THOMAS E. FAIRCHILD LECTURE

FEDERAL SENTENCING POLICY: CHANGES SINCE THE SENTENCING REFORM ACT OF 1984 AND THE EVOLVING ROLE OF THE UNITED STATES SENTENCING COMMISSION

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INTRODUCTION

Good afternoon. It is an enormous honor and pleasure to be here with you today to deliver the twenty-third Thomas E. Fairchild Lecture. Judge Thomas Fairchild served with exceptional distinction on

* United States District Judge, District of Vermont. From November 1999 until December 2010, the speaker was a member of the United States Sentencing Commission, where he served as vice chair from 1999 to 2009 and chair from 2009 to 2010.

the United States Court of Appeals for the Seventh Circuit for forty-one years, from 1966 up until his death in February 2007. He was a man of extraordinary courage which led him to run as a Progressive Democrat against Senator Joseph McCarthy in the 1950s. He was a passionate protector of civil rights and civil liberties for all Americans, and at the same time he was described by those who appeared before him as empathetic, kind, courteous, and wise. He was a legendary judge, and what an honor to participate in this lecture series.

I have been asked to give a lecture. I am reminded of comments made by Judge Richard Arnold of the Eighth Circuit when he was asked to give a lecture. Judge Arnold was a personal friend and one of my heroes. He observed:

> I dislike the term "lecture." I am not really sure why anybody would come to an event billed as a lecture. I suppose the students had to come. I don't know what inducement was offered to you or what punishment was threatened, but no one likes to be lectured at or lectured to. So I like to think of this as a conversation.[1]

So just as Judge Arnold approached his lecture as a conversation, so shall I.

I. INTRODUCTION OF TOPIC

My charge today is to discuss the evolution of federal sentencing policy since the Sentencing Reform Act of 1984[2] and the changing role of the United States Sentencing Commission. I'll focus particularly on the past eleven years during which I served on the Commission. But in a broader sense, I'll reflect on my observations of how our system of government works on issues as controversial as sentencing policy.

The mid-1990s were turbulent times for the Sentencing Commission. In fact, from 1997 to 1999 there were no commissioners. In 1999, President Clinton appointed me and six other Commissioners to serve on the United States Sentencing Commission. We were confirmed by the Senate as part of a grand compromise between the parties in Congress. I served for eleven years on the Commission, having been reappointed by President Bush in 2004. President Obama nominated me to serve as Chair of the Commission soon after he

1. Richard S. Arnold, *Irving L. Goldberg Lecture, Southern Methodist University Dedman School of Law: The Federal Courts: Causes of Discontent*, 56 SMU L. REV. 767, 769 (2003).

2. Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211–300, 98 Stat. 1837, 1987–2040.

assumed the Presidency, and I was subsequently confirmed by the Senate in September 2009. My term expired in December 2010.

One might ask how does a judge from the sticks of Vermont—and I am from the sticks; my home town has a population of about 1,000—get picked by Presidents Clinton, Bush, and Obama to serve on the Commission and ultimately become its Chair. It clearly was a merit selection. My merit was having been a campaign manager and friend of the Chairman of the Senate Judiciary Committee, Patrick Leahy. But that's a story for another day.

The Commission sets sentencing policy in a most generalized way: it establishes guidelines and policy directives for the courts. And in doing so, it works at the center of and in response to the demands of the three branches of government, each of which claims an interest in sentencing policy. Its members are appointed by the President and confirmed by the Senate.

During that decade-long period, sentencing policy endured a number of tidal waves of change in policy directives brought by Congress and the Supreme Court. I will describe the inherent tension among the branches of government and the inevitable upheavals in policy that tension creates. Many of those changes over the past ten years have resulted in a consistent increase in penalties, and not coincidentally, the federal prison population has mushroomed. Between 1999 and 2010, the federal prison population increased by seventy-six percent from 119,185 to 210,142,[3] resulting in a thirty-seven percent overcapacity in the Bureau of Prisons facilities.[4] I'll then give you my assessment of federal sentencing policy today.

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3. U.S DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1999, at 99 tbl.7.9 (2001), http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs9907.pdf (noting that at the end of fiscal year 1999, the federal prison population was 119,185); *Weekly Population Report*, FED. BUREAU PRISONS, http://web.archive.org/web/20101202211151/http://www.bop.gov/news/weekly_report.jsp (last visited Feb. 10, 2012). If federal inmates in privately run facilities and state facilities are included, the total federal prison population in 2010 was around 210,000. *Weekly Population Report*, *supra*. At the time of the initial promulgation of the federal sentencing guidelines in late 1987, the federal prison population was 44,000. Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 FED. SENT'G REP., July/Aug. 1993, at 29, 29. As a result of this growth in the federal prison population, the number of federal prisons has nearly doubled in the past two decades. *See* Harley G. Lappin, Dir., Fed. Bureau of Prisons, Statement Before the United States Sentencing Commission at the Regional Hearing on the State of Federal Sentencing (Nov. 20, 2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20091119-20/Lappin.pdf.

4. *See* Lappin, *supra* note 3. During the same period, the states' prison population rose less dramatically—from 1.2 million to 1.4 million—and even showed a slight drop in 2009. *See* PEW CTR ON THE STATES, PRISON COUNT 2010, at 1 (2010),

Finally, I'll describe proposals for change in the guideline structure, to provide a greater sense of stability and overall fairness. I propose a new presumptive guideline structure in return for reduced numbers of mandatory minimum sentences. This new system would have wider ranges within the sentencing table to provide more judicial discretion and would allow for greater use of offender characteristics to permit judges to more accurately tailor sentences to individual defendants and the circumstances of each case. Finally, I propose a more rigorous appellate standard of review to ensure greater consistency across the country.

But before setting forth my proposals, let me put the federal guideline system in its proper historical context.

II. SENTENCING REFORM ACT OF 1984

The historical underpinnings of the Commission and the guidelines appeared more than a decade before the enactment of the Sentencing Reform Act when, in 1973, Judge Marvin E. Frankel published his brief but potent book, *Criminal Sentences: Law without Order*.[5] His monograph described the existing federal sentencing system, in which federal judges imposed sentences within broad statutory ranges of imprisonment without any uniform standards and typically with little transparency. He described "wanton" and "freakish" disparities that

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available at http://www.pewcenteronthestates.org/uploadedFiles/Prison_Count_2010.pdf. A substantial portion of the increased federal prison population resulted from a disproportionate increase in prosecutions for violations of the criminal immigration laws, which grew from approximately 4,200 in 1999 (representing 7.5% of the federal caseload of non-petty offenses) to over 26,000 in 2009 (representing over 32% of the federal criminal caseload of non-petty offenses). U.S. SENTENCING COMM'N, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.A (2009) [hereinafter 2009 SOURCEBOOK], *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/SBTOC09.htm (32.2% of federal offenders sentenced in 2009, i.e., approximately 26,200, were immigration offenders); U.S. SENTENCING COMM'N, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.A (1999) [hereinafter 1999 SOURCEBOOK], *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/1999/Sbtoc99.htm (17.5% of federal offenders sentenced in 1999, i.e., approximately 4,200, were immigration offenders). Immigration prosecutions are uniquely federal, which in part may explain why the federal prison population dramatically outpaced the state prison population during the past decade. Putting aside immigration offenses, however, the federal prison population has dramatically grown in significant part due to longer prison terms resulting from mandatory minimum sentences. *See infra* text accompanying note 76 (noting that 28% of federal cases subject to the sentencing guidelines involve one or more mandatory minimum provisions).

5. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

existed in federal sentencing whereby defendants with similar offenses and records received dramatically different sentences from different judges.[6] He reacted by proposing significant changes in the system, including three key reforms: (1) creation of a sentencing commission made up of experts in the field;[7] (2) the creation by such a commission of a detailed profile of factors that would include a numerical grading system of offense and offender characteristics;[8] and (3) meaningful appellate review to assure consistency.[9]

Judge Frankel's proposals resonated among academics and on Capitol Hill,[10] particularly with Senators Edward Kennedy and Strom Thurmond,[11] and led to the passage of the Sentencing Reform Act of 1984 (SRA).[12] In enacting the SRA, Congress sought to achieve several

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6. *Id.* at 104; *see also id.* at 21–22 (noting one not atypical example in which a check forger had received thirty days in jail from one federal judge while a similarly-situated defendant convicted of the same offense received a fifteen-year prison sentence from a different judge). Judge Frankel's anecdotal account was corroborated by an influential study of inter-judge disparities in sentencing within the U.S. Court of Appeals for the Second Circuit conducted by the Federal Judicial Center. *See* ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, FED. JUD. CTR., THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT (1974).

7. FRANKEL, *supra* note 5, at 119–20.

8. *Id.* at 114.

9. *Id.* at 115. There was virtually no appellate review of sentences in federal criminal cases at that time. *See, e.g.*, *Dorszynski v. United States*, 418 U.S. 424, 431 (1974) ("[T]he general proposition [is] that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end."); *see also Appellate Review of Sentences: A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249 (1963).

10. *See, e.g.*, PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM (1977); *see also* William W. Wilkins, Jr. et al., *Competing Sentencing Policies in a "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305, 310 (1993) ("The [SRA] garnered broad, bipartisan co-sponsorship as well as support from the Executive Branch."). Judge Frankel has been correctly described as the "father of the modern sentencing reform movement." Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 230 (2003).

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

12. The Sentencing Reform Act is codified in scattered sections of Titles 18 and 28 of the United States Code. The most important provisions are 18 U.S.C. § 3553 (2006), which governs the imposition of non-capital sentences in federal court, and 28

noble purposes, including: (1) the reduction of "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors";[13] (2) truth in sentencing by removing parole;[14] and (3) transparency in sentencing by creating a detailed, rational process for determining a sentence.[15] The guideline structure was to be authored and monitored by a new Sentencing Commission. The SRA envisioned the Sentencing Commission as an "independent," "expert" agency located within the Judiciary but answerable to all branches of government.

The original Sentencing Commission submitted proposed guidelines to Congress in 1987.[16] The guidelines went into effect in November of that year.[17] The guidelines drafted by the Commission were a product of many compromises, according to one of its authors, Justice Stephen Breyer.[18] The sentencing guidelines that went into effect

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U.S.C. §§ 991–995 (2006), which creates the Sentencing Commission and mandates the creation of the sentencing guidelines.

13. 28 U.S.C. § 991(b)(B).

14. Congress was concerned that the Parole Commission was arbitrarily shortening many defendants' prison sentences, with many serving only one-third of their sentences behind bars. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (2010) ("Congress first sought honesty in sentencing . . . to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This practice usually resulted in . . . defendants often serving only about one-third of the sentence imposed by the court."); *see also* 18 U.S.C. § 3583 (instituting supervised release in lieu of parole); 18 U.S.C. § 3624 (abolishing parole and creating a limited amount of good-time credit). Defendants do not serve terms of supervised release as a substitute for a portion of their sentences of imprisonment, unlike parole. *See* U.S SENTENCING GUIDELINES MANUAL ch. 7, pt. A (2010) ("Unlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court.").

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

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

17. *See id.*

18. *Id.* at 2 ("The spirit of compromise that permeates the Guidelines arose out of the practical needs of administration, institutional considerations, and the

in 1987 reflected a "mandatory" or "presumptive" system by which federal judges were provided detailed guidance in the exercise of their sentencing authority. Superimposed on the existing, typically broad, statutory ranges of punishment were binding, narrower guidelines ranges that in many cases were driven by extremely detailed sentencing factors.[19] Those ranges were modeled on a grid system, with axes for offense levels and criminal histories.

With respect to offense conduct, the guidelines provided that virtually all aspects of the offense of conviction as well as any related or relevant conduct before, during, and after the offense of conviction were pertinent at sentencing, including relevant uncharged conduct that was proven by a preponderance of evidence.[20] In fact, acquitted conduct could also be considered. The offense conduct would be rated on a scale of forty-three offense levels.

A separate scale was created for analyzing a defendant's criminal history with six categories. The initial determination of the sentencing range would be calculated where the offense level and the criminal history category met on the grid. The severity levels were set based upon a study of average sentences that were imposed for given offenses, but then skewed by new minimum sentences passed by Congress. The Commission then added a number of aggravating or mitigating factors which increased or decreased the severity of the sentence for the underlying criminal offense. The Commission discouraged consideration of many offender characteristics, such as age and family circumstances, and instead focused on a defendant's criminal record as the most important offender characteristic.[21] Adjustments or departures from the guideline structure were authorized only in exceptional circumstances.

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competing goals of a criminal justice system . . . . It is critical to understand the different institutional reasons for compromise, and to comprehend that, in guideline writing, 'the best is the enemy of the good.'").

19. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (1987) [hereinafter 1987 MANUAL] (providing for differing offense levels based on a long list of drug types and quantities).

20. 1987 MANUAL, *supra* note 19, § 1B1.3 (relevant conduct); *see also* U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. (1992). ("The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.").

21. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.1-1.6, 5H1.9-1.12 (2010); *see also id.* § 4A1.1 (provisions concerning criminal history). The guidelines' provisions that certain offender characteristics were irrelevant (such as socio-economic status) or of "general inappropriateness" (such as family ties) were required by the SRA. 28 U.S.C. § 994(d)-(e) (2006).

From the outset, many sentencing judges, practitioners, and academics criticized the guidelines system as being too complex, rigid, and harsh, and as having replaced judges' traditional sentencing discretion with an inflexible formula that turned judges into computers.[22] Judges in particular objected to the inability to use offender characteristics to fashion sentences they deemed just.

III. COMMISSION'S ROLE IN RELATIONSHIP TO BRANCHES OF GOVERNMENT

The Commission functions at the crossroads of the three branches of government. Each branch has a constitutional investment in sentencing policy.[23] Although the Commission is an agency within the Judiciary, its members are selected by the Executive and confirmed by the Legislature. The Commission is charged with passing amendments to the Guidelines, but those amendments become effective only if Congress has not rejected them within six months of passage.

Each branch of the federal government has a unique interest in sentencing policy, due in large part to its respective role in government. Congress defines criminal offenses and prescribes sanctions. It has traditionally set maximum and, in many cases, minimum sentences for those offenses it creates. The Executive branch has the responsibility to execute the laws, and to that extent has an interest in seeing that criminal offenses result in just punishments. And judges, of course, have the duty to ensure justice is done in each case by the sentences they impose. Each branch places demands upon the Commission to establish penalties and procedures that satisfy its constitutional interests, oftentimes at the expense of the interests of the other branches. The struggle over the interests of each branch of government has dominated the Commission's history since its inception.

Congress afforded the Commission wide latitude concerning federal sentencing policy when it enacted the SRA in 1984. Yet, within two years of passage of the SRA and before the Guidelines took effect,

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22. *See, e.g.*, William W. Schwarzer, *Judicial Discretion in Sentencing*, 3 FED. SENT'G REP. 339–40 (1991) (criticism of guidelines by a district judge who also served as the Director of the Federal Judicial Center); *see also* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1696–98 (1992); Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1236–37 (2004) (noting the various criticisms levied at the sentencing guidelines by federal judges after the guidelines' promulgation in 1987); Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 725–26 (1999).

23. *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 718, 758–65 (2005).

Congress proceeded to co-opt a significant area of sentencing policy by enacting mandatory minimum statutory penalties in a large segment of federal criminal cases, mostly drug and firearms offenses.[24] Congress imposed five- and ten-year mandatory minimum sentences for numerous drug trafficking offenses and a five-year mandatory minimum sentence if a weapon was possessed in furtherance of drug activity.[25]

These mandatory minimum sentences conflict both in practice and spirit with a guideline system. Their impact can be felt in two distinct ways. First, the statutory mandatory minimum sentences are often greater than the sentences called for by the Guidelines, resulting in the guideline sentences being "trumped" by the mandatory minimums. Second, the original Commission made an important policy decision in setting guideline ranges. Where Congress had made a policy decision regarding penalties for given criminal acts by imposing mandatory minimums, the Commission would incorporate those policy decisions into the Guidelines so that "cliffs" between guideline and mandatory minimum sentences would be reduced.[26] Thus, the Guideline ranges were impacted directly by the passage of mandatory minimums, resulting in the constant ratcheting-up of penalties as a result of congressional action.[27]

In addition to, or sometimes in lieu of, mandatory minimums, Congress has issued countless directives to the Commission over the

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24. *See, e.g.*, 18 U.S.C. § 924(c), (e) (2006) (mandatory minimums for certain firearms offenses); 21 U.S.C. § 841(b) (2006) (mandatory minimums for certain drug-trafficking offenses).

25. 18 U.S.C. § 924(c), (e); 21 U.S.C. § 841(b).

26. *See United States v. Williams*, 549 F.3d 1337, 1340–41 (11th Cir. 2008) ("The term 'guideline range' reflects the scope of sentences available to the district court, which could be limited by a statutorily imposed mandatory minimum 'guideline sentence.' Accordingly, when a mandatory minimum exceeds some portion of the range for the base offense level, the applicable 'guideline range' would be from that minimum to the upper end of the original guideline range.").

27. John S. Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 311, 314 (2004); *see also* Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1152 (2005) ("[M]andatory minimums seriously interfere with the rational proportionality among offenses that the guidelines seek to introduce."). For instance, a non-violent drug defendant with no criminal record convicted at a trial of selling a half of a pound of cocaine (approximately 235 grams) ordinarily would have a guidelines range of thirty-three to forty-one months. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(a)-(c) (2010); *id.* at ch. 5, pt. A (sentencing table). Such a sentencing range is higher than a defendant convicted at trial of aggravated assault involving the discharge of a firearm (but without any bodily injury); such a defendant's guideline range ordinarily would be thirty to thirty-seven months. *Id.* § 2A2.2.(a)-(b); *id.* at ch. 5, pt. A (sentencing table).

past twenty-five years.[28] There have been different species of directives, some of which required precise changes in specific guidelines.[29] Some directives have been appropriate reflections of congressional oversight that highlighted general policy concerns,[30] while others invaded the detailed work of the Commission. Such was the case with the directives issued by the PROTECT Act in 2003, which mandated precise changes to the guidelines.[31] Even when directives have not dictated specific increases in guideline penalties, the Commission often has felt compelled to add additional aggravating factors and thereby increase guideline sentences in order to ward off mandatory minimum penalties.[32]

The Commission's relationship with Congress became most strained in 1995 over mandatory minimum sentences for crack cocaine. Congress had set a five-year threshold penalty for possession or distribution of five grams of crack cocaine, while the same threshold for powder cocaine was established at 500 grams, a ratio of one hundred to one. The Commission, by a vote of four to three, promulgated an amendment and issued an accompanying report to

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28. *See* Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 196 (1993) (noting that Congress "made increased use of specific statutory directives to the Commission to set forth desired guidelines amendments" sometimes in lieu of enacting mandatory minimum statutory penalties); *see also* Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1341–42 (2005) ("Beginning in the mid-1990s . . . Congress began to intervene . . . more directly in the Commission's work, and the relationship between Congress and the Commission began to assume a more adversarial tone. By the spring of 2003, congressional directives consumed the overwhelming majority of the Commission's agenda.").

29. Hatch, *supra* note 28, at 196.

30. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079A(a)(1), 124 Stat. 1376, 2077 (2010) ("[T]he United States Sentencing Commission shall review and, if appropriate, amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of offenses relating to securities fraud or any other similar provision of law, in order to reflect the intent of Congress that penalties for the offenses under the guidelines and policy statements appropriately account for the potential and actual harm to the public and the financial markets from the offenses.").

31. *See* U.S. SENTENCING COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 38–41 (2009) (discussing the PROTECT Act's direct amendment of the child pornography guidelines). The recent Fair Sentencing Act of 2010 contains a similar specific directive concerning the drug-trafficking guideline. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

32. R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL'Y & L. 739, 752 (2001).

Congress recommending that penalties for powder and crack cocaine be equalized.[33] For the first and only time in history, Congress rejected an amendment proposed by the Commission and an accompanying amendment regarding penalties for money laundering.[34] Congress then failed to reappoint any of the commissioners when their terms expired. By 1998, the Sentencing Commission had no commissioners.[35]

Meanwhile, struggle between Congress and the Judiciary over sentencing policy continued. In 1996, the Supreme Court in *Koon v. United States*[36] reallocated to district judges more discretion to impose sentences below the guideline ranges by amending the appellate standard for departures.[37] In *Koon*, the Court held that a sentencing judge's discretion to depart from a sentence within the Guideline range was to be reviewed with "substantial deference" on appeal—for abuse of discretion—rather than de novo as the executive branch had advocated.[38] Within three years of *Koon*, district courts were exercising broader discretion and departing from the guidelines in significantly greater numbers. Between 1995 and 1999, the number of non-government-sponsored or judge-initiated downward departures had nearly doubled, rising from 8.4% to 15.8%.[39]

In response to the growing number of departures, Congress enacted the PROTECT Act of 2003, which reallocated power in the federal sentencing arena away from the judiciary.[40] Among other things, it required the Attorney General to report to Congress on

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33. *See* Steven L. Chanenson, Booker *on Crack: Sentencing's Latest Gordian Knot*, 15 CORNELL J.L. & PUB. POL'Y 551, 563–64 (2006).

34. *See* Act of Oct. 30, 1995, Pub. L. No. 104–38, § 1, 109 Stat. 334, 334 (1995).

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

36. 518 U.S. 81 (1996).

37. *Id.*; *see also* Ian Weinstein, *The Discontinuous Tradition of Sentencing Discretion*: Koon*'s Failure to Recognize the Reshaping of Judicial Discretion under the Guidelines*, 79 B.U. L. REV. 493, 494 (1999) (characterizing *Koon* as resulting in "the fundamental reallocation of sentencing power").

38. *Koon*, 518 U.S. at 91, 98–100.

39. *See* 1999 SOURCEBOOK, *supra* note 4, at 51 fig.G (showing that the percentage of cases sentenced within the guidelines steadily had fallen from 71.1% in 1995 to 64.9% in 1999, while the number of non-government-sponsored downward departures had risen from 8.4% to 15.8% during that same period).

40. Prosecutorial Remedies and Others Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 401, 117 Stat. 650, 667–75 (codified at 18 U.S.C. § 2251 (2006)).

downward departures.[41] It amended the SRA to provide for a maximum—rather than, as before, a minimum—of three federal judges as members of the Commission.[42] The legislation also dictated precise changes in the child pornography guidelines, mandating specific offense levels for certain conduct and severely restricting downward departures in these and other types of cases. The Act provided a return to pre-*Koon* de novo appellate review in all types of federal criminal cases.[43] Finally it contained a directive to the Commission to "substantially reduce" the number of downward departures generally.[44]

The Supreme Court responded quickly with a series of cases which had the effect of dramatically reclaiming judicial discretion in sentencing. In *Blakely v. Washington*,[45] construing a state "presumptive" guideline scheme, the Court held that if a guideline system ordinarily requires a sentence to be imposed within a certain guidelines range (typically well below the statutory maximum of the relevant penal statute), a jury, not a judge, must find beyond a reasonable doubt the facts justifying a sentence above the otherwise applicable guideline range.[46] In other words, a defendant has a right to have a jury decide whenever a proposed sentence is above the guideline range. *Booker v. United States*[47] soon followed, in which the Court essentially applied the *Blakely* decision to the federal guidelines. In *Booker*, the Court held that, as long as the guidelines remained mandatory, a sentencing court would violate the Constitution if it increased an offender's sentence above the guidelines range based on

41. Susan R. Klein & Sandra Guerra Thompson, *DOJ's Attack on Federal Judicial "Leniency," the Supreme Court's Response, and the Future of Criminal Sentencing*, 44 TULSA L. REV. 519, 530 (2009).

42. *Id.*

43. *See id.* at 531–32.

44. *Id.* at 532.

45. 542 U.S. 296 (2004).

46. *Id.* at 301–05; *see also Spears v. United States*, 555 U.S. 261 (2009) (per curiam) (approving district court's rejection of guidelines' 100:1 crack/powder cocaine ratio and substitution of court's own 20:1 ratio); *Nelson v. United States*, 555 U.S. 350 (2009) (per curiam) (district court erred by applying a presumption of reasonableness to guidelines sentence; only appellate courts may apply such a presumption); *United States v. Booker*, 543 U.S. 220 (2005) (applying *Blakely* to the federal sentencing guidelines and, as a remedy, rendering them "advisory"); *United States v. Irey*, 612 F.3d 1160, 1236–37 (11th Cir. 2010) (en banc) (Tjoflat, J., specially concurring in part and dissenting in part) ("*Booker* redistributed the roles in sentencing offenders between the Commission, the district courts, and the courts of appeals. The Commission no longer framed the district courts' sentencing discretion with mandatory guidelines; instead, it would inform the district courts' sentencing discretion with advisory guidelines. The district courts once again bore the responsibility of independently crafting sentences.").

47. 543 U.S. 220 (2005).

aggravating facts not found beyond a reasonable doubt by a jury.[48] It then obviated the constitutional issue by judicially rewriting the SRA to make the guidelines merely advisory.[49] Judges were to apply a three-step process in passing sentence.[50] First, since the guidelines remained an important part in the sentencing process, judges were to make the guideline calculations and establish a guideline range. Next, they were to determine if any departure grounds were applicable. Finally, sentencing courts were to consider the factors set forth in 18 U.S.C. § 3553(a) to determine if the guideline sentence was greater than necessary to satisfy the purposes of sentencing. Many of the § 3553(a) factors require a sentencing court to consider the personal characteristics of the offender in establishing a fair and just sentence, factors generally discouraged by the guidelines.

Two subsequent decisions in 2007 reinforced *Booker*. In *Kimbrough v. United States*,[51] a case addressing application of the crack-powder cocaine disparity within the guidelines, the Supreme Court held that district courts are free to reject particular guidelines as a matter of "policy" differences with Congress's and the Commission's judgments and to vary from the guidelines to impose a non-guideline sentence under 18 U.S.C. § 3553(a).[52] In *Gall v. United States*,[53] the Court rejected the government's argument that a district court may not impose a non-guidelines sentence except in an extraordinary case.[54] *Kimbrough* and *Gall* have been applied most recently in *Pepper v. United States*,[55] in which the Court held that sentencing judges may reject policy determinations made by the Commission and impose non-guideline sentences if they disagree with the Commission's views.[56] As a consequence of *Booker*, *Kimbrough*, *Gall*, and now *Pepper*, district courts must give the Commission's policy directives "respectful consideration" but are free to reject policy directives from Congress and the Commission in appropriate circumstances,[57] a clear challenge to

48. *Id.* at 226–27.

49. *Id.* at 259–60.

50. *Cf. id.* (clarifying that with its unconstitutional provisions excised, the SRA still dictates that judges review the guideline range for each offender and weigh the factors in 18 U.S.C. § 3553(a) in determining the proper sentence to impose).

51. 552 U.S. 85 (2007).

52. *Id.*; *see also Rita v. United States*, 551 U.S. 338, 350 (2007).

53. 552 U.S. 38 (2007).

54. *Id.* at 47.

55. 131 S. Ct. 1229 (2011).

56. *Id.* at 1247.

57. In fiscal year 2009, 56.8% of federal sentences were imposed within the applicable guidelines range; another 25.3% were the result of a government-sponsored downward departure, and 15.9% were imposed outside of the applicable guidelines range without a government motion. 2009 SOURCEBOOK, *supra* note 4, tbl.N. By way of

Congress's and the Commission's roles in sentencing. Courts have increasingly imposed sentences outside the guideline range, and in only the most extreme cases have the courts of appeal reversed such variances as "substantively unreasonable."[58]

Justice Breyer stated in his opinion in *Booker* that the "ball" is now in Congress's court, suggesting Congress needs to take the next step in this evolving process.[59] To date, there has been no *Booker* "fix," if what is meant by such a "fix" is one piece of legislation which will dramatically limit the exercise of judicial discretion. But the real "fix" is in the passage of more mandatory minimum sentences in which Congress sets the sentence. The call for more and more mandatory minimum sentences has increased among members of Congress. We may see legislation along the lines of the PROTECT Act, designed to roll back judicial discretion and to establish congressional will through a reinforced guideline system, or, as has been happening since *Booker*, we may see more and more mandatory minimum sentences. Either way, Congress appears poised to act.

IV. WHERE ARE WE NOW AND WHERE ARE WE HEADING?

The framers of the guidelines system envisioned an independent, bipartisan body staffed by experts in sentencing policy who would create, monitor, and modify, as warranted, a set of guidelines that would be followed by judges and practitioners. Congress envisioned the guidelines would have a certain level of flexibility to permit judges to adjust sentences based upon individualized factors and that judges would respect the policy-making role of Congress in setting statutory penalty ranges.[60] Congress had intended to set maximum, and in rare cases, minimum penalties as criminal sanctions but to refrain from defining and adjusting individual guidelines.

In the past twenty-five years, the guidelines system has undergone seismic shifts in policy, prompted by decisions of Congress and the

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comparison, in the decade or so before *Booker*, defendants received within-range sentences in approximately two-thirds to three-fourths of cases. *See* U.S. SENTENCING COMM'N, 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.G (2004) [hereinafter 2004 SOURCEBOOK] (noting varying percentages of within-range sentences from 1992 to 2004, which ranged from 64% to 78%). There has been a slow but steady decrease of within-guidelines sentences since *Booker*.

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

59. *See Booker v. United States*, 543 U.S. 220, 265 (2005) ("Ours, of course, is not the last word: The ball now lies in Congress' court [to retool the guidelines system].").

60. *See* Feinberg, *supra* note 11, at 297.

Supreme Court.[61] Now is a suitable time to reflect upon the system as a whole, especially to assess it in comparison with the intentions and expectations of those who created it. In particular, what impact have those changes in policy had upon federal sentencing practices?

For the answer, we turn to studies and sentencing statistics compiled by the Commission. Each sentence imposed in the federal system is forwarded to the Commission for analysis. The Commission reports the results of its analyses of all federal sentences on an annual basis. Trends taken from those statistics form the basis of policy decisions made by the Commission.

A. Judges and the Guidelines Culture

In 1987, when the federal sentencing guidelines first went into effect, the notion of sentencing pursuant to mandatory guidelines and a numeric grid was foreign to everyone in the federal criminal justice system. More than anyone, federal district judges balked at the guidelines as anathema to the concept of "judging."[62] A quarter-century later, a different view of sentencing guidelines prevails among district judges—the vast majority of whom were appointed to the bench after the guidelines went into effect. The Commission conducted a survey of district judges in 2010 to explore their views regarding the functioning of the guideline system. Seventy-five percent of responding judges preferred the *Booker* "advisory" system currently in place to the pre-*Booker* "mandatory" system.[63] Yet most judges are supportive of the

61. *See, e.g.*, Bowman, *supra* note 28, at 1333 ("The guidelines system was supposed to remedy the former system's excessive reliance on judicial discretion by distributing sentenc[ing] authority between the relevant institutional actors. This hoped-for institutional balance has broken down; the former unwarranted judicial and parole board hegemony over sentences has been replaced by an alliance of the Department of Justice and Congress at the rulemaking level, and [by] excessive control by prosecutors at the individual case level."); Michael Goldsmith, *Reconsidering the Constitutionality of Federal Sentencing Guidelines after* Blakely: *A Former Commissioner's Perspective*, 2004 BYU L. REV. 935, 943 ("Although Congress established the Sentencing Commission as an independent agency within the judicial branch, neither Congress nor the judiciary completely accepted the sentencing guidelines. At different times, both of these branches of government attempted to override the Sentencing Commission's authority.").

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

63. *See* U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 tbl.19 (2010) [hereinafter 2010 SURVEY] (noting that seventy-five percent of judges questioned favor the "advisory" guidelines to the former "mandatory" system or to the system that existed before the SRA).

guidelines structure. In that same survey, seventy-eight percent opined that the guidelines reduced disparity, and sixty-seven percent felt that the guidelines increased fairness.[64] Judges support the "real offense" sentencing model upon which the federal guidelines are based, including "relevant conduct" and the preponderance of evidence standard applicable at sentencing.[65] With exceptions for possession of child pornography and crack cocaine offenses, most judges do not object to the overall severity of the Guidelines offense levels. That observation is supported by sentencing statistics which show that, with the exception of sentences for crack-cocaine and possession of child pornography, the average length of imprisonment for all other offenses has remained relatively constant over the past ten years, despite *Booker* and its progeny.[66] Even when judges depart from guideline ranges, the average length of those adjustments has remained consistent and relatively modest.[67] Essentially, then, the guidelines have become accepted as part of the culture of the federal criminal justice system.

But patterns in post-*Booker* sentencing statistics suggest signs of increasing disparities among districts and circuits and within individual

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64. *See id.* at tbl.17. Seventy-eight percent of judges questioned "somewhat agree[d]" or "strongly agree[d]" that "[o]verall the federal sentencing guidelines have reduced unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct"; and sixty-seven percent of judges questioned "somewhat agree[d]" or "strongly agree[d]" that "[o]verall, the federal sentencing guidelines have increased fairness in meeting the purposes of sentencing." *Id.*

65. *See id.* at tbls.5 & 6; *see also* U.S. SENTENCING GUIDELINES MANUAL, § 1B1.3 (2010) (relevant conduct provision); *id.* § 6A1.3, cmt. ("The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."). Seventy-nine percent of judges questioned believed that "[a]ll reasonably foreseeable acts and omissions of others in furtherance of a jointly undertaken criminal activity" should be considered relevant conduct for sentencing purposes; 69% agreed that "[f]acts establishing the base offense level" should be found by a preponderance of the evidence; 85% believed that the preponderance standard was appropriate to establish facts supporting a departure from the otherwise applicable guideline range; and 87% believed that the preponderance standard was appropriate to establish facts supporting a variance. 2010 SURVEY, *supra* note 63, at tbls.5 & 6.

66. *Compare* U.S. SENTENCING COMM'N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.13 (2000) [hereinafter 2000 SOURCEBOOK] (average sentence length for all crimes was 46.9 months and median sentence length was 24.0 months), *with* 2009 SOURCEBOOK, *supra* note 4, at tbl.13 (average sentence length for all crimes was 46.8 months and median sentence length was 24.0 months).

67. *Compare* 2000 SOURCEBOOK, *supra* note 66, at tbl.31 (median decrease from the guidelines' ranges for departures is 40%), *with* 2009 SOURCEBOOK, *supra* note 4, at tbls.31A, 31B, 31C & 31D (median decrease from the guidelines for departures is 28.5% and median decrease from the guidelines for variances is 34.8%).

courthouses.[68] Sentences within the applicable guideline range slipped from 56.8% in 2009 to 55.5% by the end of 2010.[69] Judicially initiated departures or variances have increased from 13.4% in 2008 to 17.8% in 2010.[70] Comparison of sentencing statistics among circuits reveals even more significant disparities. In 2010, defendants in the District of Columbia Circuit were given sentences within the applicable guideline range in only 33.4% of cases, while judges in the Fifth Circuit imposed guideline sentences in 71.3% of cases.[71] In the First Circuit, within-range sentences in the District of Massachusetts represented only 32.1% of cases, while in the District of Puerto Rico within-range sentences represented 73.0% of all cases.[72] In a recent article published

68. *See* U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE *BOOKER REPORT'S* MULTIVARIATE REGRESSION ANALYSIS (2010); Ryan W. Scott, *The Effects of* Booker *on Inter-Judge Sentencing Disparity*, 22 FED. SENT'G REP. 104 (2009); *see also* Ryan W. Scott, *Inter-Judge Sentencing Disparity after* Booker*: A First Look*, 63 STAN. L. REV. 1 (2010) [hereinafter Scott, *A First Look*]. In 2004, James Felman, a leading member of the federal defense bar, predicted such disparities would increase in an advisory guidelines system. *See* James Felman, *How Should Congress Respond If the Supreme Court Strikes Down the Federal Sentencing Guidelines?*, 17 FED. SENT'G REP. 97, 98–99 (2004) ("It seems likely that unwarranted disparity in the near term [after *Booker*] would be considerably less than that which existed prior to 1987. . . . [But] there will be a minority of judges who will generate unwarranted disparity, and this number seems likely to increase as the years go by and the bench is filled with individuals who have no history with binding guidelines."). Earlier studies showed that inter-judge sentencing disparities decreased from the pre-SRA era under the then-mandatory federal guidelines. *See, e.g.*, James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and after the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 303 (1999) ("The Guidelines have reduced the net variation in sentence attributable to the happenstance of the identity of the sentencing judge."); Paul J. Hofer, Kevin R. Blackwell & R. Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 241 (1999) ("Together with the other research reviewed below, [our] findings suggest that the sentencing guidelines have had modest but meaningful success at reducing unwarranted disparity among judges in the sentences imposed on similar crimes and offenders."). The Commission's recent study showed that demographic differences were significantly less when the guidelines were binding (particularly during the PROTECT Act period, when appellate review of departures involved *de novo* review). *See* DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES, *supra*, at 22 fig.C.

69. *Compare* U.S. SENTENCING COMM'N, FINAL QUARTERLY DATA REPORT 1 tbl.1 (2010) [herinafter 2010 FINAL DATA REPORT], *with* 2009 SOURCEBOOK, *supra* note 4, at tbl.N.

70. *Compare* U.S. SENTENCING COMM'N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.N (2008) (percentage of "Non-Government Sponsored Below Range" sentences), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2008/SBTOC08.htm, *with* 2010 FINAL DATA REPORT, *supra* note 69, at tbl.1 (same).

71. 2010 FINAL DATA REPORT, *supra* note 69, at tbl.2.

72. *Id.*

in the *Stanford Law Review* studying the post-*Booker* sentencing patterns of judges in Boston, Professor Ryan W. Scott observed a dramatic spike in inter-judge sentencing disparity.[73]

The Commission's sentencing statistics reflect a troubling increase in sentencing disparities—both inter-judge and demographic disparities. As noted earlier, the primary purpose of the SRA was to reduce unwarranted disparities in sentencing. If Congress concludes, based upon national statistics, that the current guidelines system fails to reduce unwarranted disparities because of inconsistent sentencing practices under the advisory regime, the most obvious remedy is the increased use of mandatory minimum sentences.

B. Mandatory Minimum Sentences

The initial Sentencing Commission created a guideline structure that was "mandatory" or "presumptive," whereby judges were discouraged from departing from applicable guideline ranges absent exceptional circumstances. Mandatory minimum sentences were unnecessary in such a system, as the guidelines had adequate authority to direct that certain sentences be imposed. In 1991, the Commission filed a report with Congress opposing the use of mandatory minimum sentences as inconsistent with a rational guideline structure.[74] However, Congress's commitment to the guideline system has been inconsistent. There are over 170 provisions which bear mandatory minimum sentences.[75] In 2010, twenty-seven percent of the federal criminal cases subject to sentencing guidelines involved statutes that carried mandatory minimums.[76] The impact of mandatory minimum sentences is further exacerbated by the Commission's decision to tie the guidelines to mandatory minimum sentences[77] and Congress's directive in the PROTECT Act to require the Commission to adopt guidelines that are "consistent with all pertinent provisions of any Federal statute."[78] In practice, the Commission has increased guidelines penalties each time a new mandatory minimum sentence is passed by Congress. As a result,

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73. Scott, *A First Look, supra* note 68.

74. *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991).

75. *Mandatory Minimum Sentencing Laws—The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 6 (2007) (statement of Ricardo H. Hinojosa, Chairman, United States Sentencing Commission).

76. U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM ch. 7, at 121 (2011).

77. *See supra* note 26 and accompanying text.

78. 28 U.S.C. § 994(a) (2006).

penalties have increased significantly over time, resulting in the dramatic increase in the federal prison population I described earlier.[79]

It is not my intention to dwell on the wisdom of mandatory minimum sentencing as a matter of policy or to criticize the Commission's linkage of the guideline ranges to mandatory minimums. Congress has the constitutional authority to establish sentencing policy. It may be true that creating mandatory minimum sentences with penalties at relatively low levels could further a worthy goal by helping to ensure certainty of punishment while leaving to judges and practitioners the ultimate authority to determine appropriate sentences.[80] The problem lies with mandatory minimum sentences that require significant lengths of imprisonment. Those sentences are overly blunt instruments, bringing undue focus upon the charge of which a defendant is convicted, to the exclusion of other important considerations, including role in the offense, use of guns and violence, criminal history, risk of recidivism, and many personal characteristics of the individual defendant. Mandatory minimum sentences set at severe thresholds increase disrespect for the guideline system and encourage practitioners to use techniques to circumvent their implementation.[81]

C. Specific Directives from Congress

Congress's use of specific directives to the Commission to amend guidelines provisions has increased significantly over the past decade. The directives have had varying degrees of flexibility in implementing changes to penalties. The PROTECT Act marked a dramatic change in the nature of directives to the Commission. In that statute, Congress

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79. *See supra* notes 3–4 and accompanying text.

80. Both prosecutors and law enforcement officials repeatedly have informed the Sentencing Commission that mandatory sentencing penalties are necessary to inspire meaningful cooperation from defendants (which allows for more effective law enforcement). *See, e.g.*, Patrick Fitzgerald, U.S. Attorney, Statement Before the United States Sentencing Commission Public Hearing (Sept. 10, 2009) ("Mandatory minimum sentences have been a very effective tool in prosecuting particularly violent offenders. The threat of mandatory minimum sentences has caused many persons charged with these offenses to become cooperative witnesses, often testifying against persons with greater responsibility in the drug or gang organization. And the threat of mandatory minimum sentences also has caused some people not to commit such offenses and, thus, not go to jail at all.").

81. Proffessor Bowman has commented on the actions of front-line criminal justice actors to reduce the severity of drug sentences. *See* Bowman, *supra* note 28, at 1330; Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 559–60 (2002).

directed the Commission to make specific changes to guidelines, including incorporating certain increases in enhancements based upon conduct Congress felt worthy of such changes.[82] That meant the Commission could not conduct rigorous empirical research before amending the guidelines, nor could the Commission ensure that the changes were consistent with other guidelines.[83] In an advisory guidelines system, the Commission must be able to demonstrate to judges and practitioners that its changes to the guidelines have been empirically researched and justified. The Commission's inability to justify amendments dictated by Congress fosters disrespect for the guidelines system. Moreover, specific directives from Congress result in guidelines that are oftentimes criticized for their complexity and their inconsistency with other provisions in the manual.

But the most important reason to eliminate or reduce specific congressional directives is that they marginalize the role of the Commission in creating sentencing policy. The Commission's role is to perform as the expert body in the field. The Commission must respect Congress's role in sentencing, but at the same time be able to exercise independent judgment. The Commission's acceptance by the criminal justice community depends upon respect for the exercise of its expertise, and specific directives which usurp its policy-making function debase that respect.

D. Offender Characteristics

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

82. Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 420 n.262 (2010) ("Congress began to recognize the political utility of tweaking the Guidelines to raise sentences for the crime *du jour* . . . ." (emphasis added)). The Fair Sentencing Act of 2010, which contained numerous specific directives requiring increases in guidelines levels in drug-trafficking cases, is a prime example. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372; *see also* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10606, 124 Stat. 119, 1006–09 (2010) (specific directive to Sentencing Commission concerning health-care fraud).

83. *See* Klein & Thompson, *supra* note 41, at 530–33.

arriving at sentences that are no greater than necessary to satisfy the purposes in sentencing.)

The original Commission interpreted the SRA as discouraging the consideration of most offender characteristics at sentencing.[84] The original guidelines thus instructed that age, mental condition, physical condition, and military history, among other factors, were not ordinarily relevant to a judge's assessment of a proper sentence.[85] Such a limitation created confusion among judges, since § 3553(a)(1) instructed them—without limitation—to consider "the history and characteristics of the defendant" in imposing sentence.

During the past year, the Commission made great progress in changing policy in regard to applying offender characteristics as a part of the guideline system. Factors such as age, mental, physical, or emotional condition, and military history may now be relevant in certain circumstances.[86] The Commission has more to do in this arena, by expanding the use of offender characteristics in sentencing and by educating judges and practitioners on social science research related to use of these characteristics. Often there are volumes of research addressing the relevance of characteristics such as age to risk of recidivism. The role of educating judges on the relevance of offender characteristics is a new, but vital, one. It should be a central part of the Commission's function as the expert body in the sentencing policy arena.

V. PROPOSAL FOR A REFORMED GUIDELINES SYSTEM THAT RENEWS THE SPIRIT OF THE SENTENCING REFORM ACT OF 1984

It is entirely reasonable, indeed enlightened, to seek to avoid disparities in sentencing between different judges who sentence similar defendants with similar backgrounds who commit similar crimes. Critics of guidelines who decry unwarranted uniformity in guidelines sentences also have a point.[87] A fair and rational sentencing system would not impose similar sentences on defendants who are dissimilar in significant, relevant respects, regarding either their own personal characteristics or the circumstances of their offenses. Determining what

84. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H (1989) (providing that offender characteristics such as age and education are "not ordinarily relevant in determining whether a sentence should be outside the guidelines").

85. *Id.*

86. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.1–.3 (2010).

87. *See, e.g.*, KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 106 (1998).

characteristics are relevant at sentencing to distinguish among offenders who committed similar criminal offenses is the rub.

The Sentencing Commission has promulgated guidelines that identify myriad factors it feels are "relevant" in the sentencing decision. The current set of guidelines is an extremely detailed and complex collection of policy choices by the Commission, and in some cases by Congress,[88] which has been monitored and informed by actual sentencing practices. The Guidelines seek to achieve balance among the three most important yet competing considerations in a rational, humane, and cost-effective sentencing system: (1) avoiding unwarranted sentencing disparities between similarly situated defendants; (2) treating defendants as unique human beings with unique personal characteristics and criminal histories; and (3) protecting the public from future crimes in a cost-effective manner. Twenty-five years under the Federal Sentencing Guidelines has taught that its level of complexity has failed to achieve the appropriate balance among those objectives. The reasons why our complex system fails to achieve the correct balance are straightforward: it tends to minimize the fact that sentencing judges are thoroughly competent to exercise discretion in sentencing defendants based on a totality of unique facts and circumstances. A sentencing system should strike a balance between limiting judges' abilities to use their own subjective sense of justice so as to reduce disparity and offering judges the right to consider unique aspects of offenders and the offenses that they committed in fashioning an appropriate sentence. Too much complexity in the Guidelines for the purpose of limiting judicial discretion puts a thumb on the scales in favor of the former, while too much simplicity as a means of affording significant discretion puts a thumb on the scale in favor of the latter.

As an initial matter, I agree with Professor Kevin Reitz, the reporter for the ALI's Model Penal Code's Sentencing Revision, that "[v]oluntary [guidelines] provisions are by definition unenforceable and thus allow for the re-emergence of sentencing disparities that motivated many American sentencing reforms in the first instance."[89] "Binding

88. Although Congress in the SRA afforded the Commission wide latitude to consider the relevance of most offender and offense characteristics, *see* 28 U.S.C. § 994(c), (d)(1)-(11) (2006), Congress specifically decreed that the Commission make certain offender characteristics either "generally inappropriate[]" to be considered in sentencing (such as a defendant's family ties or employment record) or entirely irrelevant (such as defendant's socio-economic status, race, or gender), 28 U.S.C. § 994(d)-(e).

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

guidelines and searching appellate review are needed to make sentencing more consistent and legitimate."[90] If the guidelines are once again presumptive, as they were before *Booker*, there will be little if any need for severe mandatory minimum statutory provisions, which are contrary to a rational guidelines system. In the words of Senators Kennedy, Orrin G. Hatch, and Diane Feinstein, who filed an amicus curiae brief in *Booker*—presumptive guidelines:

> offer[] a middle-ground approach between sticking with the failed [pre-SRA] indeterminate system of sentencing and adopting a rigid system of determinate sentencing, in which Congress specifie[s] applicable sentences for federal offenses and judges simply impose[] sentence without any individualized consideration of the offender or his criminal conduct.[91]

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

A. Broader Presumptive Ranges with Advisory Sub-ranges

The sentencing grid is the most important part of a guidelines system because it provides the mechanism for implementing the calculations that consider both offense and offender characteristics.[92] The current table has forty-three offense levels and six criminal history categories. Add to that complexity a vast array of different guidelines that have grown increasingly detailed over the years as a result of the "factor creep" described earlier,[93] many of which have invited litigation over sentencing minutiae. A simpler grid with fewer and broader

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

91. Brief for the Honorable Orrin G. Hatch, Honorable Edward M. Kennedy, and Honorable Dianne Feinstein as Amici Curiae in Support of Petitioner, *United States v. Booker*, 543 U.S. 220 (2005) (No. 04-104), 2004 WL 1950640, at *4–5.

92. Bowman, *supra* note 28, at 1324 ("The federal sentencing guidelines are, in a sense, simply a long set of instructions for one chart: the sentencing table.").

93. *See* Ruback & Wroblewski, *supra* note 32, at 752–53; *supra* text accompanying note 32.

sentencing ranges would be the most significant reform in the federal guidelines structure.

I recommend consolidating offense levels and criminal history categories to reduce the current system's use of 258 possible ranges or cells to between 30 and 50 ranges.[94] Rather than having separate cells for each of the 43 offense levels, my proposal would tie groups of offense levels to a single broader cell on the grid. As an example, I would tie offense levels 10 through 18 into a single cell, suggesting offenders with scores at the lower and higher levels of the range be sentenced toward the bottom and at the top end of the sentencing range accordingly. I propose including three sub-ranges within each larger cell. The middle of the three ranges would represent the appropriate sentencing range for a typical case in that cell. This simplified grid would include certain cells that would afford court discretion to impose an alternative sentence, such as probation with conditions of home detention or community confinement.[95] I have intentionally broadened the use of alternatives to imprisonment in my proposed grid. I agree with Attorney General Eric Holder that being "smart on crime" requires openness to alternative sentences in appropriate cases.[96] That principle applies particularly in the case of a "first offender who has not been convicted of a crime of violence or an otherwise serious offense."[97]

The current guidelines' use of six criminal history categories is sound and is based on solid empirical evidence related to recidivism, which is the primary reason for considering a defendant's criminal history as a basis for increasing punishment.[98] However for the sake of

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94. Typical state guidelines grids offer such a model. *See* NEAL B. KAUDER & BRIAN J. OSTROM, NAT'L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM (2008), *available at* http://www.pewcenteronthestates.org/uploadedFiles/NCSC_Sentencing_Guidelines_profiles_July_2008.pdf (describing the simplified sentencing grids of the states with sentencing guidelines).

95. *Cf.* U.S SENTENCING GUIDELINES MANUAL §§ 5B1.1, 5C1.1(b)-(e) (2010) (providing for alternatives to straight imprisonment for defendants who fall in Zones A, B, and C of the Sentencing Table). I note that my proposal would expand the availability of alternative sentences a small degree beyond the current Sentencing Table. To achieve further simplification, I also propose that a sentencing judge have the discretion to impose probation with the conditions of home confinement or community confinement in any case that falls in the italicized cells on my proposed sentencing table (in addition to the option of a split sentence of such alternative confinement coupled with some imprisonment).

96. *See* Eric Holder, U.S. Attorney General, Address at the Vera Institute of Justice (July 9, 2009), *available at* http://www.justice.gov/ag/speeches/2009/ag-speech-090709.html.

97. *See* 28 U.S.C. § 994(j) (2006).

98. *See* U.S. SENTENCING COMM'N, RECIDIVISM AND THE "FIRST OFFENDER" (2004), *available at* http://www.ussc.gov/Research/Research_Publications/Recidivism/

simplification and without undercutting the predictive value of a defendant's criminal history score, I propose that the six categories be reduced to four in a manner that would still adequately take recidivism into consideration.[99]

Central to my proposal is a fundamental prerequisite: the resurrection of a presumptive guideline system in response to a reduction in the use of mandatory minimum sentences. My proposed guideline system would pass constitutional muster under both *Blakely* and *Booker*.[100] In calculating a defendant's offense level so as to determine in which cell on the grid a defendant would fall, a judge would be constrained by the Sixth Amendment principle outlined in *Blakely*—meaning that any facts that would increase the base offense level in a manner that also would increase the maximum of the applicable cell on the grid would have to be submitted to a jury and proved beyond a reasonable doubt. Some core aggravating facts, such as drug quantity, loss amount, use of weapons and violence enhancements may require a jury determination, since those factors would impact changes in grid scores. Of course, there is nothing unusual about jury involvement in sentencing in our jurisprudence. As Judge Richard Posner stated in the lower court opinion in *Booker*, "[t]here is no novelty in a separate jury trial with regard to the sentence, just as there is no novelty in a bifurcated jury trial."[101]

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z200405_Recidivism_First_Offender.pdf; U.S. SENTENCING COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATIONS OF THE FEDERAL SENTENCING GUIDELINES (2004), *available at* http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_Criminal_History.pdf [hereinafter MEASURING RECIDIVISM].

99. *Measuring Recidivism* presented analyses that demonstrated the predictive accuracy of the guidelines' Criminal History Categories ("CHCs") while using both a broad and more narrow definition of recidivism. MEASURING RECIDIVISM, *supra* note 98, at 6–8. When using the broadest definition of recidivism (which included not only reconviction but any arrest or violation of supervised release or probation) a linear relationship was found between CHC and the percentage of offenders recidivating. That is, the greater the Criminal History Category, the larger the proportion of offenders recidivating. *See id.* at 6–7. Analyses focusing on the more narrow definition of recidivism—requiring a re-conviction of an offense—also demonstrated the linear relationship between CHC and percentage of offenders recidivating. However, in the latter analysis, differences between the six CHCs were smaller. *See id.* at 21–23. Based on both these analyses, it appears that the number of CHCs could be reduced from six to four while maintaining the predictive utility of the Sentencing Table. Put another way, in my Sentencing Table's four CHCs, each category corresponds to meaningful gradations in recidivism rates.

100. *See Blakely v. Washington*, 542 U.S. 296, 299–300 (2004) (describing the presumptive nature of Washington's guidelines, whereby a sentencing judge was required to impose a sentence within the applicable guidelines range absent a finding of "exceptional" circumstances); *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004).

101. *Booker*, 375 F.3d at 514.

My proposal includes an important "advisory" aspect to the otherwise presumptive nature of the guidelines. Within each cell on the grid, a judge would have discretion to impose a sentence within any of the three sub-ranges. In this sense, the within-cell ranges would be advisory, in the same manner as the entire guideline table is now advisory under *Booker*.[102] Because the sub-ranges would be advisory, a sentencing judge could impose, consistent with the Constitution, a sentence anywhere within the larger cell; aggravating factors that would not alter the calculation of which larger cell a defendant falls in would not be subject to *Blakely* requirements.[103] I envision judges considering aggravating and mitigating circumstances in deciding where within the larger cell the sentence will fall. In our current parlance, my system would be "*Blakely*-ized" with respect to the larger cells but "*Booker*-ized" with respect to the three sub-ranges within each cell.

B. Simpler Guidelines

Another proposal for simplification would reduce the number of numeric aggravating and mitigating factors[104] in the Guidelines that result in increases and occasional decreases in the base offense level.[105] The current complex scheme of aggravating factors "has provided an

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102. *See Gall v. United States*, 552 U.S. 38, 49 (2007).

103. *See Booker v. United States*, 543 U.S. 220, 258–69 (2005) (invalidating those portions of the SRA that made the sentencing guidelines "mandatory," thus rendering the guidelines "effectively advisory").

104. Simplification of mitigators (at least those in Chapter 2) would be much easier to accomplish than simplification of aggravators—in that there are very few mitigators that *reduce* a defendant's offense level in the Chapter Two guidelines compared to the large number of aggravators that *increase* a defendant's offense level. *Compare, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b)(2) (2010) (stating in the firearms guideline that the court should reduce a defendant's base offense level to six if the defendant illegally possessed the firearm "solely for lawful sporting purposes or collection"), *with id.* § 2K2.1(b)(4) (stating that the court should increase defendant's base offense level by two or four if the firearm was stolen or had an obliterated serial number at the time of its illegal possession).

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

opening for continued congressional intervention in the details of sentencing law."[106]

As a means of achieving meaningful simplification, the system would distinguish between two types of aggravating factors: (1) those core aggravators that impact which cell is to be applied and must be proven beyond a reasonable doubt to a jury; and (2) a second type of aggravator that would be advisory and would be relegated to the application notes following the relevant guideline. The core aggravators would continue to have numeric values, since they will be applied to determine the applicable cell. The advisory aggravating factors will have no numeric value and would be the basis of a judge's exercise of discretion to impose a sentence in the higher sub-range within a particular cell. Most of the Chapter Three adjustments, such as obstruction of justice and role in offense,[107] would become advisory considerations for choosing sub-ranges within a cell. The one exception would be acceptance of responsibility, which would continue to involve a numeric reduction in the offense level.

In retooling the guidelines in the manner I have described here, the Sentencing Commission would be required to make difficult policy choices in deciding which aggravators would remain in the guidelines and which would become advisory considerations in the application notes.[108] But that potential difficulty should not bar this type of simplification reform.

C. Relevant Conduct

Uncharged relevant conduct would play a much more limited role in my proposed guideline system.[109] In a *Blakely*-ized system, an offense level could not be adjusted upward based on conduct that is not charged in an indictment and proved to a jury beyond a reasonable doubt. Uncharged relevant conduct could only be used to sentence within a larger cell on the simplified grid (and then only if found by the

106. Bowman, *supra* note 28, at 1341.

107. *See* U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2010).

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

109. This would appeal to most federal district judges. *See* 2010 SURVEY, *supra* note 63, at tbl.5 (only 32% of judges believed that "[u]ncharged conduct referenced only in the presentence report" should be considered, as opposed to 77% who believed that it was appropriate to consider "[u]ncharged conducted that is presented at trial or admitted by the defendant in court").

court by a preponderance of the evidence). Acquitted conduct, a highly controversial topic in the post-SRA era,[110] could not increase a defendant's offense level, but could be considered within sub-ranges.

D. Departures and Variances

The new system would significantly affect the practice of "departures" and "variances,"[111] both the upward and downward varieties. Variances and departures would be merged, since the guidelines would become presumptive and factors within § 3553(a) would be incorporated within the guideline structure. Upward departures would no longer be available. Most of the upward departures granted in the current system, which have consistently taken place in less than two percent of the cases,[112] would be subsumed within the expanded ranges. The other upward departures—those that would increase sentences beyond the expanded ranges—would require notice and proof to a jury beyond a reasonable doubt in the *Blakely*-ized system.

Judges would continue to have the discretion to depart downward from the guideline structure, although discretion to depart would be based on truly extraordinary offender or offense characteristics.[113] The system would not change the current rules concerning a sentencing court's consideration of a defendant's prior convictions. A defendant's criminal record would remain an important consideration under Chapter Four of the Guidelines. The current practice of downward departures

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110. *See id.* (only 16% of judges surveyed believed that "acquitted conduct" should be considered at sentencing).

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

112. *See* 2009 SOURCEBOOK, *supra* note 4, at tbl.N (showing only 2.0% of cases sentenced above applicable guidelines range).

113. In the past year, the Commission has amended Chapter Five of the guidelines to permit broader consideration of certain offender characteristics. *See* U.S. SENTENCING COMM'N, SENTENCING GUIDELINES FOR UNITED STATES COURTS 11–21 (2010), *available at* http://www.ussc.gov/Legal/Federal_Register_Notices/20100511_Submission_to_Congress.pdf (notice to Congress of amendments). The Commission also has stated its intent to continue its study of Chapter Five to consider additional amendments allowing for broader consideration of other offender characteristics. *See Sentencing Guidelines for United States Courts: A Notice by the United States Sentencing Commission on 09/08/2010*, FED. REG., https://www.federalregister.gov/articles/2010/09/08/2010-22340/sentencing-guidelines-for-united-states-courts. Although broader consideration of certain offender characteristics is permitted under the recently amended provisions in Chapter Five, the guidelines still contemplate relatively few departures based on offender characteristics. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2010).

based on a defendant's "substantial assistance" to the authorities under § 5K1.1 of the *Guidelines Manual* would continue as well.

E. Heightened Appellate Scrutiny

The issue of appellate review in a simplified system is critical.[114] To put it bluntly, as others have, "[t]he threat of reversal [on appeal] is a key component of [effective] guidelines."[115] In this post-*Booker* world,[116] there is a good deal of confusion and uncertainty about whether there is any meaningful appellate review of sentences.[117] Appellate review in the system I propose would promote the legitimacy of the new presumptive guidelines. Appeals would involve a determination whether the judge applied the guidelines correctly. District courts' choices of sentences within an applicable cell on the grid would be essentially unreviewable on appeal as long as the courts considered all of the relevant aggravating and mitigating factors and all relevant factors in the manual. Government appeals of downward departures[118] would receive relatively strict scrutiny by the appellate courts, thereby maintaining the presumptive nature of the simplified guideline system.

F. Benefits of Proposed Guideline System

The presumptive system I have described is aimed at reducing unwarranted sentencing disparities, yet it also seeks to afford sentencing judges meaningful discretion within broader ranges to consider relevant offense and offender characteristics. It would be much simpler to implement, it would reduce disparities by reducing

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

115. Bibas, *supra* note 90, at 1371; *see also* Michael M. O'Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 WM. & MARY L. REV. 2123 (2010).

116. *See, e.g.*, *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007).

117. *See* Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 3–4 (2008) (noting "the confusion that the Court's sentencing review cases have created" since *Booker*).

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

departures,[119] and it would conserve judicial resources by simplifying appellate review. The system would also satisfy constitutional concerns under *Blakely* and *Booker* and is respectful of the important role of judges and juries in our democratic form of government.[120] Most importantly, the system may result in the elimination or reduced use of mandatory minimum sentences, since the presumptive guideline system will ensure consistency and accountability in sentencing.

Thank you for being patient in listening to my comments. It has been a true honor to give this Lecture. I look forward to hearing your questions, thoughts, or comments.

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119. *See* William W. Wilkins, Jr., *The Federal Sentencing Guidelines: Striking an Appropriate Balance*, 25 U.C. DAVIS L. REV. 571, 574 (1992) ("[A]s the number and complexity of required decisions increase, the risk that different judges will apply the guidelines differently to situations that are in fact similar also increases. As a result, the very disparity that the guidelines are designed to eliminate would be reintroduced."). Judge (and former Commission Chair) Wilkins made that observation in 1992, when the sentencing guidelines were considerably less complex than they currently are. His observation seems particularly apposite today.

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