

BLOWING OUT ALL THE CANDLES: A FEW  
THOUGHTS ON THE TWENTY-FIFTH BIRTHDAY OF  
THE SENTENCING REFORM ACT OF 1984

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I. INTRODUCTION

Happy Birthday, Sara!

Yes, I know that your full name is the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, codified at 18 U.S.C. § 3551 et seq. and 28 U.S.C. §§ 991 to 998, but that's an awful mouthful. And really, you'll always be just "SRA"—Sara—to me.

Sara, 2009 was your twenty-fifth birthday and in your honor, throughout 2009 and early 2010, the United States Sentencing Commission ("Commission") held parties across the country.<sup>1</sup> Yes, I know, officially they called them regional hearings, convened

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1. See Press Release, U.S. Sentencing Comm'n, Sentencing Comm'n to Conduct Regional Public Hearings on Federal Sentencing Policy (Jan. 13, 2009), [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Newsroom/Press\\_Releases/20090113\\_01\\_Press\\_Release.htm](http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20090113_01_Press_Release.htm) [hereinafter Commission Press Release].

pursuant to the Commission's authority under 28 U.S.C. § 994(o), but we know that they were really birthday parties for you.

And you *deserve* birthday parties. Life has not been easy for you. You endured a nearly decade-long gestation<sup>2</sup> and a traumatic birth.<sup>3</sup> Soon after you were born, hundreds of federal judges condemned you as unconstitutional,<sup>4</sup> and that controversy went all the way to the Supreme Court.<sup>5</sup> Then, like so many others coming of age, you endured growing pains and the *sturm und drang* of adolescence. As a preteen, your confidence was shaken by the aftermath of the Rodney King incident,<sup>6</sup> but in your teenage years, you grew big and strong.<sup>7</sup> Do you remember the PROTECT Act, Sara?<sup>8</sup> You grew *very strong*. Perhaps that is why the Supreme

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2. See, e.g., KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 38 (1998) (tracing origins of the Sentencing Reform Act of 1984 ("SRA") to a 1975 dinner party hosted by Senator Kennedy).

3. Specifically, the SRA became law on October 12, 1984, as part of an omnibus continuing appropriations measure. Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. §§ 3551-3586 (2006 & Supp. III 2009)); see also Paul J. Hofer et al., U.S. Sentencing Comm'n, FIFTEEN YEARS OF GUIDELINES SENTENCING 3 (2004) [hereinafter FIFTEEN YEARS REPORT], available at [http://www.ussc.gov/Research/Research\\_Publications/2004/15\\_year\\_study/index.cfm](http://www.ussc.gov/Research/Research_Publications/2004/15_year_study/index.cfm).

4. See MICHAEL TONRY, SENTENCING MATTERS 73 (1996) (noting that within two years of the SRA's passage, "more than 200 district judges invalidated the guidelines and all or part of the Sentencing Reform Act" (internal citation omitted)); Gregory C. Sisk, et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1403, 1435 tbl.5 (noting that 179 district court judges invalidated the Guidelines less than one year after passage).

5. See *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (upholding the constitutionality of the SRA, the U.S. Sentencing Commission, and the Guidelines).

6. See, e.g., *Koon v. United States*, 518 U.S. 81, 85-91, 100 (1996) (considering the convictions of two Los Angeles Police Department officers convicted in the Rodney King beating incident and holding that whether a given sentencing factor was a legitimate ground for departure was a factual matter to be determined by the sentencing judge, subject to an abuse of discretion standard on appellate review). It was suggested by some that *Koon* was responsible for a decrease in the rate of within-Guidelines sentences imposed. See *infra* notes 215-18 and accompanying text.

7. See U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 51 fig.1 (2006) [hereinafter BOOKER REPORT] (depicting 1991-2003 rates of within-Guidelines sentences above sixty percent and rates that were either within-Guidelines or pursuant to a section 5K1.1 motion that were above eighty percent), available at [http://www.ussc.gov/booker\\_report/Booker\\_Report.pdf](http://www.ussc.gov/booker_report/Booker_Report.pdf).

8. The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, included a section entitled "Sentencing Reform" that, *inter alia*, modified 18 U.S.C. § 3553(b) to limit sentencing judges' ability to sentence outside the Guidelines, and modified 28 U.S.C. § 991(a) to change the composition of the United States Sentencing Commission from "[a]t least" three judges to "[n]o more than" three. Pub. L. No. 108-21, §§ 401(b), (n)(1), 117 Stat. 668-69, 675-76 (codified as amended at 18 U.S.C. § 3553(b) (2006); 28 U.S.C. § 991). Two years later, § 3553(b) was struck down as unconstitutional in *United States v. Booker*, 543 U.S. 220, 245 (2005). In 2008, the original

Court's decision in *United States v. Blakely*<sup>9</sup> came as such a stinging rebuke. You took it so badly: you ran to your room and slammed your door.

"You want to destroy me!" you shouted petulantly.

What a drama queen!

But, Sara, your fears were well founded. Just one year later, in *United States v. Booker*, the Supreme Court held that the United States Sentencing Guidelines ("Guidelines") violated the Sixth Amendment, and remedied the situation by engaging in major surgery, excising some of your operative parts.<sup>10</sup> Yikes!

Today, you're lucky to be alive.

Yet here you are, Sara, alive and well. You survived even *Booker*.

And you have not only survived, Sara—you've *thrived*. Since you were born, more than a million people have been sentenced in the federal system.<sup>11</sup> So that makes it official: *you're a big girl now*. And so on this momentous occasion, I want to reflect a bit about where you came from (Part II), to think about what you have become (Part III), and—finally—to ask what you'd like to be when you grow up (Part IV).

## II. ORIGINS

It has been said, Sara, that your birth was "perhaps the most dramatic change in sentencing law and practice in our Nation's history."<sup>12</sup> That's quite an accolade, but it also makes me wonder:

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language in 28 U.S.C. § 991(a) was restored with passage of the Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, § 16, 122 Stat. 4295 (codified at 18 U.S.C. § 991(a) (2006)). For a general discussion of the Feeney Amendment, see Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295 (2004).

9. 542 U.S. 296, 305, 308–11 (2004) (invalidating Washington's determinate sentencing scheme to the extent that maximum penalties are determined based on facts not proven by a jury).

10. See 543 U.S. 220, 245–48 (2008) (remediating the Guidelines' constitutional defect by stripping the provisions of the SRA that made the Guidelines mandatory).

11. Commission Press Release, *supra* note 1.

12. U.S. Sentencing Comm'n, *The Sentencing Reform Act of 1984: Principal Features Affecting Guideline Construction* (Simplification Draft Paper), <http://www.ussc.gov/SIMPLE/sra.htm> (last updated Mar. 11, 2003).

From where did that kind of unprecedented change come? What was your genesis?

Your legislative history is well documented elsewhere,<sup>13</sup> but it is worth noting that you were a piece of bipartisan legislation. The product of a mixed marriage, you had parents from both sides of the aisle, and accordingly, you had to embody the sentencing philosophies of those numerous supporters. Although you rejected rehabilitation as the legitimate sole rationale for imprisoning someone,<sup>14</sup> you embody each of the cardinal philosophies of punishment—retribution,<sup>15</sup> deterrence,<sup>16</sup> incapacitation,<sup>17</sup> and rehabilitation<sup>18</sup>—without favoring one over another.<sup>19</sup> Using slightly

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13. See generally 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) (tracing legislative history of SRA); Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291 (1993) (same).

14. See 28 U.S.C. § 994(k) (2006) (“The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.”).

15. See generally JEAN HAMPTON, *The Retributive Idea*, in FORGIVENESS AND MERCY 111 (Jeffrie Murphy & Jean Hampton eds., 1988) (describing the retributive basis of punishment); HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 37–39 (1968) (same); RICHARD G. SINGER, *JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT* 14–18 (1979) (same); ANDREW VON HIRSCH, *THE COMM. FOR THE STUDY OF INCARCERATION, DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 54–55 (Northeastern Univ. Press 1986) (same). *But see* Charlton T. Lewis, *The Indeterminate Sentence*, 9 YALE L.J. 17, 19 (1899) (suggesting that determinate sentences tied to desert are “but organized lynch law”).

16. See generally PACKER, *supra* note 15, at 39–48 (exploring deterrence at a basis of punishment); FRANKLIN R. ZIMRING & GORDON J. HAWKINS, *DETERRENCE* (1973) (same); Johannes Andenaes, *The Morality of Deterrence*, 37 U. CHI. L. REV. 649 (1970) (same); Panel on Research on Deterrent and Incapacitative Effects, *Deterrence*, in *DETERRENCE AND INCAPACITATION* 19 (Alfred Blumstein et al. eds. 1978); Ernest Van Den Haag, *The Criminal Law as a Threat System*, 73 J. CRIM. L. & CRIMINOLOGY 769 (1982) (same).

17. See generally PETER GREENWOOD & ALAN ABRAHAMSE, *SELECTIVE INCAPACITATION* (1982) (describing incapacitative basis of punishment); PACKER, *supra* note 15, at 48–53 (same); Panel on Research on Deterrent and Incapacitative Effects, *Incapacitation*, in *INCAPACITATION AND DETERRENCE*, *supra* note 16, at 64–80 (same); Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 HARV. L. REV. 511, 512 (1982) (same).

18. See generally FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981) (describing rehabilitative basis of punishment); FRANCIS T. CULLEN & KAREN E. GILBERT, *REAFFIRMING REHABILITATION* (1982) (same); PACKER, *supra* note 15, at 53–58 (same).

19. See Paul J. Hofer & Mark Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 29 (2003) (“The SRA . . . mandates a comprehensive, hybrid philosophy that accommodates all four of the traditional purposes of sentencing. But the SRA does not specify priorities among these purposes . . .”); Aaron J. Rappaport, *Unprincipled Punishment: The United*

different language, you enumerate all of them in the United States Code:

FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . .<sup>20</sup>

Sometimes these cornerstone goals of punishment harmonize neatly. For example, in a case in which an offender is placed on probation, the partial deprivation of his liberty interests repays the debt he owes society (retribution), deters him from committing the crime again (specific deterrence), deters others like him from committing the crime (general deterrence), reduces his opportunity to commit the crime again (incapacitation), and provides him with necessary training, treatment, and guidance to reduce the likelihood of his reoffending (rehabilitation). But sometimes the four goals of punishment are incommensurable,<sup>21</sup> such as in the case of corporal or capital punishment. For example, executing offenders yields top marks on measures of retribu-

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*States Sentencing Commission's Troubling Silence About the Purposes of Punishment*, 6 BUFF. CRIM. L. REV. 1043, 1071–77 (2003).

20. 18 U.S.C. § 3553(a)(1)–(2) (2006).

21. See Christopher Slobogin, *Introduction to the Symposium on the Model Penal Code's Sentencing Proposals*, 61 FLA. L. REV. 665, 679–80 (2009) (noting that desert and crime control often “are at odds, not just because a dangerous person might not be blameworthy (or vice versa), but because characteristics that appear mitigating—youth, addiction, impaired functioning—are frequently risk factors”).

tion, specific deterrence, and incapacitation,<sup>22</sup> but results in failing marks on conventional measures of rehabilitation.<sup>23</sup>

Sara, perhaps you incorporate all of these theories simply because of *when* you were born.

Perhaps you are *what* you are because of *when* you were born—sort of like being born as a Libra.<sup>24</sup> After all, you were conceived at a moment in U.S. history when the belief in indeterminate sentencing yielded to the belief in determinate sentencing. Is it mere coincidence that Robert Martinson published his infamous “What Works?” article (thereby sounding the death knell for the rehabilitative movement in the United States)<sup>25</sup> just one year before Senator Kennedy launched the legislative initiative that would culminate in your passage?<sup>26</sup> I think not. Rather, I think that penology and attendant sentencing practices were changing, and that both Martinson’s article and Kennedy’s initiative tapped into that shifting zeitgeist.<sup>27</sup>

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22. See David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 4, 27 (1998) (“Death is the surest incapacitation: it eliminates the possibility of the defendant murdering again while inside prison walls, and in the outside world should the defendant ever be on the loose again due to parole, executive clemency, or escape. LWOP [life imprisonment without the possibility of parole] is a potent, but not perfect substitute for death: LWOP negates the possibility of parole, but cannot assure against the defendant’s murdering while inside the prison, or after receiving executive clemency, or escaping.”).

23. *But see* C.S. Lewis, *The Humanitarian Theory of Punishment*, in CONTEMPORARY PUNISHMENT 194, 197–98 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972) (arguing that one has a right to be punished for one’s actions). Under such a view, execution may be a necessary act of expiation, required in order to rehabilitate a soul. *See id.*

24. Sara is a Libra. The SRA was signed into law by President Reagan on October 12, 1984. *See* Pub. L. No. 98-473, 98 Stat. 1987, 1987.

25. *See* Robert Martinson, *What Works?—Questions and Answers about Prison Reform*, PUB. INT., Spring 1974, at 22, 22–25 (concluding from a review of 231 studies that rehabilitative programs did not significantly reduce rates of recidivism). *But see* Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 254 (1979) (recanting his “nothing works” findings by writing, “I withdraw this conclusion. I have often said that treatment added to the network of criminal justice is ‘impotent,’ and I withdraw this characterization as well.” (footnote omitted)). For a discussion of Martinson’s life and work, *see* SASHA ABRAMSKY, *AMERICAN FURIES* 43–53 (2007).

26. STITH & CABRAMES, *supra* note 2, at 38 (describing Senator Kennedy’s 1975 dinner party).

27. *See* Antony Duff & David Garland, *Introduction: Thinking about Punishment*, in A READER ON PUNISHMENT 1, 10 (Antony Duff & David Garland eds., 1994) (describing the change in views about sentencing as “a larger reaction against the consequentialist mentality and the kind of social engineering which often accompanied it”).

Of course, the zeitgeist had been shifting for a long time. Colonial sentences had been almost entirely determinate,<sup>28</sup> but throughout the late nineteenth and early twentieth centuries, compassion and economic pragmatism had converged to make indeterminate sentencing very popular.<sup>29</sup>

In 1870, New York became the first state to utilize an indeterminate-sentencing system. By 1922, all but four states and the federal government employed some type of indeterminate sentencing or used the parole system which functioned in the same way. By the 1960s, every state had an indeterminate-sentencing structure or some variation.<sup>30</sup>

Under the indeterminate model of sentencing that dominated the United States landscape between 1930<sup>31</sup> and the 1970s, punishment was related to utilitarian concerns of crime control, through deterrence, incapacitation, and, notably, rehabilitation.<sup>32</sup> Indeed, for much of the early twentieth century, crime was

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28. Sentences were almost entirely prescribed by colonial laws, and judges had little or no discretion to modify the punishment called for by the law. See SANDRA SHANE-DUBOW ET AL., SENTENCING REFORM IN THE UNITED STATES 5 (1985).

29. Compassion played a role in the rise of indeterminate sentencing. The Quaker reformer Benjamin Rush advocated abandoning determinate sentencing. He wrote that “the kinds of punishments that might be employed should be specified by law but their duration should not be fixed, save as a possible maximum. The limitations of punishment in specific cases within the prison should not be known to the prisoners.” STITH & CABRANES, *supra* note 2, at 16 (quoting O.F. LEWIS, THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS 1776–1845, at 22 (1922)). The uncertainty of punishment would lead prisoners to assume the worst (e.g., the longest punishments for even the smallest crimes), and this, in turn, would lead prisoners to behave their best. But economics played a significant role in the rise of indeterminate sentencing, too. In the early part of the nineteenth century, officials began to use pardons and “good time” as mechanisms of efficiency to control prison overcrowding. See William J. Powell & Michael J. Cimino, *Prosecutorial Discretion under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?* 97 W. VA. L. REV. 373, 376 (1995) (citing SHANE-DUBOW, *supra* note 28, at 3). Powell and Cimino note that

[t]o relieve the overcrowding and to make room for new inmates, the use of pardons became widespread. For example, the young state of Ohio “simply pardoned convicts whenever the population rose above 120 in number.” Problems with the pardon system, however, including bribery and extortion, led New York to adopt the nation’s first “good time” computation law in 1817.

*Id.* (quoting SHANE-DUBOW, *supra* note 28, at 4). The federal government began reducing sentences for good conduct in 1867. See PETER B. HOFFMAN, U.S. PAROLE COMM’N, HISTORY OF THE FEDERAL PAROLE SYSTEM 5 (2003), available at <http://www.justice.gov/uspc/history.pdf>.

30. Powell & Cimino, *supra* note 29, at 378 (footnotes omitted).

31. See TONRY, *supra* note 4, at 7 (noting that “the broad outlines of indeterminate sentencing had been the same everywhere since 1930”).

32. See ALLEN, *supra* note 18, at 18–19 (describing popular appeal of rehabilitation).

viewed as a disease, and one that could be cured.<sup>33</sup> It was believed that criminals were dynamic actors and could change, if only judges, prison wardens, and probation officers tried hard enough. In contrast, retribution seemed like a backward and unenlightened basis for punishment. Even the Supreme Court of the United States had affirmatively proclaimed, “Retribution is no longer the dominant objective of the criminal law.”<sup>34</sup>

By the mid-twentieth century, sentencing systems were conferring tremendous discretion upon parole boards.<sup>35</sup> One consequence of this was that offenders convicted of equivalent offenses sometimes served disparate sentences.<sup>36</sup> Judges were free to sentence defendants to any term authorized by the penal code, for nearly any reason—even for no reason whatsoever.<sup>37</sup> By the early 1970s, some critics began to condemn the horror stories about identical offenders before different judges, one who received a sentence of probation while the other was sentenced to imprisonment.<sup>38</sup> Judge Marvin Frankel condemned this kind of disparity as “judicial lawlessness” in 1972,<sup>39</sup> and soon thereafter, the re-

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33. See, e.g., KARL MENNINGER, *THE CRIME OF PUNISHMENT* 257 (1968) (suggesting that some forms of crime are indications of an underlying illness that can be healed); BERTRAND RUSSELL, *PROPOSED ROADS TO FREEDOM* 125 (1919) (“When a man is suffering from an infectious disease he is a danger to the community, and it is necessary to restrict his liberty of movement. But no one associates any idea of guilt with such a situation. On the contrary, he is an object of commiseration to his friends. Such steps as science recommends are taken to cure him of his disease, and he submits as a rule without reluctance to the curtailment of liberty involved meanwhile. The same method in spirit ought to be shown in the treatment of what is called ‘crime.’”); BARBARA WOOTTON, *SOCIAL SCIENCE AND SOCIAL PATHOLOGY* 306, 325 (1959) (advocating the renunciation of conceptions of blameworthiness and its replacement with a system in which experts predict future criminality and treat it with therapy).

34. *Williams v. New York*, 337 U.S. 241, 248 (1949), *superseded by statute*, Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1988, 1989 (codified in scattered sections of 18 U.S.C. and 28 U.S.C.).

35. See DAVID ROTHMAN, *CONSCIENCE AND CONVENIENCE* 173 (1980) (describing parole decisions in the early twentieth century being made on unreviewable, personal bases).

36. *Williams*, 337 U.S. at 247 (“The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.”).

37. *Id.* at 252 (noting that “no federal constitutional objection would have been possible if the . . . judge had sentenced him to death giving no reason at all”).

38. See Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 *FED. SENT’G REP.* 316, 318–19 (2004).

39. See Marvin E. Frankel, *Lawlessness in Sentencing*, 41 *U. CIN. L. REV.* 1, 1 (1972) (“The scope of what we call ‘discretion’ permits imprisonment from anything from a day to one, five, 10, 20 or more years. All would presumably join in denouncing a statute that said ‘the judge may impose any sentence he pleases.’ Given the morality of men, the power to set a man free or confine him for up to 30 years is not sharply distinguishable.” (foot-

tributive calls for parity and predictability began to drown out the rehabilitative charge for transformation.<sup>40</sup>

Interest in determinate sentencing quickly increased.<sup>41</sup> Under determinate sentencing, rooted in the deontological philosophies of rights and retribution,<sup>42</sup> there is little interest in the offender's capacity to change. Sentences are meant to redress past wrongs, after all, not to influence future conduct.<sup>43</sup> If a criminal should undergo a prison conversion, that might be a happy side effect, but the conversion is irrelevant for purposes of retributive sentencing.<sup>44</sup> Offenders are punished for the crimes they committed, not for who they become while incarcerated.

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note omitted); *see also* MARVIN E. FRANKEL, *CRIMINAL SENTENCES* 103 (1972) (critiquing existing sentencing practices).

40. *See, e.g.*, Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 978–81 (1999). Kadish describes the California legislature's commitment to a retributive theory of punishment:

California . . . had been at the forefront of states committed to individualized and rehabilitative punishment. In 1976, the legislature replaced its elaborate system of indeterminate sentencing with a determinate sentencing law that opened with this ringing commitment: "The Legislature finds and declares that the purpose of imprisonment for crime is punishment."

*Id.* at 980 (quoting CAL. PENAL CODE § 1170(a)(1) (West 1998)). The transition away from a rehabilitation-dominant penology may have been aided by observations that treatment, while benevolent, is not without its tyrannies. *See, e.g.*, THOMAS S. SZASZ, *LAW, LIBERTY, AND PSYCHIATRY* 17, 184–85 (1963) (arguing that mental illness is a myth and suggesting that state-mandated treatment is no less an assault upon personal liberty than criminal punishment).

41. *See* Samuel H. Pillsbury, *Understanding Penal Reform: The Dynamic of Change*, 80 J. CRIM. L. & CRIMINOLOGY 726, 751 (1989) (describing the ascendance of determinate sentencing between 1976 and 1989).

42. *See id.* ("As with the reform movements already considered, the determinate sentencing movement began with a new vision of penal justice. Idealist reformers promoted an ideology of rights which justified punishment on a retributive, deontological basis instead of utilitarian principles.").

43. Allen S. Olmstead, "Suppose We Change the Subject," FED. PROBATION, Sept. 1964, at 10, 12 ("Is it justice to punish one man in order to influence the conduct of other men?").

44. *See, e.g.*, *United States v. Bergman*, 416 F. Supp. 496, 499–50 (S.D.N.Y. 1976). The court noted that it

agrees that this defendant should not be sent to prison for "rehabilitation." Apart from the patent inappositeness of the concept to this individual, this court shares the growing understanding that no one should ever be sent to prison *for rehabilitation*. That is to say, nobody who would not otherwise be locked up should suffer that fate on the incongruous premise that it will be good for him or her. . . . If someone must be imprisoned—for other, valid reasons—we should seek to make rehabilitative resources available to him or her. But the goal of rehabilitation cannot fairly serve in itself as grounds for the sentence to confinement.

*Id.* at 498–99.

The dominant philosophy of punishment was changing. Just as the prison was evolving from a place of mere detention, to a place of penitence and rehabilitation, back into a place of warehousing and detention,<sup>45</sup> sentencing, too, was getting back to basics.

It was at *this* moment that you were conceived, Sara. At this moment you began your process of maturation. No wonder your parents placed such a premium on the reduction of unwarranted sentencing disparity.<sup>46</sup>

As you know, when you were born, federal parole was abolished prospectively.<sup>47</sup> That, alone, did a great deal to root out disparity.<sup>48</sup> At the same time, the Commission was formed and charged with the development and promulgation of the Guidelines.<sup>49</sup> Indeed, it has been said that the primary goal of the Guidelines was the reduction of unwarranted sentencing disparity.<sup>50</sup>

But the Guidelines have not realized their promise, and many commentators have condemned them as a failure.<sup>51</sup> Yes, the Guidelines achieved some of the goals announced at your birth,<sup>52</sup>

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45. See J.C. Oleson, Comment, *The Punitive Coma*, 90 CAL. L. REV. 829, 836–43 (2002) (chronicling the evolution of the prison from a place of mere detention, to its use as a place of rehabilitation, back to a place of mere detention).

46. See FIFTEEN YEARS REPORT, *supra* note 3, at 79 (“Eliminating unwarranted sentencing disparity was the primary goal of the Sentencing Reform Act.”).

47. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 218(a)(4), 98 Stat. 1987, 2027 (repealing 18 U.S.C. § 4161 (1982)).

48. See STITH & CABRANES, *supra* note 2, at 114 (noting that “elimination of parole by itself . . . , quite apart from any effect of the Guidelines, can be expected to reduce sentencing variation”).

49. 28 U.S.C. § 991 (2006).

50. See Feinberg, *supra* note 13, at 295 (“The first and foremost goal of the sentencing reform effort was to alleviate the perceived problem of federal criminal sentencing disparity.”).

51. See, e.g., TONRY, *supra* note 4, at 73 (“Possibly the best evidence that the federal sentencing guidelines have been a policy failure comes from the experiences of other jurisdictions that have appointed sentencing commissions.”); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1685 (1992) (noting that “the federal sentencing guidelines are not succeeding”); José A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, N.Y. L.J., Feb. 11, 1992, at 2 (“[T]he sentencing guidelines system is a failure—a dismal failure, a fact well known and fully understood by virtually everyone who is associated with the federal judicial system.”); AM. COLL. OF TRIAL LAWYERS, UNITED STATES SENTENCING GUIDELINES 2004: AN EXPERIMENT THAT HAS FAILED 35 (2004), [http://www.actl.com/AM/Template.cfm?Section=All\\_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=58](http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=58) (“Twenty years after the enactment of the Sentencing Reform Act, the current sentencing system is fundamentally flawed. While the goal of eliminating unfair disparity in federal sentences was laudable, the Guidelines themselves are an experiment that failed.”).

52. See FIFTEEN YEARS REPORT, *supra* note 3, at 136–46 (describing “[s]ubstantially

but the reformation of the federal criminal justice system did not occur as planned,<sup>53</sup> and the elusive utopia of the sentencer's dreams remains unrealized.

In fact, the cure may have been worse than the disease.<sup>54</sup>

### III. IMPLEMENTATION

You know, Sara, that the Commission has been dismissed by many commentators as ineffectual,<sup>55</sup> and you know that the Guidelines are the object of widespread scorn.<sup>56</sup> But this is rather strange. After all, guideline sentencing has been successful in many states that have adopted it.<sup>57</sup> The guidelines in North Carolina, for example, have been hailed as “the exemplar of smart political and rational reform”<sup>58</sup> and the guidelines in Minnesota have been enthusiastically replicated by other states.<sup>59</sup>

It seems like the Guidelines *should have* worked. In 1984, the Commission possessed all the raw materials it needed to develop a set of guidelines that were as good as or better than those employed by the states: the backing of Congress, adequate time, and

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[a]chieved [g]oals of the SRA,” “[p]artially [a]chieved [g]oals of the SRA,” and “[p]artial [i]mplementation of the [c]omponents of [s]entencing [r]eform”).

53. See *id.* at 144 (“In practice, the reformed sentencing system has fallen short of this ideal [of uniform treatment across all stages in the criminal justice system] in several respects, which helps explain why the goals of sentencing reform have been only partially achieved.”).

54. See Gerald F. Uelman, *Federal Sentencing Guidelines: A Cure Worse Than the Disease*, 29 AM. CRIM. L. REV. 899, 899 (1992).

55. See, e.g., 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 . . .”).

56. See, e.g., TONRY, *supra* note 4, at 11 (“Few outside the federal commission would disagree that the federal guidelines have been a disaster.”); Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing* 23 (Cato Inst. Policy Analysis, Paper No. 458, 2002), available at <http://www.cato.org/pubs/pas/pa458.pdf>. (“There are many possible paths to positive change, all leading to the dissolution of the commission and the repeal of its Guidelines.”).

57. See TONRY, *supra* note 4, at 25 (“The [state] sentencing commission is alive and well.”); Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1192–94 (2005).

58. DANIEL F. WILHELM & NICHOLAS R. TURNER, VERA INST. OF JUSTICE, IS THE BUDGET CRISIS CHANGING THE WAY WE LOOK AT SENTENCING AND INCARCERATION? 7 (2002), available at <http://www.vera.org/download?File=269/IIB%2BBudget%2Bcrisis.pdf>.

59. Richard S. Frase, Blakely in Minnesota, *Two Years Out: Guidelines Sentencing Is Alive and Well*, 4 OHIO ST. J. CRIM. L. 73, 94 (2006).

ample resources.<sup>60</sup> So why is it said, Sara, that “[t]he U.S. commission’s guidelines are easily the most disliked sentencing reform initiative in the United States in this [twentieth] century”?<sup>61</sup>

The answer to that question is complicated. In truth, there are probably a host of causes that, considered in combination, may explain the unpopularity of the Guidelines.

Many of these causes can be traced to the inception of the Commission. In addition to the not-insignificant logistical challenge of establishing a federal agency from scratch, the Commission was immediately beset by fundamental disagreements about sentencing philosophies.<sup>62</sup> One of the founding commissioners resigned in protest;<sup>63</sup> one dissented from the promulgation of the Guidelines;<sup>64</sup> and the *ex officio* member from the Department of Justice indicated that had he been a voting member, he would have voted against approving the Guidelines, too.<sup>65</sup> The initial staff director—one of the only people at the Commission with any prior experience with sentencing guidelines—resigned within one year.<sup>66</sup> In fact, by the time the Government Accountability Office (then called the General Accounting Office) published its evaluation of the Commission in 1990,<sup>67</sup> the Commission had had four

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60. See TONRY, *supra* note 4, at 11.

61. *Id.* at 25.

62. See Hofer & Allenbaugh, *supra* note 19, at 31 (“For the first eighteen months of its existence, the Commission debated and drafted competing versions of the Guidelines, each built on fundamentally different philosophies.”).

63. See Paula Yost, *Sentencing Panel Member Resigns Over Research*, WASH. POST, Aug. 23, 1989, at A25 (noting that Commissioner Michael K. Block resigned because of “a lack of commitment by commissioners to base decisions on research and scientific data when amending sentencing guidelines”).

64. See Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 18,121, 18,121–22, 18,132 (May 18, 1987) [hereinafter Robinson Dissent] (condemning the enacted guidelines and dissenting from their promulgation). Commissioner Robinson ultimately resigned. Hofer & Allenbaugh, *supra* note 19, at 31.

65. See Robinson Dissent, *supra* note 64, at 18,121 (observing that *ex-officio* Commissioner Ronald L. Gainer asked the Commission to note in its publication of the guidelines that “if he were a voting Commissioner, as a personal matter, he would not have voted to support the guidelines in their current form”).

66. See TONRY, *supra* note 4, at 84–85 (describing Kay Knapp’s tenure).

67. See U.S. Sentencing Commission: *Changes Needed to Improve Effectiveness: Before the Subcomm. On Criminal Justice of the H. Comm. on the Judiciary*, 101st Cong. 2–3 (1990) [hereinafter *U.S.S.C. Hearings*] (Statement of Lowell Dodge, Director, Administration of Justice Issues), available at <http://archive.gao.gov/t2pbat11/140806.pdf> (attributing the Commission’s failure to meet key deadlines to several factors related to “organization-

staff directors or executive directors and one interim staff director over a four-year period.<sup>68</sup> Similarly, “[g]eneral counsels to the commission came and went at the same rate in the early years.”<sup>69</sup> The research director’s position languished, vacant for a year and a half,<sup>70</sup> and was later abolished.<sup>71</sup> Those who joined the Commission thinking they could change it, or even endure it, often left broken and dismayed.<sup>72</sup> Susceptibility to congressional action made the already politicized situation worse.<sup>73</sup>

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al disarray,” including, inter alia, lack of planning, unclear lines of authority, lack of coordination between commissioner research initiatives, and frequent vacancies and personnel turnover in key positions).

68. See *id.* at 14 (“In 4 years the Commission has had four staff directors or executive directors and one interim staff director.”).

69. TONRY, *supra* note 4, at 85.

70. See *U.S.S.C. Hearings, supra* note 67, at 15 (“The research director’s position has been vacant for over a year and a half. . . . [P]art of the problem has been finding qualified candidates who would be willing to take the position, given perceptions that the working environment is complicated by commissioner involvement in research and other matters.”).

71. See TONRY, *supra* note 4, at 85 (noting that “qualified research directors proved elusive and the position was finally abolished”).

72. See *id.* (“One nationally prominent researcher joined the research staff in the face of warnings from friends; she explained that things at the commission had gotten so bad that they were bound to improve and she would be starting work as the commission rebounded. She quit within months, reporting that the environment steadily worsened during her tenure. Another nationally prominent researcher, an experienced senior civil servant, pooh-poohed friends’ warnings about the commission; he explained that he was accustomed to working effectively within politicized federal agencies and was a political survivor. He survived for a year before he too was driven out by internal commission politics.”).

73. See Barkow, *supra* note 55, at 765 (“When the Supreme Court upheld the Sentencing Commission against separation of powers challenges in *Mistretta v. United States*, it characterized the agency as an ‘expert body’ engaged in an ‘essentially neutral endeavor.’ The image of the Sentencing Commission as an independent agency, divorced from politics, was a strong one. . . . [D]espite this description[,] . . . the Sentencing Commission was a highly politicized agency from the outset. Then-Judge Stephen Breyer, one of the initial members of the Commission, wrote that the Commission reached certain compromises in its initial set of guidelines because ‘the Commission was appointed by politically responsible officials and is therefore, at least to some degree, a ‘political’ body.’ Michael Tonry has put it more starkly: ‘The U.S. commission . . . made no effort to insulate its policies from law-and-order politics and short-term emotions.’” (footnotes omitted)); see also Michael K. Block, *Emerging Problems in the Sentencing Commission’s Approach to Guideline Amendments*, 1 FED. SENT’G REP. 451, 453 (1989) (“Congress created the Commission to rationalize the overall sentencing system to the practical end of improving the effectiveness of criminal punishment. In enacting the legislation that created the Commission, Congress specifically warned against drawing inferences about relative severity of offenses from statutory maximum provisions, and called upon the Commission to assist in rationalizing those provisions as well. The most troubling aspect of the ‘signaling’ argument is not merely that it is wrong, but that such an erroneous argument, without supporting any analysis, carried the day with a majority of the Commission. Basing guideline amendments on vague arguments like ‘signaling’ abdicates our responsibility to rationalize sen-

The Commission, unlike Disneyland, was apparently *not* the happiest place on earth.

There is an old joke about university politics being so fierce because the stakes are so low. In many ways, Sara, the newly formed Commission seemed like an acrimonious university department, except that its stakes were enormous: the punishment of thousands of people every year.<sup>74</sup>

Those contentious politics may explain the Guidelines that ultimately emerged. Because initial disagreements about the philosophy of the Guidelines led to impasse<sup>75</sup> and delayed their development,<sup>76</sup> and because suggestions to defer and field test the Guidelines were dismissed,<sup>77</sup> the Guidelines that *were* eventually promulgated were rushed and cobbled together using features from inconsonant models.<sup>78</sup>

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tencing and turns upside down the institutional arrangement Congress created.”(footnote omitted)).

74. UTILIZATION OF CRIMINAL JUSTICE STATISTICS PROJECT, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: DEFENDANTS SENTENCED IN U.S. DISTRICT COURTS tbl.5.23.2007 (Kathleen Maguire ed., 2007), *available at* <http://www.albany.edu/sourcebook/pdf/t5232007.pdf> (documenting the number of defendants sentenced between 1945 and 2007, ranging annually in the thousands, from a low of 12,415 in 1970 to a high of 67,257 in 2006).

75. See Hofer & Allenbaugh, *supra* note 19, at 33.

76. See Ilene H. Nagel, Foreword, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 918–19 (1990) (describing the Commission’s efforts to reconcile “two sets of theoretically orthodox guidelines: one adhering to the principles of just deserts, and one to the principles of crime control” as an “abysmal failure”). The promulgated Guidelines were developed between July 1986 and April 1987. See *id.* at 921, 939.

77. See STITH & CABRANES, *supra* note 2, at 58 (describing Chairman Wilkins’s mention of delaying the implementation of the Guidelines as being rebuffed by Representative Lungren as resulting in “continued undue leniency” in sentencing).

78. See Andrew von Hirsch, *Federal Sentencing Guidelines: The United States and Canadian Schemes Compared*, IV OCCASIONAL PAPERS FROM THE CENTER FOR RESEARCH IN CRIME AND JUSTICE, N.Y.U. SCHOOL OF LAW 2 (1988) (“Shortly after the commissioners were appointed, however, problems began to be apparent. A first draft of the guidelines was written in the spring of 1986 by one of the commissioners, and then jettisoned. The next two drafts emanated from the Chairman’s office, were circulated for public comment, and then abandoned after an unfavorable response. It was only in the winter of 1987 that other commissioners were drawn actively into the process. The final draft was written at a late date in some haste to meet the submission deadline.”). *But see* Nagel, *supra* note 76, at 922 (“This agreement represented not a hastily formulated idea, nor a night-before-they-were-due idea, but rather the natural culmination of an evolutionary process whereby three previous drafts of varying structures had been evaluated, assessed, tested, revised, and refined . . .”).

The problems with the Guidelines have been described elsewhere,<sup>79</sup> but I would suggest, Sara, that the Guidelines are the object of derision because they are too severe,<sup>80</sup> too complicated,<sup>81</sup> and too rigid.<sup>82</sup>

### A. *Three Flaws of the Federal Sentencing Guidelines*

#### 1. Severity

One common complaint about the Guidelines is that they are too harsh.<sup>83</sup> Although Congress *intended* federal penalties for some offenses to be more severe than what judges had historically imposed, and said so when you were born,<sup>84</sup> there's little doubt that sentences associated with crimes charged under federal jurisdiction are *dramatically* longer than equivalent crimes charged

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79. See generally STITH & CABRANES, *supra* note 2; TONRY, *supra* note 4; Luna, *supra* note 56.

80. See *infra* Part III.A.1 (describing severity of the Guidelines).

81. See *infra* Part III.A.2 (describing complexity of the Guidelines).

82. See *infra* Part III.A.3 (describing rigidity of the Guidelines).

83. See, e.g., Marvin E. Frankel & Leonard Orland, *A Conversation about Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655, 655–61 (1993) (“I argue that harshness imposed by a sentencing commission is far worse than idiosyncratic harsh sentences imposed in an age of discretion because a guideline system imposes harshness as a rule of law.”). *But see* Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1020 (2004) (arguing that the guidelines approximate public moral intuitions about punishment).

84. See 28 U.S.C. § 994(h) (2006) (directing Commission to formulate guidelines “at or near the maximum” for third or subsequent federal drug trafficking offense or “crime of violence”); *id.* § 994(m) (“The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense.”). The Senate Committee on the Judiciary concurred in a 1983 report on the SRA:

It is not intended that the Sentencing Commission necessarily continue to follow the average sentencing practices . . . . The Commission might conclude that a category of offenders, for example, first offenders convicted of a particular nonviolent offense that did not involve substantial harm to the victim, were too frequently sentenced to terms of imprisonment, and that for many of them a term of probation might sufficiently carry out the punishment, deterrence, incapacitation, and rehabilitation purposes necessary . . . . On the other hand, the Commission might conclude that a category of major white collar criminals too frequently was sentenced to probation or too short a term of imprisonment because judges using the old rehabilitation theory of sentencing, did not believe such offenders needed to be rehabilitated and, therefore, saw no need for incarceration. The Commission might conclude that such a category of offenders should serve a term of imprisonment, or a longer term than currently served, for purposes of punishment and deterrence.

S. Rep. No. 98-225, at 177 (1983).

in state courts. For example, the aggregate mean maximum sentence length for all felonies is thirty-seven months in state prisons, but is sixty-one months in federal prisons.<sup>85</sup> For drug offenses, state sentences average thirty-one months in length while federal sentences average eighty-four months;<sup>86</sup> for weapons offenses, state sentences average thirty-two months in length while federal sentences average eighty-four months.<sup>87</sup> This is not because of substantive differences between state and federal crimes—that nostalgic era in which federal jurisdiction was restricted to interstate crimes (e.g., Mann Act violations) and offenses directly involving the federal government (e.g., treason, counterfeiting, and mail fraud) is long gone.<sup>88</sup> Today, federal jurisdiction extends to numerous crimes with no obvious federal nexus,<sup>89</sup> including offenses such as dealing drugs,<sup>90</sup> loansharking,<sup>91</sup> and carjacking.<sup>92</sup> In fact, Sara, Congress has passed so many federal crimes that *no one actually knows how many there are*.<sup>93</sup> Yet while we don't know how many crimes there are, we *do* know that the penalties for federal crimes are generally much tougher than those for equivalent state offenses.

Sometimes the choice between state and federal prosecution is arbitrary<sup>94</sup> and sometimes strategic,<sup>95</sup> but the reality is that one

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85. See MATHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, STATE COURT SENTENCING OF CONVICTED FELONS, 2004—STATISTICAL TABLES, COMPARISON OF FELONY CONVICTIONS IN STATE AND FEDERAL COURTS, 2004 tbl.1.10 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/html/scscf04/tables/scs04110tab.cfm> (depicting mean maximum sentence length imposed in state and federal courts in 2004).

86. *Id.*

87. *Id.*

88. JAMES A. STRAZZELLA, AM. BAR ASS'N, CRIMINAL JUSTICE SECTION, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998).

89. *But see* United States v. Lopez, 514 U.S. 549, 566–67 (1995) (striking down the federal Gun-Free School Zones Act because the effects on interstate commerce were too attenuated to justify federal authority).

90. 21 U.S.C. § 841(a) (2006)

91. 18 U.S.C. §§ 891–896 (2006).

92. *Id.* § 2119.

93. STRAZZELLA, *supra* note 88, at 9, 91–93 (“So large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes.”); JOHN S. BAKER, JR., THE FEDERALIST SOC'Y FOR LAW AND PUB. POLICY STUDIES, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 3–5 (2004), available at <http://fedsoc.server326.com/Publications/practicegroupnewsletters/criminallaw/crimreportfinal.pdf> (identifying obstacles in counting crimes and estimating the existence of more than four thousand federal crimes).

94. See William Anderson & Candice E. Jackson, *Washington's Biggest Crime Problem*, REASON, Apr. 1, 2004, at 41, available at <http://www.reason.com/archives/2004/04/01/Washingtons-biggest-crime-prob> (“When Rudolph Giuliani was the U.S. attorney for the

offender may be charged in state court for cultivating marijuana and receive a \$1,000 fine (waived because he's indigent) while his partner, charged in federal court for the identical crime, may receive ten years in prison and eight years of postconviction supervised release.<sup>96</sup> Offenders sentenced under the Guidelines serve much longer sentences than offenders punished for equivalent criminal conduct in state courts and offenders punished for equivalent crimes in many foreign jurisdictions.<sup>97</sup>

Isn't it ironic that your birth, which was supposed to reduce sentencing disparity, may have narrowed *intra*-federal disparity,<sup>98</sup> but simultaneously created vast *extra*-federal disparity?

How did this happen? Well, at your birth, when Congress called for more severe sentences in *some* cases,<sup>99</sup> the Commission interpreted the requirement as a call for more severe sentences in *more* cases,<sup>100</sup> and acted accordingly. The Guidelines were estab-

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Southern District of New York in the 1980s, he implemented an anti-drug policy he called 'Federal Day.' On a different day each week, all drug offenders arrested and charged that day were prosecuted in federal court. Thus a crack cocaine offender arrested on Monday, say, would face a 10-year mandatory minimum sentence, while a crack offender arrested on Tuesday that same week would face perhaps 18 to 20 months of prison time under state law.").

95. See, e.g., John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1103, 1119 (1995) (noting that "federal prosecutors can conduct organized crime investigations more quickly, bring more charges, and win more convictions than state and local authorities" and suggesting that "if federal prosecutors had been asked to create the sentencing regime that would place the maximum permissible pressure on criminal defendants to cooperate with the government, they could hardly have done better than the Sentencing Commission").

96. See Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 648-49 (1997) (describing the disparate state and federal sentences for co-conspirators Mark Brock Palmer and Jack Roberts).

97. See Clymer, *supra* note 96, at 647-48 (exploring key differences in state and federal sentencing regimes); André Kuhn, *International Imprisonments*, in ENCYCLOPEDIA OF CRIME AND PUNISHMENT 918, 925 (David Levinson ed., 2002) ("There is no doubt that the American criminal justice system is much more punitive than the European systems. Even allowing for differences in crime rates, sentencing severity (use of prison as a sentence and length of prison sentences) is much higher in the United States than in Europe.").

98. See FIFTEEN YEARS REPORT, *supra* note 3, at 140 ("Rigorous statistical study both inside and outside the Commission confirm that the guidelines have succeeded at the job they were principally designed to do: reduce unwarranted disparity arising from differences among judges."). *But see* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1424-25 (2008) ("The federal effort to stamp out judicial disparity through the Guidelines was probably not successful.").

99. See *supra* note 84.

100. See U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 18-19 (1987) [hereinafter SUPPLEMENTARY REPORT].

lished by averaging the sentences imposed in 10,500 cases for which the Commission had adequate presentence report data,<sup>101</sup> but the Commission deviated from this approach for a number of offense types.<sup>102</sup>

Instead of allowing mandatory minimum sentences for drugs to operate as trumps at the applicable quantity levels—the approach followed by state guidelines systems—the Commission decided to peg the drug Guidelines so they were all above the mandatory minimum terms.<sup>103</sup> They then extrapolated that penalty structure across other quantity levels, increasing *all* drug penalties, including those not covered by mandatory minimums.<sup>104</sup>

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101. STITH & CABRANES, *supra* note 2, at 61. The approach has been criticized. Commissioners Block and Robinson both condemned the approach. Block wrote that relying on past averages allowed the Sentencing Commission to avoid developing a “consistent sentencing philosophy.” Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 AM. CRIM. L. REV. 289, 315–19 (1989) (footnote omitted). Robinson noted that Congress had instructed the Commission to consider past practice but to “independently develop a sentencing range that is consistent with the purposes of sentencing.” Robinson Dissent, *supra* note 64, at 18, 121–22 (quoting 28 U.S.C. § 994(m) (2006)). Stith and Cabranes note that by relying on presentence reports and not actual judgments, the Commission assumed that actual sentences were shaped by the presentence report factors that the Commission evaluated, and not upon factors the Commission ignored. See STITH & CABRANES, *supra* note 2, at 61.

102. See Hofer & Allenbaugh, *supra* note 19, at 33 (noting that “the extent to which sentences under the Guidelines actually mirror past practice has been overstated”).

103. See TONRY, *supra* note 4, at 96–97 (“This approach, which every state sentencing commission adopted, has the advantage that it makes clear when sentences uniquely result from application of mandatory penalty statutes.”).

104. *Id.* It may not be possible to adequately reconcile the Guidelines and mandatory minimum sentences. See, e.g., William W. Schwarzer, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges*, 66 S. CAL. L. REV. 405, 405–06 (1992) (identifying difficulties in harmonizing sentencing guidelines and mandatory minimums). Chief Justice William H. Rehnquist noted that “one of the best arguments against any more mandatory minimums and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish.” William H. Rehnquist, Chief Justice of the Supreme Court of the U.S., Luncheon Address at the Inaugural Symposium on Crime and Punishment in the United States (June 18, 1993), in U.S. SENTENCING COMM’N, DRUGS AND VIOLENCE IN AMERICA 283, 287 (June 16–18, 1993). Justice Stephen Breyer, one of the architects of the Guidelines, has written:

[S]tatutory mandatory sentences prevent the Commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments. . . . Every system, after all, needs some kind of escape valve for unusual cases. . . . For this reason, the Guideline system is a stronger, more effective sentencing system in practice. In sum, Congress, in simultaneously requiring Guideline sentencing and mandatory minimum sentencing, is riding two different horses. And those horses, in terms of coherence, fairness, and effectiveness, are traveling in opposite directions. [In my view, Congress should] abolish mandatory mini-

Inspired by Congress's decree that "in many cases, current sentences do not accurately reflect the seriousness of the offense,"<sup>105</sup> the Commission also increased penalties—well above historical averages—for white-collar offenses.<sup>106</sup> Similarly, and without articulating its rationale, the Commission raised penalties for violent crimes "where the Commission was convinced that they were inadequate."<sup>107</sup> In fact, the categories of offenses in which the Commission purposely deviated from past practice actually outnumber the remaining categories of crime.<sup>108</sup>

The result, as you already know, was that federal sentence length increased under the Guidelines for most offenses.<sup>109</sup> The number of offenders sentenced to straight probation plummeted from thirty-three percent in 1984<sup>110</sup> to roughly six percent in 2007.<sup>111</sup> And while that increased rate of imprisonment should have *reduced* the mean sentence length (since those who previously received only probation now received a presumably short prison sentence), sentence length actually *increased*.<sup>112</sup>

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mums altogether.

Stephen Breyer, Assoc. Justice of the Supreme Court of the U.S., Address at the University of Nebraska College of Law (Nov. 18, 1998), *in* 11 FED. SENT'G REP. 180, 184–85 (1999). Of course, there is precedent for doing away with mandatory minimum sentences that frustrate the goals of justice. Congress has done it before. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1227, 1291–92 (repealing almost all mandatory minimum drug sentences then in effect).

105. 28 U.S.C. § 994(m) (2006).

106. *See* SUPPLEMENTARY REPORT, *supra* note 100, at 18.

107. *Id.* at 18–19.

108. STITH & CABRANES, *supra* note 2, at 60–61.

109. *See* FIFTEEN YEARS STUDY, *supra* note 3, at 139 ("For offenders who are imprisoned, the length of time served has increased substantially in the guidelines era. The average time served more than doubled after implementation of the guidelines. Since 1992 there has been a slight downturn in average time served, but the typical federal offender sentenced in 2002 will still spend almost twice as long in prison as in 1984, (the year the SRA was enacted) increasing from an average of just under 25 months to almost 50 months."). Increased severity over time creates another kind of sentencing disparity: temporal disparity. The Guidelines may have reduced the disparity between the sentencing judge in courtroom *A* and the sentencing judge in courtroom *B*, but by deviating from past practice, an offender convicted in year *X* received a different sentence than an identical offender, convicted of an identical offense, convicted in year *Y*.

110. *See* U.S. SENTENCING COMM'N, STAFF DISCUSSION PAPER: SENTENCING OPTIONS UNDER THE GUIDELINES 10 (on file with author).

111. *See* COURTNEY SEMISCH, U.S. SENTENCING COMM'N, ALTERNATIVE SENTENCING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 4 tbl.2 (2009), *available at* [http://www.ussc.gov/general/20090206\\_Alternatives.pdf](http://www.ussc.gov/general/20090206_Alternatives.pdf) (noting that 6.2% of all offenders received a sentence of straight probation in fiscal year 2007, while 86.5% of offenders received a prison-only sentence).

112. *See* STITH & CABRANES, *supra* note 2, at 62 ("If the Guidelines reflected past prac-

But such, Sara, is the way of the world. Just as iron tends to rust when exposed to oxygen, so do sentence lengths tend to increase when exposed to politics.<sup>113</sup> Operating on a one-way ratchet, sentences tend to increase over time because “the story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones.”<sup>114</sup>

The most ironic part of the Guidelines’ severity—the insult added to the injury—is that you ostensibly require judges to impose “a sentence sufficient, but not greater than necessary, to comply with the purposes” of sentencing.<sup>115</sup> Yet because the Guidelines prohibited many factors,<sup>116</sup> and because other factors were discouraged,<sup>117</sup> judges were precluded from considering

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tice, one would expect that the reduced reliance on probation would be offset by a reduction in the median prison sentence . . . . On average, however, time served in prison has *increased* in the Guidelines era.”)

113. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 525–26 (2001). Of course, Jeremy Bentham defended the proposition that “[t]he legislator ought, as much as possible, to determine everything relating to punishments, for two reasons: that they may be *certain*, and *impartial*.” JEREMY BENTHAM, *THE RATIONALE OF PUNISHMENT* 411–12 (1830) (“The legislator is necessarily unacquainted with the individuals who will undergo the punishment he appoints; he cannot, therefore, be governed by feelings of personal antipathy or regard. He is impartial, or at least, appears to be so. A Judge, on the contrary, only pronouncing upon a particular case, is exposed to favourable or unfavourable prejudices, or at least, to the suspicion of such, which almost equally shake the public confidence.”). Yet if Stuntz is correct in suggesting that legislators and prosecutors are, in order to satisfy public passions, complicit in ensuring that offenders are found guilty and punished, then requiring sentencing judges look defendants in the eye when imposing punishment may serve as an essential moral check against the politicization of crime. See Stuntz, *supra*, at 526–28, 540–41. But see J.C. Oleson, *The Antigone Dilemma: When the Paths of Law and Morality Diverge*, 29 CARDOZO L. REV. 669, 670 (2007) (noting that many judges impose morally suspect laws under the rationale that “law is law”).

114. Stuntz, *supra* note 113, at 510.

115. 18 U.S.C. § 3553(a) (2006). The notion that punishment is an evil, and therefore should be limited in its application to the quantity necessary to prevent crime, can be traced to Bentham. See BENTHAM, *supra* note 113, at 24 (“If the evil of the punishment exceed the evil of the offence [sic], the punishment will be unprofitable, the legislator will have produced more suffering than he has prevented. He will have purchased exemption from one evil at the expense of a greater.”).

116. See U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.4, 5H1.10, 5H1.12 (2009) (noting that race, sex, national origin, creed, religion, socioeconomic status, lack of guidance as a youth, drug or alcohol dependence, gambling addiction, and economic hardship are prohibited categories).

117. See *id.* §§ 5H1.2–5H1.6, 5H1.11 (noting that defendant’s physical condition or appearance; family ties and responsibilities; education and vocational skills; employment

many of the offender characteristics that historically had been relevant to sentencing (e.g., addiction, employment, or family obligations). Judges who took the parsimony provision seriously and tried to sentence below the Guidelines were stymied unless there existed a “mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”<sup>118</sup> Even then, in deciding whether a factor had been adequately taken into consideration, judges were permitted to “consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.”<sup>119</sup> And because the Guidelines have been amended more than seven hundred times since their promulgation,<sup>120</sup> there are virtually no sentencing factors that have not been considered by the Commission.<sup>121</sup>

The result? Frustrated federal judges are directed by statute to impose the least severe punishment to satisfy the enumerated goals of punishment while being simultaneously required by the Guidelines to impose sentences far longer than those imposed in other jurisdictions. In fact, the draconian nature of federal sentences may explain why Justice Kennedy publicly condemned the harshness of the Guidelines and praised judges who found ways to exercise their departure authority. Specifically, Justice Kennedy asserted that federal judges who depart downward from the Guidelines are “courageous, and [are] exercising the independence and the authority of the judiciary not to follow blindly unjust guidelines.”<sup>122</sup>

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record; military, civic, charitable or public service record; and mental and emotional conditions are not ordinarily relevant).

118. 18 U.S.C. § 3553(b).

119. *Id.* § 3553(b)(1). This provision was added at the Commission’s suggestion so that its members and records could not be subpoenaed into court. *See* 133 CONG. REC. 31,947 (1987).

120. Commission Press Release, *supra* note 1.

121. *See* STITH & CABRANES, *supra* note 2, at 102 (“As it happens, the Sentencing Commission has already considered, and the Sentencing Guidelines have already factored in, many if not all circumstances that are arguably relevant to criminal sentencing; this micro-management is one of the Guidelines’ most notable features. The Guidelines have done this by prohibiting altogether the consideration of some factors and by specifying the weight to be accorded other significant factors depending on the precise degree to which they are present.”).

122. *See* Alan J. Chaset, *Improving the Federal Sentencing Guidelines: Can We Get There From Here?*, CHAMPION, June 2004, at 6, 6.

It says rather a lot about the severity of the Guidelines that a sitting Supreme Court Justice has gone on record, praising “courageous” judges who resist blind obedience to “unjust guidelines.” But, Sara, while severity is one flaw of the Guidelines, it is not the *only* one.

## 2. Complexity

Many despise the Guidelines because of their harshness; others hate them because of how complex and labyrinthine they are. Most guidelines systems employ a modest number of offense levels. For example, Minnesota’s felony guidelines grid has eleven levels,<sup>123</sup> Pennsylvania’s grid has fourteen,<sup>124</sup> and Washington State utilizes a sixteen-level grid.<sup>125</sup> There are good reasons to keep sentencing grids simple. For one thing, while it may be possible to distinguish between ten or fifteen levels of culpability (e.g., manslaughter is less serious than second-degree murder, which is less serious than first-degree murder, and so forth), it can be difficult to draw meaningful distinctions between overly elaborate sentencing grades.<sup>126</sup> Michael Tonry, for example, has described sentencing commissions as struggling with the question, “Could we plausibly explain to a judge why a level sixteen crime is more serious than a level fifteen crime?”<sup>127</sup> Additionally, the more complicated the sentencing grid, the more susceptible it becomes to error.<sup>128</sup> Even simple sentencing grids regularly lead to calculation errors and elaborate grids produce even higher levels of application error.<sup>129</sup>

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123. See MINN. SENTENCING GUIDELINES MANUAL 57 (2008).

124. See PA. SENTENCING GUIDELINES MANUAL § 303.16 (2008).

125. WASH. SENTENCING GUIDELINES MANUAL I-2 tbl.1 (2008).

126. See TONRY, *supra* note 4, at 98–99.

127. *Id.* at 98.

128. See *id.* at 87.

129. *Id.* at 99. Erik Luna describes the same problem: “[T]he sheer complexity of the system ensures a high error rate in tallying federal sentences. The cases are legion of officials miscalculating sentence length . . . sometimes resulting in sentences that are off by years.” Luna, *supra* note 56, at 12. Empirical studies confirm this theory. In 1992, researchers at a sentencing institute asked forty-seven probation officers to calculate base offense levels for three hypothetical defendants. Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of Relevant Conduct Guidelines § 1B1.3*, 10 FED. SENT’G REP. 16, 17 (1997). Officers applying the relevant conduct rules produced widely divergent outcomes, ranging from 57 to 136 months for the first defendant, 37 to 136 months for the second defendant, and 24 to 136 months for the third defendant. *Id.* at 18–19. In a 1996 survey, less than twenty percent of probation officers indicated that Guide-

But such concerns did not prevent the Commission from introducing a federal sentencing grid that contains forty-three rows (offense levels) and six columns (criminal history categories).<sup>130</sup> That's 258 *different* cells, resulting in a grid so large it has to be printed in a small font size to fit on a single page.<sup>131</sup> And while that grid might appear to contain a ridiculous level of detail,<sup>132</sup> locating an offender's placement on the Guidelines table isn't just a matter of looking up the offense level and the number of prior convictions. In fact, the grid may be the most straightforward part of the Guidelines analysis.<sup>133</sup>

To ascertain the offense level, one must start with the offense of conviction, include relevant conduct, add specific offense characteristics, and factor in cross-references;<sup>134</sup> in drug cases, weight calculations are paramount, and in economic crimes, loss amounts and specific offense characteristics drive sentences.<sup>135</sup> Special mathematical operations are needed to derive adjusted scores for multiple counts, and adjustments must be made for obstruction of justice or acceptance of responsibility.<sup>136</sup> Similarly, to

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lines calculations were accurate in most of the cases they had seen, while forty percent indicated that they were more likely than not to be incorrect. *See Probation Officers Advisory Group Survey*, 8 FED. SENT'G REP. 303, 303, 306 (1996) [hereinafter *Probation Officers Survey*].

130. U.S. SENTENCING GUIDELINES MANUAL § 5A sentencing tbl. (2009). The complexity of the grid can be traced to congressional requirements:

If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

28 U.S.C. § 994(b)(2) (2006). Even if the Sentencing Commission had not determined to make the levels overlapping, the statute requires a minimum of eighteen levels. *See* CONSTITUTION PROJECT, RECOMMENDATIONS FOR FEDERAL CRIMINAL SENTENCING IN A POST-BOOKER WORLD 22 n.26 (2006), available at <http://www.constitutionproject.org/manage/file/33.pdf> (describing mathematical minimum of eighteen levels). The Constitution Project recommends repeal of the "25% rule" and adoption of a ten-level grid. *Id.* at 13–14. The Commission has also explored the possibility of simplifying the Guidelines. *See* U.S. Sentencing Comm'n, *supra* note 12 (describing simplification efforts).

131. *See* U.S. SENTENCING GUIDELINES MANUAL § 5A sentencing tbl. (2009).

132. Justice Breyer has been critical of such fine distinctions. "Ranking offenders through the use of fine distinctions is like ranking colleges or the 'liveableness' of cities with numerical scores that reach ten places past a decimal point. The precision is false." Breyer, *supra* note 104, at 186.

133. *See* Marc Miller, *Rehabilitating the Federal Sentencing Guidelines*, 78 JUDICATURE 180, 183–84 (1995) (describing the complexity of the Guidelines).

134. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 1B1.1, 1B1.3 (2009).

135. *See id.* ch. 2, pts. B, D.

136. *See id.* ch. 3, pts. D, E.

determine the criminal history score, one must calculate points assigned for qualifying previous sentences, adjusting for their recency, departing as necessary, and then ensure that the score is not otherwise enhanced by any of the criminal history provisions governing career offenders, armed career criminals, or repeat child sexual offenders.<sup>137</sup>

Sara, just finding the appropriate block on the elaborate federal grid can be baffling. For this reason, the instruction manual is enormous. Indeed, the most recent iterations of the Guidelines manual (including the Guidelines, policy statements, and commentary) contain more than fifteen hundred *pages* of technical regulations.<sup>138</sup> That means the combined portions of the Guidelines manual are thicker than the telephone directories of many metropolitan cities.<sup>139</sup> Furthermore, the content of those pages can be numbingly dense.<sup>140</sup> For these reasons it has been said that “the Guidelines make the federal tax code look like *Reader’s Digest*.”<sup>141</sup>

One of the reasons more than fifteen hundred pages of instructions are needed is that the federal system incorporates modified real-offense sentencing.<sup>142</sup> State guideline systems have rejected real-offense sentencing,<sup>143</sup> perhaps because the idea is so non-intuitive.

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137. See *id.* ch. 4, pts. A, B.

138. See Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 35 (2005) (“The Guidelines supposedly set down a sentence for every case through exhaustive rules contained in the ‘Guidelines Manual,’ a document that has ballooned to some 1,500 pages of regulations . . .”).

139. See Adam Zagorin, *Get Out of Jail, Not Quite Free*, TIME, May 24, 1993, <http://www.time.com/time/magazine/article/0,9171,978562,00.html>.

140. See STITH & CABRANES, *supra* note 2, at 3 (“The Sentencing Guidelines are almost a parody of the overly detailed, inflexible legal structures that lawyer and author Philip K. Howard criticized in his 1994 best-selling book, *The Death of Common Sense*.”).

141. Luna, *supra* note 56, at 12 (citation omitted). *But see* Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 328–29 (2000) (noting that an empirical measurement of the tax code against the Guidelines reveals that the tax code is *much* larger).

142. See William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 503–06, 513 (1990) (describing relevant conduct sentencing).

143. See TONRY, *supra* note 4, at 78 (“Real offense sentencing has been unanimously rejected elsewhere . . .”); *id.* at 93–94 (“[T]he sentencing commissions in Arkansas, Canada, Delaware, Kansas, Florida, Louisiana, Minnesota, New York, North Carolina, Ohio, Oregon, Pennsylvania, Washington, and Wisconsin unanimously rejected real offense sentencing and based guidelines on conviction offenses.”).

When sentencing experts tell laypeople that, in the federal system, defendants can be punished for criminal counts that were never filed—even for crimes of which they were acquitted—and for facts that are not found beyond a reasonable doubt, the public often thinks that these legal scholars are having one over on them.<sup>144</sup> It sounds too Kafkaesque to be true.<sup>145</sup> When the experts *do* succeed in convincing the public that they're serious, people are outraged. Indeed, many scholars and lawyers are outraged;<sup>146</sup> others were, and have merely grown inured by habit.<sup>147</sup> Punishing defendants for uncharged or acquitted conduct sounds like the cruelest of lawyer jokes:

A man walks into a lawyer's office and says he's been indicted with partners on multiple counts of stock fraud. He sees the government's case as weak and wants to go to trial. The lawyer informs the stunned client that if he's convicted on only *one* count, the jury's not-guilty verdict on the other charges means little under the Federal Sentencing Guidelines. Why? A defendant may be punished for acquitted conduct if the judge merely *believes* he's guilty. The punch

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144. See *id.* at 93–94 (“More than once when describing the relevant conduct system to government officials and judges outside the United States, I have been accused of misreporting or exaggerating.”).

145. See FRANZ KAFKA, *THE TRIAL* 7 (Willa Muir & Edwin Muir trans., Alfred A. Knopf, Inc. 1992) (1925) (“‘That is the Law. How could there be a mistake in that?’ ‘I don’t know this law,’ said K. ‘All the worse for you,’ replied the warder. . . . ‘You’ll come up against it yet.’”); see also G. Thomas Eisele, *The Sentencing Guidelines System? No. Sentencing Guidelines? Yes.*, FED. PROBATION, Dec. 1991, at 16, 20 (characterizing the Guidelines system as Kafkaesque).

146. See Elizabeth T. Lear, *Is Conviction Irrelevant?* 40 UCLA L. REV. 1179, 1237–39 (1993); Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 553–64 (1993); David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 403, 405 (1993).

147. See generally STEVE BOGIRA, *COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE* (2005) (describing blasé attitude of courtroom actors). Borrowing from G.K. Chesterton, Bogira notes:

“[T]he horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it. Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop.”

*Id.* at vii (quoting G.K. CHESTERTON, *The Twelve Men*, in *TREMENDOUS TRIFLES* 85–86 (1909)). The same point has been made about the Guidelines. See Luna, *supra* note 138, at 74 (“The mechanical methodology anesthetizes the system, its participants, and even the public to the inherently moral judgment involved in punishing another human being with the imprimatur of the state.”).

line: You can win at a trial only if there's a complete acquittal. If you're convicted of *anything*, you can be punished for *everything*.<sup>148</sup>

The idea behind real-offense sentencing was noble enough: shifting power away from prosecutors (who could charge-bargain) to judges (who could sentence using all relevant conduct, regardless of what prosecutors charged).<sup>149</sup> In theory, real-offense sentencing might have resembled inquisitorial civil-code jurisprudence.<sup>150</sup> But in practice, Sara, the shift in power did not operate as imagined. Parties subverted the Guidelines to reach acceptable outcomes.<sup>151</sup> Having great leverage, prosecutors—through charge- and fact-bargaining—controlled Guidelines sentencing far more than they had during the pre-Guidelines era.<sup>152</sup>

District judges did not assume power over sentencing under real-offense guidelines, Sara. Do you know who did? Prosecutors did.<sup>153</sup> The Commission did.<sup>154</sup>

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148. Gerald Shargel, *Run-on Sentencing: The Barely Noticed Mayhem Following the Supreme Court's Blakely Decision*, SLATE (July 12, 2004, 5:21 PM), <http://www.slate.com/id/2103754>.

149. See Julie R. O'Sullivan, *In Defense of the United States Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1347 (1997) ("Pure real-offense sentencing also works to remove the secondary level of potential sentencing disparities by nullifying the influence of the prosecutor's choice of charge upon the eventual sentencing decision. Assuming that the sentencing authority has complete access to the 'real' circumstances of the offense and is able to resolve accurately disputes regarding those facts, each defendant will receive a sentence commensurate with offenders sharing the same 'real' characteristics, not just those with whom the prosecutor, for her own reasons, chooses to group the defendant.").

150. See Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 533 (2007) ("The premises of the Guidelines transformed common law judges into civil code clerks."). Of course, not all federal judges were supportive of a civil-code approach to sentencing. See Eisele, *supra* note 145, at 20 ("I have characterized this system as a dark, sinister, and cynical crime management program. It is in effect a reincarnation of those systems prevalent in Central and Eastern European countries 150 years ago. It has a certain Kafkaesque aura about it.").

151. See Bowman, *supra* note 141, at 341 (reporting national Guidelines departure in about a third of cases); 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, 553–54 (1992) (reporting that judges and prosecutors circumvented guidelines in about one-sixth of cases); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 284–86 (1989) (reporting manipulation of the guidelines by prosecutors).

152. See, e.g., Bowman, *supra* note 141, at 341–47 (describing Guidelines evasion via departures, charge bargaining, and fact bargaining); *Probation Officers Survey*, *supra* note 129, at 303 (discussing fact bargaining); Mary Pat Flaherty & Joan Biskupic, *Prosecutors Can Stack the Deck; Sentencing Powers Shift from Judges*, WASH. POST, Oct. 7, 1996, at A1.

153. See, e.g., Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for*

The Commission seized power over sentencing (a power traditionally reserved for judges) by establishing an elaborate system that regulated not only the judicial interpretation of *charged* offenses, but governed every relevant aspect of sentencing. It tried to quantify every aspect of the offense and the offender like some kind of weird *Dungeon Master's Guide*<sup>155</sup> of punishment—elaborate rules rooted in look-up tables. But federal defendants are not eleventh-level paladins, and commentators have condemned the Commission for pretending that three-dimensional actors can be adequately represented on the two-dimensional world of the sentencing grid.

Inspired by the classic novella of mathematics, *Flatland*,<sup>156</sup> Erik Luna writes:

Voila! A human being has been transformed from a multidimensional being into a string of letters and numbers, cast onto the grid of Gridland for internment in a federal penitentiary. The defendant is now a two-dimensional character—as flat as any in Flatland—his vertical axis an offense level and his horizontal axis a criminal history category. There is no depth or detail, no shading or perspective, only an initial movement within the grid pursuant to points or levels duly added or subtracted, placing him within a narrow range of punishment. The Guidelines are “neutral” with regard to the offender’s race, sex, national origin, and creed, a restriction that seems eminently reasonable in both Gridland and worlds of higher dimensionality. But federal judges cannot consider an assortment of issues deemed significant in lands not wholly defined by the x-y axes, including the defendant’s: age, education, vocational skills, mental and emotional condition, physical condition, drug or alcohol dependence, lack of guidance as a youth, employment history, family ties and responsibilities, community ties, military and public service, and char-

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*Less Aggregation*, 58 U. CHI. L. REV. 901, 926 (1991) (describing the Guidelines system as a “prosecutor’s paradise”); Stith, *supra* note 98, at 1430 (“[T]here is no doubt that because they set forth the consequences of each statutory charge and each specified sentencing factor, the Federal Sentencing Guidelines had the potential to effect a transfer of discretion over the severity of punishment from the judge to the prosecutor.”).

154. See Stith, *supra* note 98, at 1435 (“In this way, a sentence would be based on the rules set forth by the Commission, not on the exercise of discretion by either the judge or the prosecutor.”).

155. E. GARY GYGAX & DAVE ARNESON, DUNGEON MASTER’S GUIDE (Kim Mohan et al. eds., Wizards of the Coast, Inc., rev. 3.5 2003) (1979) (providing documentation and reference tables that allow the Dungeon Master to facilitate play of Dungeons and Dragons).

156. See William F. Lindgren & Thomas F. Banchoff, *Introduction* to EDWIN A. ABBOTT, FLATLAND 1 (William F. Lindgren & Thomas F. Banchoff eds., Cambridge Univ. Press 2010) (1884).

itable works. Under the Guidelines, judges thus confront defendants as numbers rather than as human beings.<sup>157</sup>

Luna makes an important point here, Sara. Important enough that another example is warranted. In the film *Dead Poets Society*, a classroom of prep students is confronted with a stultifying essay (by Dr. J. Evans Pritchard, Ph.D.) entitled “Understanding Poetry.”<sup>158</sup> It directs students of poetry to ask two questions:

One, how artfully has the objective of the poem been rendered, and two, how important is that objective. Question one rates the poem’s perfection, question two rates its importance. . . . If the poem’s score for perfection is plotted along the horizontal of a graph, and its importance is plotted on the vertical, then calculating the total area of the poem yields the measure of its greatness. A sonnet by Byron may score high on the vertical, but only average on the horizontal. A Shakespearean sonnet, on the other hand, would score high both horizontally and vertically, yielding a massive total area, thereby revealing the poem to be truly great.<sup>159</sup>

The *X* and *Y* axis might seem strangely familiar to you, Sara. In the movie, after one of the students reads the essay aloud, the new English teacher, John Keating, pronounces his judgment of it: “*Excrement*. That’s what I think of Mr. J. Evans Pritchard. We’re not laying pipe, we’re talking about poetry.”<sup>160</sup> Keating tells his students to tear out the page—to tear out the entire essay—assuring them, “It’s not the Bible, you’re not going to go to hell for this. Go on, make a clean tear, I want nothing left of it.”<sup>161</sup>

Keating, too, makes an important point. Merely draping something—be it poetry or sentencing—in the trappings of mathematics and science does not make it empirical. For example, the mathematics of the Guidelines may help to conceal the Commission’s failure to make fundamental decisions about sentencing philosophies,<sup>162</sup> but merely quantifying variables does not mean an approach is scientific or accurate.<sup>163</sup> Yes, the jargon of the Guidelines

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157. Luna, *supra* note 138, at 38–39 (2005).

158. DEAD POETS SOCIETY (Touchstone Pictures 1989). The essay is exceedingly similar to the real-life work of Laurence Perrine. See LAURENCE PERRINE, SOUND AND SENSE: AN INTRODUCTION TO POETRY 260–62 (4th ed. 1973).

159. DEAD POETS SOCIETY, *supra* note 158.

160. *Id.* (emphasis added).

161. *Id.*

162. See Hofer & Allenbaugh, *supra* note 19, at 29–32 (describing Commission’s failure to identify an organizing theory of punishment).

163. See DARRELL HUFF, HOW TO LIE WITH STATISTICS 8 (1954) (“The secret language of statistics, so appealing in a fact-minded culture, is employed to sensationalize, inflate, con-

(e.g., “points” and “levels” and “scores”) creates an appearance of objectivity and analytic precision,<sup>164</sup> but the Guidelines were not derived entirely by science. In large part, they were established in the belief that they embodied the punishments Congress wanted.<sup>165</sup> The Commission issued *diktats* to the courts, dressing up the politics in the robes of science. They did not explain their reasoning.

The malcontents who would challenge the Commission’s decisions are often frustrated since the Sentencing Commission has a monopoly on federal sentencing data.<sup>166</sup> Unless an individual is able to disentangle the Commission’s statistics,<sup>167</sup> there is no direct way to challenge the policy decisions of the Commission on empirical grounds.<sup>168</sup> Those who wanted to sentence outside the

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fuse, and oversimplify.”).

164. See *United States v. Reich*, 661 F. Supp. 371, 378 (S.D.N.Y. 1987) (“The formulae and the grid distance the offender from the sentencer—and from the reasons for punishment—by lending the process a false aura of scientific certainty.”); Breyer, *supra* note 104, at 184–85 (asserting that the Guidelines are not as precise as they may seem).

165. See *supra* note 73 and accompanying text (describing amendments based on perceived congressional signals).

166. See 28 U.S.C. § 994(w)(1) (2006) (requiring the chief judge of each district to submit to the Sentencing Commission a written report on each sentence imposed that includes the judgment and commitment order, the statement of reasons, any plea agreement, the indictment or other charging document, and the presentence report). Because many of these documents are not public record, there is no meaningful way to examine patterns of federal sentencing, independent of the Sentencing Commission’s dataset. Some have argued for increased transparency in sentencing data. See Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1356–57 (2005) (arguing for increased public access to sentencing data); Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715, 740–41 (2008) (“The unavailability of judge-identifying data in criminal sentencing is one of the most frustrating aspects of the study of federal sentencing and has significantly impeded scholarly evaluation of the Guidelines’ efficacy.”).

167. See Cindy R. Alexander et al., *Evaluating Trends in Corporate Sentencing: How Reliable Are the United States Sentencing Commission’s Data?*, 13 FED. SENT’G REP. 108, 108 (2000) (suggesting that the quality and usefulness of the Sentencing Commission’s corporate sentencing data is limited).

168. But see Amy Baron-Evans, *Sentencing by the Statute* 21 (Office of Defender Services, Working Paper, Apr. 27, 2009), [http://www.fd.org/pdf\\_lib/Sentencing%20By%20the%20Statute.2.28.09.pdf](http://www.fd.org/pdf_lib/Sentencing%20By%20the%20Statute.2.28.09.pdf). (“[R]arely do the guidelines reflect the Commission’s study of pre-guideline sentencing practice, nor do most guidelines reflect the Commission’s exercise of judgment as an expert, research-based agency unfettered by politics. Using empirical research, in some cases research undertaken at the Commission itself, you can readily show that the guideline range was not developed based on national sentencing data or empirical research and that it recommends a sentence that is greater than necessary to satisfy § 3553(a)’s objectives. . . . In fact, you can develop an evidentiary basis for a non-guidelines sentence that is stronger than anything the Commission has developed in support of the recommended guideline range.”).

Guidelines could not disaggregate the data to support their efforts; judges who didn't want to be reversed on appeal had no choice but to submit.<sup>169</sup>

In some ways, the Commission's use of opacity and mystification is reminiscent of the Grand Inquisitor in Dostoevsky's magnum opus, *The Brothers Karamazov*.<sup>170</sup> The Guidelines may have reduced unwarranted disparity,<sup>171</sup> and perhaps they even prevented Congress from enacting more mandatory minimum statutes;<sup>172</sup> but they did so at great cost, trenching upon the discretion of judges, limiting their ability to tailor sentences to fit the specific characteristics of the offense and the offender. In the following quote, Dostoevsky's Inquisitor is describing the authority of the church, but the same principle may apply to the Commission:

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169. By supplanting the old (decentralized) approach to sentencing, the Guidelines have made it virtually impossible to think about federal sentencing without referencing them. *See United States v. Jaber*, 362 F. Supp. 2d 365, 375–76 (D. Mass. 2005) (“[The Guidelines] have shaped the vocabulary we use to describe sentences, and the standards we use to evaluate and compare cases. Since there were no alternative rules prior to the Sentencing Guidelines—no empirical studies linking particular sentences to particular crime control objectives, no common law of sentencing—and there have been none since, the Guidelines will continue to have a critical impact.”). Actually, the habituation of judges to the Guidelines is not so different from the operant conditioning of sheep:

“We solved our problem [of managing the location of sheep] with a portable electric fence which could be used to move our flock of sheep about the lawn like a gigantic mowing machine, but leaving most of it free at any time. At night the sheep are taken across the brook to the main fold. But we soon found that the sheep kept to the enclosure and quite clear of the fence, which didn't need to be electrified. So we substituted a piece of string, which is easier to move around. . . . [New lambs stray,] but they cause no trouble and soon learn to keep with the flock. The curious thing is . . . that most of these sheep have never been shocked by the fence. Most of them were born after we took the wire away. It has become a tradition among our sheep never to approach string. The lambs acquire it from their elders, whose judgment they never question.”

B.F. SKINNER, *WALDEN TWO* 15–16 (Hackett Publ'g Co. 2005) (1948).

170. FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* 249–50 (Richard Pevear & Larissa Volokhonsky trans. 1990) (1880).

171. *See FIFTEEN YEARS REPORT*, *supra* note 3, at 140 (concluding that Guidelines have reduced inter-judge disparity).

172. *But see Barkow*, *supra* note 55, at 770–71 (“Of course, it is possible that without the Sentencing Commission, Congress would have enacted even longer sentences or passed even more mandatory minimums. But . . . [i]n those instances where the Commission tried to exert influence and get Congress to change course, it failed. And in many other instances where Congress took action on sentencing, there is no evidence that the Commission was consulted. If the Commission has had a moderating influence, it has been so slight as to be imperceptible.”).

With us everyone will be happy, and they will no longer rebel or destroy each other, as in your freedom, everywhere. Oh, we shall convince them that they will only become free when they resign their freedom to us, and submit to us. Will we be right, do you think, or will we be lying? They themselves will be convinced that we are right, for they will remember to what horrors of slavery and confusion your freedom led them. Freedom, free reason, and science will lead them into such a maze, and confront them with such miracles and insoluble mysteries, that some of them, unruly and ferocious, will exterminate themselves; others, unruly but feeble, will exterminate each other; and the remaining third, feeble and wretched, will crawl to our feet and cry out to us: "Yes, you were right, you alone possess his mystery, and we are coming back to you—save us from ourselves."<sup>173</sup>

Sara, whether the complexity of the Guidelines was intentional and benevolent (pacifying judges and saving them from Congress), intentional and self-serving, or purely accidental, their complexity may have increased their acceptance. By masking the politics of sentencing beneath a veneer of science, the Guidelines made punishment appear more rational, empirical, and precise. But the complexity of the Guidelines simultaneously made them cumbersome and subject to increased rates of error. Furthermore, the complexity (and severity) of the Guidelines were greatly exacerbated by a third problem: rigidity.

### 3. Rigidity

Until the Supreme Court's decision in *United States v. Booker*, the Guidelines were binding.<sup>174</sup> In practice, the Guidelines were law;<sup>175</sup> only nominally were they ever "guidelines." Of course, "mandatory guidelines" is both a contradiction in terms and more than a little Orwellian,<sup>176</sup> but that's the nomenclature that was used. And, as you know very well, a great deal of friction was generated in the world of federal sentencing over just how mandatory those guidelines were.

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173. DOSTOEVSKY, *supra* note 170, at 258.

174. 543 U.S. 220, 245 (2005).

175. See Stith, *supra* note 98, at 1429–30 ("As Justice Antonin Scalia recognized in his 1989 dissent in *Mistretta*[,] . . . and as Justice Harry Blackmun's majority opinion refused to acknowledge, the Guidelines were law.").

176. See GEORGE ORWELL, 1984, at 5 (1949) (coining such memorable slogans as "WAR IS PEACE," "FREEDOM IS SLAVERY," and "IGNORANCE IS STRENGTH").

This was strange. One might think that if judges kept departing from a guideline system, it might suggest that those guidelines were in need of revision. After all, that was the idea when you were born, Sara.<sup>177</sup> But that is not what transpired. Instead of locating the problem with the Guidelines, the problem was blamed on activist judges.<sup>178</sup> Accordingly, the solution was not to modify the Guidelines, but to coerce judges into compliance. At one point, House Majority Whip Tom DeLay threatened, “The judges need to be intimidated. . . . They need to uphold the Constitution.’ If they don’t behave, ‘we’re going to go after them in a big way.’”<sup>179</sup> And in what sometimes seemed like a battle between branches of government,<sup>180</sup> some legislators threatened to strip judges of *all* discretion, enacting broad slates of mandatory minimums.<sup>181</sup> Sometimes the conflict seemed less like a battle, and more like a knife fight. At one point, Judge James Rosenbaum was investigated by the House Judiciary Committee for resisting the Guidelines.<sup>182</sup>

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177. See 28 U.S.C. § 994(o) (2006) (“The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.”); U.S. SENTENCING COMM’N, DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 5 (2003) [hereinafter DOWNWARD DEPARTURES], available at <http://www.ussc.gov/departtrpt03/departtrpt03.pdf> (noting that “a high or increasing rate of departures for a particular offense, for example, might indicate that the guideline for that offense does not take into account adequately a particular recurring circumstance and should be amended accordingly”).

178. See, e.g., David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211 *passim* (2004) (describing congressional hostility toward federal judges who exercised judicial discretion).

179. Joan Biskupic, *Hill Republicans Target ‘Judicial Activism’; Conservatives Block Nominees, Threaten Impeachment and Term Limits*, WASH. POST, Sept. 14, 1997, at A1.

180. See, e.g., Debra Rosenberg et al., *The War on Judges*, NEWSWEEK, Apr. 25, 2005, at 22 (describing inflammatory legislative criticism of the judiciary); Ruth Marcus, *Booting the Bench; There’s New Ferocity in Talk of Firing Activist Judges*, WASH. POST, Apr. 11, 2005, at A19 (describing intense congressional interest in impeaching “activist” federal judges and justices).

181. See *Blakely v. Washington and the Future of the Federal Sentencing Guidelines: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 3 (2004) [hereinafter *Blakely Hearing*] (comments of Sen. Hatch) (“[I]t is possible that some here in Congress may respond by creating new mandatory minimum penalties to compensate for this unfettered discretion.”).

182. See Zlotnick, *supra* note 178, at 227–28 (describing House Judiciary Committee’s investigation of Judge Rosenbaum’s records); Tresa Baldas, *Congress Comes After a Federal Judge: Sentencing at Issue in Subpoena Uproar*, NAT’L L.J., Mar. 24, 2003, at A1 (“In a rare and controversial move that has judges nationwide expressing concern, the House Judiciary Committee has threatened to issue subpoenas for records relating to Rosenbaum’s sentencing decisions, and has requested a federal review of the entire Minnesota federal bench as part of a broader inquiry . . . .”); David Rubenstein, *Rosenbaum Inquisition*, NATION, Dec. 11, 2003, at 7 (describing investigation of Judge Rosenbaum’s sentenc-

This battle over departures largely ignored the fact that district judges are not the only actors exercising discretion in the system. Prosecutors were free to grant downward departures for substantial assistance,<sup>183</sup> and no one in Congress seemed particularly bothered by *that*. United States Attorney's offices were free to establish different practices (e.g., one district would establish a fast-track program while an adjacent district would not, resulting in radically different sentences for offenders separated by only a few miles),<sup>184</sup> and no one in Congress seemed bothered by *that*, either. Sentencing disparity of this kind was deemed to be *warranted* disparity.<sup>185</sup> But as soon as a judge departed downward from a Guidelines sentence because the Justice Department's fast-track system did not operate in the district, he would be reversed, even if the departure had been applied to redress sentencing disparity created by the unequal promulgation of fast-track programs.<sup>186</sup> The inference is obvious: under the mandatory Guidelines, prosecutorial discretion was viewed as a necessary evil but all judicial discretion was suspect.<sup>187</sup>

Of course, the Orwellian "mandatory Guidelines" were struck down as constitutionally doubleungood in *United States v. Booker*.<sup>188</sup> But, curiously, even post-*Booker*, there has been a great deal of attention paid to rates of departure and variances. Judges wor-

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ing practices).

183. See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009).

184. See Steven G. Kalar & Jon Sands, *An Object All Sublime—Let the Punishment Fit the Crime: Federal Sentencing after Gall and Kimbrough*, 32 CHAMPION, Mar. 2008, at 20, 28 ("Over the past decade, different federal districts have created—or rejected—'fast track' offers for illegal re-entry defendants. These (non-guideline) deals can mean a 75 percent reduction in a federal defendant's sentence. Whether an alien gets these deals depends largely on the geographical fluke of location of arrest. Whether an alien is detected on the border in Arizona instead of Nevada, or even between divisions *in the same district* in Texas, can mean that a defendant will—or will not—receive these remarkable deals. The discrepancies between identically situated aliens who do—or do not—receive fast-track deals make a mockery of the guidelines' goal to eliminate sentencing disparity.").

185. See Marc L. Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 423–25 (1992) (discussing what constitutes unwarranted disparity).

186. See, e.g., *United States v. Banuelos-Rodriguez*, 215 F.3d 969, 970–73, 978 (9th Cir. 2000) (rejecting § 3553 sentence below Guidelines based on fast track disparities). *But see*, e.g., *United States v. Morales-Chaires*, 430 F.3d 1124, 1131 (9th Cir. 2005) (upholding a § 3553 sentence above Guidelines, despite fast-track disparity).

187. See, e.g., 130 CONG. REC. 973 (1984). Senator Mathias characterized the views of SRA supporters: "[J]udges cannot be trusted. You cannot trust a judge . . . you must not trust a judge." *Id.*

188. 543 U.S. 220, 245 (2005).

ried that if they took a “free at last, free at last” approach,<sup>189</sup> Congress might respond with a “Booker fix” even more restrictive than the mandatory Guidelines.<sup>190</sup> So judges monitored sentencing trends closely, as did the Commission and a vigilant Congress.<sup>191</sup> Even now, the Commission presents its data by comparing post-Booker statistics against pre-Booker rates of departures,<sup>192</sup> even though pre-Booker Guidelines achieved their compliance rates by violating the Sixth Amendment.<sup>193</sup>

The rigidity of the Guidelines can be traced to a zeal for parity. Parity in sentencing lies close to your heart, Sara;<sup>194</sup> and equal punishment for equal offenders is a difficult proposition with which to quibble. Of course, wherever there is discretion, there is disparity, so the Guidelines imposed dramatic limits on judicial discretion.<sup>195</sup> Yet in so doing, the Guidelines deprived judges of the ability to tailor appropriate sentences to the characteristics of each offender and each offense.<sup>196</sup> Yes, the Guidelines succeeded in treating like offenders alike, but they did so by (to a large degree) treating *unlike* offenders alike.<sup>197</sup>

Parity in sentencing is an important goal in any just system of laws, but it is not the *only* goal.<sup>198</sup> After all, automatic death pe-

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189. See *United States v. Jaber*, 362 F. Supp. 2d 365, 370 (D. Mass. 2005) (describing the “free at last” approach as an unacceptable response to *Booker*).

190. See *United States v. Wilson*, 355 F. Supp. 2d 1269, 1287–88 (D. Utah 2005) (“Should the courts fail to carry out congressional will, there should be little doubt what will follow. Congress can easily implement its desired level of punitiveness in the criminal justice system, through such blunderbuss devices as mandatory minimum sentences.”); see also *supra* note 181 (describing suggestion of mandatory minimums).

191. See DOWNWARD DEPARTURES, *supra* note 177, at 1 (analyzing departure data as required by § 401(m) of the PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 650, 675 (codified at 28 U.S.C. 994 note (2006))).

192. See, e.g., PRELIMINARY QUARTERLY DATA REPORT, 10 fig. A (Third Quarter 2010), available at [http://www.uscourts.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics\(Quarter\\_Sentencing\\_Updates/USSC\\_2010\\_Quarter\\_Report\\_3rd.pdf](http://www.uscourts.gov/Data_and_Statistics/Federal_Sentencing_Statistics(Quarter_Sentencing_Updates/USSC_2010_Quarter_Report_3rd.pdf).

193. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”).

194. See FIFTEEN YEARS REPORT, *supra* note 3, at 79 (identifying disparity reduction as main objective of SRA); Feinberg, *supra* note 13, at 295 (same).

195. See Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027, 1028–29 (1997).

196. *Id.*

197. See, e.g., Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 870 (1992).

198. See Alschuler, *supra* note 153, at 902 (“Some things are worse than sentencing disparity, and we have found them.”).

nalty statutes would have neatly solved the conundrum of channeled discretion in post-*Furman* capital punishment cases—assuring oodles of parity—but in *Woodson v. North Carolina*, statutes of this kind were struck down as unconstitutional.<sup>199</sup> The federal courts place great value on equal justice under law,<sup>200</sup> but our idea of justice encompasses other values, too, such as affording defendants competent representation,<sup>201</sup> requiring each element of a crime to be proved beyond a reasonable doubt before finding someone guilty,<sup>202</sup> or entitling defendants to a jury of their peers.<sup>203</sup> These values may frustrate efforts to establish parity, but they possess a jurisprudential gravity of their own.

Still, the congressional commitment to parity in sentencing, coupled with a fundamental mistrust of federal judges, led to the rigidity of the Guidelines (as well as to mandatory minimum sentences). The Guidelines are often praised as being more nuanced than mandatory minimum sentencing<sup>204</sup>—operating as a scalpel instead of a meat cleaver—but the Guidelines were so rigid that, when they were binding, they operated like “mandatory minimums light.” They were more finely calibrated, of course, but they suffered from the same fundamental inflexibility as statutory minimums.<sup>205</sup> Ultimately, ironically, it was the very rigidity of the

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199. 428 U.S. 280, 305 (1976) (construing *Furman v. Georgia*, 408 U.S. 238, 239–40 (1971)).

200. Indeed, the words “Equal Justice Under Law,” are carved into the architrave of the Supreme Court of the United States, over the front doors. See OFFICE OF THE CURATOR, SUPREME COURT OF THE UNITED STATES, THE WEST PEDIMENT: INFORMATION SHEET (2003), available at <http://www.supremecourtus.gov/about/westpediment.pdf> (describing pediment carvings).

201. See *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963) (holding that the Sixth Amendment requires states to provide counsel for indigent defendants).

202. See *In re Winship*, 397 U.S. 358, 368 (1970) (holding that when a juvenile is charged with an offense, every element must be proved beyond a reasonable doubt); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (construing this rule for all offenses).

203. See 4 WILLIAM BLACKSTONE, COMMENTARIES \*344 (“[H]owever *convenient* these [new methods of trial] may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters.”).

204. See, e.g., Breyer, *supra* note 104, at 184–85.

205. See, e.g., STITH & CABRANES, *supra* note 2, at 123 (“[T]he federal Sentencing Guidelines are not an *alternative* to mandatory sentencing, as the Commission and many sentencing reformers insist, but a particularly complex *form* of mandatory sentencing.”); Freed, *supra* note 51, at 1742–43 (“Readers of the [Commission’s Mandatory Minimums] report cannot avoid observing the resemblance between the statutory mandates the Commission condemned and the guideline mandates its own *Guidelines Manual* contained.”); Luna, *supra* note 56, at 2 (“Like mandatory minimums, the Sentencing Guidelines set

Guidelines that precipitated the Supreme Court's remedial holding in *United States v. Booker* and ushered in a new era of federal sentencing.<sup>206</sup>

B. *That Which Cannot Bend Must Break: Booker and Its Progeny*

Shortly after you were conceived on the Senate floor and signed into existence, the Supreme Court began issuing a series of important opinions about federal sentencing.

In the beginning, of course, there was *Mistretta*.

In *Mistretta v. United States*, the Supreme Court upheld the constitutionality of the Commission and the Guidelines.<sup>207</sup> In an eight-to-one decision (with Justice Scalia writing as the lone dissenter), the Court concluded that Congress had not violated the nondelegation doctrine when it delegated the power to promulgate sentencing guidelines for federal offenses to the Commission.<sup>208</sup> The majority reasoned that “[a]lthough the unique composition and responsibilities of the Sentencing Commission give rise to serious concerns about a disruption of the appropriate balance of governmental power among the coordinate Branches,” the Commission did not violate the principle of separation of powers.<sup>209</sup> Neither the location of the Commission within the judicial branch,<sup>210</sup> nor the requirement that at least three Article III judges serve,<sup>211</sup> nor the fact that the President appoints the commissioners,<sup>212</sup> was sufficient to invalidate you, Sara.

After *Mistretta* settled the question of the Commission's constitutionality, the Supreme Court and Congress entered a period of détente during which tension grew over downward departures.<sup>213</sup> Judges who chafed at the severity and rigidity of the Guidelines

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strict parameters for punishment (including a lower limit), absent some basis to depart from the sentencing range.”)

206. 543 U.S. 220, 233–34, 245 (2005).

207. 488 U.S. 361, 412 (1989). Prior to *Mistretta*, hundreds of district judges had invalidated the SRA and the Guidelines. See *supra* note 4 and accompanying text (describing pre-*Mistretta* cases).

208. *Mistretta*, 488 U.S. at 371.

209. *Id.* at 384.

210. See *id.* at 396–97.

211. See *id.* at 405, 408.

212. *Id.* at 409.

213. See Zlotnick, *supra* note 178, at 244 (describing friction between federal judges and legislators).

sought mechanisms to impose less draconian sentences, but at the same time, members of Congress who campaigned on tough sentences sought mechanisms to block the downward departures of bleeding-heart judges.<sup>214</sup>

On the one hand, the Guidelines had the force and effect of law, which suggested that sentences should fall within appropriate Guidelines ranges (set by the Commission); but on the other hand, the departure mechanism was *part of* the Guidelines system, which suggested that Congress and the Commission *intended* judges to have the ability to sentence outside the Guidelines whenever the interests of justice so required.<sup>215</sup> The real question turned upon how rare departures from the Guidelines range should be, and whether trial judges or appellate judges should determine whether the facts of a case warranted a departure.

Congress and the courts struggled over downward departures, locked in some weird kind of jurisprudential chess match.<sup>216</sup> The environment between Congress and the judiciary grew strained, even poisonous.<sup>217</sup> Then, in *Koon v. United States*, the Supreme Court unanimously held that whether a given sentencing factor was a legitimate ground for departure was a factual matter to be determined by the sentencing judge, subject to an abuse of discre-

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214. *Id.* at 226–27.

215. See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(b) (2009) (“When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.”). This view was articulated in the legislative history of the SRA, as well:

The Committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes 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. The purpose of sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.

S. Rep. No. 98-225, at 52 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235.

216. See Kalar & Sands, *supra* note 184, at 20 (describing *Apprendi* litigation and shifting coalitions on the Supreme Court as a chess match).

217. See Interview with Stephen B. Burbank, Professor, Univ. of Pa. Sch. of Law, *in A Law Professor’s Watch on Judicial Accountability and Independence*, THIRD BRANCH, July 2004, at 10 (Burbank stated, “This is the most poisonous atmosphere for legislative-judicial relations that I can remember.”).

tion standard on appellate review.<sup>218</sup> The holding was viewed by some as encouraging judges to disregard the Guidelines.<sup>219</sup>

The rate of non-prosecution-sponsored downward departures increased throughout the nineties. It rose from 5.8% in 1991, spiking to 10.3% in 1996, the year that *Koon* was decided, and climbed to 18.1% in 2001.<sup>220</sup> Armed with these statistics, an already-hostile Congress, abetted by the Department of Justice,<sup>221</sup> enacted a piece of anti-downward-departure legislation known as the Feeney Amendment.<sup>222</sup>

You remember the Feeney Amendment, Sara.

Added as an amendment to the PROTECT Act with virtually no debate,<sup>223</sup> and over the strenuous objections of the judiciary,<sup>224</sup> the Feeney Amendment was a slap in the face of federal judges. The legislation contained a host of provisions to hamstring any judge who might be inclined to sentence below the Guidelines. Among other things, the amendment overturned *Koon* and replaced the “abuse of discretion” standard with *de novo* appellate

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218. 518 U.S. 81, 96–100 (1996).

219. See Michael S. Gerber, *Down with Discretion*, LEGAL AFF., Mar.–Apr. 2004, at 72, 72 (“Prosecutors who don’t like the increase [in downward departures] blame it on activist judges emboldened by the 1996 Supreme Court decision *United States v. Koon*.”).

220. See DOWNWARD DEPARTURES, *supra* note 177, at 32 fig.1 (showing non-cooperation downward departures).

221. See Skye Phillips, *Protect Downward Departures: Congress and the Executive’s Intrusion Into Judicial Independence*, 12 J.L. & POL’Y 947, 976–84 (2004) (discussing the interplay between Congress and the Department of Justice in events culminating in the passage of the Feeney Amendment); Laurie P. Cohen & Gary Fields, *Ashcroft Intensifies Campaign against Soft Sentences by Judges*, WALL ST. J., Aug. 6, 2003, at A1 (“Mr. Feeney himself says he was simply the ‘messenger’ of the amendment bearing his name, which was drafted by two Justice Department officials.”).

222. The Feeney Amendment was a section of the PROTECT Act of 2003, Pub. L. No. 108-21, § 401, 117 Stat. 650, 667 (2003) (codified as amended at 28 U.S.C. § 994 note (2006)). See also *supra* notes 178–81 and accompanying text (describing congressional hostility toward judicial discretion in sentencing).

223. See 149 CONG. REC. 9365 (Apr. 10, 2003) (statement of Sen. Edward Kennedy) (“This legislation overturns a unanimous Supreme Court decision, without a single day, hour, or minute of hearings.”); SUE MYRICK, PROVIDING FOR CONSIDERATION OF H.R. 1104, THE CHILD ABDUCTION PREVENTION ACT OF 2003, H.R. REP. NO. 108-48, at 3–4 (2003) (limiting debate on the amendment to a total of 20 minutes, including statements from proponents).

224. See Letter from William H. Rehnquist, Chief Justice, Supreme Court of the U.S., to Patrick Leahy, Senator, *in* 149 CONG. REC. 9351 (Apr. 10, 2003) (“[T]he Judicial Conference believes that this legislation, if enacted, would do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of courts to impose just and responsible sentences. Before such legislation is enacted there should, at least, be a thorough and dispassionate inquiry into the consequences of such action.”).

review.<sup>225</sup> It prohibited judges from departing downward in almost all cases involving child pornography, sexual abuse, or sex trafficking;<sup>226</sup> prohibited the Commission from establishing any new grounds for downward departures for two years;<sup>227</sup> and directed the Commission to reduce the number of available downward departures.<sup>228</sup> The amendment also required a government motion before judges could adjust downward for acceptance of responsibility<sup>229</sup> or “fast-track” reasons in immigration cases.<sup>230</sup>

More ominously, the Feeney Amendment authorized a “black list” of judges, requiring the Department of Justice to report all departures, including the name of the sentencing judge, to Congress within fifteen days of sentencing.<sup>231</sup> This angered and intimidated judges<sup>232</sup> and, remarkably, prompted Chief Justice Rehnquist to warn Congress against overstepping its boundaries. Almost certainly alluding to the investigation of Judge James Rosenbaum,<sup>233</sup> Chief Justice Rehnquist reminded Congress that judges cannot be impeached for their official acts:

This [collecting judge-specific information], it seems to me, is more troubling. For side-by-side with the broad authority of Congress to legislate and gather information in this area is the principle that federal judges may not be removed from office for their judicial acts. . . . [This] principle was established just about two centuries ago in the trial of Justice Samuel Chase of the Superior Court by the Senate. . . . The political precedent set by Chase’s acquittal has governed that day to this: a judge’s *judicial* acts may not serve as a basis for impeachment.<sup>234</sup>

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225. § 401(d)(2), 117 Stat. at 670 (amending 18 U.S.C. § 3742(e)).

226. *Id.* § 401(b) (amending 28 U.S.C. § 994 note).

227. *Id.* § 401(j)(2).

228. *Id.* § 401(m)(2)(A).

229. *Id.* § 401(a)(2) (amending 18 U.S.C. § 3553(b)(2)(A)(iii)).

230. *Id.* § 401(m)(2)(B) (amending 28 U.S.C. § 994 note).

231. *Id.* § 401(l)(2)(A) (amending 18 U.S.C. § 3553 note).

232. See Zlotnick, *supra* note 178, at 234 (“This reporting system accomplishes its goal: the Court is intimidated, and the Court is scared to depart.” (quoting Judge Paul Magnuson as describing his reasoning for not departing in a white collar crime case)); Ian Urbina, *New York’s Federal Judges Protest Sentencing Procedures*, N.Y. TIMES, Dec. 8, 2003, at B1.

233. See *supra* note 182 and accompanying text (describing House Judiciary Committee’s investigation of Judge Rosenbaum); see also Representative F. James Sensenbrenner, Jr., Chairman, House Comm. on the Judiciary, Remarks Before the U.S. Judicial Conference Regarding Congressional Oversight Responsibility of the Judiciary (Mar. 16, 2004), available at <http://judiciary.house.gov/legacy/news031604.htm> (implying the seeking of impeachment for judges who impose “illegal” sentences).

234. William H. Rehnquist, Chief Justice, Supreme Court of the U.S., Remarks at the

Finally, the Feeney Amendment reached all the way back to *Mistretta* to poke the federal courts in the eye.<sup>235</sup> The amendment included a provision reducing the number of judges serving on the Commission from “[at] least three” to “[n]ot more than 3.”<sup>236</sup>

President Bush signed the PROTECT Act—with the Feeney Amendment’s provisions included—into law on April 30, 2003.<sup>237</sup> By enacting the Feeney Amendment, Congress, impatient with federal judges who treated the mandatory Guidelines as if they were merely advisory, had finally backed downwardly departing judges into a corner.

But nobody puts Baby in a corner.<sup>238</sup>

Whether they knew it or not, Congress and the judiciary had been playing a game of constitutional Jenga.<sup>239</sup> And with the 2003 passage of the PROTECT Act, the whole assembly came crashing down.

In *United States v. Detwiler*, one judge focused on the provision reducing the number of judges on the Commission.<sup>240</sup> Harkening back to the Supreme Court’s analysis in *Mistretta*, Judge Owen Panner concluded that post-PROTECT Guidelines were unconstitutional:

The Feeney Amendment also prohibits judges from ever occupying more than three seats on the Commission, thus ensuring that judges will never again comprise a majority of the voting membership of the Commission. When selecting Commission members, the President

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Federal Judges Association Board of Directors Meeting (May 5, 2003), available at [http://www.supremecourt.gov/publicinfo/speeches/view speeches.aspx?Filename=sp\\_05-05-03.html](http://www.supremecourt.gov/publicinfo/speeches/view speeches.aspx?Filename=sp_05-05-03.html).

235. See *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (upholding the constitutionality of the SRA, the Commission, and the Guidelines).

236. § 401(n), 117 Stat. at 676 (amending 28 U.S.C. § 991(a)).

237. *Id.* at 650.

238. DIRTY DANCING (Vestron Pictures 1987).

239. See Steven L. Chanenson, *Hoist with Their Own Petard?*, 17 FED. SENT’G REP. 20, 20 (2004) (“[B]y passing the PROTECT Act . . . Congress and the Department [of Justice] may well have inadvertently helped to destroy the very system they were trying to dominate.”); Noelle Tsigounis Valentine, *An Exploration of the Feeney Amendment: The Legislation that Prompted the Supreme Court to Undo Twenty Years of Sentencing Reform*, 55 SYRACUSE L. REV. 619, 647–51 (2005) (suggesting Feeney led to *Blakely*); see also 108 CONG. REC. S8573 (daily ed. July 21, 2004) (“Congress has seriously undermined the basic structure and fairness of the Federal Guidelines system through posturing and ideology. . . . It may be that the *Blakely* decision was occasioned in part by recent tinkering with the Sentencing Reform Act that went too far.” (quoting Sen. Patrick Leahy)).

240. 338 F. Supp. 2d 1166, 1173 (D. Or. 2004).

need not consider the views of the Judicial Conference unless he voluntarily chooses to nominate federal judges.

We are thus left with a strange creature that is nominally lodged within the Judicial Branch, and purports to be performing duties of a judicial nature, yet need contain no judges, does not answer to anyone in the Judicial Branch, and into which the Judicial Branch is assured no input, whether substantively or in selecting the members of the Commission.<sup>241</sup>

Judge Panner's opinion was hailed as a "separation of powers masterpiece that should be included in most con law casebooks,"<sup>242</sup> but was disavowed as controlling law in the District of Oregon.<sup>243</sup> And although intellectually provocative, the *Detwiler* analysis was never explored in the courts of appeals, because the Supreme Court's decisions in *Blakely v. Washington* and *United States v. Booker* effectively mooted its holding.<sup>244</sup>

Both *Blakely* and *Booker* were blockbusters.

In *Blakely*, the Court applied the principle from *Apprendi v. New Jersey* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."<sup>245</sup> The Court determined that the term "statutory maximum" applied to the presumptive sentencing ranges established under Washington State's sentencing guidelines.<sup>246</sup>

This was *huge*. Professor Steven Chanenson suggested, "*Blakely* is one of the most, if not *the* most, significant constitutional criminal procedure decisions in generations."<sup>247</sup> Professor Douglas Berman claimed that it was bigger, writing, "*Blakely* is the biggest criminal justice decision not just of this past term, not just of this decade, not just of the Rehnquist Court, but perhaps in the

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241. *Id.* (citation omitted).

242. Jeannie, comment to *Sentencing Law and Policy: West Coast Offense*, SENT'G. L. & POL'Y (Oct. 6, 2004, 2:35 PM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2004/10/west\\_coast\\_offe.html#comments](http://sentencing.typepad.com/sentencing_law_and_policy/2004/10/west_coast_offe.html#comments).

243. *United States v. Jones*, 143 Fed. App'x 230, 231–32 (11th Cir. 2005).

244. *See United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004).

245. 542 U.S. at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 301 (2000)).

246. *Id.* at 303–04.

247. Chanenson, *supra* note 239, at 20.

history of the Supreme Court.<sup>248</sup> Even Supreme Court justices joined the chorus of hyperbole. In the language of a Delphic Oracle, Justice O'Connor warned in her *Blakely* dissent, "What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy."<sup>249</sup> Other commentators described *Blakely* in the language of natural disasters.<sup>250</sup> They did so not because of the case's impact on state sentencing schemes, but because the Washington State guidelines were not obviously distinguishable from the federal Guidelines.<sup>251</sup> Many observers predicted that the federal Guidelines would be struck down as unconstitutional, as well.<sup>252</sup>

And they were, in *Booker*.<sup>253</sup>

*Booker* was a strange decision, split into two different five-to-four opinions: (1) a constitutional holding that said the mandatory Guidelines violated the Sixth Amendment principle articulated in *Apprendi*,<sup>254</sup> and (2) a remedial holding that corrected the constitutional violation by striking the portions of the Sentencing Reform Act that made the Guidelines mandatory.<sup>255</sup> Only one jus-

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248. Douglas Berman, *Supreme Court Cleanup in Aisle 4*, SLATE (July 16, 2004, 8:04 PM), <http://slate.com/toolbar.aspx?action=printed&id=2104014>.

249. 542 U.S. at 326 (O'Connor, J., dissenting).

250. See, e.g., United States v. Mueffelman, 327 F. Supp. 2d 79, 84 (D. Mass. 2004) (Gertner, J.) ("seismic"); Larry Kupers, *Proposal for a Viable Federal Sentencing Scheme in the Wake of Blakely v. Washington*, 17 FED. SENT'G REP. 28, 28 (2004) ("a tsunami"); Letter from Albert W. Alschuler, Professor, Univ. of Chi. Law School, to Orrin Hatch, Senator, and Patrick Leahy, Senator (July 19, 2004), available at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/files/alschuler\\_blakely\\_response.doc](http://sentencing.typepad.com/sentencing_law_and_policy/files/alschuler_blakely_response.doc) (last visited Dec. 3, 2010) ("a tidal wave"); Jeff Chorney, *O'Connor to Judges: Explain Yourselves*, LAW.COM (July 23, 2004), <http://www.law.com/jsp/article.jsp?id=1090180161284> (quoting Justice O'Connor) ("a number 10 earthquake"); Douglas Berman, *Principle Versus Pragmatism*, SENT'G L. & POL'Y (Aug. 19, 2004, 8:21 AM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2004/08/principle\\_versu.html](http://sentencing.typepad.com/sentencing_law_and_policy/2004/08/principle_versu.html) ("Godzilla rampaging through Tokyo during a level 10 (on the Richter scale) earthquake . . .").

251. See Jon Wool & Don Stemen, *Aggravated Sentencing: Blakely v. Washington: Practical Implications for State Sentencing Systems*, POL'Y & PRAC. REV., Aug. 2004, at 1-2, available at <http://www.vera.org/content/aggravated-sentencing-blakely-washington-practical-implications-state-sentencing-systems> (describing state sentencing systems that could implicate the *Blakely* ruling in half the states).

252. See Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217, 239-40 (2004); Note, *The Unconstitutionality of Determinate Sentencing in Light of the Supreme Court's "Elements" Jurisprudence*, 117 HARV. L. REV. 1236, 1252-53 (2004).

253. 543 U.S. 220, 226-27 (2005).

254. *Id.* at 244.

255. *Id.* at 245 (holding 18 U.S.C. §§ 3553(b)(1) and 3742(e) unconstitutional).

tice—Justice Ginsburg—joined both opinions, and she did not provide any explanation of her reasoning.<sup>256</sup> The result of *Booker*, though, was clear: the Guidelines were no longer mandatory.<sup>257</sup> They were advisory.<sup>258</sup> To many, the result seemed like the best of all possible worlds.<sup>259</sup> Advisory Guidelines were similar to what the Judicial Conference of the United States had once considered,<sup>260</sup> to what the Federal Judicial Center found appealing to many judges,<sup>261</sup> and to what the American College of Trial Lawyers had proposed.<sup>262</sup>

Many commentators thought Congress would react to *Booker* with legislation (the so-called *Booker-fix*).<sup>263</sup> Indeed, Congress held hearings on the subject,<sup>264</sup> and a “topless guidelines” proposal, in-

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256. *See id.* at 225.

257. *Id.* at 245 (holding that 18 U.S.C. § 3553(b)(1) is mandatory and thus unconstitutional).

258. *Id.* at 246.

259. *See, e.g.*, Robert J. Anello & Jodi Misher Peikin, *Evolving Roles in Federal Sentencing: The Post-Booker/Fanfan World*, 1 FED. CTS. L. REV. 301, 331–32 (2006); Douglas A. Berman, *Perspectives and Principles for the Post-Booker World*, 17 FED. SENT’G REP. 231, 231–32 (2005); Douglas A. Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 375 (2006); James G. Carr, *Some Thoughts on Sentencing Post-Booker*, 17 FED. SENT’G REP. 295, 295, 297 (2005).

260. *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 90 (1979), available at <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1979-09.pdf> (noting that several legislative initiatives existed to reduce sentencing disparity, and concluding that no Conference action should be taken until the legislative objectives and criteria were established, but noting that “[i]f Congress should fail to adopt new measures relating to sentencing, the Judicial Conference should consider recommending guidelines for use at the discretion of district judges to reduce undesirable disparity in sentencing”).

261. *See* MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, FED. JUDICIAL CTR., THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER’S 1996 SURVEY 3 (1997), available at <http://www.fjc.gov/public/pdf.nsf/lookup/gssurvey.pdf//&file/gssurvey.pdf> (“About two-thirds of district judges and chief probation officers responding to this question, and more than half of the circuit judges responding, expressed a preference for advisory guidelines, while less than one-third of each group preferred the former system of discretion-based sentencing with parole.”).

262. *See* AM. COLL. OF TRIAL LAWYERS, *supra* note 51, at 35 (“The College therefore proposes that the existing Guidelines be replaced with nonbinding guidelines that judges may use to inform their sentencing discretion, but from which judges may depart for good reasons explained on the record and with the sentence subject to review on appeal for abuse of discretion.”).

263. *See, e.g.*, Douglas A. Berman, *Assessing Federal Sentencing After Booker*, 17 FED. SENT’G REP. 291, 291–93 (2005). *But see* Robert C. Scott, Chairman, U.S. House Subcomm. on Crime, Terrorism, and Homeland Sec., Plenary Speech at the 2008 Fall Conference of the American Bar Association Criminal Justice Section 11 (Oct. 24, 2008) (on file with author) (“*Booker* is not the problem. *Booker* is the fix.”).

264. *See, e.g.*, United States v. Booker: *One Year Later—Chaos or Status Quo?: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the Comm. On the Judi-*

itially floated by Professor Frank Bowman, generated a great deal of discussion.<sup>265</sup> The Chair of the House Judiciary Committee, James Sensenbrenner, even introduced a topless guidelines bill<sup>266</sup>—“guidelines gone wild”<sup>267</sup>—but Congress did not pass any new legislation, and the courts were left to wrestle with the question of just how much weight the now-advisory Guidelines should receive. Some judges, noting that the Guidelines incorporated the other sentencing factors enumerated at 18 U.S.C. § 3553(a), suggested that the Guidelines should be entitled to “heavy weight”<sup>268</sup>—and the patterns of federal sentencing showed that judges were generally still sentencing within the Guidelines, much as if *Booker* had never happened<sup>269</sup>—but other judges suggested that the Guidelines were merely one § 3553(a) factor among many, and entitled to no special deference.<sup>270</sup>

Since *Booker*, the Court has issued additional guidance on the topic. In *Cunningham v. California*, the Court reiterated that “under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.”<sup>271</sup> In *Rita v. United States*, the Court held that appellate courts were free to “apply a presump-

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*ciary*, 109th Cong. 119 (2006).

265. See Am. Bar Ass’n Criminal Justice Section, *Report on Booker and Recommendation*, 17 FED. SENT’G REP. 335, 338 (2005) (noting that there are no convenient “quick fixes” to *Booker*, and that “[t]he ‘Bowman fix’ presents numerous problems”).

266. See Sentencing Fairness and Equity Restoration Act, H.R. 6254, 109th Cong. § 2(a)(1)–(2) (2006).

267. See Frank O. Bowman, III, Professor, Ind. Univ. Sch. of Law, Testimony Before the United States Sentencing Commission, (Nov. 17, 2004), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20041117/111704-paneltwo.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20041117/111704-paneltwo.pdf) (“I will get around to talking about what I prefer to call ‘topless guidelines,’ or as Doug Berman christened them, ‘guidelines gone wild.’”).

268. See, e.g., *United States v. Wilson*, 350 F. Supp. 2d 910, 912 (D. Utah 2005). Astonishingly, Judge Paul Cassell issued the opinion in *Wilson* just one day after the Supreme Court issued its opinion in *Booker*, prompting some commentators—well, actually, just me—to speculate that Cassell is actually a cyborg, sent back in time to alter the development of post-*Booker* jurisprudence. Cf. *THE TERMINATOR* (Hemdale Film 1984).

269. See Douglas Berman, *Same Old Sentencing*, NAT’L L.J., Dec. 26, 2005, at 27 (suggesting that “in the wake of *Booker*, federal sentencing practices and outcomes have not really changed much (at least not yet)” and concluding that judicial culture influences actual sentencing patterns more than jurisprudential limits).

270. See, e.g., *United States v. Ranum*, 353 F. Supp. 2d 984, 985 (E.D. Wis. 2005).

271. 549 U.S. 270, 281 (2007). Furthermore, any system that does not permit judges to sentence outside a recommended range based on “[g]eneral objectives of sentencing” absent a “factfinding anchor” also violates the Sixth Amendment. *Id.* at 279–80 (alteration in original).

tion of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines.”<sup>272</sup> In *Gall v. United States*, the Supreme Court answered the reciprocal question in the negative, holding that appellate courts are *not* free to presume that outside-the-Guidelines sentences are unreasonable.<sup>273</sup>

Since *Booker*, within the context of crack-cocaine sentences, the Supreme Court has held that judges may consider the 100:1 disparity between federal crack and powder-form cocaine sentences when imposing a sentence “sufficient, but not greater than necessary;”<sup>274</sup> that “district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines;” and that, when they do, they may use a different ratio.<sup>275</sup>

Most recently, in *Nelson v. United States*, the Court re-emphasized just how advisory the Guidelines truly are, holding that a district court commits reversible error whenever it treats the Guidelines as presumptively reasonable.<sup>276</sup> “The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable.”<sup>277</sup>

The result is peculiar. The Court’s holding in *Booker* requires sentencing courts to begin by correctly calculating the advisory Guidelines sentence.<sup>278</sup> But the Guidelines sentence, if imposed without further analysis, constitutes reversible error under *Nelson*.<sup>279</sup> Thus, the sentencing court must go through all the calculations associated with the Guidelines, and then engage in a second

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272. 551 U.S. 338, 347 (2007). Despite the presumption of reasonableness available to appellate judges, district judges could not presume the Guidelines to be reasonable. *Id.* at 351.

273. 552 U.S. 38, 51 (2007).

274. *Kimbrough v. United States*, 552 U.S. 85 (2007). Since *Kimbrough*, the ratio between crack and powder-form cocaine was reduced from 100:1 to 18:1 when President Obama signed the Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 into law on August 3, 2010.

275. *See Spears v. United States*, 555 U.S. \_\_\_, \_\_\_, 128 S. Ct. 840, 843–44 (2009).

276. 555 U.S. \_\_\_, \_\_\_, 129 S. Ct. 890, 892 (2009) (quoting *Gall*, 552 U.S. at 49–50).

277. *Id.* at \_\_\_, 129 S. Ct. at 892.

278. *See id.* at \_\_\_, 129 S. Ct. at 891–92 (“[T]he sentencing court must first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors, 18 U.S.C. § 3553(a), explaining any variance from the former with reference to the latter.”).

279. *See id.* at \_\_\_, 129 S. Ct. at 891–92.

layer of analysis, using all of the § 3553(a) factors to demonstrate why the sentence is sufficient, but not greater than necessary, to comply with the purposes of sentencing.<sup>280</sup>

Frankly, it is a little like the Ptolemaic system of astronomy that Thomas Kuhn described in *The Structure of Scientific Revolutions*.<sup>281</sup> According to Kuhn, as the accuracy of celestial observations improved, the complexity of the Ptolemaic models (positing a geocentric model of the solar system) had to increase correspondingly.<sup>282</sup> Scientists like Galileo Galilei found evidence that conflicted with the geocentric model, so epicycles were added to existing astronomic cycles in order to maintain the calculated positions of planets at their observed positions.<sup>283</sup> Eventually, the system became so complicated<sup>284</sup>—so increasingly elaborate—that the Ptolemaic model could no longer be sustained, and was overtaken by the Copernican model (positing a heliocentric model of the solar system).<sup>285</sup>

Of course, the laws of Congress are not the laws of nature.<sup>286</sup> The creation of the legislator is different than the discovery of the natural scientist. But if the Guidelines are indeed advisory, there *are* steps that could make them far more useful to judges confronted with the awesome responsibility of sentencing. Perhaps the Guidelines are in need of their own Galileo.<sup>287</sup>

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280. See *supra* notes 20–22 and accompanying text (listing purposes of sentencing).

281. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (Otto Neurath et al. eds., 2d ed. 1970) (1962).

282. See *id.* at 68 (citation omitted).

283. *Id.* at 268–69. Ptolemy introduced epicycles (small combinations of circles) into his geocentric system of astronomy to account for small irregularities in the observed positions of the planets. Ptolemy's successors, like Apollonius and Hipparchus, added more epicycles, making the system so elaborate that Copernicus eventually rejected Ptolemy's system and its "technical minutia." See THOMAS S. KUHN, *THE COPERNICAN REVOLUTION: PLANETARY ASTRONOMY IN THE DEVELOPMENT OF WESTERN THOUGHT* 64–72 (2d ed. 1966). Galileo's observations provided evidence that conflicted with the geocentric model of astronomy, and supported the heliocentric model posited by Copernicus. See *id.* at 219–24.

284. See *supra* Part III.A.2 (describing the complexity of the Guidelines).

285. KUHN, *supra* note 281, at 69.

286. See KURT VONNEGUT, *God's Law*, in *PALM SUNDAY: AN AUTOBIOGRAPHICAL COLLAGE* 9–12 (1981) (distinguishing between divine law, natural law, and mere human law by comparing them to an ace trumping a king or queen in a hand of cards).

287. ANDREA. Unhappy is the land that breeds no hero.

GALILEO. No, Andrea: Unhappy is the land that needs a hero.  
BERTOLT BRECHT, *GALILEO* 115 (Charles Laughton trans., 1966) (1940).

I will describe some of the steps that a sentencing Galileo could take in Part IV, Sara, when I talk about what you could be.

#### IV. ALTERNATIVES

Sara, I already explained that under today's (Ptolemaic) law, courts must begin by calculating the Guidelines,<sup>288</sup> but the Guidelines they calculate are not binding.<sup>289</sup> The process, not the product, is mandatory.

The Guidelines are advisory. Not only are district judges *not compelled* to sentence within the Guidelines, but they *may not* presume a Guidelines sentence is reasonable.<sup>290</sup> Thus the Guidelines may (and must) serve as a starting point, but judges must find their own ways, using the § 3553(a) factors to guide them.

Today, the Guidelines are informational. They do not tell judges which penological goals should dominate, nor how much weight to afford to sentencing factors,<sup>291</sup> and they no longer bar judges from considering those factors deemed irrelevant by the Commission.<sup>292</sup> Once again, as long as the Guidelines are correctly calculated and as long as the § 3553(a) factors are adequately addressed, sentencing judges are free to impose any sentence permitted by law, subject to appeal under a standard of "reasonableness."<sup>293</sup> It is much like a return to the old days of indeterminate

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288. *Nelson v. United States*, 555 U.S. \_\_\_, \_\_\_ 129 S. Ct. 890, 891 (2009).

289. *United States v. Booker*, 543 U.S. 220, 245 (2005).

290. *Nelson*, 555 U.S. at \_\_\_, 129 S. Ct. at 892 (quoting *Gall v. United States*, 552 U.S. 38, 50 (2007)).

291. See *Bowman*, *supra* note 141, at 322 (describing similar sentencing disparities when a hypothetical heroin dealer appears before a Kantian judge and a utilitarian judge, and noting that "[b]oth positions are plausible, shared by many serious persons, and rationally and morally defensible"). This is not a purely abstract possibility, but one with practical consequences for the federal bench:

"[L]iberals" tend to believe that factors external to the offender are responsible for criminal behavior. Rehabilitation is more of a sentencing goal for these judges, leading to greater reliance on probation and less concern with retribution. "Conservatives" believe that offenders choose to commit crimes. They are more punishment-oriented and tend to impose longer prison terms.

Paul J. Hofer, et al., *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L & CRIMINOLOGY 239, 250 (1999).

292. See Brian J. Foley, *The Mass Incarceration Crisis as an Opportunity to Rethink Blame*, 9 CONN. PUB. INT. L.J. 1, 5-7 (2009).

293. See *Rita v. United States*, 551 U.S. 338, 347 (2007) ("[C]ourts of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines.").

sentencing,<sup>294</sup> except there is no longer a parole mechanism to reduce the sentences on the back end.<sup>295</sup>

George Santayana famously warned that “those who cannot remember the past are condemned to repeat it,”<sup>296</sup> and under a system of advisory Guidelines, there is some risk of returning to the “bad old days”<sup>297</sup> of sentencing disparity.<sup>298</sup> Although data from the Commission suggests that national sentencing patterns have not changed dramatically after *Booker*,<sup>299</sup> some circuits are showing greater fidelity to Guidelines sentencing than others.<sup>300</sup> Under the existing system, it is not difficult to imagine that identical defendants might receive disparate sentences, based on nothing more than philosophical views of the judges assigned to the cases.<sup>301</sup>

This is worrying.

And Sara, it would be heartbreaking to see all your promise lost.

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294. See Jonathan Chiu, Comment, *United States v. Booker: The Demise of Mandatory Federal Sentencing Guidelines and the Return of Indeterminate Sentencing*, 39 U. RICH. L. REV. 1311, 1342–44 (2005).

295. See *supra* note 47 and accompanying text (describing prospective abolition of parole by SRA).

296. GEORGE SANTAYANA, *THE LIFE OF REASON* 284 (2d ed. 1929).

297. See *Blakely v. Washington and the Future of the Federal Sentencing Guidelines: Hearing Before the S. Judiciary Comm.*, 108th Cong. 5 (2004) (statement of Sen. Patrick Leahy, Member, S. Judiciary Comm.) (referring to the “bad old days” of disparity under indeterminate sentencing).

298. See U.S. SENTENCING COMM’N, *DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT’S MULTIVARIATE REGRESSION ANALYSIS 2* (2010), available at [http://www.ussc.gov/Research/Research\\_Publications/2010/20100311/20100311\\_Multivariate\\_Regression\\_Analysis\\_Report.pdf](http://www.ussc.gov/Research/Research_Publications/2010/20100311/20100311_Multivariate_Regression_Analysis_Report.pdf) (“Black male offenders received longer sentences than white male offenders. The differences in sentence length have increased steadily since *Booker*.”).

299. See *BOOKER REPORT*, *supra* note 7, at 58 (“Despite the initial increase in the imposition of non-government-sponsored, below-range sentences, a relatively stable month-to-month trend was immediately established and has continued.”).

300. See U.S. SENTENCING COMM’N, *2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS* tbls.N, N-DC, N1 to N11 (2008), available at [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2008/SBTOC08.htm](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2008/SBTOC08.htm) (noting that some circuits report rates of within-Guidelines sentences well below the national average, while others report rates well above the national average). Whether circuits *should* aspire to Guidelines fidelity for the sake of parity is an altogether different question; some might suggest that the parsimony provision obligates judges to sentence outside the Guidelines in some cases, and that doing so is laudable. See Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion Revived in Booker and Fanfan*, 33 PEPP. L. REV. 615, 665–70 (2006).

301. See *supra* note 291 (describing competing philosophical approaches to sentencing that are each reasonable, yet produce different outcomes).

Despite the flaws of the Guidelines,<sup>302</sup> there is a great deal of value in structured sentencing.<sup>303</sup> It would be tragic if the reverberations of *Booker* incited Congress to enact more mandatory minimum sentences.<sup>304</sup>

The solution lies neither in straightjacketing federal judges, nor in coercing their compliance with threats of reversal and investigation,<sup>305</sup> but with providing them with the information they need to craft thoughtful, wise, and appropriate sentences.

After all, judges do not wake up in the morning with the intention of frustrating members of Congress. They do not go out of their way to depart from the Guidelines for the sake of asserting their judicial independence. They depart downward when, based on the evidence before them, the Guidelines call for sentences that appear to be “blindly unjust.”<sup>306</sup>

If we provide judges with the necessary information to impose fair sentences, they will do so.

In 2009, Chief United States Probation Officer Greg Forest made this point at the first of the Commission’s regional hearings.<sup>307</sup> He suggested that “the data collected by the Sentencing

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302. See *supra* Part III.A (describing flaws of the Guidelines).

303. See, e.g., BUREAU OF JUSTICE ASSISTANCE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING xv–xvi, <http://www.ncjrs.gov/pdffiles/strsent.pdf> (“The most promising model is sentencing guidelines developed by sentencing commissions.”).

304. See *United States v. Wilson*, 355 F. Supp. 2d 1269, 1287–88 (D. Utah 2005) (suggesting that one potential congressional response to *Booker* is the passage of more mandatory minimum sentences). Mandatory minimum sentencing has been widely condemned by expert agencies, academics, justices, legislators, and presidents. See, e.g., U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 56–63 (1991) (identifying problems with mandatory minimum sentences); 116 CONG. REC. H33314 (1970), reprinted in 3 FED. SENT’G REP. 108 (1990) (remarks of then-Congressman George H.W. Bush) (same); TONRY, *supra* note 4, at 5–6 (same); Breyer, *supra* note 104, at 182–85 (same); 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, 193–95 (1993) (same).

305. See *supra* note 182 and accompanying text (describing investigation of Judge Rosenbaum).

306. See John S. Martin Jr., *Why Mandatory Minimums Make No Sense*, 18 NOTRE DAME J.L. ETHIC PUB. POL’Y 311, 312 (2004) (“The reason the judges are opposed to mandatory minimums is not that they are power hungry but rather that they see on a day-to-day basis the injustice that results from inflexibility in sentencing, whether it be a result of mandatory minimums or the result of a restriction of judicial discretion under the sentencing guidelines.”); *supra* note 122 and accompanying text (quoting Justice Kennedy as criticizing “blindly unjust guidelines”).

307. See Greg Forest, Chief U.S. Prob. Officer, W. Dist. N.C., Statement to the United

Commission may be equally important—or more important—than the guidelines it promulgates. Sentencing data and data integrity are perhaps more important now than they have ever been.<sup>308</sup> Along similar lines, last year, attorney James Felman observed:

While the United States Sentencing Commission's ability to dictate specific sentences in individual cases has been weakened by the now advisory status of its Guidelines, the Commission's importance in the collection, analysis, and dissemination of sentencing data is now greater than ever. Under advisory Guidelines, district courts are empowered to consider a much richer mix of information in sentencing. District courts are now free to craft much more individualized sentences in light of the particular circumstances of specific defendants. But to do so and be affirmed on appeal, district courts must give specific and detailed *reasons* for their sentencing determinations. It is for this reason that there has perhaps never been a better time for the study of sentencing policy than now. The reasons given by district courts, if collated, analyzed by the Commission, and then disseminated by the Commission, can give rise to the most expansive wealth of sentencing data and jurisprudence in our nation's history. Trends in sentencing considerations can now be recorded with detail. Success or failure with differing sentencing options involving otherwise similar offenders and offenses may now be documented and analyzed to a degree not previously possible.<sup>309</sup>

Forest and Felman are not the first to suggest something along these lines. Before them, Professor Marc Miller described a sentencing information system, and extolled its many virtues.<sup>310</sup> Before Miller, criminologist Norval Morris described an analogous approach,<sup>311</sup> and before Morris, sociologist Max Weber imagined a

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States Sentencing Commission Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984: View From the Probation Office 8 (Feb. 10, 2009), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20090210/Forest\\_testimony.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090210/Forest_testimony.pdf).

308. See *id.* at 8–9. The focus on data provides a sound answer to the questions posed by Frank Bowman in the wake of *Blakely*. See Bowman, *supra* note 252, at 242 (“It is even more difficult to understand what continuing role the Sentencing Commission could play if the product of its work, guidelines rules, were deemed void *ab initio*. After sentencing, would judges be obliged to report to the Sentencing Commission their factual findings or their reasons for adhering to or varying from Guidelines prescriptions? If the Guidelines are to be merely useful benchmarks, what function would the Sentencing Commission serve? Would it continue to exist at all?”).

309. James E. Felman, *The State of the Sentencing Union: A Call for Fundamental Reexamination*, 20 FED. SENT’G REP. 337, 338 (2008).

310. See Miller, *supra* note 166, at 1370–80.

311. See Norval R. Morris, *Sentencing Convicted Criminals*, 27 AUSTL. L.J. 186, 200 (1953).

kind of sentencing computer that would collect relevant facts and dispense a just sentence.<sup>312</sup>

Even Marvin Frankel, the patron saint of sentencing guidelines, acknowledged that computers could be useful in bringing parity and fairness to sentencing.<sup>313</sup> Writing in 1972 (when computers were still the size of refrigerators and fed by punch cards),<sup>314</sup> Frankel suggested:

It is not necessary, or desirable, to imagine that sentencing can be completely computerized. At the same time, the possibility of using computers as an aid toward orderly thought in sentencing need not be discounted in advance. James V. Bennett, for years the able Director of the Federal Bureau of Prisons, noted the possibility some time ago.<sup>315</sup>

Sentencing software already exists. In China, for example, a program has been used by a court in the city of Zibo, guiding the decisionmaking of sentencing judges in more than one hundred different types of offenses.<sup>316</sup> Analogous software exists in the United States, too. Practitioners working with the Guidelines at a

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312. See MAX WEBER, *ECONOMY AND SOCIETY* 886 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978) (1913) (envisioning a system in which the judge could drop the relevant facts into a kind of penological slot machine, and wait for the appropriate decision to be rendered automatically). For a contrasting suggestion that sentencing is fundamentally about moral judgments and that a mathematical approach is inappropriate, see H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 613 (1958) (“To a judge striking a balance among these claims, with all the discretion and perplexities involved, his task seems as plain an example of the exercise of moral judgment as could be; and it seems to be the polar opposite of some mechanical application of a tariff of penalties fixing a sentence careless of the moral claims which in our system have to be weighed.”).

313. See generally FRANKEL, *supra* note 39 (arguing for sentencing guidelines).

314. See *Print Advertisements*, HP COMPUTER MUSEUM, <http://www.hp.com/go/prints> (last visited Dec. 3, 2010); *New Media Timeline*, POYNTER ONLINE (May 5, 2010, 12:00 AM), [http://www.poynter.org/content/content\\_view.asp?id=75845](http://www.poynter.org/content/content_view.asp?id=75845). Computing power has improved dramatically since Frankel published his book. See, e.g., J.C. Oleson, “Drown the World”: *Imperfect Necessity and Total Cultural Revolution*, 3 UNBOUND 19, 71 (2007) (noting that “we use desktop computers that possess five to ten times more computational power than the system that put man on the moon”). Prior to the SRA, the federal courts had little experience with computers of any kind. I have been told that the first computers in the federal judiciary were those used by the Sentencing Commission.

315. FRANKEL, *supra* note 39, at 114–15.

316. See Douglas A. Berman, *China Does Guidelines One Better*, SENT’G L. & POL’Y (Sept. 13, 2006, 5:40 PM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2006/09/china\\_does\\_guid.html](http://sentencing.typepad.com/sentencing_law_and_policy/2006/09/china_does_guid.html).

basic level may find value in a free online calculator,<sup>317</sup> or download freeware for use on personal digital assistants (“PDAs”).<sup>318</sup>

But instead of developing software that merely mirrors existing Guidelines, automating the lookup tables and the calculations, it is possible to develop a more powerful sentencing information system that provides judges with meaningful information about recidivism. Merely automating an unscientific system will not make it sound,<sup>319</sup> but a philosophical shift toward the use of outcome measures would be profound, and computers could make this effort much easier. Given recent developments in the field of risk/needs instruments,<sup>320</sup> and drawing upon sentencing information systems developed by other jurisdictions,<sup>321</sup> a new approach to sentencing is not an impossible goal.<sup>322</sup>

Imagine that a mid-level crack dealer with three previous state convictions appears before a judge for sentencing. As you know, Sara, this happens with some frequency in the federal courts. Instead of requiring a probation officer to go through tortured Guidelines calculations to determine the adjusted offense level

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317. SENTENCING.US, <http://www.sentencing.us/> (providing free online Guidelines calculator) (last visited Dec. 3, 2010).

318. See *Federal Guidelines Klein Calculator 1.0*, POCKETGEAR.COM, <http://www.pocketgear.com/en/usd/4802861,product-details.html> (last visited Dec. 3, 2010) (providing PDA sentencing software).

319. See *supra* Part III.A.2 (“[D]rapping something . . . in the trappings of mathematics and science does not make it empirical.”).

320. See, e.g., MODEL PENAL CODE: SENTENCING § 6B.09(2) (Council Draft No. 2, 2008) (encouraging sentencing commissions to develop “offender risk-assessment instruments or processes, supported by current and ongoing recidivism research of felons in the state, that will estimate the relative risks that individual felons pose to public safety through future criminal conduct”); D. A. Andrews et al., *Classification for Effective Rehabilitation: Rediscovering Psychology*, 17 CRIM. JUST. & BEHAV. 19, 19–23 (1990) (describing the evolution of assessment tools for criminal justice).

321. See Miller, *supra* note 166, at 1370–75 (2005) (describing sentencing information systems in operation in Canada, Scotland, and New South Wales (Australia)).

322. See Marc L. Miller & Ronald F. Wright, “*The Wisdom We Have Lost*”: *Sentencing Information and Its Uses*, 58 STAN. L. REV. 361, 371 (2005) (“The Sentencing Guidelines in the federal system became more voluntary after *Booker v. United States*. In more flexible systems the possible uses of well-organized and usable sentencing data are even more obvious. Data and analyses of the patterns and practices of other judges in similar cases and across all cases can help to inform judges about whether the Guidelines are reasonably applied to the case before them and, in any case, what a reasonable sentence might be. Since most of the information necessary for a functional sentencing information system is already collected in the federal system, a directive from Congress could quickly make such a system a reality.”); see also Matthew Kleiman et al., *Using Risk Assessment to Inform Sentencing Decisions for Nonviolent Offenders in Virginia*, 53 CRIME & DELINQ. 106, 106, 110–11 (2007) (describing use of risk assessment instruments to divert “25% of nonviolent, prison-bound offenders into alternative sanction programs”).

and criminal history score, the sentencing software would automatically capture key details (e.g., the defendant's name, date of birth, and offense of conviction) from existing court documents. The judge would verify that the information is correct, add any additional relevant data (drug weight, prior convictions, or any other variables), and the software would display a scatter plot.

The severity of sentence would be plotted on the horizontal axis (representing the entire spectrum of terms of imprisonment available under the statute)<sup>323</sup> and the duration without a new arrest ("survival") would be plotted on the vertical axis. Each point in the cloud of the scatter plot would represent a previous case (offenders matched for offender and offense characteristics), and by clicking on any single point with a mouse, the judge could pull up the specifics of that case: the name and photo of the offender, the offense of conviction, the characteristics of the offender, and the particulars of the sentence imposed. The judge would be able to review any educational, vocational, or treatment programs that successful offenders had completed while serving their sentences,

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323. The existing Guidelines do not encompass fines, community service, or other alternatives to incarceration as discrete sentences. See TONRY, *supra* note 4, at 95 ("The federal guidelines allow no independent role for intermediate punishments like fines, house arrest, intensively supervised probation, or community service. The only freestanding sentences authorized are prison and probation . . ."). Fines are imposed, but the imposition of a large fine, for example, does not offset the term of imprisonment. See *id.* A sentencing information system that canvasses the entire statutory range of sentencing alternatives, however, should include recidivism data for noncustodial penalties, as well as for terms of incarceration. Kevin R. Reitz, *Sentencing*, in THE HANDBOOK OF CRIME AND PUNISHMENT 542, 556–57 (Michael Tonry ed., 1998). A sophisticated system may overcome the problem described by Reitz:

One of the great unsolved puzzles of the 1980s and 1990s is how to write sentencing guidelines for nonprison sanctions. Although there has been widespread agreement among policy makers and academics that creative exploitation of "intermediate punishments" (defined as those sanctions in between the harshness of prison and the laxity of regular probation) would be a good idea in principle, and might be the only realistic way to stem the tide of prison growth, no American jurisdiction has yet implemented a systemwide program of intermediate punishments that has meaningfully diverted offender populations away from incarceration sanctions.

A large part of the problem, in the view of experienced sentencing reformers like Michael Tonry and Kay Knapp, is that the machinery of sentencing guidelines has not yet become fine-tuned enough to give structure to trial court decisions about intermediate sanctions.

*Id.* (citations omitted). One mechanism to incorporate intermediate sanctions into a sentencing information system of this kind is the use of punishment units or exchange equivalencies, such as those considered by the states of Oregon and Washington. See Michael Tonry, *Intermediate Sanctions in Sentencing Guidelines*, 23 CRIME & JUST. 199, 208–09 (1998) (describing efforts to equate prison terms with noncustodial penalties).

and to search online for available, equivalent programs. If desired, the underlying documents associated with any of the previous cases could be retrieved with a click of the mouse.<sup>324</sup>

By concentrating on points near the top of the vertical axis (individuals who went long periods of time without a new arrest), the judge could engage in actuarial sentencing and impose a sentence that was effective in reducing recidivism among similar defendants convicted of similar crimes.<sup>325</sup> A judge could divert correctional resources from low-risk offenders (who actually become *more* likely to reoffend if oversupervised)<sup>326</sup> to high-risk offenders in greater need of intensive services. Defendants who are statistically most likely to recidivate could be sentenced to longer sentences (within the statutory range),<sup>327</sup> while those who present lit-

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324. These documents could be accessed through the judiciary's case management/electronic case files (CM/ECF) system. See generally PUBLIC ACCESS TO COURT ELECTRONIC RECORDS, <http://pacer.psc.uscourts.gov/cmecf/ecffaq.html> (last visited Dec. 3, 2010) (describing CM/ECF).

325. The notion of actuarial sentencing and managing recidivism may signify a change in penology. See Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, in THE CRIMINOLOGY THEORY READER 451, 451–66 (Stuart Henry & Werner Einstadter eds., 1998) (describing the emergence of risk prediction, the shift from rehabilitation and crime control to a focus on management, and the targeting of offenders in the aggregate rather than individualizing punishment, as hallmarks of the “new penology”).

326. See, e.g., Christopher T. Lowenkamp & Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, in NAT'L INST. OF CORRECTIONS, U.S. DEP'T OF JUSTICE, TOPICS IN COMMUNITY CORRECTIONS 3–8 (2004), <http://nicic.gov/library/period265> (noting that providing unnecessary services to low-risk offenders wastes resources that could be devoted to more serious offenders and affirmatively *increases* the risk that low-risk offenders will reoffend).

327. Criminological research suggests that a modest number of offenders are responsible for a disproportionate amount of crime. See, e.g., MARVIN E. WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT 68–69, 89, 102–03 (1972) (reporting that 6% of delinquents were responsible for 52% of offenses, including 71% of murders and 69% of aggravated assaults); Sarnoff A. Mednick, *A Bio-Social Theory of the Learning of Law-Abiding Behavior*, in BIOSOCIAL BASES OF CRIMINAL BEHAVIOR 1, 1–2 (Sarnoff A. Mednick & Karl O. Christiansen eds., 1977) (reporting that one percent of men in a Copenhagen birth cohort of 30,000 were responsible for more than half the crime). If one can selectively incapacitate high-rate offenders, it may be possible to substantially reduce the crime rate while avoiding the considerable human and fiscal costs associated with incarcerating large swaths of the population. See GREENWOOD & ABRAHAMSE, *supra* note 17 *passim*, a seminal work on selective incapacitation, suggesting that a seven-factor analysis would allow criminal justice professionals to incapacitate high-crime offenders, while subjecting other offenders to noncustodial punishments or brief terms incarceration. Greenwood's scale was the subject of vigorous debate. See, e.g., Jacqueline Cohen, *Incapacitation as a Strategy for Crime Control: Possibilities and Pitfalls*, 5 CRIME & JUST. 1, 37–54 (1983); Andrew von Hirsch & Don M. Gottfredson, *Selective Incapacitation: Some Queries About Research Design and Equity*, 12 N.Y.U. REV. L. & SOC. CHANGE 11, 12–13, 16–51 (1984). But whether or not the Greenwood scale is methodologically or ethically acceptable, there is good rea-

tle risk of recidivism could be sentenced to brief terms of incarceration or noncustodial sentences.<sup>328</sup> Obviously, the software could not guarantee that the mid-level crack dealer will avoid re-arrest, but it *could* provide the judge with empirical information, and it *could* suggest whether a long or short sentence is more likely to reduce future crime. It could indicate the programs that reduce recidivism and allow the judge to use the resources of the criminal justice system far more efficiently.<sup>329</sup>

Perhaps Oliver Wendell Holmes was not too far off-base when he suggested, “For the rational study of the law the black-letter

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son to think that risk-assessment instruments may once again become attractive to decisionmakers in the criminal justice system. In 2008, the United States incarcerated more than 2.2 million persons in prisons and jails; more than 1-in-100 adults were behind bars. See JENNIFER WARREN, PEW CTR. ON THE STATES, ONE IN 31, at 1–5 (2009), available at [http://www.pewcenteronthes-tates.org/uploadedfiles/PSPP\\_1in31\\_report\\_FINAL\\_WEB\\_3\\_26\\_09.pdf](http://www.pewcenteronthes-tates.org/uploadedfiles/PSPP_1in31_report_FINAL_WEB_3_26_09.pdf). If one counts individuals on probation or parole (as well as those who are incarcerated), more than 7.3 million people were under state or federal supervision in 2008. *Id.* at 5. However, in recent years, as U.S. budgets have been slashed, many jurisdictions have struggled to operate their prisons and correctional facilities with available funds. David L. Hudson, Jr., *Cutting Costs . . . and Courts: Judicial Resources Dwindle as States Cope with Budget Crises*, 89 A.B.A. J. 16, 16–17 (2003). The situation is perhaps most dire in California. See *Coleman v. Schwarzenegger*, No. CIV 5-90-0520 LKK JFM P., 2009 WL 2430820, at \*1, \*115–16 (E.D. Cal. Aug. 4, 2009) (concluding that “California’s prisons are bursting at the seams and are impossible to manage” and ordering that the state reduce the prison population to 137.5% of its design capacity within two years so as to comport with minimal constitutional standards). But California is not unique. See, e.g., Jeff Carlton, *Milestone: Inmate Population Poised to Dip*, S.F. CHRON., Dec. 20, 2009, at A30. While the American rage to punish may not have abated, the ability of states to indulge their punitive impulse may be financially limited. See *id.* (“The inmate population has risen steadily since the early 1970s as states adopted get-tough policies that sent more people to prison and kept them there longer. But tight budgets now have states rethinking these policies and the costs that come with them.”). Any instrument or scale that allows decisionmakers to accurately identify high-rate offenders may be welcomed as a means to respond to manage social and fiscal conditions.

328. See BRIAN J. OSTROM ET AL., NAT’L CTR. FOR STATE COURTS ET AL., OFFENDER RISK ASSESSMENT IN VIRGINIA 10, 17, 20–22 (2002), available at [http://www.vcsc.virginia.gov/risk\\_off\\_rpt.pdf](http://www.vcsc.virginia.gov/risk_off_rpt.pdf) (analyzing a potential offender risk assessment instrument in Virginia by which high-risk offenders are imprisoned while those who are statistically unlikely to recidivate receive noncustodial, alternative sentences).

329. See AM. BAR ASS’N JUSTICE KENNEDY COMM’N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 4 (2004) [hereinafter KENNEDY COMM’N], available at <http://www.abanet.org/media/jkres.html> (follow “Introduction” hyperlink) (last visited Dec. 3, 2010) (“*Our resources are misspent*, our punishments too severe, our sentences too long.” (emphasis added) (quoting Justice Kennedy)). Risk/needs assessment tools can allow courts to allocate criminal justice resources to high-risk offenders—who will benefit from them—while diverting resources from low-risk offenders—who become more likely to reoffend when over-treated. See, e.g., Lowenkamp & Latessa, *supra* note 326, at 3–8 (noting that providing unnecessary services to low-risk offenders squanders resources that could be devoted to the more serious offenders, and, moreover, *increases* the risk that low offenders will reoffend).

man may be the man of the present, but *the man of the future is the man of statistics* and the master of economics.”<sup>330</sup>

Indeed, armed with statistical sentencing software of this kind, a judge could know that sentencing *this* offender to pay a fine and serve a term of community service would likely be more effective at deterring future crime—while still serving the requisite retributive goals of punishment—than even a brief period of incarceration.

Conversely, a judge could know that the optimal sentence for *that* offender is thirty-seven months of incarceration. At thirty-seven months, that offender would be significantly less likely to re-offend than if sentenced to one to three years in prison, but *also* less likely to re-offend than if sentenced between thirty-eight and sixty months.

And if two sentencing alternatives appeared to be *equally effective* at reducing recidivism, a judge could impose the least onerous of them, consistent with the parsimony provision in 18 U.S.C. § 3553(a).<sup>331</sup>

The scatter plot is a straightforward way of displaying *utilitarian* drivers of sentencing, but the software could also address *retribution-related* considerations by highlighting one section of the horizontal-axis in red. This approach would be a visual variation on Morris’s notion of limiting retributivism.<sup>332</sup> The red band would reflect the recommended sentencing range in terms of proportion-

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330. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (emphasis added). Under a traditional economic model that treats people as rational maximizers, punishment has a transitive property. Thus, potential offenders should be equally deterred when there is a one-in-a-thousand chance of fifty years in prison as when there is a one-in-twenty chance of one year in prison. But research suggests that a great deal of human decisionmaking is guided not by rationality but by *bounded* rationality. See, e.g., Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1075 (2000). A criminal act is not usually the product of Boolean cost-benefit analysis, but is more often the consequence of weighing perceived risk against the visceral allures of offending. See JACK KATZ, *SEDUCTIONS OF CRIME* 312–17 (1988).

331. By utilizing empirical behavioral models, a sentencing information system would better allow judges to impose optimal punishments. Cf. Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985) (describing economic models for efficient criminal penalties).

332. See NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 73–80 (1974) (suggesting that retributive considerations should set the upper and possibly lower limits of sentencing, but that utilitarian considerations might be used to select from not undeserved penalties within this range).

ality and just deserts. Of course, the judge would be free to sentence outside of the red band (because any sentence on the display is authorized by statute and therefore reflects Congress's ultimate assessment of desert), and may wish to do so if utilitarian concerns outweigh retributivist ones, or if unusual characteristics of the offender or the offense so dictate. However, as a general rule, the red band would serve as an anchoring point for the moral wrongness of the offense, and suggest appropriately retributive penalties.<sup>333</sup>

These are the same considerations that judges must consider when sentencing under § 3553(a),<sup>334</sup> but today judges are forced to guess about how much retribution and how much rehabilitation should go into a sentence. They must guess whether an offender needs to be incarcerated to protect the public and whether an offender will successfully turn his life around. "Prediction is inherent in sentencing decisions."<sup>335</sup> Strangely, though, in consigning people to prison, judges impose their sentences based on less information about what works and what is cost-effective than physicians who prescribe medicine.<sup>336</sup> Imagine how much more effec-

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333. In the absence of a uniform federal penal code that organizes offenses by gravity, the Sentencing Commission might establish red-band recommendations by ordinally ranking federal crimes. They could begin by referring to extant work. *See, e.g.*, THORSTEN SELLIN & MARVIN E. WOLFGANG, *THE MEASUREMENT OF DELINQUENCY* 292–310, 318 (1964) (establishing index of offense severity); PETER ROSSI & RICHARD BERK, *JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED* 33–54, 63–71 (1997) (assessing public opinion of seventy-three offenses). Of course, real-offense sentencing would complicate efforts to identify recommended desert-based sentences, but the additive logic of the Guidelines might be adapted to the endeavor. Desert, unlike the utilitarian bases for punishment, is not amenable to falsification. *See, e.g.*, Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1334–35 (2006) ("Importantly in this 'age of empiricism,' the moral claims of retributivism are non-falsifiable: one can dispute whether a punishment accords with community sentiments of desert, but one cannot disprove the underlying claim that it is morally right to impose deserved punishment."). Still, even a rudimentary ranking of offenses might help rectify the problems with proportionality that affect the federal system. *See United States v. Angelos*, 345 F. Supp. 2d 1227, 1230, 1244–45 (D. Utah 2004) (noting that a defendant who carried a handgun to two \$350 marijuana sales and had guns in his garage is punished twice as severely under federal law as a drug kingpin responsible for a death, four times as severely as a second-degree murderer, and five times as severely as someone who rapes a ten-year-old).

334. *See supra* note 20 and accompanying text (quoting requirements of § 3553(a)).

335. Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389, 1406 (2008).

336. *See* Sheila M. Bird, *Prescribing Sentence: Time for Evidence-Based Justice*, 364 LANCET 1457, 1457 (2004) (citations omitted) ("Judges prescribe sentence on lesser evidence about what works and what is cost effective than doctors prescribe medicines. This is a disservice to the judiciary, public safety, and offenders themselves . . .").

tive judges could be if they were equipped with meaningful information about desert and recidivism, Sara! Not only would they be able to see what other judges had done when confronted with an analogous case—allowing a kind of common law of sentencing to flourish—but they could know whether a given sentence had *worked*.<sup>337</sup> Even judges confident of their sentencing judgments would discover that they are more effective when equipped with actuarial instruments.<sup>338</sup>

It would be evidence-based sentencing.<sup>339</sup>

Sara, I'm pretty sure that federal judges would *adore* a system like this. After all, the Judicial Conference of the United States, the policymaking body for the federal judiciary, endorsed a system of this kind in 1977.<sup>340</sup>

If they were free to impose any sentence permitted under the statute, and if they were informed about what kind of sentences had worked and which had not, federal judges would almost cer-

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337. 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, 94, 110–11 (1993) (“[I]t remains critically important for federal judges to embrace their opportunities to actively cultivate a common law of sentencing. By so doing, the federal judiciary can reestablish its role in federal sentencing lawmaking and still save the federal guidelines experiment.”); Robert W. Sweet et al., *Towards a Common Law of Sentencing: Developing Judicial Precedent in Cyberspace*, 65 FORDHAM L. REV. 927, 946 (1996) (suggesting statistics could allow “judges to harmonize a new sentence with previous ones”).

338. See MODEL PENAL CODE: SENTENCING § 6B.09 cmt. A (Preliminary Draft No. 5, 2007) (“Actuarial—or statistical—predictions of risk, derived from objective criteria, have been found superior to clinical predictions built on professional training, experience, and judgment of the persons making predictions.”); William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, 2 PSYCHOL. PUB. POL'Y & L. 293, 298 (1996) (reporting that in a meta-analysis, actuarial prediction outperformed clinical prediction overwhelmingly). Of course, if an actuarial sentencing information system *can* outperform professional judgment, it raises the question of whether the optimal sentence identified by the system should be a mere recommendation for judges to consider when exercising their traditional discretion, or whether sentencing should be automated and mandatory. See *supra* note 312 (contrasting views of Weber and Hart). Of course, under existing law, this is a settled matter. See *United States v. Booker*, 543 U.S. 220, 245 (2005) (excising the provision of the federal sentencing statute that made the Guidelines mandatory).

339. See Wolff, *supra* note 335, at 1405–08 (describing empirically based sentencing that draws upon risk assessment instruments).

340. See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 74–75 (1977), available at <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings.aspx> (follow “1977: March” hyperlink) (endorsing “the concept of a new probation information system” that would, inter alia, “[p]rovide up-to-date information to guide sentencing courts in selecting sentences for convicted defendants”).

tainly impose sentences that work. They wouldn't have to be *coerced* into using sentencing software of this kind.<sup>341</sup>

The irony is that software of this kind *is* available. It has been for years.<sup>342</sup> In an article published in 2004, Oregon State Judge Michael Marcus described using DSS (“Decision Support Systems”) software on a desktop computer to produce sentencing bar charts.<sup>343</sup> In a screen shot, a variety of fourteen sentencing alternatives are displayed (in order of frequency imposed); for each alternative, the percentage of similar offenders who avoided conviction for three years is displayed.<sup>344</sup>

Software of this kind—programs that can guide judicial discretion during sentencing—has been available for years. Yes, it would have required a prodigious effort to make data of this kind available in 1984, but with twenty-five years of development in computers and software, developing a program to graphically display the efficacy of sentences would be pretty straightforward.

Of course, even the most zealous proponents of actuarial sentencing do not pretend that it is a panacea, or that a scatter plot of data can adequately substitute for the exercise of human judgment.<sup>345</sup> It is well understood that merely “incanting the word ‘information’ is not a magical solution.”<sup>346</sup> Yet there is little doubt that judges would profit from having empirical information about the efficacy of sentencing alternatives.

The existing Guidelines *are* empirical in part, drawing upon historical sentencing practice to establish ranges for many cate-

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341. See Michael A. Wolff, *Missouri's Information-Based Discretionary Sentencing System*, 4 OHIO ST. J. CRIM. L. 95, 101 (2006) (“The starting point for the Missouri Sentencing Advisory Commission was how to influence judicial discretion. There are other actors—notably, prosecutors, probation officers, and others—whose hearts and minds also must be won. The challenge is daunting because of the varying attitudes and influences of all the various actors—law enforcement, prosecutors, defense attorneys, probation officers, judges, prison officials, the Parole Board, and parole officers. Unless the Commission can give these actors something they need, they have no reason to pay attention to us.”).

342. See Miller & Wright, *supra* note 322, at 371 (describing sentencing information systems used by foreign jurisdictions).

343. See Michael Marcus, *Smarter Sentencing: On the Need to Consider Crime Reduction as a Goal*, CT. REV., Winter 2004, at 16, 20–21.

344. *Id.*

345. Douglas A. Berman & Steven L. Chanenson, *Can and Will Information Spur Post-Modern Sentencing Reforms?*, 19 FED. SENT'G REP. 219, 220 (2007).

346. *Id.*

gories of offenses.<sup>347</sup> It certainly would be consistent with that approach for the Commission to provide judges with information about the likely outcomes of sentences they might impose.<sup>348</sup> The necessary information should be available in existing databases.<sup>349</sup> The information needed to identify analogous offenders should be contained in presentence reports,<sup>350</sup> while arrest and re-conviction data should be a matter of public record.

Of course, there would be serious logistical challenges in implementing a sentencing information system of this kind. Using official statistics (such as re-arrest or re-conviction) always implies a series of discretionary judgments,<sup>351</sup> and these statistics

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347. See Breyer, *supra* note 104, at 181 (“We found typical past practice [by asking probation officers to analyze more than 10,000 cases. These analyses, along with data from 100,000 other cases, were entered into the commission’s computers . . . .”).

348. It has been suggested that a new agency be established to manage national sentencing data and research. See Miller & Wright, *supra* note 322, at 378 (noting that although “the U.S. Sentencing Commission already has substantial data and information duties . . . we believe the Commission’s role as a policymaker and its dominant focus on the federal criminal justice system make it a poor repository of national data responsibilities.”). The authors recommend creating a separate National Sentencing Institute, even if only the federal system is at stake. *Id.* at 378–79. I would suggest, however, that the U.S. Sentencing Commission would be well situated to manage a sentencing information system of this kind. See William W. Wilkins, Jr., *The United States Sentencing Commission: Its Many Missions*, FED. PROB., Dec. 1991, at 26, 26–28 (describing data collection, research, and evaluation responsibilities of the Commission).

349. See Miller, *supra* note 321, at 1390, who notes:

Far from being an academic fantasy, systems like this are already beginning to emerge in one of the most inhospitable places—the federal sentencing system. The United States Sentencing Commission already makes extensive sentencing data files available, albeit in large chunks, late, and with some substantial questions about the quality of the data. Some of the sentencing commission data has been combined with information from other federal agencies and organized in a much more accessible, interactive fashion by the Federal Justice Statistics Resource Center, an arm of the Bureau of Justice Statistics in the U.S. Department of Justice. An even more impressive private effort to organize vast quantities of data about the operation of the federal government, including prosecutorial and sentencing information, is being conducted by the Transactional Records Access Clearinghouse (TRAC) under the name of TRACFED. While neither of these systems yet offers a full federal [sentencing information system], they suggest how useful even the restricted current federal sentencing information can be if restructured and made available through a relatively straightforward (if not exactly intuitive) interface.

*Id.*

350. See OFFICE OF PROBATION AND PRETRIAL SERVICES, THE PRESENTENCE INVESTIGATION REPORT, at I-3, I-4 (2006), available at [http://www.fd.org/odstb\\_SentencingResource3.htm](http://www.fd.org/odstb_SentencingResource3.htm) (describing contents of federal presentence reports).

351. See John I. Kitsuse & Aaron V. Cicourel, *A Note on the Use of Official Statistics*, 11 SOC. PROBS. 131, 133 (1963) (noting that official statistics may tell us more about the exercise of discretion in the criminal justice system than about actual rates of crime).

operate as an imperfect proxy for real deterrence or rehabilitation. Ensuring the accuracy of all data entered into the database would be essential (requiring a firm commitment to quality control)<sup>352</sup> and there would be technical obstacles to overcome in establishing the smooth flow of information from external databases.<sup>353</sup>

Establishing an outcome-based sentencing information system would also entail analytic challenges. For example, judges would not be able to draw directly from the last twenty years of federal sentencing data because that data would reflect the homogenizing influence of the mandatory Guidelines regime.<sup>354</sup> Similarly, mandatory minimum sentences would frustrate any effort to identify optimal sentences that lay below the statutory floor. While it might be possible to use pre-Guidelines data, twenty years of crime legislation has changed the statutory landscape enormously, and the availability of parole prior to 1984 would mask the actual sentences served.

Some of the challenges in establishing a sentencing system of this kind are neither technical nor analytical in nature, but philo-

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352. See generally CYRUS TATA ET AL., A SENTENCING INFORMATION SYSTEM FOR THE HIGH COURT OF JUSTICIARY OF SCOTLAND: REPORT OF THE STUDY OF THE FIRST PHASE OF IMPLEMENTATION, EVALUATION AND ENHANCEMENT (2002) (describing qualitative and quantitative data issues in establishment of Scottish Sentencing Information System).

353. The federal Probation and Pretrial Services System's Access to Law Enforcement Systems ("ATLAS") Supervised Release File platform merges data from both the National Crime Information Center (NCIC) and Nlets. See ADMIN. OFFICES OF THE U.S. COURTS, 2009 LONG RANGE PLAN FOR INFORMATION TECHNOLOGY IN THE FEDERAL JUDICIARY 11 (2009); *National Crime Information Center*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ncic/ncic> (last visited Dec. 3, 2010); *What We Do*, INT'L JUST. & PUB. SAFETY INFO. SHARING NETWORK, <http://www.nlets.org/whatWeDo.aspx> (last visited Dec. 3, 2010). A sentencing information system like the one described may also draw upon data contained in the judiciary's PACTS and CM/ECF systems, and the e-designate interface developed by the Federal Bureau of Prisons.

354. It may be possible to use state sentencing data, which would be valid inasmuch as state offenders and sentences are comparable to federal offenders sentenced to federal facilities. If state data cannot be matched to federal sentencing, it might be necessary to look to departures and variances, or perhaps Bureau of Prisons programming, to identify promising directions for sentencing trends. For example, a scatter plot with a negative linear relationship between sentence length and recidivism (in which recidivism decreases as sentence length increases) may justify imposition of an even longer sentence than had been imposed under the Guidelines; conversely, if the plot depicts a positive linear relationship (in which the risk of recidivism increases as sentence length increases), a sentence somewhere below Guidelines range may seem appropriate. It would take time for sentencing alternatives to emerge and for recidivism data to become available. Thoroughly informed decisionmaking would be possible only when recidivism data becomes available for the whole statutory range of sentencing alternatives.

sophical.<sup>355</sup> Some might object that evidence-based sentencing punishes defendants for the crimes of others (e.g., defendant *X* gets a long prison sentence just because he resembles offenders who avoided recidivism only when they received long prison sentences).<sup>356</sup> The idea of punishing people for offenses they didn't commit veers dangerously close to the concept of precrime illustrated in *Minority Report*.<sup>357</sup> Certainly, there are theorists who believe that utilitarian concerns should play no role in punishment, and that sentences should be imposed purely upon desert.<sup>358</sup>

But this argument has already been settled. After all, you, Sara, stated that sentencing should draw upon *all four* traditional grounds for punishment: deterrence, incapacitation, rehabilitation, and retribution.<sup>359</sup> The first three of these justifications could be more rigorously applied at sentencing if recidivism data were available to sentencing judges.

Thornier, perhaps, is the problem of sentencing disparity. After all, the reduction of unwarranted sentencing disparity lies at your heart.<sup>360</sup> Under a system of evidence-based sentencing, two first-time offenders convicted of the same crime might get very different sentences. It smacks of the inequities that prompted the Guidelines in the first place.<sup>361</sup>

But people must be careful about fetishizing parity in sentencing, for infatuation with equality, although meant well, can lead

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355. See BERNARD E. HARCOURT, *AGAINST PREDICTION* 33, 109–92 (2d ed. 2007) (raising economic and philosophical arguments against the use of risk prediction instruments in the criminal justice system).

356. See *id.* at 190–92.

357. See MINORITY REPORT (DreamWorks 2002) (depicting society in which precognitive visionaries can identify crimes before they occur); see also Robert Batey, *Minority Report and the Law of Attempt*, 1 OHIO ST. J. CRIM. L. 689, 694–98 (2004) (discussing the point at which it is appropriate to hold actors responsible for inchoate offenses).

358. See IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 198 (W. Hastie trans., The Lawbook Exchange, Ltd. 2002) (1887) (“Even if a Civil Society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves throughout the whole world—the last Murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that bloodguiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of Justice.”).

359. See 18 U.S.C. § 3553(a) (2006).

360. See Feinberg, *supra* note 13, at 295 (describing the elimination of sentencing disparity as the “first and foremost goal” of the SRA).

361. See King & Klein, *supra* note 38, at 318–19.

to unintended consequences.<sup>362</sup> In reality, each human being is unique. The notion of “like” sentences for “like” offenders is a legal fiction maintained by excluding those characteristics deemed irrelevant for purposes of punishment.<sup>363</sup> Even then, two defendants who receive the same sentence in the same prison may have radically different subjective experiences.<sup>364</sup>

Reasonable minds may differ about which characteristics to include and exclude from the calculus of punishment. Historically, judges considered a wide range of characteristics in their sentencing decisions.<sup>365</sup> When you were enacted, Sara, Congress directed the Commission to “maintain[] sufficient flexibility to permit individualized sentences when warranted,”<sup>366</sup> to ensure the Guidelines were “entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders,”<sup>367</sup> and to take into account (though only to the extent that they are relevant to sentencing) eleven offender characteristics:

- (1) age; (2) education; (3) vocational skills; (4) mental and emotional condition to the extent that such condition mitigates the defendant’s culpability or to the extent that such condition is otherwise plainly relevant; (5) physical condition, including drug dependence; (6) previous employment record; (7) family ties and responsibilities; (8) community ties; (9) role in the offense; (10) criminal history; and (11) degree of dependence upon criminal activity for a livelihood.<sup>368</sup>

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362. See KURT VONNEGUT, *Harrison Bergeron*, in WELCOME TO THE MONKEY HOUSE 7, 7–14 (1968) (describing intentional handicapping of athletes, artists, and the otherwise able in an effort to force lockstep equality).

363. See Peter K. Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 539–40, 542 (1982) (suggesting the notion that “like individuals should be treated alike” is a mere tautology, and that “[e]quality, therefore, is an idea that should be banished from moral and legal discourse as an explanatory norm”).

364. See TONRY, *supra* note 4, at 19 (“Two years’ imprisonment in a maximum security prison may be a rite of passage for a Los Angeles gang member. For an attractive, effeminate twenty-year-old, it may mean the terror of repeated sexual victimization. For a forty-year-old head of household, it may mean the loss of a job and a home and a family. For an unhealthy seventy-five-year-old, it may be a death sentence.”); Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 183 (2009) (describing the inequities of punishment imposed by subjecting more sensitive and less sensitive prisoners to “like” punishments).

365. This was not always appropriate. See RICHARD QUINNEY, *THE SOCIAL REALITY OF CRIME* 141–42 (Transaction Publishers 2001) (1970) (“[J]udicial decisions are not made uniformly. Decisions are made according to a host of extralegal factors, including the age of the offender, his race, and social class.”).

366. 28 U.S.C. § 991(b)(1)(B) (2006).

367. *Id.* § 994(d).

368. *Id.*

The Commission seized upon criminal history as highly relevant,<sup>369</sup> but concluded, without explanation, that among the other enumerated characteristics, a defendant's education and vocational skills,<sup>370</sup> employment record,<sup>371</sup> family ties and responsibilities,<sup>372</sup> and mental and emotional conditions<sup>373</sup> are not ordinarily relevant.

Two offenders, who seem equivalent when only relevant conduct, criminal history, and substantial assistance are considered, suddenly appear very different when judges include discouraged characteristics in their sentencing decisions. Suddenly, identical sentences imposed on these two offenders, with very different educational experiences, career paths, and family responsibilities, appear inequitable and unfair. Thus, changes in the permitted categories of sentencing variables (such as risk-related variables) will produce changes in what appear to be equitable sentences.<sup>374</sup> In affording weight to sentencing factors that were not included in the once-binding Guidelines, judges will (quite reasonably) ar-

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369. See SUPPLEMENTARY REPORT, *supra* note 100, at 41 ("From a crime control perspective, a criminal history component is especially important because it is predictive of recidivism."); Nagel, *supra* note 76, at 924 (noting that commissioners determined that "an offender's criminal history score would dramatically affect an offender's ultimate sentence").

370. U.S. SENTENCING GUIDELINES MANUAL § 5H1.2 (2008).

371. *Id.* § 5H1.5.

372. *Id.* § 5H1.6.

373. *Id.* § 5H1.3.

374. The question of which risk-related factors courts can (and should) consider is a difficult one. See John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 434-39 (2006) (describing tension between legitimate sentencing considerations and predictive risk factors). Monahan notes:

In the past, courts rarely have had to address jurisprudential considerations in making violence risk assessments because actuarial instruments with scientific validity in assessing violence risk did not exist. Now, such instruments do exist and are being used with increasing frequency in criminal sentencing, the civil commitment of people with serious mental disorder, and the civil commitment of sexually violent predators. Among the empirically valid risk factors that are candidates for inclusion on these instruments are those that pertain to what the person is (age, gender, race/ethnicity, and personality), what the person has (major mental disorder, personality disorder, and substance abuse disorder), what the person has done (prior crimes and violence), and what has been done to the person (being raised in a pathological family environment and being physically victimized). Jurisprudential considerations in premising legal decisions on these specific risk factors can no longer be avoided: Their appearance on actuarial prediction instruments makes their use apparent.

*Id.* at 434-35.

rive at different sentences than those obtained under the Guidelines.

The observation is not dismissive of Marvin Frankel's concerns about identical offenders receiving disparate punishments based on nothing more than the idiosyncrasies of sentencing judges.<sup>375</sup> Unwarranted sentencing disparity of that kind is a blight upon any fair system of punishment. But legislators, judges, and the public should be equally cautious about focusing myopically upon uniformity in sentencing while ignoring other legitimate objectives (e.g., reduction of recidivism). After all, as noted by one judge, the "disparities based on the risk of reoffending—as measured, perhaps, by the severity of the offense and the offender's criminal history—may be acceptable *and even desirable*."<sup>376</sup>

Ultimately, the solution is to provide judges with reliable data, allow them to evaluate the empirical evidence and competing penological considerations, and impose appropriate sentences. This is what judges do well: evaluate evidence to arrive at judgments. A sentencing information system that informs judges about the actuarial risks of recidivism and that identifies retributive considerations (such as proportionality and desert) would be extraordinarily helpful. Without such a system, judges will be swinging blindly at the metaphorical piñata of sentencing, sending defendants to prison based upon nothing more than the qualitative information in the presentence report and the rudimentary quantitative information mandated by the advisory Guidelines (e.g., the adjusted offense level and criminal history category). Without question, judges will do the best they can, but will, by necessity, make their decisions using limited information.

Those who worry about a gradual drift toward disparity under the post-*Booker* advisory Guidelines may be well advised to support an evidence-based sentencing information system of this kind. Such a system would serve as a noncoercive means of channeling the discretion of federal judges. The alternatives to such a system—"Blakelyizing" sentencing factors,<sup>377</sup> expanding

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375. See FRANKEL, *supra* note 39, at 21 (describing judges with wildly differing views of what kind of sentence a draft resister should receive).

376. See Wolff, *supra* note 335, at 1401–02 (emphasis added).

377. The notion of "Blakelyizing" sentencing factors is explored in Justice Stevens's dissent in the remedial portion of *Booker*. *United States v. Booker*, 543 U.S. 220, 285–91 (2005). For a description of the problems associated with the *Blakelyizing* federal sentenc-

the use of mandatory minimum sentences,<sup>378</sup> or simply exhorting judges to adhere to the advisory Guidelines—are all problematic. An evidence-based sentencing information system is the best available option.<sup>379</sup>

Twenty-five years have passed since Congress enacted the Sentencing Reform Act of 1984. In that time, four key changes have occurred:

- (1) The Guidelines have grown increasingly complex and severe, and are widely disliked;<sup>380</sup>
- (2) The Guidelines have been made toothless—the Supreme Court struck down as unconstitutional the provisions that made them mandatory in *Booker*;<sup>381</sup>
- (3) Actuarial risk prediction has improved significantly;<sup>382</sup> and
- (4) Computers have become cheaper, faster, and much better connected.<sup>383</sup>

In light of these four developments, the Commission may wish to establish an evidence-based sentencing information system. It could rebrand itself and issue a superior product, supplementing—or, better still, supplanting altogether—the advisory Guidelines with a sentencing information system. Most of the necessary statutory authority to achieve this goal already exists; you, Sara, provided the Commission with most of the authority it would

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ing, see Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217, 235–39 (2004) (describing legal and logistical challenges associated with *Blakely*izing Guidelines).

378. See Bowman, *supra* note 377, at 264 (describing alternative of expanded mandatory minimum sentencing).

379. See Miller, *supra* note 321, at 1391 (“The idea of providing better, more complete, faster information to lawyers, judges, scholars, and reformers may be the most attractive sentencing reform model, as it is one that does not rely on government agencies alone to develop wise sentencing rules and practices.”); see also ROGER K. WARREN, CRIME AND JUSTICE INST., EVIDENCE-BASED PRACTICE TO REDUCE RECIDIVISM 50–51 (2007), available at <http://www.wicourts.gov/about/organization/programs/docs/cjjudicialpaperfinal.pdf> (including “creating offender-based data and sentencing support systems that facilitate data-driven sentencing decisions” as a key recommended sentencing reform for states).

380. See *supra* Part III.A.1 (describing complexity of the Guidelines).

381. See *supra* notes 253–86 and accompanying text.

382. See David Boener & Roxanne Lieb, *Sentencing Reform and the Other Washington*, 28 CRIME & JUST. 71, 114 (2001).

383. See *supra* notes 308–22 and accompanying text.

need.<sup>384</sup> And to the extent that you imposed obligations inconsistent with an evidence-based approach, the Commission should seek requisite statutory changes to 28 U.S.C. §§ 991 to 998, and Congress should enact the requested changes.

Since the Guidelines were promulgated, the number of prisoners in the custody of the Bureau of Prisons has increased geometrically. In 1985, while the Guidelines were being drafted, there were 35,781 people in federal custody;<sup>385</sup> as of June 13, 2009, there were 194,435.<sup>386</sup> At an annual cost of roughly \$25,000 per inmate,<sup>387</sup> the United States now spends more than \$5.5 billion dollars annually on incarcerating federal prisoners.<sup>388</sup> Many of these offenders are nonviolent,<sup>389</sup> and could be safely supervised in their communities at a fraction of the cost.<sup>390</sup> By incarcerating only those who require imprisonment, and by limiting terms of imprisonment to the minimum durations necessary to reduce reoffending, correctional resources could be used far more efficiently. Prison crowding (and all of its attendant evils) could be reduced.<sup>391</sup> The number of people unnecessarily subjected to the pain of im-

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384. See, e.g., 28 U.S.C. § 995(a)(13), (15), (16) (2006).

385. See UTILIZATION OF CRIMINAL JUSTICE STATISTICS PROJECT, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: NUMBER AND RATE (PER 100,000 U.S. RESIDENTS) OF PERSONS IN STATE AND FEDERAL PRISONS AND LOCAL JAILS tbl.6.13.2009 (Kathleen Maguire ed., 2009), available at <http://www.albany.edu/sourcebook/pdf/t6132009.pdf> (reporting federal prison population over time).

386. See *Weekly Population Report*, FED. BUREAU OF PRISONS, [http://www.bop.gov/locations/weekly\\_reports.jsp](http://www.bop.gov/locations/weekly_reports.jsp) (last visited Dec. 3, 2010).

387. See Memorandum from Matthew Rowland, Deputy Assistant Dir., Office of Prob. & Pretrial Servs., to Chief Probation Officers, and Chief Pretrial Servs. Officers (May 6, 2008) (on file with author). The memo, titled “Cost of Incarceration and Supervision,” reported that the annual cost for a single prisoner’s imprisonment in the Bureau of Prisons was \$24,992. *Id.*

388. See OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2011, at 95, 97 (2010), available at <http://www.whitehouse.gov/omb/budget/fy2011/assets/budget.pdf> (reporting estimated 2009 fiscal year budget of \$5.534 billion for the Federal Bureau of Prisons).

389. See THE SENTENCING PROJECT, THE FEDERAL PRISON POPULATION: A STATISTICAL ANALYSIS, [http://www.sentencingproject.org/Admin/Documents/publications/inc\\_federalprisonpop.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_federalprisonpop.pdf) (reporting that “nearly three-fourths (72.1%) of federal prisoners are serving time for a non-violent offense and have no history of violence”).

390. See Memorandum from Matthew Rowland, *supra* note 387 (reporting the annual cost of probation supervision as \$3,621.64).

391. See Oleson, *supra* note 45, at 850–53 (outlining the negative consequences of prison crowding); see also Craig Haney, *Psychology and the Limits to Prison Pain: Confronting the Coming Crisis in Eighth Amendment Law*, 3 PSYCHOL. PUB. POL’Y & L. 499, 552–59 (1997) (describing constitutional problems associated with prison crowding).

prisonment could be minimized<sup>392</sup> and second-order effects upon families and communities reduced accordingly.<sup>393</sup>

By simply providing judges with information about sentencing efficacy, the Commission could reduce the resources squandered on mass incarceration. There is good reason to believe that any information system that could reduce the prison population while maintaining public safety would be supported by the judiciary<sup>394</sup> and the Congress.<sup>395</sup>

## V. CONCLUSION

You were born of good intentions, Sara:

[C]ertainty and 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 . . . .<sup>396</sup>

This was a laudable vision.<sup>397</sup> But, as the saying goes, the road to hell is paved with good intentions, and the guidelines that con-

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392. See generally Gresham M. Sykes, *The Pains of Imprisonment*, in *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 63, 63–78 (1971) (describing deprivations of liberty, goods and services, heterosexual relationships, autonomy, and security).

393. See, e.g., TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007) (describing corrosive effects of incarceration upon poor communities); *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney-Lind eds., 2002) (describing impact of prison on families and communities).

394. See KENNEDY COMM'N, *supra* note 329, at 4 (“There are realistic limits to efforts at rehabilitation. We must try, however, to bridge the gap between proper skepticism about rehabilitation on the one hand and improper refusal to acknowledge that the more than two million inmates in the United States are human beings whose minds and spirits we must try to reach.” (quoting Justice Kennedy)).

395. See, e.g., National Criminal Justice Commission Act of 2009, S.714, 111th Cong. § 6(a)(1) (2009) (charging a proposed Criminal Justice Commission with “refocus[ing] incarceration policies to reduce the overall incarceration rate while preserving public safety, cost-effectiveness, and societal fairness”); Scott, *supra* note 263, at 7–8 (describing problem of overincarceration).

396. 28 U.S.C. § 991(b)(1)(B) (2006).

397. See Norval Morris, *Punishment, Desert and Rehabilitation*, in *SENTENCING* 257 (Hyman Gross & Andrew Von Hirsch eds., 1981) (“A recently developed plan, currently under discussion in the Department of Justice, may prove a useful step in that direction [of imposing order on sentencing]. The proposal calls for the abolition of the Federal Parole Board and the creation of Commission on Sentencing, composed of nine commissioners whose task it would be to promulgate guidelines to sentencing in the federal system. . . . This plan is politically sophisticated and practical; its broad thrust, gradually bringing defined criteria and appellate review to sentencing, is to be welcomed.”).

trolled federal sentencing for the last twenty-two years have been hellish. They aimed for too much.<sup>398</sup> Guidelines turned people into numbers,<sup>399</sup> transformed judges into calculators,<sup>400</sup> changed probation officers into quasi-legal fact finders,<sup>401</sup> inflamed interbranch hostilities between Congress and the courts,<sup>402</sup> and increased the federal prison population five-fold.<sup>403</sup>

Some of this was your fault, Sara. You implied that you wanted tougher sentences,<sup>404</sup> but then failed to specify which sentencing philosophies should be used to achieve them.<sup>405</sup> But the fault is not entirely yours. Many other institutional actors share in the blame. For example, by failing to engage in the discussion about sentencing guidelines, the Judicial Conference of the United States bears some responsibility for the guidelines system that was imposed upon it.<sup>406</sup> The Commission obviously shares in the blame, as well.<sup>407</sup> Adopting modified real offense sentencing per-

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398. See Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217, 228 (2005) (suggesting that sentencing reform fails because of “too much ambition—especially, as evidenced by the Sentencing Reform Act and the Sentencing Guidelines, when such ambition is suffused with a utopian impulse”).

399. See Luna, *supra* note 138, at 39 (“Under the Guidelines, judges thus confront defendants as numbers rather than as human beings.”).

400. See BERT BRANDENBURG & AMY KAY, JUSTICE AT STAKE CAMPAIGN, COURTS . . . OR CALCULATORS? THE ROLE OF COURTS IN CRIMINAL SENTENCING 4 (2004), [http://www.justiceatstake.org/media/cms/sentencingBrief\\_7B7B273FA18FD.pdf](http://www.justiceatstake.org/media/cms/sentencingBrief_7B7B273FA18FD.pdf) (“Federal judges are on their way to becoming more stenographer than Solomon.”).

401. See Sharon M. Bunzel, Note, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933, 960 (1995) (“No longer able to focus on the individual to facilitate rehabilitation, the probation officer has been transformed into a component of determinate sentencing and of a just deserts penal philosophy.”).

402. See Zlotnick, *supra* note 178, at 222, 251 (citation omitted) (describing judges who “essentially apologized to defendants and their families and blamed Congress for tying their hands” and members of Congress who have vowed “to scour the output of federal judges for evidence of what they call ‘judicial abuse’”).

403. Compare UTILIZATION OF CRIMINAL JUSTICE STATISTICS PROJECT, *supra* note 385 (reporting 35,781 prisoners in federal custody in 1985), with *Weekly Population Report*, *supra* note 386 (reporting 194,435 prisoners in custody at latest count).

404. See 28 U.S.C. § 994(m) (2006).

405. See Hofer & Allenbaugh, *supra* note 19 (describing Commission’s failure to identify an organizing theory of punishment).

406. See Robert Howell, *Sentencing Reform Lessons: From the Sentencing Reform Act of 1984 to the Feeney Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 1069, 1081 (2004) (“Judges are themselves largely to blame for their absence from a central role in developing sentencing policy.”).

407. See TONRY, *supra* note 4, at 90–91 (describing seven “technical or technocratic” policy choices made by the Commission—not compelled by the SRA—that led to resentment of the Guidelines).

verted the adversarial system of justice in federal courts,<sup>408</sup> but failed to empower judges.<sup>409</sup> Congress contributed to the problem by enacting incoherent mandatory minimum sentences that frustrated the Commission's effort to maintain a scaled system of Guidelines penalties,<sup>410</sup> and it further muddied things by amending the Guidelines directly.<sup>411</sup> The Department of Justice bears considerable responsibility, too, by requiring prosecutors to charge "the most serious, readily provable" offense,<sup>412</sup> and by operating fast-track programs in some places but not others, while simultaneously condemning sentencing disparity.<sup>413</sup>

The Supreme Court's decision in *United States v. Booker* recast the landscape, however. In holding that the Guidelines are advisory,<sup>414</sup> the Court diverted federal sentencing from the road to hell. Today, judges are free to consider any factors they deem relevant, and to weigh the goals of sentencing in whatever way they deem fit, subject to reasonableness review by the courts of appeals.<sup>415</sup>

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408. See Bunzel, *supra* note 401, at 957–60 (stating the Sentencing Reform Act drastically changed the purpose of the presentence report and probation officer from rehabilitation of offenders to essential elements in sentence determination).

409. See Luna, *supra* note 138, at 51 ("In practice, the relevant conduct provisions only amplified the already awe-inspiring prosecutorial power and helped transform U.S. Attorneys into the real sentencers in the federal system.")

410. See Hatch, *supra* note 304, at 194 ("While the Commission has consistently sought to incorporate mandatory minimums into the guidelines system in an effective and reasonable manner, in certain fundamental respects, the general approaches of the two systems are inconsistent." (footnote omitted)).

411. See Zlotnick, *supra* note 178, at 232. ("While the Sentencing Commission's influence had fallen considerably since its inception for a variety of reasons, the Feeney Amendment was the first time that Congress actually wrote Guidelines language itself, bypassing the Sentencing Commission entirely." (footnote omitted)).

412. Stith, *supra* note 98, at 1442 (quoting 8 DEP'T JUST. MANUAL § 9-27.310 (Aspen 1993)) ("The project to achieve nationwide uniformity in sentencing, as represented by the Sentencing Reform Act and the Guidelines, became, from the perspective of Main Justice, a project to achieve nationwide centralization of prosecutorial power, as represented by the Thornburgh Memorandum and its successors.")

413. See FIFTEEN YEARS REPORT, *supra* note 3, at 106 ("Practitioners and commentators have expressed concern that the presence of these [fast-track] programs in some districts, and their absence from neighboring districts, could lead to disparate sentencing outcomes for offenders convicted of similar conduct." (citing Public Hearing Before the U.S. Sentencing Commission 6–7 (Aug. 19, 2003), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_hearings\\_and\\_Meetings/20030819/0819USSC.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_hearings_and_Meetings/20030819/0819USSC.pdf))).

414. 543 U.S. 220, 245 (2005).

415. See *Rita v. United States*, 551 U.S. 338, 347, 350–51 (2007) (articulating rule for reasonableness review).

After *Booker*, however, sentencing has become increasingly complicated. The calculation of the Guidelines—which used to be the end of the analysis—is now just the beginning. The court must still break out its abacus and *Dungeon Master’s Guide*,<sup>416</sup> although the product of these calculations—the advisory sentencing range—is but a preliminary step in a full § 3553(a) analysis. Any court that calculates the Guidelines range and ends their inquiry, risks being reversed.<sup>417</sup> The process has grown elaborately Byzantine, yet still cannot provide judges with predictive information about sentencing alternatives to reduce recidivism.

Thankfully, a paradigm shift lies within reach. Instead of basing federal sentences on political intuitions, the Commission could provide sentencing judges with meaningful data about which available sentences are most effective in reducing recidivism. Improvements in risk assessment and technology have made it possible for the Commission to provide judges with data that were scarcely imaginable twenty-five years ago.

Even five years ago, given the acrimonious climate between Congress and the courts,<sup>418</sup> it was difficult to envision a system of this kind. But much has changed. Given the Feeney Amendment, *Booker* and its progeny, and a growing interest in evidence-based policy,<sup>419</sup> an actuarial sentencing information system is not only intellectually conceivable, but socially and politically viable.

So that, Sara, is my wish for your birthday: an actuarial sentencing information system that allows federal judges to impose data-driven sentences that are effective, efficient, and fair. It is something that, at twenty-five, you might become.

So close your eyes, make a wish, and blow out all the candles.

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416. See *supra* note 155 and accompanying text (comparing guidelines manuals to the Dungeons and Dragons handbook).

417. See *Nelson v. United States*, 555 U.S. \_\_\_, \_\_\_, 129 S. Ct. 890, 891–92 (2009).

418. See Zlotnick, *supra* note 178, at 242–55 (describing the politics of federal sentencing).

419. See, e.g., URBAN INSTITUTE, BEYOND IDEOLOGY, POLITICS, AND GUESSWORK: THE CASE FOR EVIDENCE-BASED POLICY 5 (2008), available at [http://www.urban.org/UploadedPDF/901189\\_evidencebased.pdf](http://www.urban.org/UploadedPDF/901189_evidencebased.pdf) (“During the first half of 2008, evidence-based decision-making seemed on the rise. . . . The U.S. Sentencing Commission is holding open discussions about mandatory minimums and federal sentencing guidelines. Growing evidence is finding a policy audience.”).