*. *See also* Dissenting View of Commissioner Paul H. Robinson to the Promulgation of Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 18046, 18121-18132 (May 13, 1987) (stating that "[o]f all of the goals of the Sentencing Reform Act, it is most unfortunate that the goal of rationality has been abandoned and even frustrated by these guidelines," and pointing out that the guidelines were not devised to advance sentencing purposes, were not explained and were not defended with a single empirical study); Michael K. Block, *Emerging Problems in the Sentencing Commission's Approach to Guideline Amendments*, 1 Fed. Sent'g Rep. 451 (May 1989) ("What concerns me about these unsupported amendments is not only that the substantive changes may not be warranted, but also that the Commission's process for generating guideline amendments is developing in such a way as to hinder rational policymaking.").

thing."[175] He said that the Commission was "actively seeking an 'information free' environment in which to make sentencing policy," and questioned the institutional legitimacy of "reacting like the 'junior varsity Congress' that Justice Scalia feared."[176] Then-Judge and Commissioner Breyer also warned against adopting amendments that could not be explained on a principled basis,[177] and did not seek reappointment.[178]

When the Commission promulgated the first set of guidelines, it said that it would revise them later based on the courts' experience in applying them.[179] But the Commission actively suppressed judicial departures and feedback to the Commission, as described in Part I.B, *supra*. Judges therefore "never played an important role in improving the supposedly evolutionary guidelines."[180]

Instead, the guidelines were frequently increased in response to short-sighted demands by the Department of Justice, new mandatory minimums, and congressional directives. The Department regularly and successfully lobbied the Commission and Congress for lengthier sentences and exclusive power to confer leniency in pursuit of its own institutional interests.[181] "The resulting institutional imbalance . . . made the guidelines a one-way upward ratchet increasingly divorced from consideration of sound public policy and even from the commonsense judgments of frontline sentencing professionals who apply the rules."[182] The guidelines were increased easily and often, but it was nearly impossible to reverse even a well-documented mistake like the crack guidelines. Since the guidelines went into effect, they have been amended 748 times, nearly always in an upward direction. Only 23 amendments reduced severity in some manner; eleven of those were promulgated after *Booker*. *See* Appendix 1.

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[175] Jeffery S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-*Mistretta*): Sunshine or Sunset?*, 27 Am. Crim. L. Rev. 289, 319-20 (1989).

[176] Block, *Emerging Problems*, *supra* note 174, at 453.

[177] *Id*.

[178] Sentencing Policy, Disabled, N.Y. Times, Dec. 19, 1989, at A26, col. 1.

[179] USSG, Ch. 1, Pt. A(1)(3); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 858 (1992).

[180] Ronald F. Wright & Marc L. Miller, *Empty Heart, Vibrant Corpus*, 12 Fed. Sent'g Rep. 86, 88 (1999).

[181] *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 728 & n. 25 (2005) ("prosecutors have an incentive to lobby for higher statutory maximums than even they themselves believe to be appropriate for the crime, just to enhance their bargaining power," and listing numerous examples of the Department requesting more stringent sentencing guidelines and laws to make prosecutors' jobs easier); Frank O. Bowman III, *Pour Encourager Les Autres?*, 1 Ohio State J. Crim. L. 373, 387-435 (2004).

[182] Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005).

The missing institutional check was an effective and public voice for the Judiciary through reasoned departures. Departures and judicial feedback should have served an important role in ensuring that sentences met the purposes of sentencing in the individual case and in informing sentencing policy. A public voice for the Judiciary was especially important because the Commission's rulemaking is not subject to most administrative laws applicable to other agencies designed to ensure impartiality, transparency, and rationality.

The rules of other agencies may be challenged in court and invalidated when found to be arbitrary and capricious and on other grounds.[183] Other agencies must provide a statement of "basis and purpose" for their rules,[184] including a thorough explanation, factual evidence supporting the rule, and a reasoned response to comments opposing the rule.[185] The guidelines, however, could not be challenged in court as arbitrary and capricious or because they were promulgated in violation of the Administrative Procedures Act (APA) and other sunshine laws.

The absence of procedural safeguards allowed the Commission to engage in rulemaking that was far from impartial, transparent, or rational. Guideline amendments are subject to notice and comment and a public hearing,[186] but the Department was able to influence the Commission behind closed doors, without a fair opportunity for other stakeholders to respond.[187] Amendments did not always reflect what was proposed for comment or what was discussed at public hearings.[188] The Commission was under no pressure to explain or defend the guidelines, and did not do so.[189]

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[183] *See* 5 U.S.C. § 706(2).

[184] 5 U.S.C. § 553(c).

[185] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43, 49, 57 (1983); Richard J. Pierce, Jr., *Administrative Law Treatise*, vol. I, § 7.1, at 413 (2002); *id.* § 7.4 at 442, 449 (discussing *State Farm* and collecting cases).

[186] *See* 28 U.S.C. § 994(x); 5 U.S.C. § 553.

[187] For other agencies, "every portion of every meeting of an agency shall be open to public observation," 5 U.S.C. § 552b(b), and they may not engage in *ex parte* communications with respect to matters subject to a public hearing. 5 U.S.C. § 557(d)(1). The Commission meets with its Executive Branch *ex officio* commissioners and law enforcement agencies in nonpublic meetings, USSC, Rules of Practice and Procedure, Rule 3.3, and deliberates behind closed doors. *Id*. The "public comment file" does not include a record of these meetings, *id*. Rule 5.1, and the Commission is not subject to the Freedom of Information Act. *Compare* 5 U.S.C. § 552 *with Washington Legal Found. v. United States Sent'g Comm'n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994) (Sentencing Commission is not an "agency" for purposes of the APA); *see also* U.S. Sent'g Comm'n, Rules of Practice and Procedure, Rule 1.1 (Commission is not subject to the Freedom of Information Act).

[188] The Commission did not always follow the "logical outgrowth" principle, Joseph W. Luby, *Reining in the "Junior Varsity Congress": A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 Wash. U.L. Q. 1199, 1222 (1999), which requires a second notice and comment period if a proposed amendment differs significantly from an initial proposal or does not represent the logical outgrowth of the original request for comment. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). *See, e.g.*, Samuel J. Buffone, *The Federal Sentencing Commission's Proposed Rules of*

The Commission was seen as highly politicized, imbalanced, and unresponsive to the views and experience of the neutral Judiciary.[190] Thus, while the guidelines were required to be followed, they were not respected within the criminal justice system *or* by the political actors who interfered with the Commission's work.[191]

Practice and Procedure, 9 Fed. Sent'g Rep. 67 (1996) (describing this process regarding environmental and organizational guidelines); Amy Baron-Evans, *The Continuing Struggle for Just, Effective, and Constitutional Sentencing After* United States v. Booker, at 42-46 (2006) (same regarding amendments to firearms guideline), http://www.fd.org/pdf_lib/EvansStruggle.pdf; Brief of the Federal Public and Community Defenders and the National Association of Federal Defenders as *Amici Curiae* in Support of Petitioner in the Supreme Court of the United States, *Dillon v. United States*, No. 09-6338 (Feb. 1, 2010) (same regarding mandatory policy statement regarding retroactive amendments to the guidelines).

[189] Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 56-57 (1998); Ronald F. Wright & Marc L. Miller, *Empty Heart, Vibrant Corpus*, 12 Fed. Sent'g Rep. 86, 87 (1999).

[190] *See* Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 Stan. L. & Pol'y Rev. 93, 99 (1999) (Commission has "proven to be institutionally disposed to 'fight crime with more time.'"); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 765 (2005) ("[T]he Sentencing Commission was a highly politicized agency from the outset. . . . 'The U.S. commission ... made no effort to insulate its policies from law-and-order politics and short-term emotions.'"); Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 Stan. L. Rev. 1211, 1215 (2004) ("excessive prosecutorial power in the federal system, revealed in multiple ways and confirmed by the views of key actors, invites abuse and is therefore a failure of justice.").

[191] *See* Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 Stan. L. Rev. 217, 220 (Oct. 2005) ("This lack of respect is especially evident in Congress itself, which increasingly has rejected a role for the Sentencing Commission in formulating federal sentencing policy. . . . [T]he Commission has undermined its own legitimacy," and been "complicit in ensuring that it does not play a leading role in setting federal sentencing policy."); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 757 (2005) ("[T]he U.S. Sentencing Commission is universally recognized to be an ineffectual agency."); Ronald Weich, *The Battle Against Mandatory Minimums: A Report from the Front Lines*, 9 Fed. Sent'g Rep. 94, 96-97 (1996) (describing the Commission as "the Rodney Dangerfield of federal agencies: . . . [d]espised by judges, sneered at by scholars, ignored by the Justice Department, its guidelines circumvented by practitioners and routinely lambasted in the press."); J.C. Oleson, *Blowing Out All the Candles: A Few Thoughts on the Twenty-Fifth Birthday of the Sentencing Reform Act of 1984*, 45 U. Rich. L. Rev. 693, 703 (2011) ("the Guidelines are the object of widespread scorn"); American Bar Association, Justice Kennedy Commission, *Reports With Recommendations to the ABA House of Delegates* (2004) (rejecting federal guidelines model, noting that it is the "most criticized of all commission-guidance structures," and summarizing shortcomings); Kevin Reitz, *Model Penal Code: Sentencing: Report* (American Law Institute 2003) (supporting sentencing guidelines but summarizing criticisms of federal version), *discussed in* Kevin Reitz, *American Law Institute, Model Penal Code: Sentencing, Plan for Revision*, 6 Buffalo Crim. L. Rev. 525 (2002).

C. The Supreme Court's Decisions Give the Commission and the Judiciary the Opportunity to Re-Claim Their Proper Roles.

The Supreme Court's decisions have resurrected the judicial feedback mechanism that Congress intended, and the Commission's core duties under the SRA. "[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly."[192] The courts' "reasoned sentencing judgment[s], resting upon an effort to filter the Guidelines' general advice through § 3553(a)'s list of factors . . . should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw."[193] When the Commission acts in its "characteristic institutional role," as an independent expert body, it is "fair to assume" that the guidelines reflect a "rough approximation" of sentences that "might achieve § 3553(a)'s objectives."[194] A guideline sentence may, however, fail to "treat defendant characteristics in the proper way," or "fail properly to reflect § 3553(a) considerations."[195] As to the former, the guidelines do not account for all relevant individualized circumstances, with which the district court judge has the greatest familiarity.[196] As to the latter, as the Commission knows, some guidelines are not the product of "empirical data and national experience."[197] If not, and the guideline recommends punishment that is greater than necessary (or insufficient) to achieve § 3553(a)'s purposes, courts may vary from it "even in a mine-run case."[198] As the Commission "perform[s] its function of revising the Guidelines to reflect the desirable sentencing practices of the district courts . . . district courts will have less reason to depart from the Commission's recommendations."[199]

The Commission has shown remarkable courage in recent years, acting on the basis of research and standing up to political pressure. It has begun to base its amendments on judicial feedback and empirical research and to explain those amendments. While the Commission may

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[192] *Booker*, 543 U.S. at 264.

[193] *Rita*, 551 U.S. at 358.

[194] *Id*. at 350-51.

[195] *Id*. at 351, 357; *see also Gall*, 552 U.S. at 46 n.2; *Kimbrough*, 552 U.S. at 96; *Pepper*, 131 S. Ct. at 1247.

[196] *Id*. at 357 (Guidelines may "not generally treat defendant characteristics in the proper way"); *id*. at 365 (factors "not ordinarily considered under the Guidelines" must be considered under § 3553(a)(1)) (Stevens & Ginsburg, JJ., concurring); *see also Gall*, 552 U.S. at 51-52; *Pepper*, 131 S. Ct. at 1239-43.

[197] *Kimbrough*, 552 U.S. at 101, 109-10; *see also Rita*, 551 U.S. at 351, 357; *Gall*, 552 U.S. at 46 n.2; *Pepper*, 131 S. Ct. 1247-48.

[198] *Kimbrough*, 552 U.S. at 109-10; *see also Rita*, 551 U.S. at 351, 357.

[199] *Id*. at 382-83 (Scalia, J., concurring in part and concurring in the judgment).

have feared that it would no longer be relevant if the guidelines were not mandatory,[200] the exact opposite has occurred. The Commission heard repeatedly at the regional hearings from judges, defense lawyers, probation officers, and even some prosecutors that the advisory guidelines are working. The vast majority of judges, 92%, prefer a guidelines system to no guidelines, and 75% believe that the current advisory system achieves the purposes of sentencing better than any kind of mandatory guidelines.[201] The Commission no longer listens *only* to the Department of Justice, and the Department has become more reasonable. The Department supports the advisory guidelines system and amelioration of some mandatory minimums,[202] and now recognizes that "equal justice depends on individualized justice."[203] Some congressional leaders have voiced strong support for the advisory guidelines system,[204] and Congress has enacted fewer mandatory minimums and issued fewer specific directives in the six years after *Booker* than in any other six-year period since the guidelines went into effect. *See* Appendices 2-5.

The advisory guidelines system increases public confidence in the criminal justice system, as the courts must consider all relevant facts and circumstances rather than just aggravating facts about the offense, "relevant conduct," and criminal history. This assures defendants and their families and loved ones that the system is fair. The general public is far less

[200] *See, e.g.*, Transcript of Public Hearing Before the U.S. Sent'g Comm'n, Atlanta, Ga., at 13 (Feb. 10, 2009) (remarks of Judge Ruben Castillo, Vice Chair) (stating that a primary purpose of the regional hearings was to hear how "to make these guidelines better, to make them relevant to sentencing processes"); Transcript of Public Hearing Before the U.S. Sent'g Comm'n, Atlanta, Ga., at 150 (Feb. 10 & 11, 2009) (remarks of Judge William K. Sessions, III, Vice Chair) (asking "how [can the Commission] make the guidelines relevant in the future. [T]here is a real question as to whether the guidelines will continue to be relevant."); *id.* at 153 (remarks of Commissioner Beryl Howell) ("I just want to echo my fellow Commissioners' remarks thanking you for your comments and joining us in our exploration of thinking more broadly about how to keep the guidelines relevant and what we can do to improve them."); *id.* at 162 (remarks of Commissioner Dabney Friedrich) (asking whether the Commission can "continue to be relevant with the existing guidelines we have?").

[201] USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl.19.

[202] Lanny A. Breuer, *The Attorney General's Sentencing and Corrections Working Group: A Progress Report*, 23 Fed. Sent'g Rep. 110, 112 (2010).

[203] Memorandum to All Federal Prosecutors from Attorney General Eric H. Holder Jr. regarding Department Policy on Charging and Sentencing, at 1 (May 19, 2010).

[204] *See* Plenary Speech by Mr. Robert C. "Bobby" Scott, at 11-13, Sentencing Advocacy, Practice and Reform Institute, American Bar Association Criminal Justice Section (Oct. 24, 2008) (stating that "*Booker* is the fix," and calling upon the Commission to advise Congress of guidelines in need of revision); *Federal Sentencing at a Crossroads: A Call for Leadership*, NYU Law School, Center on the Administration of Criminal Law, May 24, 2010, webcast at 31:29-31:54 (Honorable John Conyers, Jr. stating that "*Booker* is the case that really moved us forward," "*Kimbrough* refined it," and now we "are moving toward a trend of some rationality.").

punitive than the guidelines reflect,[205] and the public includes hundreds of thousands of people who have family members in federal prison.

Judges may also vary from a guideline range, apart from individualized circumstances, if they determine that the guideline was not developed by the Commission based on the procedures set forth in the SRA and recommends a sentence that is greater than necessary to satisfy the purposes of sentencing.[206] This power is not only constitutionally required,[207] but provides valuable feedback to the Commission in a transparent manner. To paraphrase Vice Chair Carr, when the guidelines were mandatory, the Commission knew that judges were sometimes dissatisfied with the guidelines, but there was no means available for judges to express their disagreements or to demonstrate how they would have resolved them through specific sentencing outcomes.[208] The ability of judges to disagree on a reasoned basis with a guideline is a transparent mechanism to assist the Commission in promulgating guidelines that can earn the respect of judges, prosecutors, defense attorneys, members of Congress, probation officers, and the public.

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[205] *See* Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 Harv. L. & Pol'y Rev. 173, 174-76, 185-88 (2010) (finding that the Commission "failed to moor its proscribed sentences to community sentiment," based on juror surveys in which median sentence jurors would have imposed was just one-third the sentence required by the bottom of the applicable sentencing range, 88% of jurors recommended a sentence below the low end of the guideline range, and 77% recommended a sentence below that actually imposed by the judge); Peter H. Rossi & Richard A. Berk, USSC, *Public Opinion on Sentencing Federal Crimes* (1997) (respondents found the guidelines over-emphasized drug quantity, produced "much harsher" sentences in drug trafficking cases than they would have given, and did not support the severity of increases under "habitual offender" rules like the career offender guideline).

[206] *Rita v. United States*, 551 U.S. 338, 351 (2007) (court may sentence outside guideline range when "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations" or "reflect[s] an unsound judgment"); *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (judges "may vary from Guidelines ranges based solely on policy considerations, including disagreements with the Guidelines") (citing *Rita*, 551 U.S. at 351) (internal brackets omitted).

[207] *See Cunningham v. California*, 549 U.S. 270, 278-81, 286-87 & n.12 (2007) (invalidating California system because it did not permit a sentence outside the specified term based on a "policy judgment" in light of the "general objectives of sentencing," but only based on "facts"); *Rita*, 551 U.S. at 351, 357 (because the guidelines may not be presumed reasonable at sentencing, sentencing judges are permitted to find that the "Guidelines sentence itself fails properly to reflect § 3553(a) considerations"); *Kimbrough*, 552 U.S. at 91 (because "the cocaine Guidelines, like all other Guidelines, are advisory only," a conclusion that a sentencing judge was barred from disagreeing with the crack guidelines in a "mine-run case" was error because it rendered the guidelines "effectively mandatory."); Brief of the United States at 11, *Vazquez v. United States*, No. 09-5370 (U.S. Nov. 16, 2009) ("[T]he very essence of an advisory guideline is that a sentencing court may, subject to appellate review for reasonableness, disagree with the guideline in imposing sentencing under Section 3553(a).").

[208] Remarks of U.S. Sent'g. Comm'n Vice Chair William B. Carr at American Bar Association White Collar Crime Conference, San Diego, Cal. (Mar. 3, 2011).

Judges do not casually criticize the guidelines based on their personal views. They examine the way in which the guideline was developed, the reasons for the guideline offered by the Commission (if any), the way the guideline functions in real cases, and the evidence, including the Commission's own reports, regarding whether the guideline fairly and effectively achieves the purposes of sentencing, just as the Supreme Court did in *Kimbrough*. Courts frequently write opinions in these cases, contributing to a common law of sentencing and providing detailed information to the Commission.

It appears that this has helped the Commission to recognize problems with certain guidelines and prompted it to act. For example, the Commission reduced the 16- and 12-level enhancements in the illegal re-entry guideline when the prior conviction is too stale to count in the criminal history score in response to a court of appeals decision finding the guideline sentence to be substantively unreasonable in that circumstance.[209] The Commission has made other changes affecting immigration cases in response to variances, departures, and empirical research.[210] Prompted by a high rate of variances, and presumably by numerous written decisions,[211] the Commission is studying the child pornography guideline with a view to possible amendments and recommendations to Congress.[212] Recognizing a high rate of below-range sentences in cases sentenced under § 2B1.1 involving relatively large loss amounts,[213] the

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[209] *See* 76 Fed. Reg. 24960-01, 24969 (May 3, 2011) (citing *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009)).

[210] *See* USSG App. C, amend. 742 (Nov. 1, 2010) (Reason for Amendment) (eliminating recency points in response to variances and recidivism research); USSG App. C, amend. 740 (Nov. 1, 2010) (Reason for Amendment) (inviting downward departure in illegal reentry cases based on cultural assimilation to acknowledge that some circuit courts have already upheld such departures and to promote uniform consideration of cultural assimilation by courts).

[211] *See, e.g.*, *United States v. Dorvee*, 616 F.3d 174, 184, 188 (2d Cir. 2010); *United States v. Stone*, 575 F.3d 83, 97 (1st Cir. 2009); *United States v. Huffstatler*, 571 F.3d 620, 623 (7th Cir. 2009); *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010); *United States v. Henderson*, __ F.3d __, 2011 WL 1613411 (9th Cir. 2011); *United States v. McElheney*, 630 F. Supp. 2d 886 (E.D. Tenn. 2009); *United States v. Beiermann*, 599 F. Supp. 2d 1087 (N.D. Iowa Feb. 24, 2009); *United States v. Burns*, slip op., 2009 WL 3617448 (N.D. Ill. 2009); *United States v. Riley*, 655 F. Supp. 2d 1298 (S.D. Fla. 2009); *United States v. Phinney*, 599 F. Supp. 2d 1037 (E.D. Wis. 2009); *United States v. Stern*, 590 F. Supp. 2d 945 (N.D. Ohio 2008); *United States v. Johnson*, 588 F. Supp. 2d 997 (S.D. Iowa 2008); *United States v. Rausch*, 570 F. Supp. 2d 1295 (D. Colo. 2008); *United States v. Taylor*, 2008 WL 2332314 (S.D.N.Y. June 2, 2008); *United States v. McClelland*, 2008 WL 1808364 (D. Kan. April 21, 2008; *United States v. Baird*, slip op., 2008 WL 151258 (D. Neb. Jan. 11, 2008); *United States v. Stults*, 2008 WL 4277676, *4-7 (D. Neb. Sept. 12, 2008); *United States v. Goldberg*, 2008 WL 4542957, *6 (N.D. Ill. April 30, 2008).

[212] U.S. Sent'g Comm'n, *The History of the Child Pornography Guidelines* at 1 n.4, 8 (October 2009); U.S. Sent'g. Comm'n, Notice of Proposed Priorities, 76 Fed. Reg. 45,007 (July 22, 2011).

[213] *See* Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent'g Rep. 167, 169, 2008 WL 2201039, at *4 (Feb. 2008) ("[S]ince *Booker*, virtually every judge faced with a top-level corporate fraud defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high. This near unanimity suggests that the judiciary sees a consistent

Commission is considering a comprehensive review of various aspects of that and related guidelines.[214] And while the Commission made the problems with the crack guideline known long before *Booker*, courts could not sentence outside the guideline range based on those problems until after *Booker*.[215] When the Court stated in *Rita* that courts may conclude that a guideline itself is unsound, and while *Kimbrough* was pending, the Commission reduced the crack guidelines by two levels, which in turn prompted Congress to enact the Fair Sentencing Act of 2010.

If history is a guide, it is very unlikely that all of this would have happened but for the fact that courts now have a voice. Judges are finally able to enforce the Sentencing Reform Act, in the sentences they impose and by providing important information to the Commission.

The Commission should not, as was recently suggested, view district courts' ability "to reject policy directives from Congress and the Commission" as a "challenge to Congress's role in sentencing."[216] The Commission took that position in an *amicus* brief filed in *Rita* and *Claiborne*, a case later replaced by *Kimbrough*, arguing that the powder/crack disparity, and other disparities such as that created by fast programs, "cannot be considered *unwarranted* within the meaning of § 3553(a)(6)" because they are "*congressionally mandated*" disparities.[217]

Senators Kennedy, Hatch and Feinstein disagreed in an *amicus* brief filed the same day. They said that the crack-powder disparity is "completely contrary to the goals of the Sentencing Reform Act, and § 3553(a) enables courts to consider this impact as they develop principled rules on sentencing."[218] In fact, they urged reversal of the variance in Claiborne's case in part

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disjunction between the sentences prescribed by the Guidelines [in these cases] and the fundamental requirement of Section 3553(a) that judges impose sentences 'sufficient, but not greater than necessary' to comply with its objectives."); *United States v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. July 20, 2006); *United States v. Parris*, 573 F. Supp. 2d 744 (E.D.N.Y. 2008); *United States v. Watt*, 707 F. Supp. 2d 149 (D. Mass. 2010).

[214] 76 Fed. Reg. 3193, 3201 (Jan. 19, 2011).

[215] The courts of appeals held that the disparity caused by the powder/crack quantity ratio was not a permissible ground for departure because that circumstance was not "atypical." *See In re Sealed Case*, 292 F.3d 913, 916 (D.C. Cir. 2002); *United States v. Canales*, 91 F.3d 363, 369-70 (2d Cir. 1996); *United States v. Fike*, 82 F.3d 1315, 1326 (5th Cir. 1996).

[216] William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & Pol. 305, 327 (2011).

[217] Brief for the U.S. Sent'g. Comm'n as *Amicus Curiae* in Support of Respondent at 27-28, *Claiborne v. United States*, *Rita v. United States*, 551 U.S. 338 (2007) (No. 06-5618, 06-5754) (emphases in original). *Claiborne* was dismissed as moot when the petitioner died, and was replaced with *Kimbrough*.

[218] Brief of *Amici Curiae* Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein in Support of Affirmance at 30, *Claiborne v. United States* (No. 06-5618), Jan. 22, 2007.

because the judge did *not* cite the crack-powder disparity, though defense counsel raised it.[219] They emphasized that "Congress intended the Commission to establish sentencing policies based on objective data and sound public policy, not prejudice or politics, and courts should respect that institutional role,"[220] but they acknowledged that "the guidelines do not always reflect objective data or good policy," as the Commission's own findings regarding the crack guidelines demonstrated.[221]

The Senators urged the Court to require district courts to "articulate reasons for a sentence that not only are applicable to the particular facts before them, but that also cite or establish principles of general applicability," and explicitly disagreed with the position, taken by some courts of appeals to prohibit policy disagreements, that judges may rely only on "'case-specific considerations,' without reliance on broader principles."[222] Articulation of broader principles "promotes transparency," "facilitates the work of the Commission [in] refin[ing] the guidelines," and provides principles "that can be followed or distinguished by other district courts in other cases."[223]

The Senators clearly did not view judges' criticism of guidelines that were not based on the principles and procedures set forth in the SRA as an improper "challenge" to congressional authority. Instead, they hoped that reasoned disagreements with such guidelines would *enforce* the SRA in individual cases, result in a common law of sentencing, and assist the Commission in refining the guidelines. That is what the Court approved and what the lower courts are doing.

III. The Advisory Guidelines System Reduces Unwarranted Disparities.

The SRA repeatedly emphasized, in instructions to the Commission and to the courts, that punishment is justified only by the purposes listed at 18 U.S.C. § 3553(a)(2). The Commission has acknowledged that unwarranted disparity means "different treatment of individual offenders who are similar in relevant ways," and "similar treatment of individual offenders who differ in characteristics that are relevant to the purposes of sentencing."[224] The Supreme Court's decisions have brought the system closer to that goal, recognizing the "need to avoid unwarranted *similarities* among [defendants] who [are] not similarly situated,"[225] and that judges must weigh "any unwarranted disparity created by [the guideline] itself."[226]

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[219] *Id*. at 27-28.

[220] *Id*. at 4.

[221] *Id*. at 21.

[222] *Id*. at 23 & n.5 (disagreeing with *United States v. Pho,* 433 F.3d 53 (1st Cir. 2006)).

[223] *Id*. at 23.

[224] *Fifteen Year Review* at 113 (emphases omitted).

[225] *Gall*, 552 U.S. at 53-56.

[226] *Kimbrough*, 552 U.S. at 108.

During the mandatory guidelines era, "disparity-talk" was used "as a cover to further restrict judicial discretion, empower prosecutors, and pursue harsher sentences divorced from any comprehensive philosophy of punishment."[227] To many, the PROTECT Act simply "followed the pattern of the previous twenty years--jeering disparities created by judges while cheering those created by prosecutors," confirming that "[i]ncreasing prosecutorial power and the severity of criminal punishments was not the unintended consequence of Guidelines designed to reduce sentencing disparity," but "the point all along. Disparity was just a code word."[228]

This Commission can help to undo this perception. The Commission should reject continuing efforts to stigmatize judicial discretion and to sweep the most problematic disparities under the rug. The Commission should recognize that when judges sentence outside the guideline range, they help to reduce unwarranted disparities and excessive uniformity built into the guidelines, and unwarranted disparities caused by prosecutors' practices. Some variation between judges is a necessary cost of advisory guidelines, and a healthy engine for much-needed change. "[O]ngoing revision of the Guidelines in response to sentencing practices will help to 'avoid excessive sentencing disparities.'"[229]

A. Disparities Created and Masked by Mandatory Guidelines

As written, the Sentencing Reform Act would have maintained an important place for judicial discretion, but the guidelines sought to stamp it out. There is substantial evidence that the mandatory guidelines not only failed to appreciably reduce disparities among judges, which were overstated in the first place,[230] but introduced and masked new and much more troubling

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[227] *See* Paul J. Hofer, *Immediate and Long-Term Effects of* United States v. Booker, 38 Ariz. St. L.J. 425, 447 (2006); s*ee also* Michael O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. Cin. L. Rev. 749, 817 (2006) (Judge Frankel's "uniformity ideal" was used as "cover for crude punitiveness" in the mandatory guidelines era).

[228] Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stan. L. Rev. 85, 116 (2005).

[229] *See Kimbrough*, 552 U.S. at 107-08; *see also Booker*, 543 U.S. at 263-64; *Rita*, 551 U.S. at 350; *id*. at 382-83 (Scalia & Thomas, JJ., concurring in part and concurring in the judgment).

[230] Congress was convinced by four studies of disparities among judges, S. Rep. No. 98-225, at 41-46 (1983), but re-examination of those studies revealed that the data and results were flawed. Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* at 106-12 (1998). In fact, sentencing outcomes before the guidelines, even with *no statutory guidance* for judges, generally corresponded to legitimate differences in offenses and offenders. Douglas C. McDonald & Kenneth E. Carlson, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sentencing in the Federal Courts: Does Race Matter? The Transition to Sentencing Guidelines, 1986-90*, at 25 (1993). The best estimate is that mandatory guidelines reduced differences in sentence length among judges, on average, by about one month. *See* James M. Anderson, Jeffrey R. Kling, & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J. L. & Econ. 271, 271 (1999) (finding average difference in sentence length of 4.9 months before the guidelines, 3.9

disparities.[231] Judges were required to sentence defendants who differed widely in culpability, dangerousness, risk of recidivism, and need for rehabilitation as if they were the same. Many of the guidelines themselves incorporated clearly unwarranted disparities, including racial disparities, but judges were required to follow them. Prosecutors controlled sentencing outcomes through their control of the facts that set the severe guideline ranges and the reasonably available mechanisms for leniency,[232] and they exercised their discretion unevenly and often unfairly.

For these and other reasons, compliance with the guidelines was never a good measure of whether unwarranted disparity was being avoided. First, arbitrary disparities were hidden in the guideline calculation for any number of reasons, ranging from happenstance,[233] to lack of clarity in the guidelines,[234] to different interpretations of the rules,[235] to different views of the

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months after the guidelines); *see also* Paul J. Hofer, Kevin R. Blackwell & R. Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 Crim. L. & Criminology 239, 286-88 & tbl.1 (1999) (finding average difference of 7.87 months before guidelines, 7.61 months after guidelines).

[231] *See* Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stan. L. Rev. 85 (2005) (detailing the disparities the guidelines introduced); *id*. at 89 ("Adopting the viewpoint of a person of ordinary moral sensibilities rather than of the Sentencing Commission leads quickly to the conclusion that the Sentencing Guidelines have substituted new disparities for old ones. This perspective suggests in fact that the Guidelines have seriously aggravated the problem of disparity.").

[232] *See* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420, 1425 (May 2008) ("[T]he decades-long enterprise provided prosecutors with indecent power relative to both defendants and judges, in large part because of prosecutors' ability to threaten full application of the severe Sentencing Guidelines."); Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 Stan. L. Rev. 235, 244 (2005) ("[T]he Guidelines . . . granted prosecutors an unprecedented measure of authority over particular sentences because the pre-Booker Guidelines were mandatory and fact-driven, and prosecutors are largely in control of the facts.").

[233] "By happenstance, one defendant provides information to the prosecutor first and benefits from § 1B1.8, but a codefendant comes in later and thus faces a markedly higher offense level." Statement of the Honorable Robert L. Hinkle Before the U.S. Sent'g Comm'n, Atlanta, Ga. (Feb. 11, 2009). "To a considerable extent, the amount of loss caused by this crime is a kind of accident, dependent as much on the diligence of the victim's security procedures as on [the defendant's] culpability." *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2004).

[234] *See Fifteen Year Review* at 50, 87 (relevant conduct rule is inconsistently applied because of ambiguity in the language of the rule, law enforcement's role in establishing it, and untrustworthy evidence); Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, Federal Judicial Center, Research Division, 10 Fed. Sent'g Rep. 16 (1997) (sample test administered by researchers for the Federal Judicial Center to probation officers resulted in widely divergent guideline ranges for three similar defendants).

[235] "In one district a defendant is tagged only with the drugs involved in a specific transaction; in another the concept of relevant conduct is applied more broadly, and the offense level skyrockets." Statement of the Honorable Robert L. Hinkle Before the U.S. Sent'g. Comm'n (Feb. 11, 2009). *See also* Panel

evidence,[236] to varying prosecutorial practices.[237] The Commission's "statistics showing the number of sentences within the guideline range do not pick up these disparities, because they are disparities in the calculation of the guideline range."[238]

Second, the guideline range masked manipulation by prosecutors and law enforcement agents. Law enforcement agents often intentionally increased sentences with the type and quantity of drug.[239] Prosecutors could use fact bargaining, or departures purportedly based on substantial assistance, to grant leniency in cases in which they viewed full application of the guidelines as unjust, but did not always do so when deserved.[240] More often, prosecutors used

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Discussion, *Federal Sentencing Under "Advisory Guidelines": Observations by District Judges*, 75 Fordham L. Rev. 1, 16 (2006) (remarks of Judge Lynch) (when application of an enhancement is a close call, judge can find that it does not apply, which is counted as compliant, or apply it and vary, which is counted as noncompliant).

[236] *See United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007) (two presentence reports prepared by different probation officers based on information provided by the same prosecutor and the same informant assigned a guideline range of 151-188 months to one co-defendant and 37-46 months to the other co-defendant).

[237] "In one district the government files a notice of the defendant's prior convictions under 21 U.S.C. § 851 and the defendant thus faces a long mandatory minimum sentence" or an even longer career offender sentence; "in another district the government chooses not to file the notice." Statement of the Honorable Robert L. Hinkle Before the U.S. Sent'g. Comm'n (Feb. 11, 2009).

[238] *Id*.

[239] *Compare United States v. Searcy*, 233 F.3d 1096, 1099 (8th Cir.2000) ("This case demonstrates that the Sentencing Guidelines have a terrifying capacity for escalation of a defendant's sentence as a result of government misconduct," and recognizing sentencing entrapment as viable ground for downward departure), *with United States v. Jones*, 102 F.3d 804, 809 (6th Cir. 1996) ("while other circuits have recognized sentencing entrapment, this circuit has never acknowledged sentencing entrapment as a valid basis for a downward departure under the guidelines"), *and United States v. Sanchez*, 138 F.3d 1410, 1414 (11th Cir. 1998) (rejecting claim that court should have departed downward because "this Circuit has rejected sentence entrapment as a viable defense").

[240] *See* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 535, 557 (1992) (study found "circumvention" based on prosecutors' personal sense of justice, that this is not "necessarily bad" and "produces arguably just results," but is "hidden and unsystematic" and "obscures accountability"); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 853-54 (1992) (sentences are overly severe in part because of "relevant conduct," and thus "Guideline circumvention and judicial failure to control it must be understood against the background of the substantive justice of the sentences that would otherwise result. . . . Judges acquiesce in plea manipulation in part because the resulting disparity is less troubling to them than the excessive severity and substantive disparity that flow from working 'by the book.'"); *Fifteen Year Review* at 87 (Commissioner Ilene Nagel and Professor Schulhofer identified "overemphasis on harm- and quantity-driven offense characteristics, and overall severity levels required by statutory minimum penalties and the guidelines pegged to them" as having "caused prosecutors, defense attorneys,

their power to increase guideline ranges to severely punish defendants for exercising their constitutional rights.[241]

Third, the guidelines do not and cannot include all relevant factors, but departures were largely disfavored when the guidelines were mandatory. Sentences within the guidelines therefore treated offenses and offenders who were different in ways that were relevant to the purposes of sentencing the same, creating excessive uniformity. *See* Part I.A, *infra*. Fourth, unwarranted disparities are built into a number of the guidelines themselves, particularly those based on mandatory minimums and congressional directives, and others urged by the Department of Justice.

The most troubling disparities are those built into the guidelines themselves and those caused by prosecutors. Congress contemplated neither of those disparities when it enacted the SRA, and both are nearly impossible to correct in a mandatory system. Under § 3553(a), the statute Congress enacted to create reasonable consistency and fairness, those disparities are much more easily corrected. Judges, using the guidelines as the starting point and the initial benchmark, correct disparities in individual cases through variances and departures. In doing so, judges provide constructive feedback to the Commission that greatly facilitates the guideline development process.

B. Unwarranted Disparities Created by Prosecutors

1. Mandatory Guidelines Fostered Unwarranted Disparities Created by Prosecutors.

The mandatory guidelines transferred sentencing power from judges to prosecutors by strictly curtailing judicial discretion on the one hand, and giving prosecutors the ability to precisely control sentences and the terms of plea agreements on the other. Prosecutors controlled the aggravating facts that drove the guideline range, including relevant conduct and numerous other enhancements, and facts giving rise to mandatory minimum sentences, as well as the most readily available mechanism for leniency, *i.e.*, an encouraged departure for cooperation against others. Judges were required to sentence within the guideline range with very little authority to depart for reasons not sought by the prosecutor. While policy statements provided standards for judges to assess plea agreements that might be unduly lenient, judges had no authority to correct for overcharging or the piling on of relevant conduct and other aggravating factors.

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and judges to search for ways to circumvent the guidelines' strict requirements."); *id*. at 82, 141-42 ("circumventing applicable guidelines may result in sentences, in some cases, that are better suited to achieve the purposes of sentencing than the sentence that would result from strict adherence to every applicable law," but "unlike judicial departures," this "can undo the transparency and uniformity intended by the SRA.").

[241] *See, e.g., United States v. Rodriguez*, 162 F.3d 135, 150-53 (1st Cir. 1998) (difference of over 21 years between similarly situated defendants who went to trial and those who pled guilty based on different quantities agreed to or alleged at sentencing by the government was simply a consequence of prosecutor's exercise of discretion in plea bargaining under the guidelines and did not violate the Constitution).

Before the SRA, prosecutors had wide discretion in charging and structuring plea bargains, but plea bargains were negotiated in the "shadow" of both the trial and neutral judicial sentencing.[242] Indeed, "the single most important feature of the plea agreement process . . . was the judge's principal role of fixing the sentence after the guilty plea."[243] Before the SRA, there were fewer guilty pleas, less than 80% compared to over 95% today.[244]

Congress of course did not intend to reduce disparity among neutral judges only to permit partisan prosecutors to control sentences and create disparity in their unreviewable discretion.[245] Congress did not expect that prosecutors would have primary control over the guideline range, but instead expected that the guideline range would be based not only on aggravating facts but mitigating facts, and that judges would have authority to depart based on circumstances not adequately taken into account in the range.

Congress also expected that judges would reject plea agreements that undermined the goals of the SRA. Observers recognized early on that leaving "sentencing to the virtually unreviewable, invisible discretion of thousands of relatively autonomous Assistant United States Attorneys . . . could overwhelm any reduction in disparity for cases resolved by trial."[246] A study by the Federal Judicial Center confirmed these concerns.[247] It concluded that sentencing reform could increase disparity by transferring sentencing discretion from judges to prosecutors, who are younger and less experienced than judges, and whose decisions are not made in public, explained on the record, or subject to judicial review.[248] Congress responded by directing the Commission to promulgate policy statements for the use of judges in deciding whether to accept a plea agreement.[249]

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[242] Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 Cal. L. Rev. 1471 (1993).

[243] Stephen J. Schulhofer & Ilene Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am. Crim. L. Rev. 231, 239-40 (1989).

[244] Paul J. Hofer, *Has* Booker *Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 23 Fed. Sent'g Rep. 326, 327 fig. 1 (2011).

[245] Schulhofer & Nagel, *supra* note 243, at 240.

[246] *Id*. at 239.

[247] Shulhofer, Prosecutorial Discretion and Federal Sentencing Reform, Report for the Federal Judicial Center (August 1979).

[248] Schulhofer & Nagel, *supra* note 243, at 239-40.

[249] 28 U.S.C. § 994(a)(2)(E) (directing the Commission to issue policy statements regarding the appropriate use of "the authority granted [by Fed. R. Crim. P. 11] to accept or reject a plea agreement").

Any notion of balance or a judicial check on prosecutor-created disparity soon disappeared. The Commission constructed the guidelines almost solely of aggravating factors, omitting traditional mitigating factors, and also constrained judges' authority to depart far more strictly than the SRA contemplated. The Guidelines thus "granted prosecutors an unprecedented measure of authority over particular sentences because [they] were mandatory and fact-driven, and prosecutors are largely in control of the facts."[250] The Guidelines "provided prosecutors with indecent power relative to both defendants and judges, in large part because of prosecutors' ability to threaten full application of the severe Sentencing Guidelines."[251]

Two years after the SRA was enacted, Congress enacted the Anti-Drug Abuse Act of 1986, requiring mandatory minimum sentences of 5, 10, 20 years, or life. The Commission thought that the Act "suggested or required" that it incorporate mandatory minimums into the guidelines,[252] and did so through seventeen increments of punishment below, between and above the mandatory minimum quantity levels, and set the base offense level two levels higher than the mandatory minimums to induce first offenders with no aggravating factors to "plead guilty or otherwise cooperate with authorities."[253]

While Congress required a government motion for a sentence below a mandatory minimum based on cooperation,[254] it did not require such a motion for the court to depart below a guideline range based on cooperation.[255] The Commission, however, restricted the courts' departure authority, opting to make it contingent on a motion by the government, directing the courts to give "substantial weight" to the government's recommendation,[256] and judges could not consider anything but the defendant's cooperation in granting the motion.[257] Although the

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[250] Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 Stan. L. Rev. 235, 244 (2005).

[251] *See* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420, 1425 (May 2008).

[252] USSG, Ch. 1, Pt. A(1)(3).

[253] USSC, *Special Report to Congress: Cocaine and Federal Sentencing Policy* 148 (1995).

[254] 18 U.S.C. § 3553(e).

[255] 28 U.S.C. § 994(n) (directing the Commission to "assure the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.").

[256] USSG § 5K1.1, p.s.

[257] *See, e.g.*, *United States v. Mariano*, 983 F.2d 1150, 1156 (1st Cir. 1993); *United States v. Casiano*, 113 F.3d 420, 433 (3d Cir. 1997); *United States v. Pearce*, 191 F.3d 488, 492, 493 (4th Cir.1999); *United States v. Bullard*, 390 F.3d 413, 416 (6th Cir. 2004); *United States v. Thomas*, 930 F.2d 526, 529 (7th Cir. 1991), *overruled on other grounds by United States v. Canoy*, 38 F.3d 893 (7th Cir. 1994); *United States v. DeMaio*, 28 F.3d 588, 591 (7th Cir.1994); *United States v. Auld*, 321 F.3d 861, 867 (9th Cir. 2003); *United States v. Campbell*, 995 F.2d 173, 175 (10th Cir.1993); *United States v. Luiz*, 102 F.3d 466, 469 (11th Cir.1996); *United States v. Aponte*, 36 F.3d 1050, 1052 (11th Cir. 1994).

Commission expressly prohibited consideration of "[a] defendant's refusal to assist authorities in the investigation of other persons . . . as an aggravating sentencing factor,"[258] prosecutors had plenty of tools to circumvent that policy.

One such powerful tool was the "relevant conduct" rule, requiring judges to increase sentences based on uncharged, dismissed, and acquitted crimes at the same rate as if charged in an indictment and proved to a jury beyond a reasonable doubt.[259] The Commission's rationale for adopting it was to prevent prosecutors from controlling sentences through charging decisions, with the idea that probation officers would independently find out what "actually" happened.[260] In other words, the purpose was to prevent prosecutorial leniency. But probation officers depend on prosecutors for the facts. In reality, the rule armed prosecutors with the power to obtain or threaten to obtain enormous sentences and overwhelming leverage in plea bargaining, and to avoid the rule in their sole discretion.[261] The acquitted conduct rule served no purpose other than to give prosecutors to obtain, or threaten to obtain, a second bite at the apple under a lower standard of proof and no rules of evidence.[262]

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[258] USSG § 5K1.2, p.s.; USSG App. C, amend. 291 (Nov. 1, 1989) ("The Commission considered and rejected the use of a defendant's refusal to assist authorities as an aggravating sentencing factor.").

[259] USSG § 1B1.3(a)(1)(B), (2).

[260] USSG, Ch. 1, Pt. A(1)(4)(a).

[261] Prosecutors sometimes avoided the relevant conduct rule because it was unjust and excessively severe. *See, e.g.*, Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 535, 557 (1992) (study found "circumvention" based on prosecutors' personal sense of justice, that this is not "necessarily bad" and "produces arguably just results," but is "hidden and unsystematic" and "obscures accountability"); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 853-54 (1992) (sentences are overly severe in part because of "relevant conduct," and thus "Guideline circumvention and judicial failure to control it must be understood against the background of the substantive justice of the sentences that would otherwise result. . . . Judges acquiesce in plea manipulation in part because the resulting disparity is less troubling to them than the excessive severity and substantive disparity that flow from working 'by the book.'").

[262] The relevant conduct rule was not required or mentioned in the SRA, conflicts with its most basic instructions, *see* 28 U.S.C. § 994(c)(2), (3) (directing Commission to take into account "the circumstances under which the *offense was committed*" and the "nature and degree of the harm caused by the *offense*") (emphasis supplied), and deviated from past practice, *see, e.g.*, Edward R. Becker, *Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses Be Applied?*, 151 F.R.D. 153, 154 (1993); *United States v. Galloway*, 976 F.2d 414, 444 (8th Cir. 1992) (en banc) (Beam, Lay, Bright, McMillan, JJ., dissenting); *United States v. Balano*, 813 F. Supp. 1423, 1425 (W.D. Mo. 1993); *United States v. Clark*, 792 F. Supp. 637, 649 (E.D. Ark. 1992). No state guideline system, then or since, requires or allows the use of uncharged or acquitted crimes in calculating the guideline range. *See* Phyllis J. Newton, Staff Director, U.S. Sent'g Comm'n, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 Fed. Sent'g Rep. 68, 1995 WL 843512 *3 (1995). For comprehensive discussion of the problems with relevant conduct, *see* Federal Criminal

Later, the Commission acknowledged that "[t]he drug trafficking guideline . . . in combination with the relevant conduct rule . . . had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes."[263]

Like the relevant conduct rule, the policy statements allowing judges to reject plea agreements,[264] worked in one direction. Judges could reject plea agreements that did not sufficiently reflect the severity of the guidelines, but had no power to prevent prosecutors from alleging or threatening to allege uncharged conduct, from seeking or threatening to seek a sentence based on acquitted conduct, or from overcharging, count stacking, or charging or threatening to charge mandatory minimums.

By the time the PROTECT Act came around, it was an article of faith that judicial discretion is bad and prosecutorial power is good. Department representatives testified before Congress that the rate of downward departures not sponsored by the government was increasing, and that "[m]uch of the damage is traceable to the Supreme Court's decision in *Koon v. United States*."[265] They claimed that *Koon* had made it too easy for judges to depart and too difficult for the government to appeal downward departures. They drafted legislation to curtail judicial discretion even further and to give prosecutors even greater plea bargaining leverage, and enlisted a freshman congressman to introduce it.[266]

The PROTECT Act established a *de novo* standard of review for departures and directed the Commission to "ensure that the incidence of downward departures are substantially reduced."[267] Later, the Commission reported that *Koon* had had no noticeable impact on the rate of judicial departures. What had appeared in its data as an increase in judicial departures was

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Procedure Committee, American College of Trial Lawyers, *Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 Am. Crim. L. Rev. 1463 (2001); Amy Baron-Evans & Jennifer Niles Coffin, *Deconstructing the Relevant Conduct Guideline: Challenging the Use of Uncharged and Acquitted Offenses in Sentencing* (2008).

[263] *Fifteen Year Review*, at 49.

[264] USSG §§ 6B1.1-6B1.4, p.s.

[265] *See* Testimony of Daniel P. Collins Before the H. Subcomm. on Crime, Terrorism, and Homeland Security, H. Comm. on the Judiciary, at 28-29 (Mar. 11, 2003).

[266] "[T]he measure might be better characterized as a DOJ project in which congressional allies willingly joined. The sponsor, Congressman Tom Feeney (R. Fla.), appears to have been carrying water for a drafting group that included Justice Department officials and a former AUSA working for House Judiciary Chairman Sensenbrenner." Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds —The Center Doesn't*, 117 Yale L.J. 1374 (2008). Congressman Feeney said he was just the "messenger." Laurie P. Cohen & Gary Fields, *Ashcroft Intensifies Campaign against Soft Sentences by Judges*, Wall St. J., Aug. 6, 2003, at A1.

[267] Pub. L. No. 108-21, § 401(m).

actually an increase in government-sponsored departures, primarily informal "fast track" departures to facilitate swift processing of cases on the southwest border.[268] Forty percent of the downward departures that had been attributed to judges were actually sponsored by the government.[269]

Rather than curtail "fast track" departures, an institutionalized system of geographical disparity,[270] the PROTECT Act officially authorized them and placed them in the sole control of prosecutors.[271] Like the cooperation system, the "fast track" system uses harsh guideline sentences as the stick, and prosecutors' control over leniency as the carrot.[272] Professor Frank Bowman, a former prosecutor, testified that "what we've done is to set penalties [for drug and immigration offenses] at unsupportably high levels and then use those high penalties as the starting point for a program of huge sentencing discounts." This, he concluded, "may sink, once and for all, the claim that the Guidelines stand for any principle other than administrative convenience."[273]

In addition, the PROTECT Act gave prosecutors control over the third point for acceptance of responsibility. The Commission originally placed the acceptance of responsibility reduction in the hands of judges to help avoid the appearance of a trial penalty. In 1992, the Commission added a third point where the offense level was 16 or higher.[274] The PROTECT Act directly amended the § 3E1.1 to permit the third point reduction "only upon a formal motion by the government at the time of sentencing."[275]

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[268] USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 54-56, 60 (2003). Until 2003, the Commission had included all government-sponsored departures other than substantial assistance departures in the "other downward departure" rate.

[269] *Id*. at 60.

[270] *See* Linda Drazga Maxfield & Keri Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 Fed. Sent'g. Rep. 260, 2002 WL 31304861 (2002).

[271] *Id*. § 401(m)(2)(B), implemented at USSG § 5K3.1, p.s.

[272] "[W]hat makes fast track possible and makes it run is the high guideline ranges under § 2L1.2, a guideline that lacks any empirical basis." Statement of Thomas W. Hiller, II and Davina Chen, Hearing Before the U.S. Sent'g Comm'n, at 27 (May 27, 2009)

[273] Frank O. Bowman, III, *Only Suckers Pay the Sticker Price: The Effect of "Fast Track" Programs on the Future of the Sentencing Guidelines as a Principled Sentencing System*, Written Statement Prepared for Hearing Before the U.S. Sent'g. Comm'n, at 1, 4 (Sept. 23, 2003).

[274] USSG App. C, amend. 459 (Nov. 1, 1992).

[275] USSG § 3E1.1, comment. (n.6); *id*. comment. (backg'd.).

In 2004, the Commission reviewed "a variety of evidence" and found "that disparate treatment of similar offenders is common at presentencing stages. *Disparate effects of charging and plea bargaining are a special concern in a tightly structured sentencing system like the federal sentencing guidelines, because the ability of judges to compensate for disparities in presentence decisions is reduced*."[276] Mechanisms to ameliorate these effects, such as the "relevant conduct" rule, "tend to work in one direction,"[277] resulting in more severe sentences and greater unwarranted disparity.

2. Judges Can Now Compensate for Disparities in Prosecutorial Decisions.

Booker has helped right the imbalance and provide a needed check on prosecutorial power, permitting judges to reduce unwarranted disparity. In most circuits, judges may grant the equivalent of a "fast track" departure in an illegal re-entry case where there is no fast track program approved by the Attorney General.[278] Judges may vary below the guideline range based on the defendant's substantial assistance in the investigation or prosecution of another when the defendant has rendered such assistance but the government fails to make the motion.[279] Judges may correct for manipulation of the type or quantity of drugs by law enforcement agents,[280] and can compensate for the unfair piling on of consecutive mandatory minimums in some cases.[281]

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[276] *Fifteen Year Review*, at 92.

[277] *Id*.

[278] *See, e.g., United States v. Reyes-Hernandez*, 624 F.3d 405 (7th Cir. 2010); *United States v. Camacho-Arellano*, 614 F.3d 244 (6th Cir. 2010); *United States v. Arrelucea-Zamudio*, 581 F.3d 142 (3d Cir. 2009); *United States v. Rodriguez*, 527 F.3d 221, 228 (1st Cir. 2008); *United States v. Seval*, slip op., 2008 WL 4376826 (2d Cir. Sept. 25, 2008); *see also United States v. Hernandez-Lopez*, 2009 WL 921121, *5 (10th Cir. Apr. 7, 2009) (noting without discussion district court's statement that it had previously granted variances based on the disparity between sentences in fast track and other districts).

[279] *See, e.g., United States v. Blue*, 557 F.3d 682, 686 (6th Cir. 2009); *United States v. Jackson*, 296 Fed. App'x 408, 409 (5th Cir. 2008); *United States v. Arceo*, 535 F.3d 679, 688 & n.3 (7th Cir. 2008); *United States v. Doe*, 218 Fed. App'x 801, 805 (10th Cir. 2007); *United States v. Fernandez*, 443 F.3d 19, 35 (2d Cir. 2006); *United States v. Lazenby*, 439 F.3d 928, 933 (8th Cir 2006); *see also* USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbls.25, 25A, 25B (429 variances for cooperation without §5K1.1 motion).

[280] *See, e.g., United States v. Beltran*, 571F.3d 1013, 1019 (10th Cir. 2009); *United States v. Torre*s, 563 F.3d 731, 736 (8th Cir. 2009); *United States v. Williams*, 372 F. Supp. 2d 1335 (M.D. Fla. 2005); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005).

[281] *See United States v. Angelos*, 345 F. Supp. 2d 1227, 1260 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006); *United States v. Vidal-Reyes*, 562 F.3d 43 (1st Cir. 2009); *United States v. Barriera-Vera*, 354 Fed. App'x 404, 410-11 (11th Cir. 2009); *United States v. Ballard*, 599 F. Supp. 2d 539 (S.D.N.Y. 2009).

Defendants plead guilty more often without a plea agreement than they did before *Booker*.[282] This means that more sentences are being determined by judges based on § 3553(a) rather than by prosecutors to advance administrative goals. This is as it should be.

3. The Department Now Recognizes the Need for Balance and Greater Flexibility.

In May 2010, the Attorney General issued guidance to prosecutors stating that "equal justice depends on individualized justice, and smart law enforcement demands it."[283] Prosecutorial decisions must now be made on "the merits of each case" and an "individualized assessment" of the defendant's conduct, criminal history, circumstances of the offense, the needs of the local community, and federal resources and priorities.[284] "Consistent with the statute [18 U.S.C. § 3553(a)] and the advisory sentencing guidelines as the touchstone, prosecutors should seek sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford deterrence, protect the public, and offer defendants an opportunity for effective rehabilitation."[285] Sentencing advocacy, "consistent with the Principles of Federal Prosecution and given the advisory nature of the guidelines . . . must also follow from an individualized assessment of the facts and circumstances of each particular case," and prosecutors may seek departures or variances with supervisory approval.[286]

The Department has determined to support the advisory guidelines system, along with judicious use of mandatory minimums only for serious crimes, and potentially eliminating or reducing some existing mandatory minimums.[287] Like the vast majority of judges and practitioners, the Department has determined not to support a mandatory guidelines system.[288]

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[282] Jeffrey Ulmer & Michael T. Light, *Beyond Disparity: Changes in Federal Sentencing After* Booker *and* Gall*?*, 23 Fed. Sent'g Rep. 333, 338-39 (June 2011) (finding 12.3% increase based on survey of judges, defense attorneys, probation officers); Statement of Julia O'Connell Before the U.S. Sent'g. Comm'n, Austin, Tex., at 10 (Nov. 19, 2009).

[283] Memorandum to All Federal Prosecutors from Attorney General Eric H. Holder Jr. regarding Department Policy on Charging and Sentencing, at 1 (May 19, 2010).

[284] *Id*.

[285] *Id*. at 2.

[286] *Id*. at 2-3.

[287] Lanny A. Breuer, *The Attorney General's Sentencing and Corrections Working Group: A Progress Report*, 23 Fed. Sent'g Rep. 110, 112 (2010).

[288] *Id*. (the Department discussed "a return to a mandatory Guidelines structure coupled with reduced reliance on mandatory minimum statutes," and found that "practitioners and others were not enthusiastic about this course").

C. Unwarranted Disparities Built Into the Guidelines

The most obvious structural defect in the Guidelines is their failure to account for mitigating circumstances of the offense, like *mens rea*, and their disapproval of mitigating characteristics of the offender. This created unwarranted uniformity, *i.e.*, "similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing."[289]

Disparity under the guidelines also arises from the faulty way some guidelines categorize offenders in terms of the purposes of sentencing, for example, how they define and rank the seriousness of different types of crimes and the dangerousness of different types of offenders.[290] For example, guideline punishments based on quantities of drugs fail to properly target serious drug traffickers and instead treat low-level offenders as if they were serious traffickers or kingpins.[291] The career offender guideline vastly overstates the risk of recidivism and serves no deterrent or crime prevention purpose for most offenders to whom it applies.[292] Other examples of guidelines that often recommend sentences that are greater than necessary to achieve sentencing purposes are the illegal re-entry guideline, the child pornography guideline, and the fraud guideline.

Any rule that requires punishment that is greater than necessary to achieve the purposes of sentencing is unfair and creates unwarranted disparity, but if a rule has a disproportionate adverse impact on a racial or ethnic group, "it raises special concerns about whether the rule is a necessary and effective means to achieve the purposes of sentencing."[293] As shown in Figure 4.10 in the Commission's *Fifteen Year Review*, average sentences varied relatively little among racial and ethnic groups in the pre-guideline era, but average sentences for African American offenders soared above the others once the mandatory guidelines were in place.[294] The Commission identified the crack guidelines (which have now been substantially ameliorated) and

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[289] *Fifteen Year Review* at 113.

[290] *See* Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stan. L. Rev. 85, 89 (2005) ("Adopting the viewpoint of a person of ordinary moral sensibilities rather than of the Sentencing Commission leads quickly to the conclusion that the Sentencing Guidelines have substituted new disparities for old ones. This perspective suggests in fact that the Guidelines have seriously aggravated the problem of disparity.").

[291] *See* USSC, Cocaine and Federal Sentencing Policy at 28-30 (2007) (showing large numbers of low-level powder cocaine offenders exposed to penalties intended for more serious offenders); USSC, *Cocaine and Federal Sentencing Policy* 48-49 (2002) (showing drug quantity not correlated with offender function).

[292] *Fifteen Year Review* at 133-34.

[293] *Id*. at 113.

[294] *Id*. at 133.

the career offender guideline as rules with an adverse impact on African American offenders without clearly advancing sentencing purposes, and suggested that there may be others.[295]

Before *Booker*, judges could not correct for these kinds of disparities because they were too "typical," and within the "heartland." After *Booker*, judges can correct for unwarranted disparity, excessive uniformity, and disproportionality built into the guidelines themselves, based on the purposes of sentencing.[296]

D. The Commission Should Reject Ongoing Efforts to Stigmatize Judicial Discretion and Consideration of Relevant Mitigating Factors.

1. The Department's 2010 letter

Last summer, the Commission received a letter from Mr. Wroblewski claiming that federal sentencing is "fragmenting" into "two distinct and very different regimes,"[297] one "regime" in which judges sentence within the guidelines in most cases or sentences are "largely determined" by mandatory minimums, and a "second regime that has largely lost its moorings to the sentencing guidelines," in which judges allegedly sentence outside the guideline range "*irrespective of offense type or nature of the offender*," and cases involving "certain offense types for which the guidelines have lost the respect of a large number of judges," including

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[295] *Id*. at 131-35.

[296] *Kimbrough*, 552 U.S. at 108; *see, e.g.*, *United States v. McCarthy*, slip op., 2011 WL 1991146 (S.D.N.Y. May 19, 2011) (concluding based on testimony of four expert witnesses, Commission reports, and data concerning health risks that guidelines recommend punishment for MDMA offenses that is greater than justified, and that MDMA should not be punished more severely than powder cocaine); *United States v. Santillanes*, No. 07-619, Transcript of Sentencing Hr'g (D.N.M. Sept. 19, 2009) (concluding based on unrebutted evidence that punishment for certain methamphetamine offenses was unsupported by any empirical data or study and created unwarranted disparity); *United States v. Cabrera*, 567 F. Supp. 2d 271 (D. Mass. 2008) (finding two fundamental problems with drug guidelines are "over-emphasis on quantity" and "under-emphasis on role," creating "false uniformity"); *United States v. Steward*, 339 Fed. App'x 650, 653-54 (7th Cir. 2009) (district court abused its discretion in failing to consider defendant's argument based on "Sentencing Commission's own report, questioning the efficacy of using drug trafficking convictions, especially for retail-level traffickers, to qualify a defendant for career offender status"); *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010) ("By concentrating all offenders at or near the statutory maximum, § 2G2.2 eviscerates the fundamental statutory requirement in § 3553(a) that district courts consider 'the nature and circumstances of the offense and the history and characteristics of the defendant' and violates the principle . . . that courts must guard against unwarranted similarities among sentences for defendants who have been found guilty of dissimilar conduct."); *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1055 (9th Cir. 2009) ("[I]t is also legitimate to avoid 'unwarranted *similarities* among [defendants] who were not similarly situated.' . . . It is not reasonable for Amezcua's record of relative harmlessness to others for the past twenty years to subject him to the same severe offense level enhancement applied to a recent violent offender.").

[297] Letter from Jonathan Wroblewski to Hon. William K. Sessions III, Chair, U.S. Sent'g Comm'n at 1-2 (June 28, 2010) [hereinafter "Wroblewski Letter"].

"some child pornography offenses and some fraud crimes."[298] The letter alludes to "reports from prosecutors" that in some courts sentences differ depending on the judge, and "troubling sentencing trends" in which certain districts have higher or lower rates of departures and variances than the national average.[299] The second regime "leads to unwarranted sentencing disparities."[300]

The letter has been taken to mean that judges must be "reined in" by mandatory sentencing guidelines.[301] Undoubtedly, that is the implication, but it is not credible.

The letter complains on the one hand that "certain offense types for which the guidelines have lost the respect of a large number of judges" have "lost their moorings to the sentencing guidelines," and on the other urges the Commission to review and consider amendments to two such guidelines, those for some child pornography offenses and frauds involving high loss amounts.[302] That there is consistent feedback from judges that certain guidelines are broken, and now from prosecutors as well,[303] means that the advisory guidelines system is working. It is a system correcting itself, not a system "fragmenting" into good and bad "regimes."

The Department itself is largely responsible for the enormous increases in the child pornography guideline,[304] and the fraud guideline,[305] not based on the Commission's neutral

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[298] *Id*. at 1-2.

[299] *Id*.

[300] *Id*. at 2.

[301] William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles,* 26 J.L. & Pol. 305, 323-25 (2011).

[302] Wroblewski Letter at 3, 4.

[303] The child pornography guideline appears to be losing the respect of prosecutors. During the first two quarters of 2011, prosecutors sought variances below the guideline range (not based on § 5K1.1 or § 5K3.1), in 4.2% of all cases. USSC, Preliminary Quarterly Data Report, 2d Quarter Release, 2011, tbl.3. The rate in child pornography cases has grown dramatically, from 4.6% in 2007, to 6.4% in 2008, to 8.1% in 2009, to 14.5% in the first two quarters of 2011. USSC, 2007-2010 Sourcebook of Federal Sentencing Statistics, tbl.27; USSC, Preliminary Quarterly Data Report, 2d Quarter Release, 2011, tbl.3.

[304] As the letter notes, "enhancements for the use of a computer in the commission of the crime and for the number of images involved in the crime" are problematic. *Id*. at 6. The number of images enhancement was a direct amendment of the guideline, drafted by Department employees, and included in the PROTECT Act via the Feeney Amendment. *See* Pub. L. No. 108-21, § 401(i)(1)(B), (C). The Commission was forced to add the computer enhancement by the Sex Crimes Against Children Prevention Act of 1995 despite its objections to its breadth. *See* USSC, Report to Congress, Sex Offenses Against Children at 28-30 (1996).

[305] The upward ratcheting of the fraud guideline as a result of the Department's lobbying is well-documented. *See* Jeffery S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-*

expertise. The Department's apparent recognition that these penalties are now in need of revision spotlights a crucial point. It was not until the Judiciary was permitted to play *its* proper institutional role in sentencing that these problems have been brought to light.[306] Until then, the Department actively promoted these problems, the Commission was unable or unwilling to address them, and the upward ratchet continued unabated.

Booker has changed this unhealthy dynamic by giving judges their proper role in the constructive evolution of the guidelines. As Congress intended,[307] and the Supreme Court has re-emphasized,[308] sentencing decisions by judges "enhance [the Commission's] ability to fulfill its ongoing statutory responsibility under the Sentencing Reform Act to periodically review and revise the guidelines."[309]

The allegation of a "regime" of judges who "regularly impose sentences outside the applicable guideline range irrespective of offense type or nature of the offender" is supported by no evidence whatsoever. Judges are required to state specific reasons for sentences outside the guideline range based on the circumstances of the offense, the characteristics of the offender, and the purposes of sentencing,[310] subject to reversal on appeal.[311] If the Department, or the Commission, believes that judges impose sentences outside the guideline range without reason, we request a fair opportunity to examine those cases.

Judge John Gleeson, a former organized crime prosecutor, recently took the Department to task for this spurious allegation of a rogue "regime." He pointed out that aggressive, experienced prosecutors "in the trenches" where sentences are actually imposed, and the

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Mistretta*): Sunshine or Sunset?*, 27 Am. Crim. L. Rev. 289, 319 (1989); Frank O. Bowman III, *Pour Encourager Les Autres?*, 1 Ohio State J. Crim. L. 373 (2004); Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent'g Rep. 167, 2008 WL 2201039 (Feb. 2008).

[306] USSC, *The History of the Child Pornography Guidelines* at 1 n.4, 8 (October 2009); USSC, Notice of Final Priorities, 75 Fed. Reg. 54,699, 54,699-700 (Sept. 8, 2010) (announcing review of child pornography guideline based on high and increasing rate of downward departures and below-guideline variances); 76 Fed. Reg. 3193-02, 3201 (Jan. 19, 2011) (announcing multi-year review of the fraud guideline, noting that cases with relatively large loss amounts had a relatively high rate of below-range sentences).

[307] 28 U.S.C. §§ 991(b), 994(o), 995(a)(12)-(16); S. Rep. No. 98-225, at 80, 178 (1983).

[308] *See Booker*, 543 U.S. at 263-64; *Rita*, 551 U.S. at 350; *id*. at 382-83 (Scalia & Thomas, JJ., concurring in part and concurring in the judgment); *Kimbrough*, 552 U.S. at 107-08.

[309] USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 5 (2003).

[310] *See* 18 U.S.C. § 3553(a), § 3553(c); *Gall v. United States*, 552 U.S. 38, 51 (2007) ("failing to explain the chosen sentence—including an explanation for any deviation from the Guidelines range" is "significant procedural error").

[311] *See* Appendix 8, Appellate Decisions After *Gall*.

Department of Justice as well, know that "full consideration of the 'nature and circumstances of the offense and the history and characteristics of the defendant,' 18 U.S.C. § 3553(a)(1), implicates important offense and offender characteristics that are too numerous and varied, and occur in too many different combinations, to be captured, much less quantified, in the Commission's *Guidelines Manual*."[312] Prosecutors "understand that it does not undermine the Sentencing Guidelines at all, much less create some kind of rogue sentencing regime, when the consideration of factors set forth in 18 U.S.C. § 3553(a) produces a sentence that happens to be substantially below the advisory range."[313]

Judge Gleeson recounted twenty reasons stated at the sentencing hearing in the case before him, none of which are reflected in the guideline range, in support of a sentence of 60 months, 150 months below the bottom of the guideline range. Since all of those reasons were argued by the prosecutor to convince him to accept a plea agreement capping the sentence at 60 months, Judge Gleeson said "with confidence" that the Department of Justice "regards Ovid's 60-month sentence as the just result of a careful consideration of all of the relevant sentencing factors—including the advisory range—and as entirely consistent with the Guidelines themselves."[314]

Judge Gleeson noted that, like the Department, he begins with the principle that similar defendants who commit similar offenses and have similar histories should be sentenced similarly, but "the fact that two fraud defendants have similar or even identical *Guidelines ranges* does not mean they committed similar offenses."[315] Judge Gleeson had just sentenced another defendant moments before the sentencing in Ovid's case. "As far as the Guidelines were concerned, Hall and Ovid were similar," but "[i]n ways captured by the § 3553(a) factors but not sufficiently by the Guidelines themselves," Hall was far more culpable than Ovid and entirely unrepentant.[316] Judge Gleeson sentenced Hall to 126 months, a *warranted* disparity from the sentence Ovid received.

Finally, Judge Gleeson called upon the Department to exercise its right to appeal if it believes any sentence is "unacceptable," noting the low rate of government appeals despite its high success rate.[317] In fiscal year 2010, there were 14,565 sentences classified as "non-government sponsored below range,"[318] a large portion of which the government agreed to or did

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[312] *United States v. Ovid*, slip op., 2010 WL 3940724, *1-2 (E.D.N.Y. Oct. 1, 2010).

[313] *Id*. at *2.

[314] *Id*. at *6.

[315] *Id*. at *7.

[316] *Id*.

[317] *Id*. at **9-10.

[318] USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbl.N.

not oppose.[319] The government appealed only 87 sentences, raising 156 issues, that year. Thirty of those issues related to the application of § 3553(a) and the government prevailed on 60% of those claims.[320]

The claim of a judicial "regime" that has "largely lost its moorings to the sentencing guidelines" is not credible on its face. The government sponsored rate of below-guideline sentences is 26.5%, nearly 10 percentage points higher than the 17.1% non-government sponsored rate.[321] The average decrease in months of government sponsored below-guideline sentences appears to be about 19 months, as compared to 12.8 months without a government motion.[322] These statistics do not include Rule 35 reductions, totaling an additional 2,006 cases in 2010.[323] And these statistics do not reflect the full extent to which prosecutors sponsor or do not object to below range sentences.[324]

The purpose of the vast majority of the government sponsored below range sentences (85% and more including Rule 35s) is not to advance the purposes of sentencing, but to obtain cooperation, swift guilty pleas, and waivers of constitutional rights, including the right to appeal. The sentences judges impose below the guideline range without a government motion are

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[319] *See* note 324, *infra*.

[320] *Id*. tbl.58.

[321] USSC, Preliminary Quarterly Data Report, 2d Qtr, tbl.1 (2011).

[322] To estimate the average decrease, for government sponsored and non-government sponsored below range sentences, we multiplied the number of sentences by the extent decrease in months in each of the Commission's categories; added those products together to reach a total number of months of decrease; and divided the total number of months of decrease by the total number of sentences below the guideline range. USSC, Preliminary Quarterly Data Report, 2d Qtr, tbls. 7-13 (2011).

[323] USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbl.62.

[324] Statistics on rates of government sponsored and non-government sponsored sentences below the guideline range understate the extent to which the government agrees with such sentences. *See* Paul J. Hofer, *How Well Do USSC Sentencing Data Help Us Understand Post-Booker Sentencing?* 22 Fed. Sent'g Rep. 89 (2010). First, the government did not object to 46% (3,332 of 7,266) defense motions for a below range sentence classified as "non-government sponsored" in 2010. USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbl.28A. Second, because the statement of reasons form does not provide a checkbox for the court to indicate the government's position regarding reasons not addressed in a plea agreement or motion by a party, there is no information on the government's position in 4,773 such instances, all of which are classified as "non-government sponsored." *Id*. Since defense attorneys generally raise all plausible grounds for below range sentences and judges do not raise meritless grounds *sua sponte*, it is likely that the government did not object to a significant portion of these sentences. Third, in 3,246 cases classified as "non-government sponsored" below range, the Commission did not receive sufficient information to determine the government's position or whether the source was a plea agreement, a motion by a party, or something else. *Id*. Since a large majority of cases for which information was available were government sponsored, it is reasonable to assume that the government sponsored or acquiesced in a large portion of cases where information was not available.

required to comply with § 3553(a), the statute Congress enacted to ensure reasonable consistency and fairness, and are determined through a transparent adversary process, explained in open court, and subject to appellate review if the government chooses to appeal.

And even as the Department asserts that judges create a "regime" that is "unmoored" from the guidelines, when they vary from the guidelines far less often than prosecutors seek such below-range sentences, the Department has repeatedly urged the Commission *not* to revise broken guidelines because judges now have the flexibility to vary.[325]

As to the Wroblewski letter's claim of a "troubling" trend of rates of departures and variances being substantially higher or lower in some districts than the national average, if this is meant to imply that this is a problem caused by judges, prosecutorial practices must be much more troubling. The government's practices and policies regarding § 5K1.1 motions, Rule 35(b) motions, § 5K3.1 motions, and motions for departure or variance on other grounds vary widely from one district to another.[326] The difference between the highest and lowest government sponsored rates by district is 12.3 percentage points higher than the difference between the highest and lowest non-government sponsored rates by district.[327]

The notion that decisions by life-tenured judges, made in open court and subject to appellate review, are by nature suspect, while the decisions of partisan prosecutors, made behind closed doors and not subject to judicial review, are by definition warranted, has done a great deal of damage, both to the reputation of the guidelines and to thousands of individual defendants. The Commission should now decisively reject that idea.

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[325] Statement of Sally Quillian Yates Before the U.S. Sent'g Comm'n, at 10-11, 14 (Feb. 16, 2011) (stating Department's position that the Commission should not amend the illegal reentry guideline to remove the 12- and 16-level enhancements for prior convictions that are too old to count for criminal history purposes because a court can vary downward if it finds the enhancement is unwarranted); see also Tr. of Hearing Before the U.S. Sent'g Comm'n, at 207-08 (Feb. 16, 2011) (remarks of Sally Quillian Yates); Statement of Laura E. Duffy Before the U.S. Sent'g Comm'n, at 18-19 (Mar. 17, 2011) (stating Department's position that the Commission should not lower all drug base offense levels by two levels even though the additional levels unnecessarily contribute to severity, as recognized by the 2007 amendment to the crack guideline, because courts "have greater flexibility" and can vary); Statement of Tristram Coffin Before the U.S. Sent'g Comm'n, at 11 (Mar. 17, 2011) (stating Department's position that the Commission need not expand departure authority for mitigating offender characteristics in part because courts can vary and avoid the perceived complexity of the departure provisions and risk of reversal).

[326] USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbl.26 (government sponsored rate of 60.4% in the Southern District of California, 3.7% in the District of South Dakota), *id*. tbl.62 (rate of Rule 35(b) motions ranging from 0 to 91.8%).

[327] In 2010, prosecutors sought downward departures and variances in 60.4% of cases in the Southern District of California and in 3.7% of cases in the District of South Dakota, a difference of 56.7 percentage points. Judges imposed downward departures and variances in 49% of cases in the Southern District of New York and in 4.6% of cases in the Middle District of Georgia, a difference of 44.4 percentage points. *See* USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbl.26.

2. The Department's 2011 letter

We appreciate that the Department now acknowledges that the mandatory guidelines system was "without doubt imperfect" and that "not every disparity is an unwelcome one."[328] The Department still claims, however, that the system is "fragmenting" into two regimes, one allegedly "closely tied to the foundational principles of the SRA and the Commission, and one that increasingly does not."[329] This time, the examples are race disparity allegedly found after "controlling for relevant factors," the allegedly improper consideration of offender characteristics as grounds for variance, and regional disparity allegedly caused by judges.

The letter first points to the Commission's multivariate analysis, asserting that it shows an increase in the difference in sentence length between black and white males after *Booker*, after "controlling for relevant factors." But the study did not control for all "relevant factors," and that makes it an unreliable basis for such a serious charge. The report states that it "should be interpreted with caution," because it does not control for "many legal and other legitimate considerations that are not and cannot be measured" because they are "unavailable in the Commission's datasets."[330] The dangerous misuse of this study is discussed further in Part III.G.

In a related vein, the Department complains of a "growing doctrinal tension" evidenced by two decisions of the Supreme Court, both of which reached the result urged by the Solicitor General. There is no "doctrinal tension" between *Tapia* and *Pepper*. They are entirely consistent with each other and with the SRA. They reflect a very simple concept. Lack of education, vocational skills, or stabilizing ties may not be used to choose prison over probation or a longer prison term, as the Court found in *Tapia*, interpreting 18 U.S.C. § 3582(a) and 28 U.S.C. § 994(k). But education, vocational skills, employment record, family ties, community ties, or the lack thereof, may be considered to choose probation over imprisonment or a shorter prison term, as the Court found in *Pepper*, interpreting 18 U.S.C. § 3553(a) and § 3661.

Another provision, 28 U.S.C. § 994(e), reflects the same concept as 18 U.S.C. § 3582(a) and 28 U.S.C. § 994(k), that lack of education, vocational skills or stabilizing ties should not be used to choose prison over probation or a longer prison term. None of these statutes, as the letter asserts, generally "discount[s] offender characteristics" or provides that "the length of federal imprisonment terms be based on the offense and criminal history." We have explained this in detail in Part I.A of this letter and in our letter addressing departures dated August 30, 2011.

It is wrong to suggest that considering offender characteristics as grounds for leniency somehow creates "racial and ethnic disparities." "A defendant's race or nationality may play no *adverse* role in the administration of justice, including at sentencing." *Pepper v. United States*,

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[328] Letter from Lanny A. Breuer and Jonathan Wroblewski to Hon. Patti B. Saris, Chair, U.S. Sent'g Comm'n at 3 (Sept. 2, 2011).

[329] *Id.*

[330] USSC, *Demographic Differences in Federal Sentencing Practices: An Update of the* Booker Report's *Multivariate Regression Analysis* 4 (2010) [USSC, *Demographic Differences Report*].

131 S. Ct. 1229, 1240 n.8 (2011) (emphasis added). The Attorney General recently said that "equal justice depends on individualized justice, and smart law enforcement demands it."[331] We fail to see how it would be "smart law enforcement" or "equal justice" to require offenders who rehabilitated themselves by attaining an education, holding a steady job, and carrying out family responsibilities, to languish in prison on the taxpayers' dime, based solely on the offense and criminal history.

The Department's position appears to reflect what Professor Michael O'Hear has described as the "tendency towards debasement in the criminal justice system, that is, the tendency towards the misuse of high ideals as camouflage for practices that are arbitrary, self-serving, or cruel," and how this tendency had shown itself in calls by a former Attorney General for topless guidelines, "debasing" the "uniformity ideal." Michael O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. Cin. L. Rev. 749, 813-15 (2006). This same tendency towards debasement is evident in the claim that offender characteristics should not be considered because they might occur more or less frequently in one race or socioeconomic class or another, without regard to the relevance of such characteristics to the purposes of sentencing.

Finally, the letter asserts that the Southern and Western Districts of Texas "saw their combined within-guideline sentencing rate remain stable and above 71.5% in FY 2010," apparently meaning the same since 2004, but other districts "saw their compliance rates fall," from 42,6% in 2009 to 32.6% in 2010 in the Southern District of New York; from 37.9% to 29.7% in the Eastern District of Wisconsin; and from 42.7% to 36% in the Eastern District of Washington.

This is yet another example, *see* Part III.F, *infra*, of bare statistics being a false measure of regional disparity and the need to look at differences among case types and interactions between what prosecutors and judges are doing. In the Southern District of Texas, there are many immigration cases with very low sentences, prosecuted under 8 U.S.C. § 1326(a) or (b)(1), such that there is little need to depart or vary; defendants serve most of their sentences before they are sentenced. Immigration cases are 73% of the caseload in the Southern District of Texas, and the median sentence is 12 months. Similarly, in the Western District of Texas, a large percentage of the caseload are immigration cases prosecuted under 8 U.S.C. § 1326(a), and marijuana cases prosecuted under 21 U.S.C. § 841(b)(1)(D). Immigration cases are 60% of the caseload and the median sentence is 8 months. Marijuana cases are not broken out, but the guideline range is 18-24 months (or less) with acceptance and safety valve, and 12-18 months (or less) with minor role

In the Eastern District of Wisconsin, the decline in the rate of within guideline sentences (from 37.9% to 29.7%) is largely due to the *increase* in government sponsored below guideline sentences. If the rate of government sponsored below guideline sentences had been the same in 2010 as it was in 2009, and assuming the excess cases would have been sentenced within the

[331] Memorandum to All Federal Prosecutors from Attorney General Eric H. Holder Jr. regarding Department Policy on Charging and Sentencing, at 1 (May 19, 2010).

guidelines, the total rate of within guideline sentences in 2010 would have been 34.3%.[332] Significantly, even with a small decrease in the rate of within guideline sentences, the average length of imprisonment in the Eastern District of Wisconsin remained well above the national average in 2010. Where the national mean was 51.1 months, and national median was 30 months, in the Eastern District of Wisconsin the mean was 60.7 months, and median was 46 months.[333]

Similarly, in the Eastern District of Washington, where the within-guideline rate fell from 42.7% to 36.0%, the rate of government sponsored below guideline sentences *increased* by 6.5% from 2009 to 2010, whereas the rate of non-government sponsored below guideline sentences increased by only 2.8%.[334] If the rate of government sponsored below guideline sentences had been the same in 2010 as it was in 2009, and assuming the excess cases would have been sentenced within the guidelines, the total rate of within guideline sentences in 2010 would have been 42.5% instead of 36.0%, and very close to the 2009 rate of 42.7%.[335] Additionally, there was a noticeable change in a particular type of case – immigration cases – between 2009 and 2010; the rate of non-government sponsored below guideline sentences increased from 7.8% to 22.3%.[336] But for this change in this particular type of case, and the increased rate of government sponsored below-guideline sentences across all offenses discussed above, the total within guideline rate in 2010 would have been 48.0%, that is several percentage points *higher* than it had been in 2009 (42.7%).[337]

The "fall" in the Southern District of New York (from 42.6% to 32.6%) is largely meaningless in this district, and any district, without careful analysis of the ever-shifting distribution of offenses, where these figures could simply reflect an anomaly in the caseload during a particular year. The figure does not show that there was an across the board disregard for the guidelines in the District. The Southern District of New York is *not* a fast-track district, and in 2010, saw a much higher rate of non-government sponsored below guideline sentences in immigration cases than occurred in 2009 (63.9% compared to 35.5%).[338] On the other hand, the district saw a dramatic increase in its rate of within guideline sentences for robbery offenses, and

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[332] USSC, 2009 Statistical Information Packet, Eastern District of Wisconsin, tbl.8; USSC, 2010 Statistical Information Packet, Eastern District of Wisconsin, tbl.8.

[333] USSC, 2010 Statistical Information Packet, Eastern District of Wisconsin, tbl.7.

[334] USSC, 2010 Statistical Information Packet, Eastern District of Washington, tbl.8; USSC, 2009 Statistical Information Packet, Eastern District of Washington, tbl.8.

[335] *Id.*

[336] USSC, 2009 Statistical Information Packet, Eastern District of Washington, tbl.10; USSC, 2010 Statistical Information Packet, Eastern District of Washington, tbl.10.

[337] *Id.* tbls. 8,10.

[338] USSC 2010 Statistical Information Packet, Southern District of New York, tbl.10, USSC, 2009 Statistical Information Packet, Southern District of New York, tbl.10.

smaller increases for firearms, larceny and forgery.[339] And importantly, in 2010, the average total length of imprisonment in the Southern District of New York, was higher than the national average.[340]

E. Differences Among Judges Are Modest and Are Best Reduced by Revision of Problematic Guidelines.

A study of sentences imposed in the District of Massachusetts compared average sentence lengths among different judges in 2,262 cases sentenced from October 1, 2001 to September 30, 2008 in the District of Massachusetts, about .5 % of cases nationwide.[341] The study found an increase in differences in sentence length among judges of 4.7 or 5.4 months, depending on whether cases involving mandatory minimums were included.[342] Comparisons of rates and extents of below-guideline sentences showed different patterns for different groups of judges.[343]

The author concluded that "the effect of the judge remains relatively modest,"[344] and that "inter-judge sentencing disparity is but one consideration among many in evaluating the federal sentencing system. It is entirely possible to conclude that *Booker*, *Kimbrough*, and *Gall* have improved federal sentencing, on balance, by allowing judges greater flexibility to reject unjust guidelines and impose just sentences."[345]

As the Commission knows, some guidelines recommend punishment that is unjust, *i.e.*, unnecessarily harsh to accomplish a legitimate aim, in most cases to which they apply.[346] When

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[339] *Id.*

[340] USSC, 2010 Statistical Information Packet, Southern District of New York, tbl.7.

[341] Ryan W. Scott, *Inter-Judge Sentencing Disparity After* Booker: *A First Look*, 63 Stan. L. Rev. 1, 23-24 (2010).

[342] *Id.* at 31-34 & tbls. 1, 2.

[343] *Id.* at 38-40.

[344] *Id.* at 41.

[345] *Id.* at 42.

[346] *See, e.g.*, USSC, Public Meeting Minutes, Apr. 5, 2011 (Commissioners recognizing need to address problem of drug guideline two levels higher than necessary to include mandatory minimums); USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 28-30 (2007) (finding large portions of low level functionaries in *both* powder and crack cocaine cases subject to punishment Congress intended for "major" or "serious" drug traffickers); *Fifteen Year Review* at 133-34 (finding career offender guideline recommends punishment greater than necessary to satisfy the need for specific deterrence or to incapacitate and creates unjustified racial disparity); *id*. at 47-55 (discussing evidence of numerous problems in operation of all drug trafficking guidelines); USSC, Notice of Final Priorities, 75 Fed. Reg. 54,699, 54,699-700 (Sept. 8, 2010) (announcing review of child pornography guideline prompted by high rate of variances and many written opinions with a view to promulgating amendments and/or reporting to

judges discount such guidelines or give effect to relevant factors that are not included in the guidelines, they are reducing unwarranted disparity, or its equally problematic inverse, excessive uniformity. If other judges continue to follow unjust guidelines, this constitutes a difference among judges, but the disparity the Commission should worry about has been reduced.

A modest increase in differences among judges in one small district or in the nation as a whole does not outweigh the enormous benefits of the advisory guidelines system. The solution is ongoing revision of the guidelines in response to sentencing data and reasons, as Congress originally intended and as the Supreme Court has re-emphasized.[347] If the Commission does so, it will address the problem of judges who adhere to unjust guidelines. Other judges, who would welcome good advice, will follow the guidelines more often.

Differences among judges that exist today are in part due to judicial *restraint*, as the courts slowly and deliberately work through the issues,[348] and in part due to the gradual manner in which the Commission is addressing existing problems in the guidelines, including informing Congress of needed changes. After nearly twenty years of mechanical sentencing and unexplained guidelines, it should not be surprising, much less alarming, that the courts and the Commission are adjusting to their proper roles in a slow and measured way.

This is not the pre-guidelines system, when judges had no statutory guidance regarding the purposes sentences should serve and had no obligation to explain their sentences.[349] Judges

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Congress); *An Interview with John Steer, Former Vice Chair of the U.S. Sentencing Commission*, The Champion at 41-42 (Sept. 2008) (recently retired Commissioner stating that he left the Commission with a proposal to abolish the use of acquitted conduct in calculating the guideline range and to limit the impact of uncharged conduct).

[347] *See* S. Rep. No. 98-225, at 178 (1983) (Commission should not "second-guess[] individual judicial sentencing actions either at the trial or appellate level," but should learn "whether the guidelines are being effectively implemented and revise them if for some reason they fail to achieve their purposes."); *Kimbrough*, 552 U.S. at 107 ("ongoing revision of the Guidelines in response to sentencing practices will help to 'avoid excessive sentencing disparities.'"); *Rita*, 551 U.S. at 350 ("The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process." The Commission will "collect and examine" sentencing data and reasons and "can revise the Guidelines accordingly."); *Rita*, 551 U.S. at 382-83 (Scalia, J., concurring) ("By ensuring that district courts give reasons for their sentences, and more specific reasons when they decline to follow the advisory Guidelines range, . . . appellate courts will enable the Sentencing Commission to perform its function of revising the Guidelines to reflect the desirable sentencing practices of the district courts. . . . And as that occurs, district courts will have less reason to depart from the Commission's recommendations, leading to more sentencing uniformity.").

[348] *See, e.g.*, *United States v. Henderson*, __ F.3d __, 2011 WL 1613411 (9th Cir. 2011) (after judge declined, without first receiving guidance from the court of appeals, to vary from the child pornography guideline based on evidence that it was not developed based on empirical study and recommended excessive punishment, holding that judges may disagree with the child pornography guideline so long as they continue to treat it as the starting point and adequately explain their choice of the sentence, including their policy disagreement).

[349] S. Rep. No. 98-225, at 38, 40, 49 (1983).

now must impose sentences in compliance with 18 U.S.C. § 3553(a), the statute Congress enacted for the purpose of achieving reasonable consistency in sentencing.[350] They must explain their sentences according to the terms of that statute, subject to reversal on appeal.[351] And, the Supreme Court has given the guidelines more primacy than does the plain language of the statute, directing judges to treat the guideline range as "the starting point and the initial benchmark."[352]

F. Regional Differences Were Contemplated by the SRA and Arise for Legitimate Reasons.

The SRA did not require nationwide uniformity, but instead recognized that regional differences are relevant in three different ways – "the community view of the gravity of the offense," "the public concern generated by the offense," and "the current incidence of the offense in the community."[353] The Commission decided not to take account of local conditions in the guidelines, but judges and prosecutors take account of such differences and always have.

Attorney General Holder has adopted a policy of "district-wide consistency," in accordance with "district-specific policies, priorities, and practices," and "the needs of the communities we serve."[354] Judges must consider "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."[355] "[R]etribution imposes punishment based upon moral culpability and asks [what] penalty is needed to restore the offender to moral standing within the community."[356] The "community view of the gravity of the offense" and the "public concern generated by the offense" are therefore relevant.[357] A failure to take into account local conditions and norms would create unwarranted uniformity.[358]

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[350] *See* S. Rep. No. 98-225, at 50-52, 74-75 (1983); Brief of *Amici Curiae* Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein in Support of Affirmance, *Claiborne v. United States* (No. 06-5618), Jan. 22, 2007.

[351] *See* Appendix 8, Appellate Cases After *Gall*.

[352] *Gall*, 552 U.S. at 49.

[353] *See* 28 U.S.C. § 994(c)(4), (5), (7).

[354] Memorandum to All Federal Prosecutors from Attorney General Eric H. Holder Jr. regarding Department Policy on Charging and Sentencing, at 1, 3 (May 19, 2010).

[355] *See* 18 U.S.C. § 3553(a)(2)(A).

[356] *United States v. Cole*, slip op., 2008 WL 5204441 *4 (N. D. Ohio Dec. 11, 2008).

[357] *See United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (en banc).

[358] *See* Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 Iowa L. Rev. 721, 741-43 (2002) (explaining why

When the guidelines were mandatory, there were wide variations among districts and circuits.[359] Prosecutorial practices and court cultures varied by district, and differences in the treatment of drug cases were greater after the guidelines than before, as prosecutors and judges found different ways to adjust to the severity of the drug trafficking guidelines and mandatory minimums.[360]

There are countless regional difference in how crimes and appropriate punishments for them are perceived, and both prosecutors and judges act on those differences.[361] For example, a drug case that would not even be prosecuted in the Eastern District of New York is front page news in a small town in Iowa.[362] Moreover, judges and prosecutors react or adjust to what the other is doing. For example, in drug cases, the rate of substantial assistance departures is high and the rate of non-government sponsored below range sentences is low in some districts, while it is the reverse in other districts.[363]

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federal-state disparities should be considered at sentencing); Vincent L. Broderick, *Local Factors In Sentencing*, 5 Fed. Sent'g Rep. 314, 314 (1993) ("Local variations are important because of the wide spectrum of conditions, attitudes and expectations spanning the nation. Overcentralization can produce a rigidity engendering hostility and causing diminution of respect for the national government."); Michael O'Hear, *Federalism and Drug Control*, 57 Vand. L. Rev. 783, 821-22 (2004) (discussing the distortion of drug policy by federalization and understandable regional differences).

[359] *Fifteen Year Review* at 99-112.

[360] *Id*. at 140; Hofer, Blackwell & Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 Crim. L. & Criminology 239, 303-04 (1999); Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 Iowa L. Rev. 1043, 1134 (2001).

[361] *See* John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 Hofstra L. Rev. 639, 656 n.66 (2008) ("These differences matter, not just to the residents of our nation's communities, but to the jurors, lawyers, and judges in them. They are acted upon in numerous ways, including in plea bargaining decisions, to produce results that prosecutors and judges believe are just. To be sure, those results are not uniform. Some drug couriers get a four-level downward role adjustment based on the happenstance of being arrested in New York rather than in Miami, just as some illegal immigrants get a three-level fast-track adjustment based on the happenstance of being arrested in Arizona rather than in Utah.").

[362] *See Clinton Man Sentenced for Drug Trafficking*, Clinton Herald, Apr. 26, 2011 (defendant sentenced to 188 months in federal court for possessing with intent to distribute 5 grams of crack cocaine).

[363] For example, in the Eastern District of Kentucky, 63.2% of drug cases receive a substantial assistance departure, 6% receive a non-government sponsored below range sentence, and average sentence length is 70 months. USSC, 2010 Statistical Information Packet, Eastern District of Kentucky, tbls. 7, 10. In the Southern District of West Virginia, 10.7% of drug cases receive a substantial assistance departure, 35.1% receive a non-government sponsored below range sentence, and average sentence length is 75 months. USSC, 2010 Statistical Information Packet, Southern District of West Virginia, tbls. 7, 10.

Variation among prosecutorial practices by district appears to be greater than variation among judges. The difference between the highest and lowest government sponsored rates by district is 12.3 percentage points higher than the difference between the highest and lowest non-government sponsored rates by district.[364]

Before concluding that regional variation is a problem, the Commission would have to untangle some complex interactions, many of which are not apparent in its data. To understand what judges and prosecutors are doing in different districts and why, the Commission needs to look at the kinds of cases brought, the government's charging and plea practices, and the kinds of cases in which judges are departing or varying in the district.[365] A few examples are illustrative.

The "Fast Track" Effect. Most districts have a growing number of immigration cases but few have a "fast track" program authorized by the Attorney General. Some have observed that the "fast track" system is essentially an admission that guideline ranges for offenses subject to them, including both drug and immigration offenses, are too high.[366] And "fast track" programs are not "uniform" among districts; the eligibility criteria and sentencing benefits differ greatly among districts.[367]

Judges in districts without "fast track" programs frequently vary from the guideline range without a government motion.[368] In doing so, they are avoiding excessive punishment and what the Commission has found to be unwarranted geographical disparity.[369]

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[364] In 2010, prosecutors sought downward departures and variances in 60.4% of cases in the Southern District of California and in 3.7% of cases in the District of South Dakota, a difference of 56.7 percentage points. Judges imposed downward departures and variances in 49% of cases in the Southern District of New York and in 4.6% of cases in the Middle District of Georgia, a difference of 44.4 percentage points. *See* USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbl.26.

[365] For some of the circumstances that affect sentencing in the twenty-three districts in the northeast region, see Statement of Alexander Bunin, Federal Public Defender for the Northern District of New York, Hearing before the U.S. Sent'g. Comm'n, at 7-11 (July 9, 2009).

[366] "[W]hat we've done is to set penalties [for drug and immigration offenses] at unsupportably high levels and then use those high penalties as the starting point for a program of huge sentencing discounts." Frank O. Bowman, III, *Only Suckers Pay the Sticker Price: The Effect of "Fast Track" Programs on the Future of the Sentencing Guidelines as a Principled Sentencing System*, Written Statement Prepared for Hearing Before the U.S. Sent'g. Comm'n, at 1 (Sept. 23, 2003). "[W]hat makes fast track possible and makes it run is the high guideline ranges under § 2L1.2, a guideline that lacks any empirical basis." Statement of Thomas W. Hiller, II and Davina Chen, Hearing Before the U.S. Sent'g Comm'n, at 27 (May 27, 2009).

[367] *United States v. Ramirez*, __ F.3d __, 2011 WL 2864417 at *6 (7th Cir. 2011); *United States v. Ramirez*, Nos. 09-3932, 10-2190, and 10-2689, Petition for Rehearing and Suggestion for Rehearing En Banc, http://www.fd.org/pdf_lib/Ramirez%20Pet%20for%20Rhg.pdf

[368] The government sponsored rate in immigration cases in districts with "fast track" programs is, for example, 64.7% in Arizona and 61% in Utah. The variance rate in immigration cases in districts without "fast track" programs is, for example, 63.9% in the Southern District of New York, 37.3% in the Eastern

The Career Offender Guideline in Two Districts. An example from the Districts of Massachusetts and neighboring Rhode Island illustrates that what may look like a disparity among districts is actually a reduction in unwarranted disparity caused by the interaction of a particular guideline, state law, circuit law, and prosecutorial charging policy. The career offender guideline recommends some of the most severe punishments in the Guidelines Manual, *i.e.*, 210-262 months, 262-327 months, or 360 months to life in nearly all cases in which it applies.

The vast majority of career offenders in the Districts of Massachusetts and Rhode Island are convicted of a drug or bank robbery offense,[370] and typically have prior state convictions for relatively minor drug offenses or "crimes of violence."[371] The Districts of Massachusetts and Rhode Island have the highest percentage of defendants classified as career offenders in the nation, at 16.1% and 16.8% of their total caseloads, respectively, in FY 2009.[372] The national average was a mere 3%,[373] and no other district came close.

The reasons for this are several. First, although Congress appears to have intended that the career offender guideline would apply only to offenders with prior convictions that were "felonies" under the law of the convicting jurisdiction,[374] the guideline counts prior convictions if the offense was punishable by more than one year even if the state classifies the offense as a misdemeanor. The statutory maximum for certain Massachusetts state misdemeanors, including possession with intent to distribute marijuana, resisting arrest, and assault and battery (including simple assault), exceeds one year, whereas most states set the maximum for such offenses at one

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District of Pennsylvania, and 36.4% in the District of Rhode Island. USSC, 2010 Statistical Information Packet, tbl.10.

[369] *See* Linda Drazga Maxfield & Keri Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 Fed. Sent'g. Rep. 260, 2002 WL 31304861 (2002).

[370] In the District of Massachusetts, the instant offense in FY 2009 was a drug offense for 65.9% of career offenders and bank robbery for 21.5% of career offenders; in the District of Rhode Island, the instant offense was a drug offense for 77.3% of career offenders and bank robbery for 13.6% of career offenders. USSC, 2009 Monitoring Dataset. (We have not yet analyzed 2010 data on career offenders.)

[371] The career offender guideline is broader than required by 28 U.S.C. § 994(h). It includes as qualifying prior convictions state drug offenses (where the statute requires only certain federal offenses), a broader definition of "crime of violence," and state misdemeanors if punishable by more than one year (where the statute requires only felonies). *See* USSG § 4B1.1, § 4B1.2.

[372] USSC, 2009 Monitoring Dataset.

[373] USSC, 2009 Sourcebook of Federal Sentencing Statistics, tbls. N, 22.

[374] *See* 28 U.S.C. § 994(h)(2) (requiring that the defendant "has previously been convicted of two or more prior *felonies*."). When § 994(h) was enacted in 1984 and today, the unadorned term "felony" was and is defined as follows: "The term 'felony' means any Federal or State offense classified by applicable Federal or State law as a felony." *See* 21 U.S.C. § 802(13), § 951(b).

year. These offenses, with the exception of simple assault as of just recently,[375] are qualifying prior convictions under the career offender guideline. Second, until just recently, the First Circuit held that juvenile adjudications count as career offender predicates,[376] though the career offender guideline requires adult convictions.[377] Third, in both jurisdictions, many street level dealers charged with small amounts of drugs are prosecuted in federal court.

This confluence of circumstances in the Districts of Massachusetts and Rhode Island makes the career offender guideline applicable to a large portion of drug and robbery offenders with relatively minor records, subjecting them to decades-long guideline ranges, while many similarly situated offenders in other districts would likely be prosecuted in state court or, if prosecuted in federal court, would not be career offenders. Further, as the Commission has found, the severe punishment recommended by the career offender guideline, as applied to those who qualify based on prior drug convictions, vastly overstates the risk of recidivism, serves no deterrent purpose, and has a racially disparate impact.[378]

Judges in the two districts vary from the guidelines in drug and robbery cases at a high rate compared to the national average, reflecting their high rate of career offender cases.[379] Average sentence length, however, is consistent with the national average.[380] While this appears as a disparity in rates of below-guideline sentences in the Commission's reported statistics, it is in fact a reduction of unwarranted disparity.

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[375] Recently, the First Circuit held that one form of assault and battery, offensive touching, is no longer a "violent felony" under 18 U.S.C. § 924(e). *United States v. Holloway,* 630 F.3d 252 (1st Cir. 2011). The same analysis applies for purposes of a "crime of violence" under USSG § 4B1.2.

[376] *See United States v. McGhee*, __ F.3d __, 2011 WL 2465452 (1st Cir. June 22, 2011) (reversing prior precedent counting juvenile adjudications).

[377] USSG § 4B1.2, comment. (n.1).

[378] *Fifteen Year Review* at 133-34.

[379] *See* USSC, Statistical Information Packet, Fiscal Year 2009, District of Massachusetts, tbl.10 (below-range rate of 42.7% in drug trafficking cases, 71.4% in robbery cases); USSC, Statistical Information Packet, Fiscal Year 2009, District of Rhode Island, tbl.10 (below-range rate of 47.9% in drug trafficking cases, 50% in robbery cases); *ibid*. (national rate of 17.2% in drug trafficking cases, 21.3% in robbery cases). In the District of Massachusetts, 21.6% of drug trafficking offenders are career offenders and 60.7% of robbery offenders are career offenders; in the District of Rhode Island, 35% of drug trafficking offenders are career offenders and 37.5% of robbery offenders are career offenders. USSC, 2009 Monitoring Dataset.

[380] *See* USSC, *Statistical Information Packet, Fiscal Year 2009, District of* Massachusetts, tbl.7 (69.1 months in drug trafficking cases, 91 months in robbery cases); USSC, *Statistical Information Packet, Fiscal Year 2009, District of Rhode Island,* tbl.7 (82.9 months in drug trafficking cases, 82.4 months in robbery cases); *ibid*. (national average of 81.2 months in drug trafficking cases, 82.2 months in robbery cases).

Prosecutorial Practices. Testimony at the Commission's 2009-10 regional hearings revealed many ways in which prosecutorial practices create regional differences. For example, one U.S. Attorney noted that prosecutors in his office generally requested sentences within the guideline range "rather than introduce yet another point of disparity, namely, the subjective sentencing philosophies of individual AUSAs."[381] Yet, his philosophy and practice differed from more punitive practices of U.S. Attorneys in other districts. In his district, drug defendants with two criminal history points not able to provide substantial assistance and not eligible for safety valve relief were allowed to plead to a less serious offense (a "telephone count" under 21 U.S.C. § 843(b)) to avoid a mandatory minimum sentence. In his district, the Ashcroft Memorandum was interpreted in light of § 9-27.300 of the U.S. Attorney's Manual,[382] to permit broader options for filing charges, reaching plea agreements, and arguing for particular sentences. In adjoining districts, prosecutors hewed closely to the Ashcroft Memorandum, charging the most serious offense possible and pursuing the longest sentence possible without regard to proportionality, sentencing purposes, or mitigating factors, and in one district even bringing charges for the purpose of circumventing the safety valve.[383]

On May 19, 2010, Attorney General Holder issued new guidance superseding the Ashcroft Memorandum, and reviving the Principles of Federal Prosecution in Title 9, Chapter 27 of the U.S. Attorneys Manual.[384] The Holder Memorandum institutes a policy of "district-wide consistency" and "individualized justice." It may lessen unfair regional disparities caused by prosecutors, but it will not result in lockstep uniformity.

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[381] Transcript of Public Hearing before the U.S. Sent'g Comm'n, Chicago, Ill., at 245 (Sept. 9-10, 2009) (remarks of Patrick J. Fitzgerald, U.S. Att'y, N.D. Ill.).

[382] The section says, in relevant part:

> [A] faithful and honest application of the Sentencing Guidelines is not incompatible with selecting charges or entering into plea agreements on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime. Thus, for example, in determining "the most serious offense that is consistent with the nature of the defendant's conduct that is likely to result in a sustainable conviction," it is appropriate that the attorney for the government consider, inter alia, such factors as the Sentencing Guideline range yielded by the charge, whether the penalty yielded by such sentencing range (or potential mandatory minimum charge, if applicable) is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation. . . .

U.S. Attorney's Manual, § 9-27.300

[383] Statement of Nicholas T. Drees Before the U.S. Sent'g Comm'n, Denver, Colo., at 4-5 (Oct. 21, 2009).

[384] Memorandum to All Federal Prosecutors from Attorney General Eric H. Holder Jr. regarding Department Policy on Charging and Sentencing, at 1, 3 (May 19, 2010).

G. The Commission Should Not Suggest that Judges Discriminate Against Racial Minorities.

In March 2010, the Commission issued a report announcing that black male offenders received longer sentences than white male offenders after the PROTECT Act of 2003, but that these differences increased after *Booker* and again after *Gall*.[385] At the same time, black females received shorter sentences than males of any race and females of any race except "other."[386] Under a different model spanning the entire ten-year period from 1999 through 2009, the greatest difference in sentence length between black and white offenders occurred in 1999 when the guidelines were mandatory.[387]

We urge the Commission not to rely on this analysis. It has resulted in claims of racial bias by judges, even though such a conclusion is not possible because the analysis does not and cannot include many legally relevant factors that legitimately affect sentencing decisions. Other research using the Commission's datasets but a different methodology has reached different and more nuanced conclusions. Unproven allegations of racial bias by judges divert attention from proven sources of unwarranted racial disparity in sentencing that flourish and are incapable of correction in a mandatory sentencing system.

1. Previous allegations of racial bias by judges were later repudiated, but significant racial disparity was built into the mandatory rules.

Allegations of racial bias infecting judicial decisions were made before the sentencing guidelines were adopted, but were later proven unfounded. In a comprehensive review sponsored by the Department of Justice's Bureau of Justice Statistics in 1993, leading sentencing researchers concluded:

> During 1986-1988, before full implementation of the guidelines, white, black and Hispanic offenders received similar sentences, on average, in Federal district courts.[388]
>
> [The] few studies [that] examined actual Federal sentencing decisions prior to the introduction of the guidelines . . . . showed that sentencing was not greatly dependent on the judge that one drew. Rather, outcomes generally corresponded to differences in cases and offenders' characteristics that were commonly seen as legitimately considered. . . . Differences clearly thought to be unwarranted (*e.g.*,

[385] USSC, *Demographic Differences Report*, *supra* note 330, at 2, 22-23.

[386] *Id*. at 4, 22, 23. "Other" includes Native American, Asian, Alaskan Native, and Pacific Islander.

[387] *Id*. at 14.

[388] Douglas C. McDonald & Kenneth E. Carlson, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sentencing in the Federal Courts: Does Race Matter? The Transition to Sentencing Guidelines, 1986-90*, at 1 (1993).

by the offender's race or ethnicity) were found to be uniformly small or statistically insignificant.[389]

Despite the repudiation of the charges, racial bias was and is routinely cited as a core reason driving the creation of mandatory sentencing guidelines. In fact, the guidelines and the mandatory minimums on which many guidelines are based are responsible for significant racial disparity. The 1993 Bureau of Justice Statistics review concluded that "there were substantial aggregate differences in sentences imposed on white, black, and Hispanic offenders . . . sentenced under guidelines from January 20, 1989, to June 30, 1990," and that "[n]early all of the aggregate differences . . . can be attributed to characteristics of offenses and offenders that current law and sentencing guidelines establish as legitimate considerations in sentencing decisions."[390]

After its own comprehensive review in 2004, the Commission concluded that some of these laws and guidelines with a disproportionate impact on racial minorities, in particular the crack and career offender guidelines, were not justified by the purposes of sentencing.[391] The Commission concluded that "if unfairness continues in the federal sentencing process, it is more an 'institutionalized unfairness' built into the sentencing rules themselves rather than a product of racial stereotypes, prejudice, or other forms of discrimination on the part of judges. . . . Today's sentencing policies, crystallized into the sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation. Attention might fruitfully be turned to asking whether these new policies are necessary to achieve any legitimate purpose of sentencing."[392]

2. The analysis is misleading.

One of the most common failings of studies that purport to show demographic disparities, or to show that mandatory guidelines reduced such disparities, is a failure to account for all relevant factors that legitimately affect sentencing decisions.[393] Many legitimate and relevant factors that affect judges' sentencing decisions are missing from the Commission's datasets, including employment history, history of violence, family responsibilities, mental illness, substance abuse or abstinence, and many others.

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[389] *Id*. at 25.

[390] McDonald & Carlson, *supra* note 388, at 1.

[391] *Fifteen Year Review* at 131-34.

[392] *Id*. at 135.

[393] Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 107, 115 (1998).

A correlation between a missing but relevant factor, such as employment history or history of violence, and a demographic factor, such as race, can produce misleading results. If judges take the relevant factor into account, multivariate analysis can appear to show evidence of demographic effects when judges are in fact taking proper account of relevant factors. And the analysis would appear to show an increase in demographic effects under advisory guidelines when judges are in fact taking greater account of relevant factors not reflected in the guidelines.

The Commission's report acknowledges that the differences in sentence length it found may be attributable to one or more of a number of factors that are not included in the guidelines or the Commission's datasets, which may be correlated with demographic factors, but are legitimate and relevant considerations at sentencing, such as violence in a defendant's past, violence in the instant offense not reflected in the offense level, crimes not reflected in the criminal history score, and employment record.[394]

The report, however, did not make explicit that if there is a correlation between missing but relevant factors and demographic characteristics, sentencing differences would be expected to increase under advisory guidelines, not because of bias but because judges take greater account of *relevant* factors *not included in the guidelines*.

The report asserted that the missing variable problem "does not mean that the results of such an analysis are misleading or wrong."[395] But if the "results" are taken to mean that racial bias infects judicial sentencing decisions, they *are* misleading and wrong. The Department of Justice inaccurately asserts that the Commission's study "control[ed] for relevant factors,"[396] when in fact it did not. Others too have cited the report to suggest that judges, once freed of mandatory guidelines, act on the basis of racial bias.[397]

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[394] *Id*. at 4, 9-10 & nn.37-39 ("[O]ne or more key factors which could affect the analysis may have been omitted from the methodologies used because a particular factor is unknown or was erroneously excluded from the analysis, or because data concerning such a factor is unavailable in the Commission's dataset. Examples of factors for which no data is readily available . . . . include a measure of the violence in an offenders' criminal past, information about crimes not reflected in an offender's criminal history . . . and information about an offender's employment record. For these reasons, the results presented in the report should be interpreted with caution.").

[395] *Id*. at 10.

[396] Letter from Lanny A. Breuer and Jonathan Wroblewski to Hon. Patti B. Saris, Chair, U.S. Sent'g Comm'n at 3 (Sept. 2, 2011).

[397] *See* Press Release, House Comm. on the Judiciary, Booker Decision Hinders Equal Justice for Defendants (Mar. 12, 2010) (statement of Ranking Member Lamar Smith) ("The Sentencing Commission's report confirms why we need mandatory sentencing guidelines. . . . Unfortunately, without sentencing guidelines for courts to follow, some individuals have received harsher penalties than others despite committing similar crimes."), http://judiciary.house.gov/news/03122010.html; William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & Pol. 305, 330 (2011) (declaring without qualification that "[r]eliable evidence suggests that, as a result of the decreasing

3. Researchers at Pennsylvania State University reached different results using a different methodology.

Shortly after release of the Commission's report, a team of researchers at Pennsylvania State University released a study, also using the Commission's datasets, but reaching different and more nuanced conclusions. They found that:

- disparity in sentence lengths based on race, ethnicity and gender has *not* increased after *Booker* and *Gall*,[398]
- black-white differences in sentence length are significantly *smaller* in the post-*Booker* and *Gall* periods compared to the pre-PROTECT Act period (October 2001-April 2003) when the guidelines were mandatory, [399]
- gender differences in sentence length are significantly *less* in the post-*Gall* period than in either the pre-PROTECT Act or PROTECT Act period,[400]
- the effects of race and gender on sentence length were considerably *less* after *Booker* and *Gall* than in 1994-95,[401]
- there were no statistically significant differences in sentence lengths across time periods for Hispanics or non-citizens,[402] and
- there is no evidence that *Booker* has "produced greater disparity in the likelihood of minority offenders to receive non-substantial assistance downward departures."[403]

The Penn State Study concluded: "Put simply, racial and gender sentence length disparities are less today, under advisory Guidelines, than they were when the Guidelines were arguably their most rigid and constraining."[404]

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adherence to the sentencing guidelines since the Supreme Court rendered them 'advisory' in 2005, . . . demographic disparities - have been increasing steadily.").

[398] Jeffery T. Ulmer, Michael T. Light, & John Kramer, *The "Liberation" of Federal Judges' Discretion in the Wake of the Booker/Fanfan Decision: Is There Increased Disparity and Divergence Between Courts?*, Justice Quarterly (forthcoming 2011) ["Penn State Study – Interdistrict Disparity"] (manuscript at 24), http://www.informaworld.com/smpp/content~content=a934522285.

[399] *Id.* (manuscript at 24).

[400] *Id.*

[401] Jeffery T. Ulmer, Michael T. Light, & John H. Kramer, *Racial Disparity In the Wake of the Booker/Fanfan Decision: An Alternative Analysis to the USSC's 2010 Report*, 10 Criminology & Pub. Pol'y __ (forthcoming) ["Penn State Study – Alternative Analysis"] (manuscript at 31-32), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1675117 (updated manuscript on file with authors).

[402] Penn State Study – Interdistrict Disparity (manuscript at 24).

[403] Penn State Study – Alternative Analysis (manuscript at 33).

[404] *Id.* (manuscript at 32).

The different conclusions of the Commission and Penn State studies are the result of different methodologies. As noted above, inconsistent findings were typical in research of racial disparity in federal sentencing prior to the guidelines, and these inconsistencies continued during the mandatory guidelines era. The Commission's *Fifteen Year Review* reviewed research from the pre-*Booker* era and concluded: "Different studies yield different answers as to whether discrimination influences sentences at all and, if so, how much. These studies also disagree on which racial and ethnic groups are discriminated against and exactly where in the criminal justice process this discrimination occurs."[405] The latest studies show that these inconsistencies continue in the advisory guidelines era due to the methodological choices made by researchers.

These choices explain differences between the Commission and Penn State studies. Researchers have a choice to model the sentencing decision as either (1) a single decision (How long to imprison?) or (2) a series of decisions (First, *whether* to imprison, and second, for those offenders for whom imprisonment is necessary, *for how long*?). Different factors affect the two decisions differently. For example, a defendant's current employment may influence a judge to prefer probation, so that the defendant can keep his job and continue to support his dependents.[406] But if imprisonment is necessary for other reasons, employment has less influence because the job will be lost in any event.

These kinds of considerations led the Penn State team to prefer the second approach.[407] The Commission chose the first approach, studying all types of sentences together and treating probationary sentences as zero months of imprisonment. The Penn State researchers found that what appeared to be lengthier prison sentences for black male offenders under the advisory guidelines was, in fact, an increased difference in the portion of black and white male offenders who received probation after *Gall*. Even this difference, however, "did not attain statistical significance" when viewed across time periods in the same model.[408] Moreover, the decision whether to imprison is most sensitive to the very offender characteristics missing from the Commission's data. This means that any "racial" disparity found may in reality be differences in these relevant but missing characteristics, such as employment and violence in criminal history.[409] Factors like these are likely to affect the court's decision whether to sentence the defendant to incarceration.

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[405] *Fifteen Year Review* at 118.

[406] *See* USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* 16 (Nov. 1996) (finding that "offenders who were viably employed were 21 percent more likely to receive an alternative sentence than unemployed offenders").

[407] Penn State Study – Alternative Analysis (manuscript at 11-15).

[408] *Id*. (manuscript at 28).

[409] The Commission reported that a greater portion of black offenders have violent events in their criminal history than offenders of other races. *Demographic Differences Report, supra* note 330, at 9-10 n.37.

The two studies also differed in their approach to immigration offenses. The Penn State researchers excluded immigration offenses because the overwhelming majority involve non-citizens, who are often non-White, and because immigration cases are handled differently from other crimes, for example, through the use of deportation as a sentencing option and the government's use of "fast track" programs that are dependent not on the defendant's criminal conduct but the district in which the defendant is prosecuted.[410] If immigration cases are included, it cannot be fairly concluded that any racial or ethnic disparity found is due to discrimination based on these characteristics rather than the result of differences in how non-citizens and immigration cases are handled.[411]

Variations in methodology and findings in this field of research are longstanding and caution against basing policy decisions on the results of this type of study: "Any findings that are sensitive to minor changes in model specifications such as these must be interpreted with caution."[412]

The only fair conclusion is that there is no reliable evidence that judges act on racial bias when they exercise discretion in sentencing. It would be surprising indeed if judges *did* discriminate against racial or ethnic minorities today, given that sentencing differences by race and ethnicity were uniformly small or insignificant during the pre-guidelines era, when judges had unfettered discretion and were arguably less aware of recognizing and avoiding bias.

Notably, the Penn State Study found that below-guideline sentences sponsored by the government "are a greater site of racial disparity than judge initiated deviations."[413] Their results suggest that "disparity against Hispanic males in the prosecutorial use of substantial assistance departures has considerably increased since *Gall*."[414]

4. Unproven allegations of racial bias by judges divert attention from proven sources of unfairness in sentencing, and ignore the fact that judicial discretion helps to correct these problems.

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[410] Penn State Study – Alternative Analysis (manuscript at 15-16, 29-30, 38).

[411] This choice by the Penn State researchers appears to be supported by Commission staff research: "Non-citizens are less likely to receive an alternative than are U.S. citizens, reflecting perhaps the impending deportation of the defendant and the absence of a local residence suitable for home confinement. Higher imprisonment rates for non-citizens and for immigration offenders appeared to account for the higher aggregate imprisonment rates for Hispanic defendants. No differences in the use of alternatives were found between Whites, Blacks, and Hispanic defendants after controlling for all other factors in the model." USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* 16 (Nov. 1996).

[412] McDonald & Carlson, *supra* note 388, at 106.

[413] Penn State Study – Alternative Analysis (manuscript at 2, 34-35, 39).

[414] *Id.* at 34.

Multivariate analyses investigating whether there is judicial discrimination at sentencing do not measure the effects of the *sentencing rules themselves* on racial unfairness. These studies treat the guidelines, mandatory minimum statutes, and pre-sentencing decisions that control the guideline calculation as "legally relevant," fair and appropriate. They do not assess the demonstrated adverse impact of rules that are needlessly harsh and that disproportionately punish minorities, such as the different treatment of powder and crack cocaine (which was lessened by but continues under the Fair Sentencing Act of 2010) or the severe treatment of prior drug offenses under the so-called "career offender" guideline, or the impact of unequal law enforcement scrutiny, arrests, and charging and plea bargaining decisions.[415]

Nor do these studies assess how much increased judicial discretion after *Booker* has improved fairness in sentencing by permitting judges to offset the effects of these unfair rules and practices. The fact is, defendants of all groups are treated more fairly when judges can discount unjustified and excessively severe rules, take greater account of relevant differences among defendants, and correct for unfairness in prosecutorial practices and policies.

The mandatory guidelines created unwarranted disparity arising from unjust rules and the uneven exercise of prosecutorial discretion. Judges were not permitted to correct these problems. Proposals to reinstate mandatory or presumptive guidelines in some form, under the guise of correcting demographic disparity or otherwise, would reinstate this unjust regime.

IV. Even by Superficial Measures, Change Has Been Exceedingly Modest and the System is Stable.

Many are disappointed in how *little* change *Booker* has brought.[416] Judges *of course* sentence outside the guideline range more frequently after *Booker*. But given the near-absence of mitigating factors in the guidelines and the excessive weight assigned to many aggravating factors, the increase in the rate of below guideline sentences has been exceedingly modest. That rate has now begun to drop, likely in response to the reduction in the crack guidelines and

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[415] *Fifteen Year Review* at 89-92, 133-35.

[416] *See, e.g.*, Paul J. Hofer, *Has* Booker *Restored Balance?*, 23 Fed. Sent'g Rep. 326, 331 (2011) (discussing the "timidity of the courts" in exercising their authority to reject the crack guidelines, noting that 42.9 percent of crack defendants without a trumping mandatory minimum continued to be sentenced within the guidelines in 2009); Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. Chi. L. Rev. 367, 468-69 (2010) ("[R]egardless of what the Court may say, district judges still treat Guidelines facts as creating a presumptively valid sentencing zone, albeit a zone with perhaps 10 to 15 percent less gravitational pull than before. . . . Moreover, despite the Guidelines' reduced gravitational pull and the increased percentage of sentences below the Guidelines range, actual sentence lengths have scarcely budged."); Lynn Adelman and Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important New Role for District Courts*, 57 Drake L. Rev. 575, 590 (2009) (noting that "most courts continue to sentence within or close to the Guidelines," and encouraging courts to play a role in improving federal sentencing practices); Jelani Jefferson Exum, *The More Things Change: A Psychological Case Against Allowing the Federal Sentencing Guidelines to Stay the Same in Light of Gall, Kimbrough, and the New Understandings of Reasonableness Review*, 58 Cath. U.L. Rev. 115 (2008).

somewhat because of the elimination of recency points. The average extent of below-guideline sentences has not increased over time and is less than it was when the guidelines were mandatory. Average sentence length, after increasing for the first few years after *Booker*, has now begun to drop, but this is almost wholly because of the reduction in the crack guidelines and an increase in immigration cases with lower guideline ranges.

1. The rate of below-range sentences has been modest in light of the guidelines' problems, and has begun to drop as the Commission has begun to improve the guidelines.

Following *Booker*, one would have expected judges to sentence below the guideline range in the majority of cases. The Commission's 2010 survey revealed that large majorities of judges believe that offense and offender characteristics deemed by the policy statements to be never or not ordinarily relevant are "ordinarily relevant."[417] Large majorities believe that uncharged conduct not presented at trial or admitted by the defendant, dismissed conduct, and acquitted conduct should not be considered.[418] The majority of judges believe that alternatives to straight prison should be more available for most types of offenses.[419] The majority said that the guidelines for crack were too high (at least as they stood in 2010), and that the guidelines for possession and receipt of child pornography are too high, and one third or more said that other guidelines, including the illegal reentry guideline and the guidelines for trafficking in drugs other than crack, are also too high.[420] Notwithstanding their dissatisfaction with many guidelines, judges have been remarkably restrained in imposing sentences outside the recommended range.

The rate of non-government sponsored sentences has been 17.1% in the first two quarters of 2011, down from 17.8% in 2010.[421] This is likely due to ameliorating changes to the guidelines for crack and recency points, and may confirm that courts "have less reason to depart from the Commission's recommendations" as the Commission "perform[s] its function of revising the Guidelines to reflect the desirable practices of the district courts."[422]

The "compliance" rate was 82.9% during the first two quarters of 2011, up from 80.4% in 2010.[423] The government continues to seek sentences below the guideline range at a far higher

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[417] USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl.13.

[418] *Id*. tbl.5.

[419] *Id.* tbl.11.

[420] *Id*. tbl.8.

[421] USSC, Preliminary Quarterly Data Report, 2d Quarter Release, tbl.1 (2011); USSC, Sourcebook of Federal Sentencing Statistics, tbl.N.

[422] *Rita*, 551 U.S. at 382-83 (Scalia & Thomas, JJ., concurring in part and concurring in the judgment); *Booker*, 543 U.S. at 264.

[423] USSC, Preliminary Quarterly Data Report, 2d Quarter Release, tbl 1 (2011); USSC, Sourcebook of Federal Sentencing Statistics, tbl.N.

rate than judges impose such sentences without a government motion, *i.e.*, in 26.5% of cases thus far in 2011. The vast majority of these are to reward cooperation or obtain swift guilty pleas in "fast track" districts, which may or not satisfy the purposes of sentencing, result in unwarranted disparities, as discussed in Part III, and are immune from appeal due to appeal waivers the government usually requires. The government obtains lower sentences in even more cases under Rule 35(b), an additional 2,006 cases in 2010.[424] The government also appears to agree that most sentences below the guideline range that it does not actively seek are reasonable. The government did not object to at least 23% of sentences classified as "non-government sponsored" below range in 2011.[425] The government appealed only thirty sentences in 2010 based on the application of § 3553(a), despite a 60% success rate in such appeals.[426]

2. The extent of below-range sentences is smaller than before *Booker*.

Despite the modest increase in below guideline sentences since *Booker*, "the size of their impact on sentence length has decreased."[427] Although it is difficult to pin down precise comparisons because of how the Commission tracked departure information before 2003, it is safe to say that the median decrease for non-government sponsored sentences has not increased since *Booker*, and may well have decreased. Significantly, the median percent decrease is decidedly lower post-*Booker*.

In the eight years preceding *Booker*, the median decrease reported by the Commission for "downward departures" was 12 months in five of those years and 10 months in three of those years.[428] The average median decrease for non-government sponsored downward departures was likely higher from 1997 through 2002, because until 2003, the Commission included in the undifferentiated category of "downward departures" government-sponsored "fast track" departures, which would have lowered the average because the average decrease for those departures is generally under a year.[429]

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[424] USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbl.62.

[426] The government prevailed in 60% of its appeals based on § 3553(a) factors, a rate only slightly lower than its win rate on guideline issues of 66%. USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbl.58. Defendants appealed 1,471 sentences based on the application of § 3553(a) and prevailed in only 5.4% of those appeals. *Id*. tbl.57.

[427] Jeffrey Ulmer & Michael T. Light, *Beyond Disparity: Changes in Federal Sentencing After* Booker *and* Gall*?*, 23 Fed. Sent'g Rep. 333, 340 (June 2011).

[428] *See* USSC, 1997-2002 Sourcebook of Federal Sentencing Statistics, tbl.31 (10 months in 1997 and 1998, 12 months in 1999, 2000 and 2001, 10 months in 2002); USSC, 2003-2004 Sourcebook of Federal Sentencing Statistics, tbl.31A (12 months in 2003 and 2004).

[429] *See* USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 54-56, 60 (2003). Departures sought by prosecutors in immigration cases on the southwest border began to increase in the early to mid-1990s. *See* Statement of John R. Steer, Vice-Chair, U.S. Sentencing Commission, before the Subcommittee on Criminal Justice Oversight, U.S. Senate Judiciary Committee at 6-10 (Oct. 13, 2000).

The median decrease for § 3553(a) variances, comprising 75.4% of below-range sentences today, has been 12 or 13 months since *Booker* was decided. The median decrease for departures, comprising 14.3% of below-range sentences today, has been 10 or 11 months since *Booker*; for departures/§ 3553(a) variances, comprising 6%, 13 to 18 months; and for the 4.3% remaining, 6 to 8 months. *See* Appendix 7.

In the three periods for which the Commission reported non-government sponsored departures separately from all government-sponsored departures (2003 and pre- and post-*Blakely* in 2004), the *median percent decrease* was 40%, 35.1%, and 37.5%.[430] In the two largest categories of below range sentences after *Booker*, comprising nearly 90% of such sentences today, the median percent decrease has consistently been 34% or less.[431]

The extent of government-sponsored below range sentences is greater overall than the extent of non-government below range sentences. For substantial assistance departures, comprising 44.7% of government-sponsored below range sentences today, the median decrease has been 29-31 months since *Booker* was decided; for fast track departures, comprising 39.5% today, the median decrease has been 7-8 months; and for "other" government sponsored variances, comprising 16% today, the median decrease has increased from 10 months in 2007 to 16 months in 2011. *See* Appendix 7.

3. Sentence length has begun to drop, not because of more or larger below range sentences, but because of lower guideline ranges in two kinds of cases.

As shown in Appendix 6, average sentences imposed continue to be driven by the guidelines. After increasing from about 46 months before *Booker* to 51.8 months by 2007[432] due to increased guideline ranges for economic and drug crimes,[433] average sentence length began to decrease in 2008 and is now at 44 months.[434] This is not primarily due to an increase in the size

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[430] *See* 2003 Sourcebook of Federal Sentencing Statistics, tbl.31; 2004 Sourcebook of Federal Sentencing Statistics, tbls. 31 & 31A (pre-and post-*Blakely*).

[431] *See* USSC, 2005-2010 *Sourcebook of Federal Sentencing Statistics* tbls. 31A, 31C; USSC, 2011 Preliminary Quarterly Data Report, Second Quarter Release, tbls. 10, 12.

[432] USSC, 2001-2007 Sourcebook of Federal Sentencing Statistics, tbl.13 (average sentence length was 46.8 months in 2001, 46.9 months in 2002, 47.9 months in 2003, 50.1 months in 2004 (pre-*Blakely*), 45 months in 2004 (post-*Blakely*), 46.3 months in 2005 (pre-*Booker*), 51.1 months (post-*Booker*), 51.8 months in 2006, and 51.8 months in 2007).

[433] USSC, 2007 Final Quarterly Data Report, figs. C-I.

[434] USSC, Preliminary Quarterly Data Report, 2d Quarter Release, fig. C (2011); *id*. tbl.19; USSC, 2008-2010 Sourcebook of Federal Sentencing Statistics, tbl.13 (average sentence length was 49.6 months in 2008, 46.8 months in 2009, and 44.3 months in 2010).

or rate of below guideline sentences, but to lower guideline ranges in two types of cases.[435] Average sentences in crack cases dropped from 129 months in 2007 to 111 months in 2010,[436] the result of a deliberate choice to lower penalties for these offenses. Average sentences for immigration cases fell from 29 months when *Booker* was decided to 19 months in 2010,[437] due to a 40% increase in prosecutions under 8 U.S.C. § 1326(a).[438]

Average sentence length for all other major categories of offenses remains unchanged or higher today than when *Booker* was decided.[439] Average sentence length is significantly higher for theft and fraud than before *Booker*, is slightly higher for firearms and alien smuggling, and is about the same for drugs other than crack.[440] While child pornography cases are not a major category, constituting only 2% of federal cases, it is noteworthy that even though below guideline sentences are frequently imposed by judges and sought by prosecutors in cases involving possession or receipt,[441] average sentence length has continued to grow, from 49.7 months in 2002 to 117.8 months in 2009,[442] to 118 months in 2010, to 122.5 months in the first two quarters of 2011.[443]

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[435] USSC, Preliminary Quarterly Data Report, 2d Quarter Release, figs. G, I (2011).

[436] USSC, 2007 & 2010 Sourcebook of Federal Sentencing Statistics, fig. J.

[437] USSC, 2010 Final Quarterly Data Report, fig. G.

[438] From 2005 to 2010, there was a 40% increase in cases in which the defendant had little or no criminal history, which are subject to a statutory maximum of two years, *see* 8 U.S.C. § 1326(a), and a lower guideline range, *see* USSG § 2L1.2(a). *Compare* USSC, FY 2005, Use of Guidelines and Specific Offense Characteristics, at 45-46 (of 10,229 illegal re-entry cases, 20.9% received no prior conviction enhancement) *with* USSC, FY 2010, Use of Guidelines and Specific Offense Characteristics, at 47 (of 19,767 illegal re-entry cases, 29% received no prior conviction enhancement).

[439] USSC, Preliminary Quarterly Data Report, 2d Quarter Release, figs. D-I (2011).

[440] *Id*. figs. D, E, F, I.

[441] USSC, Preliminary Quarterly Data Report, 2d Quarter Release, 2011, tbl.3.

[442] *See* USSC, 2002-2009 Sourcebook of Federal Sentencing Statistics, tbl.13. Before 2010, the Commission reported average sentence length for defendants convicted of "Pornography/ Prostitution" offenses, which included not only possession, receipt and distribution of child pornography, but direct exploitation of minors. *See* USSC, 2009 Sourcebook of Federal Sentencing Statistics, Appendix A.

[443] *See* USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbl.13; USSC, Preliminary Quarterly Data Report, 2d Quarter Release, 2011, tbl.19. As of 2010, the Commission reports average sentence length for defendants convicted of "Child Pornography" offenses, which includes only possession, receipt and distribution of child pornography. *See* USSC, 2010 Sourcebook of Federal Sentencing Statistics, Appendix A.

4. Advisory guidelines remain as restrictive of judicial discretion as any guidelines system in the nation.

The federal advisory guidelines have all of the attributes of what is considered a "mandatory" system in the states. Judges are required to calculate the guideline range, and to state reasons for departing from the range.[444] Most states that have appellate review provide it to the defendant but not the prosecution,[445] while the federal system provides it to both. In "voluntary" state systems, judges are free to depart without giving reasons, and there is no appellate review.[446]

Professor Kevin Reitz, an expert on guideline systems, correctly notes that the pre-*Booker* federal system was a "stark outlier" in restricting judicial discretion "to a much greater extent than the laws of any state,"[447] and that the "*Booker*-ized Guidelines . . . remain as restrictive of judicial sentencing discretion as any system in the United States."[448] This is so because the guideline range must be calculated and considered; the range works as a psychological anchor because it is narrow, requires detailed calculations, and has the appearance of precision; judges must explain sentences outside the guideline range; and sentences are subject to appellate review for reasonableness.[449] Subsequent to Professor Reitz's assessment, the Supreme Court added two more features that tend to emphasize the guidelines: Courts of appeals *may* apply a non-binding presumption of reasonableness to sentences within the guideline range,[450] and judges *must* treat the guidelines as the "starting point and initial benchmark," whether they sentence within the range, outside the range based on individualized circumstances,[451] or outside the range because the guideline *itself* recommends a sentence greater than necessary to satisfy sentencing purposes.[452]

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[444] Nat'l Ctr. for State Courts, *State Sentencing Guidelines, Profiles and Continuum* ["State Sentencing Guidelines"], http://www.ncsconline.org/csi/PEW-Profiles-v12-online.pdf.

[445] State Sentencing Guidelines, *supra* note 444.

[446] Nat'l Ctr. for State Courts, *Assessing Consistency and Fairness in Sentencing: A Comparative Study in Three States* 5, http://www.pewcenteronthestates.org/uploadedFiles /PEWExecutiveSummaryv10.pdf; State Sentencing Guidelines, *supra* note 444.

[447] Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 Stan. L. Rev. 155, 155-56 (Oct. 2005).

[448] *Id*. at 171.

[449] *Id*. at 162-65.

[450] *Rita v. United States*, 551 U.S. 338 (2007).

[451] *Gall v. United States*, 552 U.S. 38, 49 (2007).

[452] *Kimbrough v. United States*, 552 U.S. 85, 109 (2007).

In addition, the vast majority of judges, 92%, prefer a guidelines system to no guidelines, even though 75% believe that the current advisory system achieves the purposes of sentencing better than any kind of mandatory guidelines.[453]

As a result of all this, the federal "advisory" guidelines "fall--at a minimum--very close to the most restrictive guidelines among those created by the states in the past twenty-five years."[454]

V. *Booker* Has Prevented Tens of Thousands of Years of Unnecessary Incarceration and Saved the Taxpayers Nearly $2 Billion at Today's Cost of Incarceration.

Without *Booker*, sentence lengths would have been even longer and rates of imprisonment even higher. A conservative estimate, including only variances that involve no "departure," 45,427 years in prison have been averted and $1.3 billion saved since *Booker* was decided.[455] Another 17,411 prison years have been averted and $492 million saved when below-range sentences sought by the government for reasons other than cooperation and "fast track" are included.[456]

Due to the ever-increasing severity of the guidelines and mandatory minimums, the Bureau of Prisons is 37% overcapacity, resulting in extreme overcrowding, unsafe conditions, and reduced capacity to provide treatment and training shown to reduce recidivism.[457] Seventy thousand inmates will be triple bunked in three years even if new prisons are opened as projected.[458] Fifty-two percent of federal inmates are serving "extremely long" sentences for

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[453] USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl.19.

[454] Reitz, *supra* note 447, at 169.

[455] This estimate was derived by multiplying the number of variances under § 3553(a) not involving any "departure" by the median decrease in months for each period since *Booker* was decided (12 or 13 months each period), adding the months per period to reach a total number of months (545,124), dividing by 12 months to reach a total number of years (45,427), and multiplying by the cost of imprisonment per year ($28,284), to reach a total cost savings of $1,284,857,200. For number of variances and median decreases, see Appendix 7.

[456] This estimate was derived by multiplying the number of government sponsored below range sentences for reasons other than cooperation or fast track by the median decrease in months for each period since *Booker* was decided (ranging from 10 to 17 months), adding the months per period to reach a total number of months (208,930), dividing by 12 months to reach a total number of years (17,411), and multiplying by the cost of imprisonment per year ($28,284), to reach a total cost savings of $492,448,000. For number of below-range sentences for reasons other than cooperation or fast track and median decreases, see Appendix 7.

[457] Transcript of Public Hearing Before the U.S. Sent'g Comm'n at 10, 15-16, 49-50, 52 (Mar. 17, 2011) (testimony of Harley G. Lappin, Director Federal Bureau of Prisons).

[458] *Id*. at 28-29, 50-51.

drug related offenses,[459] but less than 30% of inmates commit a new offense after release.[460] And the suggestion that crime has dropped "dramatically" as a result of severe sentences is not supported by the scientific evidence.[461] In 2007, the JFA Institute, a nonprofit criminal-justice consulting firm, issued a report whose authors included eight criminologists from major public universities, concluding that "[m]ost scientific evidence suggests that there is little if any relationship between fluctuations in crime rates and incarceration rates."[462] And this costs the taxpayers well over $6 billion a year.[463]

Judges have helped to slow this trend in individual cases, and the Commission can help slow it further by lowering guideline penalties that are currently too severe.

VI. Evaluation of the Appellate Standard of Review

The Commission may include an evaluation of the appellate standard of review in a report on sentencing after *Booker*. As discussed below, the standard of review is working appropriately. Moreover, we fail to see how the standard could be made to enforce the guidelines more strictly without running afoul of the Sixth Amendment.

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[459] *Id*. at 9-10, 55.

[460] *Id*. at 12, 37-38.

[461] Letter from Lanny A. Breuer and Jonathan Wroblewski to Hon. Patti B. Saris, Chair, U.S. Sent'g Comm'n at 5 (Sept. 2, 2011).

[462] The JFA Institute, *Unlocking America: Why and How to Reduce America's Prison Population* 8 (2007), available at http://www.countthecosts.org/sites/default/files/Unlocking-America.pdf. The report surveyed the studies on the impact of incarceration on crime rates, and summarized them as "com[ing] to a range of conclusions" lacking "conclusive evidence." *Id.* at 8-9. One researcher who argues that "the crime rate today would be 25% higher were it not for the large increases in imprisonment from 1970 to 1990" based his analysis on national trends and "does not explain why some states and counties that lowered their incarceration rates experienced the same crime reductions as states that increased incarceration." *Id.* at 9. Instead, "the bulk of the evidence" suggests that the effect of imprisonment on crime rates, if any, is "small," and "diminishes as prison populations expand," and that "[t]he overwhelming and undisputed negative side effects of incarceration far outweigh its potential, unproven benefits." *Id*. *See generally* The Sentencing Project, *Incarceration and Crime: A Complex Relationship* (2005) (direct link between severe sentences and crime reduction is "far from an accepted fact"). Professor Franklin Zimring, a leading scholar on criminal justice issues, will soon publish research suggesting that the major factor underlying reductions in crime rates is better policing, not mass incarceration. Ted Gest, *Cops and Crime*, The Crime Report (Aug. 2, 2011), http://www.thecrimereport.org/archive/2011-08-cops-and-crime.

[463] The annual cost of imprisonment per inmate in 2010 was $28,284.16. *See* U.S. Courts, News, *Newly Available: Costs of Incarceration and Supervision in 2010*, http://www.uscourts.gov/News/NewsView/11-06-23/Newly_Available_Costs_of_Incarceration_and_Supervision_in_FY_2010.aspx. As of August 26, 2011, the prison population was 217,757. *See* Federal Bureau of Prisons, Weekly Population Report, http://www.bop.gov/locations/weekly_report.jsp.

We continue to believe that if the Commission wishes to make appellate review more meaningful, it should explain the guidelines and provide evidence showing that the guidelines are based on empirical data and national experience. We understand that this is not possible for certain guidelines as they currently exist. The Commission should revise those guidelines and, if necessary, seek permission from Congress to do so.

A. The Standard of Review is Working Appropriately.

When Congress enacted the SRA, its goals for appellate review were to "preserve the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court," to correct "clearly unreasonable" sentences, and to "reduce *unwarranted* sentencing disparity."[464] During the mandatory guidelines era, the courts of appeals regularly substituted their own judgment for that of the district court judge, and enforced the guidelines much more strictly than Congress expected. As we have explained in Parts I and III, the guidelines themselves created and masked unwarranted disparity and unwarranted uniformity. Strict appellate enforcement of the guidelines was a large part of the problem. The current standard of review has restored proper deference to the sentencing decisions of the district courts, while requiring independent evaluations of the appropriate sentence in light of the § 3553(a) considerations and reasoned explanations for the sentence imposed.

Some have expressed the view that the standard should have more "teeth," but we have not heard a convincing argument as to why that is so. The appellate judges at the Commission's regional hearings did not generally espouse that view, except for a concern by two judges about sentences that may be too *high*.[465] Both said that the most useful thing the Commission can do is to provide information to facilitate more informed decisionmaking by the district courts and thus more meaningful review in the courts of appeals.

In any event, this is less of a concern now that the above-guideline rate has leveled off. The real effect of a stricter standard would be to reverse more non-government sponsored below guideline sentences. This would be inappropriate. First, the guidelines often recommend sentences that are too high. Second, this would suppress the judicial feedback that the Commission has just begun to use. Third, judges are not sentencing below the range at a rate that should be alarming to anyone, and that rate is dropping.

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[464] S. Rep. No. 98-225 at 150 (1983) (emphasis supplied).

[465] *See* Tr. of Public Hearing Before the U.S. Sentencing Comm'n, Stanford, California, at 47, 67-79 (May 27, 2009) (remarks of Judge Kozinski) ("[T]he most important thing the Commission can do is to provide information to judges."); Statement of Hon. Harris Hartz, Tenth Circuit Court of Appeals, Remarks Before Sentencing Commission, at 2-4 (Oct. 20, 2009) (suggesting that the solution is not to return to a stricter standard of review, but for the Commission to provide its rationale for various guideline provisions, so that in cases where the judge finds that the Commission's rationale does not apply, variances from the range "are quite proper and should even be encouraged; treating unlike cases the same is not the sort of evenhandedness one should strive for").

In 2010, the government raised 30 issues on appeal relating to § 3553(a) factors, and prevailed 60% of the time.[466] This data fails to support the notion that the reasonableness standard is ineffective.

Appendix 8 lists the appellate decisions after *Gall* that we have been able to identify, by category. Only four sentences within the guideline range have been reversed as substantively unreasonable. This is hardly cause for complaint by those who would like to see the guidelines enforced more strictly. Two of those decisions, *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010), and *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009), have contributed information regarding the need for revision of the guidelines. The Commission has already relied on *Amezcua-Vasquez* in revising § 2L1.2. The Court encouraged the Commission to "modify its Guidelines in light of what it learns" from "appellate court decision-making."[467]

Only *seven* sentences outside the guideline range appealed by defendants have been reversed as substantively unreasonable, five that were above the guideline range and two that were below the guideline range. In contrast, seventeen sentences appealed by the government, all below the guideline range, have been reversed as substantively unreasonable.

Nearly sixty sentences within the guideline range have been reversed as procedurally unreasonable where the court failed to adequately explain the sentence, or to adequately address nonfrivolous arguments for a different sentence. When a party presents nonfrivolous arguments for a sentence outside the guideline range, the judge must "normally go further and explain why he has rejected those arguments."[468] This assures the defendant, the public, and the court of appeals that the sentence is not mechanical, but fair and reasoned, and thereby increases respect for law.[469] The same is true for the nearly fifty sentences outside the guideline range reversed as procedurally unreasonable, some of which were *below* the guideline range and reversed on the defendant's appeal. By insisting that district judges better analyze and explain their sentences, whether within or outside the guideline range, appellate courts help to achieve fairer sentences, which in turn promotes "the public's trust in the judicial institution."[470] They also "will enable the Commission to perform its function of revising the Guidelines to reflect the desirable sentencing practices of the district courts,"[471] "as both Congress and the Commission

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[466] USSC, 2010 Sourcebook, tbl.58.

[467] *Booker*, 543 U.S. at 263.

[468] *Rita*, 551 U.S. at 357.

[469] *Id.*

[470] *Id.* at 356.

[471] *Id.* at 382 (Scalia, J., concurring); *id.* at 357-58 (requiring courts to articulate reasons "not only assures reviewing courts (and the public) that the sentencing process is a reasoned process but also helps that process evolve."); *Booker*, 543 U.S. at 263 (encouraging the Commission to "modify its Guidelines in light of what it learns" from "appellate court decision-making").

foresaw."[472] And it is not a pointless exercise. Reversal under the abuse of discretion standard for failure to adequately explain the sentence in terms of § 3553(a) or to address a party's nonfrivolous argument for a different sentence or to explain why that argument was rejected leads to a different sentence on remand more often than not.[473]

The current standard of review finally makes possible the development of a common law of sentencing, viewed by many as key to the evolution of "principled and purposeful" sentencing policies.[474] In their brief filed in *Claiborne v. United States*, Senators Kennedy, Hatch, and Feinstein urged the Court to require courts "at all levels to articulate principled rules that are consistent with the text of § 3553(a)," explaining that a system requiring judges to provide "principled sentencing justifications that other courts can consult and apply in like circumstances and which courts of appeal can readily review for reasonableness" serves the broader purpose of creating a common law of sentencing consistent with the goals of the SRA.[475] In practice, judicial opinions by both district and appellate courts that engage in thoughtful application of the § 3553(a) considerations and critical analysis of the guidelines, such as those in *Dorvee* and *Amezcua-Vazquez*, lead to shared insights and dialogue not only with the Commission, but with each other, which in turn lead to more reasonable, coherent, and just outcomes compared to the severity of the guidelines.[476]

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[472] *Rita*, 551 U.S. at 358.

[473] *See* Jennifer Niles Coffin, *Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation* (July 2010), http://www.fd.org/pdf_lib/Procedure_Substance.pdf.

[474] *See, e.g.*, Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 Notre Dame L. Rev. 21, 35 (2000); Michael O'Hear, *Explaining Sentences*, 36 Fla. St. U.L. Rev. 459, 484-85 (2009) (requiring judges to address arguments and explain why rejecting them results in shared insights by which judges "provide a robust feedback loop to the Commission consistent with the vision of evolutionary sentencing guidelines"); Steven L. Chanenson, *Guidance from Above and Beyond*, 58 Stan. L. Rev. 175, 177-78 (2005) ("Appellate judges . . . can give similar feedback in the post-Booker world while serving their traditional functions of checking the sentencing discretion of the lower court, correcting errors, and developing the law.")

[475] Brief of *Amici Curiae* Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein in Support of Affirmance, at 22-25, *Claiborne v. United States* (No. 06-5618) (anticipating that district courts will "cite or establish principles of general applicability that can be followed or distinguished by other district courts in other cases" and through review for reasonableness, appellate courts will ensure fairness and consistency by developing general rules that address such issues as how the § 3553(a) factors should be applied and the relationship between individual sentences and the purposes of sentencing).

[476] Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 Stan. L. Pol'y Rev. 93, 104 (1999); Kate Stith & José Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 172 (1998) (arguing that a common law of sentencing would "ensure sentencing outcomes that are more reasonable and just"); Judge Nancy Gertner, *Thoughts on Reasonableness*, 19 Fed. Sent'g Rep. 165, 166 (2007) (common-law process would require district courts "to give coherent explanations, to articulate rules of general application").

B. The Standard of Review Cannot Be Made To Enforce the Guidelines More Strictly Without Running Afoul of the Sixth Amendment.

The reasonableness standard is necessary to ensure that the Guidelines are advisory only, and it does so in several ways. First, the "numerous factors" set forth in § 3553(a) "that guide sentencing" also "guide appellate courts."[477] Section 3553(a) requires the guidelines to be treated "as one factor among several [to] consider in determining an appropriate sentence,"[478] and includes an "overarching duty to 'impose a sentence sufficient, but not greater than necessary' to serve the purposes of sentencing."[479]

Second, instead of one standard for guideline sentences and another for non-guideline sentences, the "reasonableness" standard applies to all sentences "across the board."[480] "Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard."[481] It must "review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard."[482]

Third, the Court has emphasized that review must be deferential,[483] and that it is "limited to determining whether [sentences] are 'reasonable.'"[484] "[A]ppellate 'reasonableness' review merely asks whether the trial court abused its discretion."[485] "[I]t is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable."[486] Not only is *de novo* review impermissible, but appellate courts may not apply *de novo* review in the guise of abuse of discretion review.[487]

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[477] *Id*.

[478] *Kimbrough*, 552 U.S. at 90.

[479] *Pepper*, 131 S. Ct. at 1242-43, *Kimbrough*, 552 U.S. at 101.

[480] *Booker*, 543 U.S. at 262.

[481] *Gall v. United States*, 552 U.S. 38, 51 (2007).

[482] *Id*. at 41.

[483] *Id*. at 41, 51, 52, 56, 59.

[484] *Id*. at 46; *Rita*, 551 U.S. at 368 (Scalia & Thomas, JJ., concurring in part and concurring in the judgment).

[485] *Rita*, 551 U.S. at 351.

[486] *Gall*, 552 U.S. at 59-60.

[487] *Id*. at 56.

A court of appeals "*may* consider the extent of the deviation, but *must* give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance."[488] The Court rejected "an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range" because it "come[s] too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range,"[489] and applies "a heightened standard of review to sentences outside the Guidelines range," which is "inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions-whether inside or outside the Guidelines range."[490]

In making some concessions to the guidelines, the Court has made clear that it can go no further. While it is procedural error to fail to calculate or improperly calculate the guideline range, and the district court must explain any deviation from the guideline range, it is also procedural error to treat the guidelines as mandatory or to fail to consider all of the § 3553(a) factors.[491] In reviewing for substantive unreasonableness, "[i]f the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance."[492]

When the Court held in *Rita* that courts of appeals may, but are not required to, apply a presumption of reasonableness to within guideline sentences, it went to great lengths to show that the presumption is limited and rests not on the primacy of the guidelines but on the sentencing judge's discretion. The presumption is not binding, places no burden of persuasion on either party, does not permit the appeals court to grant greater factfinding leeway to the Commission than to the sentencing judge, has no independent legal effect,[493] is an appellate presumption only, and may not be applied by a judge at sentencing.[494] The premise is that it is possible for a court in considering all of the § 3553(a) purposes and factors to independently reach the same conclusion as the Commission did regarding the appropriate sentence.[495] When

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[488] *Id*. at 51 (emphasis supplied).

[489] *Id*. at 47; *see also Rita*, 551 U.S. at 354-55.

[490] *Gall*, 552 U.S. at 49.

[491] *Id*. at 51.

[492] *Id.*

[493] *Rita*, 551 U.S. at 347, 350.

[494] *Id*. at 351.

[495] *Id*.; *see also id*. at 347 ("stating that "the presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case.") (emphases in original).

that "double determination" occurs, it "increases the likelihood that the sentence is a reasonable one."[496] Thus, "when a district judge's discretionary decision in a particular case accords with the sentence the United States Sentencing Commission deems appropriate 'in the mine run of cases,' the court of appeals may presume that the sentence is reasonable."[497]

However, when a judge finds that individualized factors warrant a non-guideline sentence or that the guideline itself fails properly to reflect § 3553(a) considerations, the court of appeals may not grant greater deference to the Commission than to the judge.[498] Recognizing that some courts of appeals had adopted a presumption of reasonableness for guideline sentences that operated as a presumption of unreasonableness for non-guideline sentences, the Court forbade the latter.[499] "[I]f the sentence is outside the guideline range, the court may not apply a presumption of unreasonableness."[500]

In concurrence in *Rita*, Justices Stevens and Ginsburg said that "the presumption, of course, must be genuinely rebuttable. . . Our decision today makes clear . . . that the rebuttability of the presumption is real."[501] In practice, the presumption has been rebutted in one case, *United States v. Wright*, 2011 WL 2600616 (6th Cir. July 1, 2011).

In *Kimbrough*, the Court mentioned the suggestion, made at oral argument in *Gall*, that "closer review" might apply to a variance "based solely on the judge's view" that the guideline itself fails properly to reflect § 3553(a) considerations. However, the Court has declined to adopt "closer review" on three separate occasions. The theoretical justification for it—that the Commission has the capacity to base its policies on empirical data and national experience—cannot apply to policies that were not developed in that manner.[502]

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[496] *Rita*, 551 U.S. at 347.

[497] *Gall*, 552 U.S. at 40.

[498] *Id*.

[499] *Id*. at 354-55; *Gall*, 552 U.S. at 47.

[500] *Gall*, 552 U.S. at 51.

[501] *Rita*, 551 U.S. at 366-67 (Stevens & Ginsburg, JJ., concurring).

[502] *See Kimbrough*, 552 U.S. at 109 ("The crack cocaine Guidelines . . . present no occasion for elaborative discussion of this matter because those Guidelines do not exemplify the Commission's exercise of its characteristic institutional role. In formulating Guidelines ranges for crack cocaine offenses, . . . the Commission . . . did not take account of 'empirical data and national experience.'"); *Spears v. United States*, 129 S. Ct. 840, 843 (2009) (when a district court disagrees with a guideline that does "not exemplify the Commission's exercise of its characteristic institutional role," that disagreement is entitled to as much "respect" on appeal as any other sentence and "is not suspect"); *Pepper v. United* States, 131 S. Ct. 1229, 1247 (2011) (reiterating that "a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views," which is "particularly true where [such views] rest on wholly unconvincing policy rationales").

The Court has not directly addressed whether "closer review" in this context could pass constitutional muster, but all indications are that it could not. To pass constitutional muster, a guideline system must permit judges to sentence outside the guideline range based not only on "facts" about the offense or offender, but based on a "policy judgment" in light of the "general objectives of sentencing."[503] In making clear that courts may not apply a "legal presumption that the Guidelines sentence should apply," the Court said in *Rita* that courts may vary when "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations," or when "the Guidelines reflect an unsound judgment."[504] The Court then held in *Kimbrough* that judges "may vary from Guidelines ranges based solely on policy considerations, including disagreements with the Guidelines."[505] When a court of appeals reviews a policy disagreement, "'reasonableness' is the standard controlling appellate review"[506] A court of appeals that prohibits a policy disagreement with a guideline errs by treating the guidelines as "effectively mandatory."[507] It is therefore "not . . . an abuse of discretion . . . to conclude" that a guideline "yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case."[508] As stated by the Solicitor General: "Under *Booker*, all guidelines are advisory, and the very essence of an advisory guideline is that a sentencing court may, subject to appellate review for reasonableness, disagree with the guideline in imposing sentencing under Section 3553(a)."[509]

In short, the current standard of review, as elaborated by the Supreme Court, is what allows the guidelines to operate in a constitutional manner. The mandatory system was "no longer an open choice."[510] The Court adopted the reasonableness standard to avoid "invalidation of the entire Act."[511] We do not see how a stricter standard is possible.

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[503] *See Cunningham v. California*, 549 U.S. 270, 278-81, 286-87 & n.12 (2007) (invalidating California system because, unlike the federal system under § 3553(a), it required a sentence to a specified term unless the court found "facts" about the offense or the offender, and did not permit a sentence outside the specified term based on a "policy judgment" in light of the "general objectives of sentencing"); *id*. at 300, 304-05 & n.6, 307-08 (contending that the California system, like the federal system under § 3553(a), permitted courts to sentence outside the specified term based on "policy considerations" or a "subjective belief" and not facts alone) (Alito, J., dissenting).

[504] *Rita*, 551 U.S. at 351.

[505] *Kimbrough*, 552 U.S. at 91, 101 (citing *Rita*, 551 U.S. at 351) (internal brackets omitted).

[506] *Kimbrough*, 552 U.S. at 90; *Gall*, 552 U.S. at 59.

[507] 552 U.S. at 91.

[508] *Id*. at 110.

[509] Brief of the United States at 11, *Vazquez v. United States*, No. 09-5370 (Nov. 16, 2009).

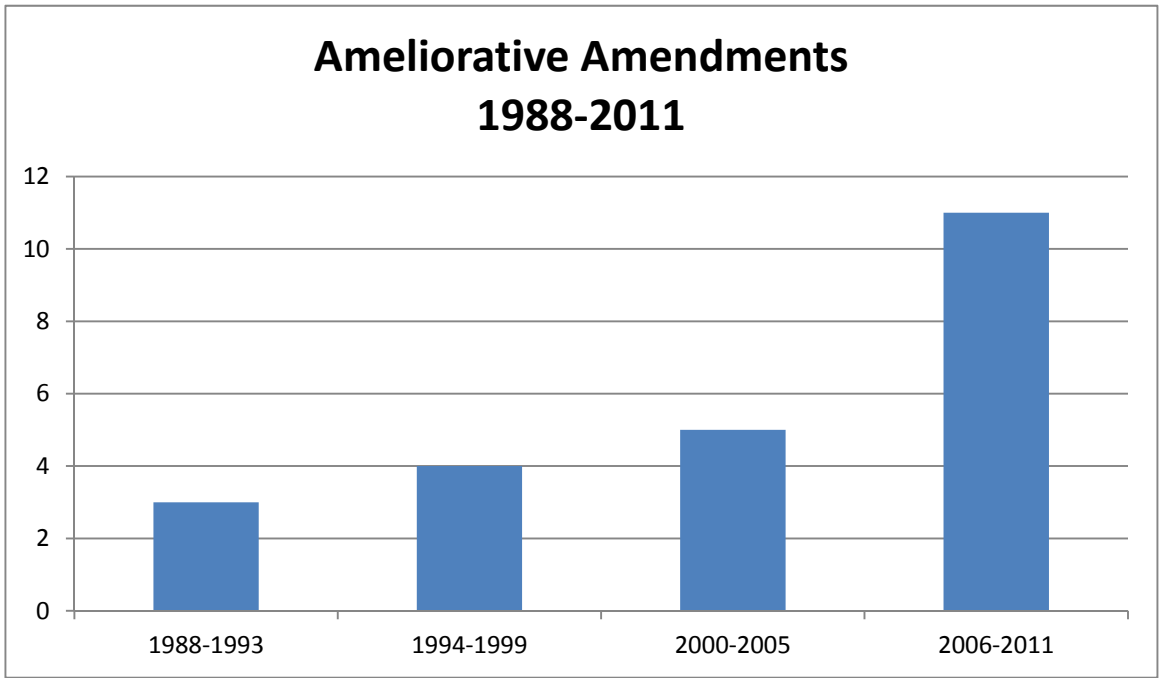
[510] *Booker*, 543 U.S. at 263.

VII. Legislation Regarding Sentencing Policy

We urge the Commission not to propose legislation to curtail judicial discretion. There is no real reason to do so, and many reasons not to. It would disrupt a workable system that has the broad support of judges, defense lawyers, sentencing policy advocates, and even many prosecutors. Each of the proposals we have seen or heard of has serious policy problems, and its own constitutional problems.

[511] *Id.*

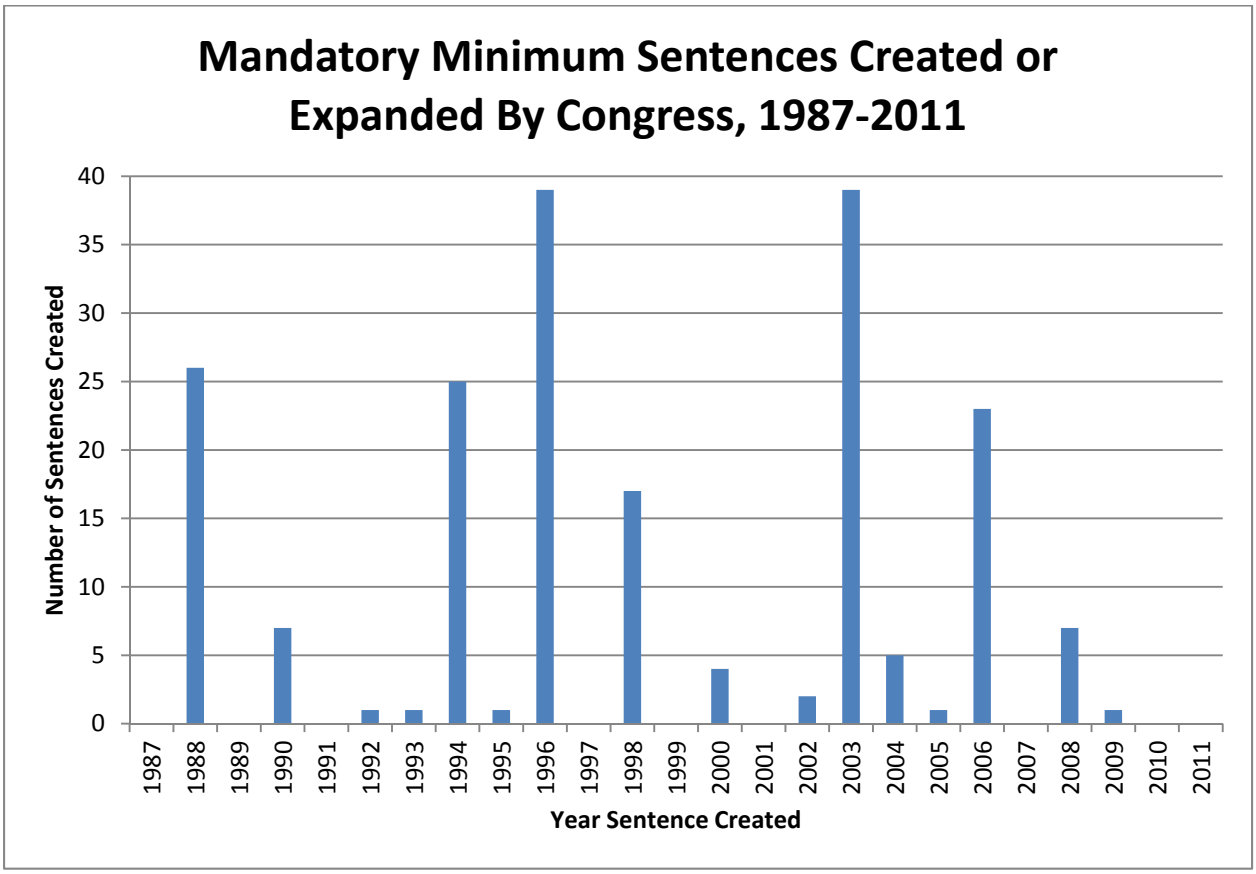
APPENDIX 1



Source: USSG App. C, amend. 396 (Nov. 1, 1991) (reducing the impact of "mixture or substance" in cases involving marijuana plants); *id.* amend. 448 (Nov. 1, 1992) (in recalibrating offense levels for offenses involving drug establishments, including a four-level decrease under §2D1.8(a)(2) based on role in the offense); *id.* amend. 488 (Nov. 1, 1993) (revising the method of calculating the weight of LSD for purposes of determining the guidelines offense level); *id.* amend. 505 (Nov. 1, 1994) (reducing the upper limit of the Drug Quantity Table at USSG §2D1.1(c) from level 42 to level 38); *id.* amend. 515 (Nov. 1, 1995) (two-level decrease under §2D1.1 if defendant meets safety valve criteria, added in response to section 80001(b) of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322); *id.* amend. 516 (Nov. 1, 1995) (reducing the weight equivalency applicable to marijuana plants in cases involving more than fifty marijuana plants); *id.* amend. No. 543 (May 1, 1997) (three-level decrease under §2L1.1 if the offense involved the smuggling only of the defendant's spouse or child, in response to section 203(e)(2)(F) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208); *id.* amend. 590 (May 1, 2000) (providing a two-level reduction in intellectual property cases if the offense as not committed for commercial advantage or private financial gain, since the NET Act of 1997 provided lower statutory penalties in those cases); *id.* amend. 624 (Nov. 1, 2001) (expanding the two-level reduction under §2D1.1 to all qualified offenders who meet safety-valve criteria, but also adding a guideline minimum); *id.* amend. 640 (Nov. 1, 2002) (capping the quantity-based offense level at 30 for those who receive a mitigating role adjustment, but the cap was soon increased to 30, 31, 33, or 34 depending on the offense level, *see* USSG App. C, amend. 668 (Nov. 1, 2004)); *id.* amend. 632 (Nov. 1, 2001) (reducing the enhancement for some aggravated felonies in §2L1.2 from 16 to 12 or 8 levels); *id.* amend. 634 (Nov. 1, 2001) (revising the money laundering

guidelines by calibrating sentences to the seriousness of underlying criminal conduct); *id.* amend. 657 (Nov. 1, 2003) (modifying the drug quantity measure for oxycodone for purposes of calculating the base offense level); *id.* amend. 706 (Nov. 1, 2007) (reducing base offense levels for crack offenses by two levels); *id.* amend. 709 (Nov. 1, 2007) (amending §4A1.2 regarding prior convictions counted for purposes of criminal history score, with the effect of excluding some prior offenses that were previously counted); *id.* amend. 742 (Nov. 1, 2010) (eliminating "recency" points from the criminal history score); *id.* amend. 738 (Nov. 1, 2010) (expanding Zones B and C of the Sentencing Table by one level, providing a greater range of alternatives to incarceration); *id.* amend. 748 (Nov. 1, 2010) (reducing drug quantity table for crack offenses, in response to section 8 of the Fair Sentencing Act of 2010, incorporating the 18:1 ratio applying to the statutory mandatory minimums); *id.* (adding minimal role base offense level cap of 32 under §2D1.1(a)(5) for a "minimal participant" under § 3B1.2(a), in response to section 7(1) of the Fair Sentencing Act of 2010, Pub. L. No. 111-220); *id.* (adding 2-level decrease under §2D1.1(b)(15) for a "minimal participant" under § 3B1.2(a) who meets additional specified criteria, in response to subsection 7(2) of the Fair Sentencing Act of 2010, Pub. L. No. 111-220); 76 Fed. Reg. 24,960, 24,968-69 (May 3, 2011) (Amendment 6) (reducing the enhancement based on prior convictions for illegal reentry offenses sentenced under §2L1.2 if the prior conviction does not count for criminal history purposes); *id.* at 24,969 (Amendment 7) (eliminating commentary to §3B1.2 for mitigating role adjustments that had the "the unintended result of discouraging courts from applying the adjustment"); *id.* at 24,969-70 (Amendment 8) (amending §5D1.1 regarding supervised release to advise that a term of supervised release should ordinarily not be imposed for deportable aliens and when not required by statute, and reduced the minimum terms of supervised release recommended under §5D1.2).

APPENDIX 2


Mandatory Minimum Sentences Created or Expanded By Congress, 1987-2011
Number of Sentences Created
0
5
10
15
20
25
30
35
40
1987
1988
1989
1990
1991
1992
1993
1994
1995
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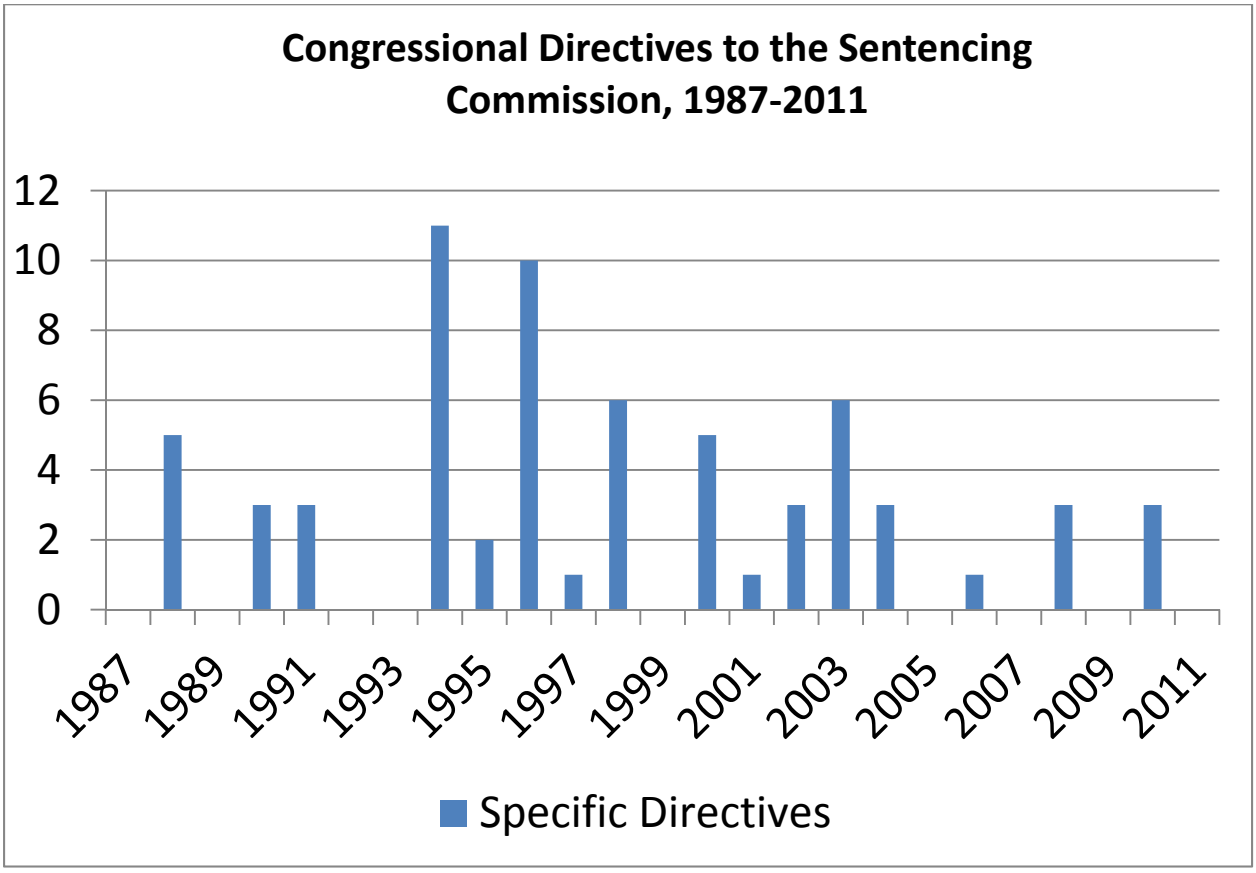
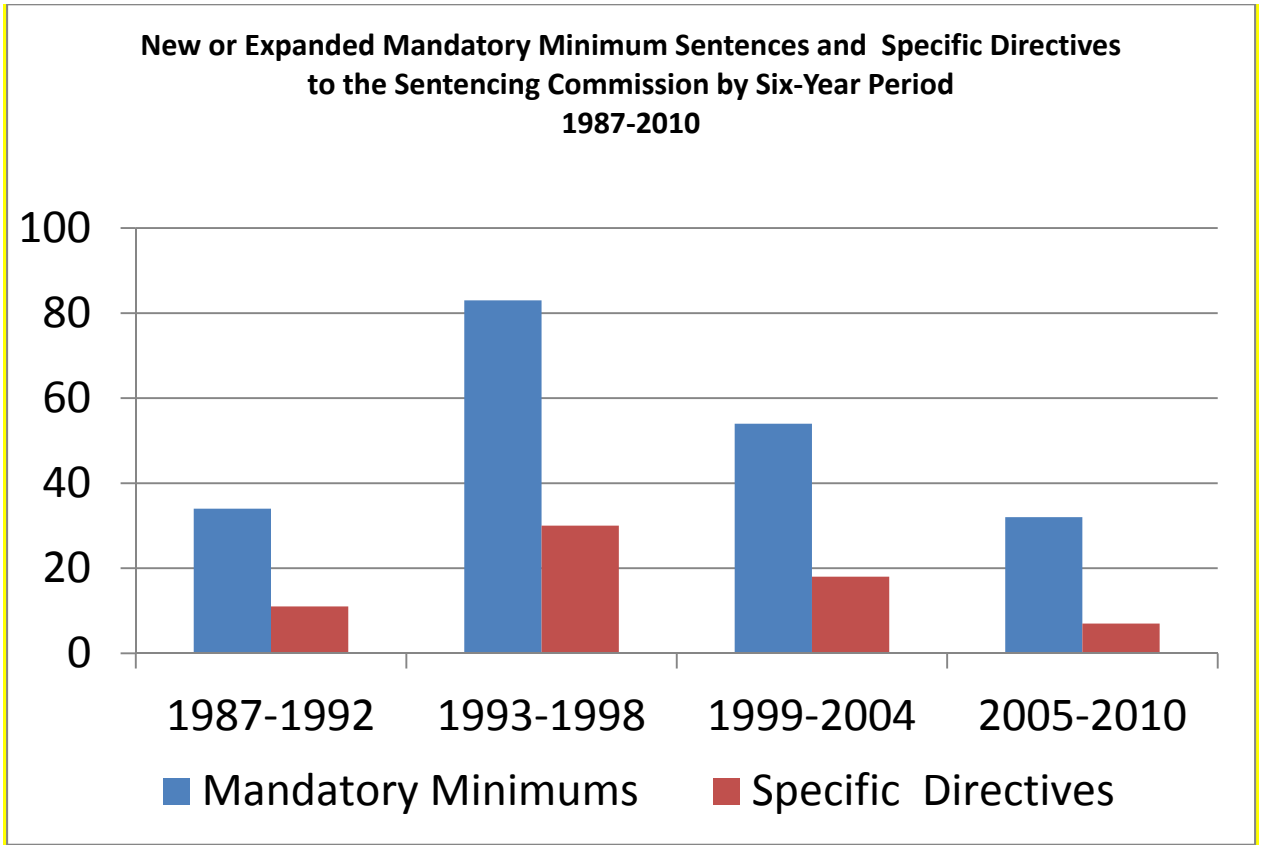
Year Sentence Created

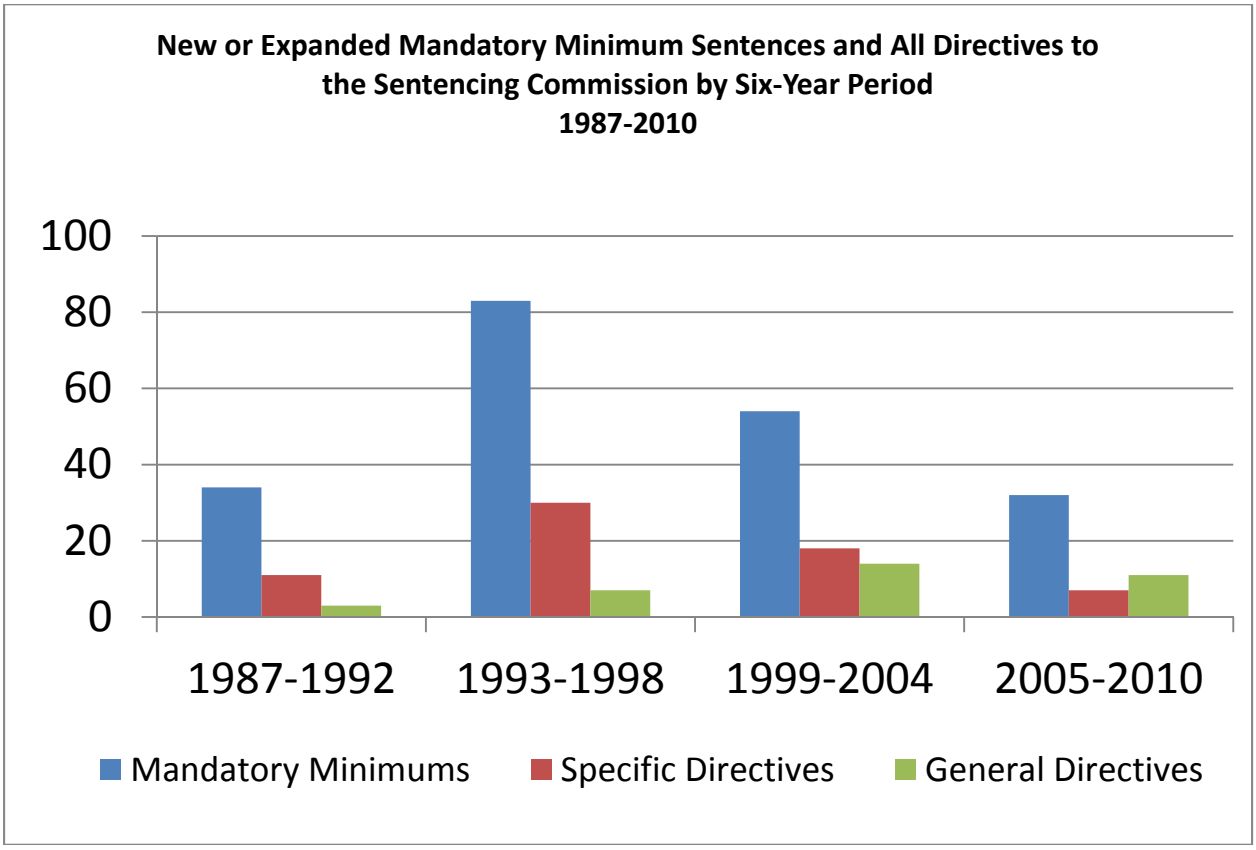
APPENDIX 3


Congressional Directives to the Sentencing Commission, 1987-2011
12
10
8
6
4
2
0
1987
1989
1991
1993
1995
1997
1999
2001
2003
2005
2007
2009
2011
Specific Directives

APPENDIX 4

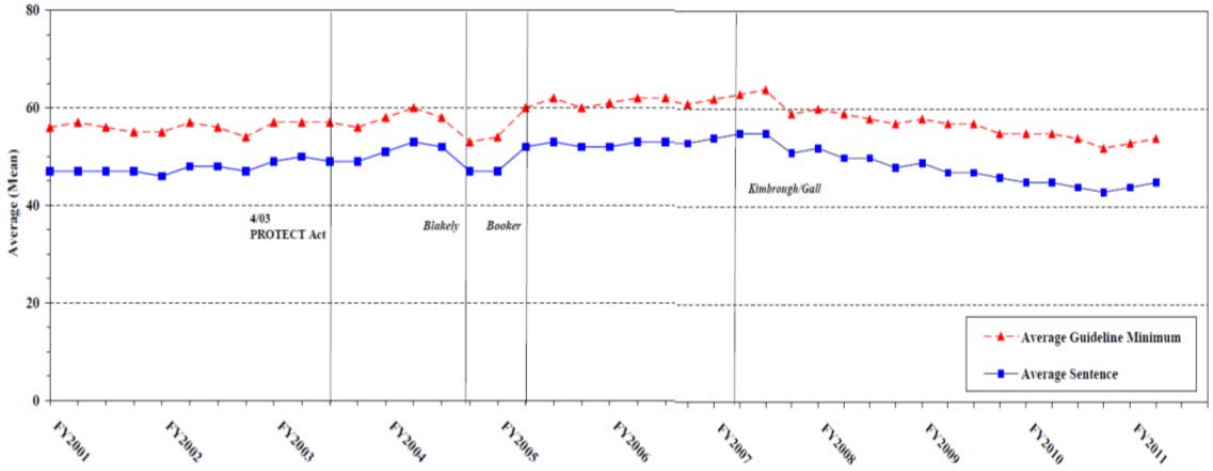

New or Expanded Mandatory Minimum Sentences and Specific Directives to the Sentencing Commission by Six-Year Period 1987-2010
100
80
60
40
20
0
1987-1992
1993-1998
1999-2004
2005-2010
Mandatory Minimums
Specific Directives

APPENDIX 5


New or Expanded Mandatory Minimum Sentences and All Directives to the Sentencing Commission by Six-Year Period 1987-2010
100
80
60
40
20
0
1987-1992
1993-1998
1999-2004
2005-2010
Mandatory Minimums
Specific Directives
General Directives

APPENDIX 6

AVERAGE SENTENCE LENGTH AND GUIDELINE MINIMUM
FY2001 -FY2011Q2



Source: USSC, Combined from Final Quarterly Data Report, FY2006; Preliminary Quarterly Data Report, FY2011Q2; Figure C.

APPENDIX 7
NUMBER AND EXTENT OF DECREASE -- FY2005-2011Q2

		2005 After 1/12/05	2006	2007	2008	2009	2010	2011Q2
GOVERNMENT SPONSORED								
	Total number	11,662	17,239	17,896	19,063	18,671	19,174	9,693
5K1.1	Number & percent of all below-range	7,206 61.8%	10,134 58.8%	10,049 56.1%	10,048 52.7%	9,296 49.8%	8,974 46.8%	4,337 44.7%
	Median Decrease in months	34	30	29	30	30	30	30
5K3.1	Number & percent of all below-range	3,092 26.5%	5,166 30%	5,233 29.2%	5,894 30.9%	6,701 35.9%	7,205 37.6%	3,826 39.5%
	Median Decrease in months	8	8	7	7	7	7	8
Other Govt	Number & percent of all below-range	1,364 11.7%	1,939 11.2%	2,614 14.6%	3,121 16.4%	2,674 14.3%	2,995 15.6%	1,530 15.8%
	Median Decrease in months	11	12	10	10	12	15	16
NON-GOVERNMENT SPONSORED								
	Total number	6,199	8,507	8,433	9,972	11,925	13,809	6,386
3553(a)	Number & percent of all below-range	2,979 48.1%	4,243 49.9%	4,957 58.8%	6,678 67%	8,892 74.6%	10,590 76.7%	4,815 75.4%
	Median Decrease in months	13	12	12	12	13	13	13
Down Dep	Number & percent of all below-range	1,117 18%	1,903 22.4%	1,757 20.8%	1,544 15.5%	1,456 12.2%	1,598 11.6%	913 14.3%
	Median Decrease in months	11.9	10	10	10	10	10	11
Down Dep w/3553(a)	Number & percent of all below-range	464 7.5%	1,432 16.8%	1,013 12%	915 9.2%	807 6.8%	814 5.9%	380 6%
	Median Decrease in months	13	15	15	15	18	18	18
All Remaining (counted as non-government sponsored)	Number & percent of all below-range	1,639 26.4%	929 10.9%	706 8.4%	835 8.3%	770 6.4%	807 5.8%	278 4.3%
	Median Decrease in months	10	8	6	6	6	6	8

Source: USSC, 2005-2010 *Sourcebook of Federal Sentencing Statistics* tbls. 30-31D; USSC, 2011 Preliminary Quarterly Data Report, Second Quarter Release, tbls. 7-13

APPENDIX 8
APPELLATE DECISIONS AFTER *GALL*

Sentences within the guideline range reversed as substantively unreasonable

United States v. Dorvee, 616 F.3d 174 (2d Cir. 2010)
United States v. Amezcua-Vasquez, 567 F.3d 1050 (9th Cir. 2009)
United States v. Paul, 561 F.3d 970 (9th Cir. 2009)
United States v. Wright, 2011 WL 2600616 (6th Cir. July 1, 2011)

Sentences within the guideline range reversed for procedural error where court failed to adequately explain sentence or to address non-frivolous argument or explain reason for rejecting such an argument

United States v. Tutty, 612 F.3d 128 (2d Cir. 2010)
United States v. Hernandez, 604 F.3d 48 (2d Cir. 2010)
United States v. Johnson, 273 Fed. App'x 95 (2d Cir. 2008)
United States v. Byrd, 415 Fed. App'x 437 (3d Cir. 2011)
United States v. Carver, 347 Fed. App'x 830 (3d Cir. 2009)
United States v. Sevilla, 541 F.3d 226 (3d Cir. 2008)
United States v. Medel-Moran, 2011 WL 1335720 (4th Cir. Apr. 8, 2011)
United States v. Taylor, 2010 WL 1141423 (4th Cir. Mar. 22, 2010)
United States v. Walker, 403 Fed. App'x 803 (4th Cir. 2010)
United States v. Martinez-Martinez, 378 Fed. App'x 302 (4th Cir. 2010)
United States v. Jackson, 397 Fed. App'x 924 (4th Cir. 2010)
United States v. Cornette, 396 Fed. App'x 8 (4th Cir. 2010)
United States v. Black, 389 Fed. App'x 256 (4th Cir. 2010)
United States v. Lynn, 592 F.3d 572, 581 (4th Cir. 2010)
United States v. Pacheco Mayen, 383 Fed. App'x 352 (4th Cir. 2010)
United States v. Clark, 383 Fed. App'x 310 (4th Cir. 2010)
United States v. Olislager, 383 Fed. App'x 314 (4th Cir. 2010)
United States v. Murphy, 380 Fed. App'x 344 (4th Cir. 2010)
United States v. Martinez-Martinez, 378 Fed. App'x 302 (4th Cir. 2010)
United States v. Dury, 336 Fed App'x 371 (4th Cir. 2009)
United States v. Shambry, 343 Fed. App'x 941 (4th Cir. 2009)
United States v. Harris, 337 Fed. App'x 371 (4th Cir. 2009)
United States v. Sanders, 2009 WL 2431293 (4th Cir. Aug.10, 2009)
United States v. Tisdale, 264 Fed. App'x 403 (5th Cir. 2008)
United States v. Davy, 2011 WL 2711045 (6th Cir. July 12, 2011)
United States v. Pizzino, 419 Fed. App'x 579 (6th Cir. 2011)
United States v. Goff, 400 Fed App'x 1 (6th Cir. 2010)
United States v. Wallace, 597 F.3d 794 (6th Cir. 2010)
United States v. Rhodes, 410 Fed. App'x 856 (6th Cir. 2010)
United States v. Temple, 404 Fed. App'x 15 (6th Cir. 2010)
United States v. Pritchard, 392 Fed. App'x 433 (6th Cir. 2010)
United States v. Ross, 375 Fed. App'x 502 (6th Cir. 2010)

United States v. Fenderson, 354 Fed. App'x 236 (6th Cir. 2009)
United States v. Howell, 352 Fed. App'x 55 (6th Cir. 2009)
United States v. Delgadillo, 318 Fed. App'x 380 (6th Cir. 2009)
United States v. Robertson, 309 Fed. App'x 918 (6th Cir. 2009)
United States v. Recla, 560 F.3d 539 (6th Cir. 2009)
United States v. Penson, 526 F.3d 331 (6th Cir. 2008)
United States v. Stephens, 549 F.3d 459 (6th Cir. 2008)
United States v. Peters, 512 F.3d 787 (6th Cir. 2008)
United States v. Garcia-Oliveros, 639 F.3d 380 (7th Cir. 2011)
United States v. Johnson, 635 F.3d 983 (7th Cir. 2011)
United States v. Figueroa, 622 F.3d 739 (7th Cir. 2010)
United States v. Panice, 598 F.3d 426 (7th Cir. 2010)
United States v. Harris, 567 F.3d 846 (7th Cir. 2009)
United States v. Steward, 339 Fed. App'x 650 (7th Cir. 2009)
United States v. [Clinton] Williams, 553 F.3d 1073 (7th Cir. 2009)
United States v. Villegas-Miranda, 579 F.3d 798 (7th Cir. 2009)
United States v. Jackson, 546 F.3d 465 (7th Cir. 2008)
United States v. Skinner, 303 Fed. App'x 369 (7th Cir. 2008)
United States v. Mota, 2011 WL 2003433 (9th Cir. May 24, 2011)
Untied States v. Ferguson, 412 Fed. App'x 974 (9th Cir. 2011)
United States v. Waknine, 543 F.3d 546 (9th Cir. 2008)
United States v. Santillanes, 274 Fed. App'x 718 (10th Cir. 2008)
United States v. Cerno, 529 F.3d 926 (10th Cir. 2008)
United States v. Luster, 388 Fed. App'x 936 (11th Cir. 2010)
United States v. Narvaez, 285 Fed. App'x 720 (11th Cir. 2008)
United States v. Hall, 610 F.3d 727 (D.C. Cir. 2010)

Sentences outside the guideline range reversed as substantively unreasonable – Defendant's appeal

United States v. Ofray-Campos, 534 F.3d 1 (1st Cir. 2008) (above)
United States v. Olhovsky, 562 F.3d 530 (3d Cir. 2009) (below)
United States v. Calderon-Minchola, 351 Fed. App'x 610 (3d Cir. 2009) (below)
United States v. Worex, 420 Fed. App'x 546 (6th Cir. 2011) (above)
United States v. Ortega-Rogel, 281 Fed. App'x 471 (6th Cir. 2008) (above)
United States v. Miller, 601 F.3d 734 (7th Cir. 2010) (above)
United States v. Lopez, 343 Fed. App'x 484 (11th Cir. 2009) (above)

Sentences outside the guideline range reversed as substantively unreasonable – Government's appeal (all below)

United States v. Cutler, 520 F.3d 136 (2d Cir. 2008)
United States v. Hayes, 383 Fed. App'x 204 (3d Cir. 2010)
United States v. Lychock, 578 F.3d 214 (3d Cir. 2009)
United States v. Engle, 592 F.3d 495 (4th Cir. 2010)
United States v. Abu Ali, 528 F.3d 210 (4th Cir. 2008)

United States v. Camiscione, 591 F.3d 823 (6th Cir. 2010)
United States v. Christman, 607 F.3d 1110 (6th Cir. 2010)
United States v. Harris, 339 Fed. App'x 533 (6th Cir. 2009)
United States v. Hunt, 521 F.3d 636, 650 (6th Cir. 2008)
United States v. Hughes, 283 Fed. App'x 345 (6th Cir. 2008)
United States v. [Davis] Omole, 523 F.3d 691 (7th Cir. 2008)
United States v. Kane, 639 F.3d 1121 (8th Cir. 2011)
United States v. Friedman, 554 F.3d 1301 (10th Cir. 2009)
United States v. Irey, 612 F3d 1160 (11th Cir. 2010)
United States v. Livesay, 587 F.3d 1274 (11th Cir. 2009)
United States v. McVay, 294 Fed. App'x 488 (11th Cir. 2008)
United States v. Pugh, 515 F.3d 1179 (11th Cir. 2008)

Sentences outside the guideline range reversed for procedural error where court failed to adequately explain sentence or to address non-frivolous argument or explain reason for rejecting such an argument –
Defendant's appeal

United States v. Persico, 293 Fed. App'x 24 (2d Cir. 2008) (above)
United States v. Brown, 2011 WL 2036345 (May 25, 2011) (below)
United States v. Brown, 595 F.3d 498 (3rd Cir. 2010) (below)
United States v. Brown, 578 F.3d 221 (3rd Cir. 2009) (above)
United States v. Grant, 323 Fed. App'x 189 (3d Cir. 2009) (above)
United States v. Swift, 357 Fed. App'x 489 (3d Cir. 2009) (below)
United States v. Strickland, 2010 WL 235080 (4th Cir. Jan. 21, 2010) (above)
United States v. Monroe, 396 Fed. App'x 33 (4th Cir. 2010) (above)
United States v. Cameron, 340 Fed. App'x 872 (4th Cir. 2009) (above)
United States v. Maynor, 310 Fed. App'x 595 (4th Cir. 2009) (above)
United States v. Dillon, 355 Fed. App'x 732 (4th Cir. 2009) (above)
United States v. Phillips, 415 Fed. App'x 557 (5th Cir. 2011) (above)
United States v. Aguilar-Rodriguez, 288 Fed. App'x 918 (5th Cir. 2008) (above)
United States v. Barahona-Montenegro, 565 F.3d 980 (6th Cir. 2009) (above)
United States v. Grams, 566 F.3d 683 (6th Cir. 2009) (above)
United States v. Gapinksi, 561 F.3d 467 (6th Cir. 2009) (below)
United States v. Blackie, 548 F.3d 395 (6th Cir. 2008) (above)
United States v. Hann, 407 Fed. App'x 953 (7th Cir. 2011) (above)
United States v. Kirkpatrick, 589 F.3d 414 (7th Cir. 2009) (above)
United States v. Bartlett, 567 F.3d 901 (7th Cir. 2009) (above)
United States v. Azure, 536 F.3d 922, 932 (8th Cir. 2008) (above)
United States v. Oba, 2009 WL 604936 (9th Cir. Mar. 9, 2009) (above)
United States v. Medawar, 270 Fed. App'x 488 (9th Cir. 2008) (below)
United States v. Lente, __ F.3d __, 2011 WL 3211506 (10th Cir. 2011) (above)
United States v. Kirschner, 397 Fed. App'x 514 (11th Cir. 2010) (above)
United States v. Mattox, 402 Fed. App'x 507 (11th Cir. 2010) (above)
United States v. [Julio] Magana, 279 Fed. App'x 756 (11th Cir. 2008) (above)
United States v. Akhigbe, 642 F.3d 1078 (D.C. Cir. 2011) (above)

In re Sealed Case, 527 F.3d 188 (D.C. Cir. 2008) (above)

Sentences outside the guideline range reversed for procedural error where court failed to adequately explain sentence or to address non-frivolous argument or explain reason for rejecting such an argument –
Government's appeal (all below)

United States v. DeSilva, 613 F.3d 352 (2d Cir. 2010)
United States v. Negroni, 638 F.3d 434 (3d Cir. 2011)
United States v. Merced, 603 F.3d 203 (3d Cir. 2010)
United States v. Levinson, 543 F.3d 190 (3d Cir. 2008)
United States v. Moolenaar, 259 Fed. App'x 433 (3d Cir. 2007)
United States v. Morace, 594 F.3d 340 (4th Cir. 2010)
United States v. Gaskill, 318 Fed. App'x 251 (4th Cir. 2009)
United States v. Carter, 564 F.3d 325 (4th Cir. 2009)
United States v. Harris, 339 Fed. App'x 533 (6th Cir. 2009)
United States v. Henry, 545 F.3d 367 (6th Cir. 2008)
United States v. Brown, 610 F.3d 395 (7th Cir. 2010)
United States v. Kane, 552 F.3d 748 (8th Cir. 2009)
United States v. Shy, 538 F.3d 933 (8th Cir. 2008)
United States v. Bragg, 582 F.3d 965 (9th Cir. 2009)
United States v. Pena-Hermosillo, 522 F.3d 1108 (10th Cir. 2008)
United States v. Livesay¸ 525 F.3d 1081 (11th Cir. 2008)
United States v. Prather, 279 Fed. App'x 761 (11th Cir. 2008)