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Nancy Gertner

SENTENCING REFORM: WHEN EVERYONE BEHAVES BADLY

DISTINGUISHED JURIST-IN-RESIDENCE LECTURE

Honorable Nancy Gertner

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I. INTRODUCTION

Eight months ago, when I was asked to provide a topic for this speech, I decided on "Crime, Punishment, and the Evening News." I had intended to talk about the relationship between the media and criminal justice policy. But events overtook that topic. In fact, I would like to believe that in January 2005, when the Supreme Court decided *United States v. Booker*,[1] and declared the Federal Sentencing Guidelines (Guidelines) to be advisory, it was principally to spike interest for my talk. But of course, that's absurd.

Nevertheless, here is my dilemma. I want to talk about all of this—the media, the courts, and the Guidelines. In fact, I want to take a sweeping glance at sentencing over the past century, examining the unique nature of the enterprise, and the extent to which all of the institutions of our government are involved—Congress, the courts of all levels, and the Executive. I want to sprinkle in a smattering of legislative drafting and even comparative law—all in the space of this short speech. And I will. So get comfortable and, as they say, listen up.

A few introductory remarks: Sentencing is different from almost all functions of the government and surely different from the other functions of the judiciary. It is the moment when state power meets an individual directly. It necessarily involves issues that are distinct from those in other areas of the law. It requires a court to focus on the defendant, to craft a punishment proportionate to the offense and to the offender. It should come as no surprise that in countries across the world, common law and civil code, totalitarian and free, judges have been given great discretion in sentencing.[2] To be sure, that power had a different resonance in the countries of the former Soviet Union, or in China, than it did in the United States. In China and in the countries of the former Soviet Union, the judicial sentencing power involved maximizing the ability of the judge to bend to the will of the Party or the Party leadership. In the United States, in contrast, it was part and parcel of a progressive penological movement, linked to the goal of rehabilitating offenders.

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1. 125 S. Ct. 738 (2005).

2. *See, e.g.*, Andrew Ashworth, *Commentary: Sentencing Purposes in England*, 3 FED. SENT. R. 337 (May/June 1991); Bernd-Dieter Meier, *Alternatives to Imprisonment in the German Criminal Justice System*, 16 FED. SENT. R. 222 (Feb. 2004); M.C. Talgam & Uri J. Schild, *Computerized Decision Support for Judges in the Sentencing System of Israel*, 52 SYRACUSE L. REV. 1293 (2002); Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1758 (1999); Stephen B. Davis, Note, *The Death Penalty and Legal Reform in the PRC*, 1 J. CHINESE L. 303 (1987).

At the same time, a sentencing system is in fact a *system*, impacting all of the institutions of government, not merely the judiciary, but also the legislative and executive branches, and, in the United States, the jury. It would be wrong to look only at what is essentially the "end" of the story, when the judge pronounces the sentence, and not all of the stages that precede it. Likewise, it would be wrong to assume that one can change the behavior of one player in the system without that change having an impact on all of the others. Discretion is hydraulic; you take it away from one and it flows to another.[3]

United States v. Booker could well herald a new era in American sentencing practices. But before I address what that era may look like, it is important to identify two other time periods and describe how each failed to provide meaningful sentencing reform—the era of indeterminate sentencing and the era of "mandatory" guidelines (which is, perhaps, at an end). In each case, the major institutional players—including my own institution, the courts—failed to live up to the expectations of reformers. The challenge for today is how to avoid the mistakes of the past.

II. THREE REGIMES

A. Indeterminate Sentencing

1. The System

Judges: For over a century, up until the 1980s, there was indeterminate sentencing in the United States. The judge's role was essentially therapeutic, much like a physician. The judge was seen as an "expert" in individualizing the sentence to reflect the goals of punishment, including rehabilitation and deterrence. Different standards evolved between the trial stage and the sentencing stage, as befitting the very different roles of judges and juries. The trial stage was the stage of rights, evidentiary rules, and high standards of proof. At sentencing, the rules of evidence did not apply; the standard of proof was the lowest in the criminal justice system, a fair preponderance of the evidence. The approach made sense: You would no more limit the kind of information that a judge should get at sentencing to exercise his or her "clinical" role than you would limit the information available to a medical doctor in determining a diagnosis.[4]

Congress: Congress, to a degree, kept out of the process. The federal criminal code was a mess. There were myriad overlapping offenses, each permitting a judge to sentence within a broad range. Occasionally, Congress would intervene to increase the punishment for the "crime du jour." No effort was made to rationalize the punishments spread across different offenses. The criminal justice system was, for the most part, left to the sentencing experts, the judges.

Executive: In the executive branch, the prosecutor had wide discretion to pick the charge from the patchwork quilt of the criminal code. For example, the same

3. *See* Nancy Gertner, *Federal Sentencing Guidelines: A View From The Bench*, 29-SPG HUM. RTS. 6, 23 (2002).

4. *See* Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 424 (1999) [hereinafter Gertner, *Circumventing Juries*].

conduct might be characterized as the sale of drugs, a serious charge, or the more innocuous charge of use of a phone in a drug transaction.[5] But the prosecutor's discretion could be counterbalanced by the judge's; if the prosecutor over-charged or under-charged, the court could compensate so long as the sentence remained within the broad statutory ranges.

2. *Everyone Behaved Badly*

The problem was that all of the institutional players—except the jury—behaved badly. I will not rhapsodize about this period of indeterminate sentencing.

Judges: No one was really trained to exercise the mighty discretion they had. There were no applicable courses in law school—Criminal Procedure was taught as if the enterprise ended with the jury's verdict or the plea of guilty. Judges were not given courses in what punishments were efficacious.

Perhaps this was the case because, at the time, there *were* no rules or studies about what works, about what sentencing alternatives effected rehabilitation or meaningful deterrence for given classes of offenders. It was as if judges were functioning as diagnosticians without authoritative texts, surgeons without *Gray's Anatomy*.[6] Unlike medicine, with few exceptions, there was no peer review, no "clinical rounds" for judges. Indeed, judges were not second-guessed about their sentences at all. Significantly, there was no appellate review of sentencing.

Let me spend a moment on that. In England, Scotland, Australia, and countries with a common law tradition like Israel, a common law of sentencing evolved through the appellate process, just as negligence law and other areas had evolved. But in the United States the absence of any review meant that there was no pressure on judges to generate standards and rules for sentencing or to press the advocates to offer authoritative studies that could be relied on in sentencing decisions. Indeed, without appellate review few judges bothered to write sentencing opinions at all, much less reasoned decisions on the subject. There was hardly any real sentencing advocacy. In Massachusetts, for example, sentencing immediately followed the verdict or plea—without briefs, investigation, or research. Finally, without rules or standards there could be no meaningful comparative data. It was very difficult to compare the sentencing in Maine with the sentencing in Massachusetts.

The result was not as bad as the detractors of indeterminate sentencing have portrayed it—but certainly not as good as its proponents have suggested. There was disparity in sentencing among judges, although not nearly as much as current mythology suggests.[7] Judges, especially in certain regions of the country, developed benchmarks for sentencing.[8] To be sure, there were the outliers—judges who had profound differences with their compatriots about the purposes of sentencing. One could find judges who would say: "I don't believe in the marijuana laws," or the opposite, "I punish all drug offenders severely." There were surely

5. 21 U.S.C. § 843(b) (2000).

6. GRAY'S ANATOMY (Peter L. Williams et al. eds., Churchill Livingstone 37th ed. 1989).

7. *See* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 111 (1998).

8. *See generally* STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 192 (1988).

some judges who contributed to what Judge Frankel described in LAW WITHOUT ORDER (the book that helped precipitate sentence reform) as the "unruliness, the absence of rational ordering, the unbridled power of the sentencers to be arbitrary and discriminatory."[9] And without a doubt there were racial disparities in sentencing, a marked tendency to punish black offenders more severely than white offenders.

Congress: It did not intervene. Whenever a new crime was added to the substantive criminal law there was little if any effort to reconcile new crimes and old ones or to order offenses according to relative severity. Indeed, between 1966 and 1984, all efforts to pass a new criminal code, a code that would have rationalized punishments, failed.[10] Sentencing ranges remained broad on the theory that sentencing was better left to the judges.

Executive: Prosecutorial discretion to pick and choose offenses continued unabated, arguably checked only by the trial court.

B. "Mandatory" Guidelines

1. The System

By 1984 sentencing reform seemed inevitable. The result was the Sentencing Reform Act of 1984 (SRA).[11] The SRA was the product of an unusual alliance of right and left. To the right were those who believed that sentencing reform was important to rein in liberal judges. To the left were those who believed that reform was needed to rein in the draconian sentencers, and especially racially-biased judges. It represented the combined efforts of Senators Strom Thurmond and Edward Kennedy.[12]

But before I describe the SRA, let me identify what did not change. The procedural protections at sentencing—or lack thereof—remained the same. Notwithstanding the profound changes brought about by the SRA, sentencing was still relatively informal. The federal criminal code remained the same—the same sentencing ranges, the same overlapping categories, and the same hodge-podge of offenses and offense definitions.

The purpose of the SRA was this: Within the broad ranges spelled out by Congress, and in the context of that chaotic code, specific sentencing guidelines would be developed. The guidelines would be promulgated by an "expert" Commission, whose goal was to rationalize the sentencing rules, to bring to bear the latest scientific studies in effectuating all of the purposes of punishment,[13] and to do the kind of leg work in determining the appropriate sentencing practices that

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9. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 49 (1972).

10. Robert H. Joost, *Federal Criminal Code Reform: Is It Possible?*, 1 BUFF. CRIM. L. REV. 195, 202 (1997).

11. Sentencing Reform Act, 28 U.S.C. §§ 991-998 (1994) (establishing the United States Sentencing Commission).

12. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 235 (1993).

13. *See* 18 U.S.C. § 3553(a) (2000).

Congress had been unable or unwilling to do.[14] And in addition to their scientific studies, the Commission would use the approach of "limited retribution" to set the maximum and minimum sentences for offenses and to rank punishments depending on the characteristics of the offense and offenders.[15] While all of the reformers conceded that it was difficult to set the appropriate sentence in an individual case with any precision, at the very least a rough proportionality could be achieved among offenses.[16] Moreover, because it was assumed by the reformers that sentences would remain roughly where they were before the Guidelines, limited retribution would mean that there was a natural ceiling on certain offenses, no more "crime du jour" trumping all other offenses.[17]

Like much legislation in this diverse country, especially one created by an extraordinary coalition, what the SRA truly meant existed in the eye of the beholder. One view was that the SRA truly involved "guidelines." The statute admonished the Commission to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."[18]

The Commission, for its part, recognized that its list of factors that could legitimately affect sentencing was not exhaustive. This was not merely because the regime was in its preliminary stage, the problem was endemic to sentencing. The Commission noted the "difficulty of foreseeing and capturing a single set of guide-

14. As I indicated in *United States v. Jaber*:

> The Commission's mandate was to develop Guidelines that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." Moreover, it was to "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) [of title 18, United States Code]." One can imagine these directives leading to scientific studies on the efficacy of different guidelines, how they relate to crime control objectives, to what extent they deter crime, or, to quote [Judge Michael Marcus], "what works."

No. CRIM.02-10201-NG, 2005 WL 605787, at *6 (D. Mass. Mar. 16, 2005) (citations omitted).

15. *See* Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 702 n.26 (2002). *See also* NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 73-80 (1974).

16. Gerard Bradley, *Retribution and the Secondary Aims of Punishment*, 44 AM. J. JURIS. 105, 115 (1999).

17. A number of articles speak to the fact that sentences would remain where they were before the Guidelines. *See, e.g.*, Ilene Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 932 (1990) (discussing the role of proportionality in sentencing); Theresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals: An Empirical and Case Law Analysis*, 40 EMORY L. J. 393, 407 (1991) (showing how the Commission arrived at the Guidelines); Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform*, 40 FED. B. NEWS & J. 158 (March/April 1993) (arguing that mandatory minimums upset the goal of proportionality).

18. 28 U.S.C. § 991 (b)(1)(B) (2000). *See generally* Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discussion of Sentences*, 101 YALE L. J. 1681 (1992). The Senate Judiciary Committee instructed judges to examine the characteristics of each specific offender thoughtfully and comprehensively. S. REP. No. 98-225, at 52 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235. "The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences." *Id.*

lines that encompasses the vast range of human conduct potentially relevant to a sentencing decision."[19] It acknowledged that "circumstances that may warrant departure from the guideline range . . . cannot, by their very nature, be comprehensively listed and analyzed in advance."[20] Judges would be authorized to depart from the Guidelines whenever they concluded that there was a factor "of a kind, or too a degree, not adequately taken into consideration by the Sentencing Commission."[21] But although judges had that power, they would not exercise it very often.[22]

2. *Everyone Behaved Badly*

Again, the institutional players behaved badly, even the new Commission.

The Commission: The Commission did not behave like a sentencing expert at all. It did not study the effectiveness of certain sentences, nor did it analyze what worked for crime control. The Commission simply calculated the average length of sentences in the United States—and then increased them. It did not look closely at what factors judges were actually faced with or the standard used by judges in calculating sentences. It simply compared gross sentencing outcomes and decided what factors must have been significant.[23]

The Commission invented entirely new criteria for sentencing, and in effect a new vocabulary, without explanation, with minimal hearings, and with no legislative history, all of which affected how judges would use the Guidelines. There was no meaningful review of the Guidelines. The full protections of the Administrative Procedure Act did not apply. Indeed, today, citizens and officials spend more time scrutinizing the rationale of rules concerning the bird known as the "snail darter" than we do rules concerning the liberty of citizens.[24] The Commission did not carefully review the effectiveness of sentencing outcomes or alternatives. Too often what it did was just what Congress did: it took the sentences proposed by one side or the other, and split the difference. And over and over again, the Commission opted to minimize judicial discretion in sentencing by focusing on factors that were capable of quantitative values or an objective rendering, such as the value of the theft, or the amount of the drugs, or the number of convictions, rather than

19. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, introductory cmt. 4(b) (2003).

20. *Id.* at § 5K2.0, cmt. 5.

21. *Id.*

22. *Id.* at § 1A1.1, introductory cmt. 4(b).

23. *See* STITH & CABRANES, *supra* note 7, at 38-59.

24. A University of Tennessee ichthyologist discovered a previously unknown species of fish shortly before the Tellico Dam was to be built. Its popular name was the "snail darter." The fish live only in a portion of the Little Tennessee River, an area that was to be dramatically affected by the construction of a proposed dam. The Department of the Interior listed the fish on its Endangered Species List pursuant to 16 U.S.C. § 1531 et seq. (1976). The listing ultimately led to a lawsuit by environmental groups seeking to enjoin construction of the dam, a case which eventually went all the way to the United States Supreme Court. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 179 (1978). The Supreme Court held that the Endangered Species Act of 1973 prohibited completion of the dam, where operation of the dam would either eradicate known population of the snail darter, an endangered species, or destroy its critical habitat. The Court prohibited completion of the dam even though it was virtually completed and even though Congress continued to appropriate large sums of public money for the project even after congressional appropriations committees were apprised of the project's apparent impact upon the survival of the snail darter.

social background, or medical or psychological condition, even if those factors played an important role in predicting recidivism or promoting rehabilitation.

Rather than arriving at guidelines to implement *all* of the purposes of the SRA, the Commission emphasized one issue above all others, the problem of sentencing disparity. As one colleague noted, the only thing that mattered was that one judge was doing the same thing as another—even if both were wrong.

In short, this was not the high-minded Commission with expertise in penology, deterrence, rehabilitation, etc. This was what Justice Scalia described as "a junior varsity Congress,"[25] political from the outset, largely responding to public pressure to increase sentences.

Congress: Congress changed its focus. It was unable to rationalize the criminal code, but once the Commission had done so by coming up with the Guidelines, it was more than willing to intervene. Congress passed sentences with mandatory minimum terms, an approach wholly inconsistent with the SRA. It directed the Commission to increase selected sentences, whether or not the Commission agreed. Criminal justice policy changed from being largely the work of elites to its polar opposite, what one writer describes as the "politicization" of crime.[26]

The Courts: The courts behaved badly—from the trial level to the United States Supreme Court. Two hundred judges declared the Guidelines unconstitutional but then enforced them with a rigor that was unnecessary and not at all required by either the SRA or even the Guidelines the Commission promulgated.[27] In part, this was due to the same factors that had existed prior to the Guidelines: Judges continued to have no training in sentencing, no background in the area, and little time. They could not exercise discretion with respect to Guideline departures because for many—especially those who became judges post-Guidelines—they *had* no perspective independent of the Guidelines and no context from which to judge the Guideline results. And if they departed, they risked public ire.

In part, judges slavishly followed the Guidelines because of the structure of the Guidelines and the ideology that had grown up around it. The SRA and the complex Guidelines that had been promulgated created an ideology of interpretation not unlike one in a civil code country: The Guidelines were comprehensive; they were the work of "experts," and if there were gaps, the experts had to fill them; and judges were to be expert clerks, not interpreting the document, but ren-

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25. United States v. Mistretta, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

26. James Q. Whitman, *Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 91 (2003). Whitman wrote:

> To an extent unmatched elsewhere in the developed world, America allows fundamental policy choices to be made through the political process, denying a leading role to criminal justice professionals. This politicization is not just a matter of the workings of the legislative process. Actors throughout the system, from prosecutors to judges to representatives on all levels of government, make political careers by running on tough-on-crime platforms.

Id. at 92.

27. Freed, *supra* note 18, at 1719 n.191.

dering sentencing "answers."[28] The result was a jurisprudence wholly alien to a common law court.[29]

The Supreme Court: In one sense, the Supreme Court contributed to the problem. The theory of "limited retribution," as a way of moderating sentences by requiring that they be proportional to one another, made sense only if there was a "cap" to sentencing severity, some limit within which sentences would be rationalized. In *Ewing v. California*,[30] the Court upheld a law substantially increasing the sentence of an offender who had attained three "strikes," even when the prior offenses were minor.[31] In effect, the Supreme Court made it clear that there was virtually no upward limit to sentences. Nothing would prevent Congress from intervening in Guidelines sentencing with respect to any sentence, for any length—the "crime du jour" revisited.

Executive: Executive power was substantially increased, notably the power of the prosecutor. Because the criminal code had not changed, the prosecutor could still pick and choose which offense to charge, a choice that still largely determined the outcome. While the Guidelines ratified "real offense" sentencing—sentencing based on the actual conduct of the offense, rather than the elements of the charged conduct—it in fact proved to be a boon for prosecutors rather than a limit on their power.[32] The coup de grace came in 2003 when Congress passed the PROTECT Act[33] and sought to eliminate virtually all departures from the Guidelines, creating a reporting mechanism for the judges who were not "compliant." In effect, the only player now totally hedged in with rules was the courts, not Congress, and not the prosecutor. Discretion, as I said, is hydraulic. With the PROTECT Act, it flowed to every one else, except, of course, the jury.

Jury: The "new" Guidelines' regime had the most severe impact on the jury. So long as the substantive criminal law remained unchanged with broad sentencing ranges, the jury was only deciding the outer limits of punishments; the "real punishment" was determined when the judge found where the offender would fit in the range. So long as the Guidelines were rigorously enforced, it was clear that more and more issues of consequence were being tried by the judge, but with few procedural standards and less legitimacy. It should have come as no surprise (it

28. John Henry Merryman, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA (2d ed. 1985). Merryman explains:

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

Id. at 36.

29. *See generally* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441 (1997).

30. 538 U.S. 11 (2003).

31. *Id.* at 30-31.

32. Real offense or real conduct sentencing is described in *United States v. Booker*, 125 S. Ct. 738, 759-60 (2005).

33. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, P.L. 108-21 (April 23, 2003).

did not to me[34]) that what the judge did—finding facts with determinate consequences—looked more and more like what the jury did. The judge, now nothing more than "another fact finder" rather than a sentencing expert, was usurping the jury's role.[35]

C. The "Advisory" Regime

1. The System

On January 12, 2005, the United States Supreme Court in *United States v. Booker* concluded that the Guidelines were unconstitutional. *Booker* was the culmination of a series of decisions, beginning with *Apprendi v. New Jersey*,[36] and ending with *Blakely v. Washington*,[37] in which the Court implicitly acknowledged a troubling pattern. Since the days of indeterminate sentencing, when a judge had unreviewable authority to sentence an offender anywhere within the statutory range, the pendulum had swung completely in the opposite direction. In fact, the term "guidelines" had become a misnomer. The Guidelines were rules, even "diktats,"[38] mechanistically applied.

The Court found that the Guidelines violated the Sixth Amendment because they were not "guidelines" in any meaningful sense of the word.[39] They obligated judges to find facts with specific consequences, consequences that were pre-ordained by the United States Sentencing Commission and that increased a defendant's sentence beyond the range required by a jury's verdict or a plea of guilty.

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34. *See generally* Gertner, *Circumventing Juries*, *supra* note 4 (arguing that as more and more significant issues were shifted away from the jury to the judge at sentencing, both decision makers, rather than being specialists in their respective spheres, seemed to be doing exactly the same thing—finding facts with determinate consequences—but with very different procedural protections).

35. As I noted in *Mueffelman*:

> "[G]uidance" turned to mandatory rules, mechanistically applied—if the judge finds "x" fact (quantity, the amount of the fraud, for example), "y" sentence is essentially compelled. More and more issues of consequence to the punishment of an offender were being pushed into the sentencing realm, with few safeguards. And to the degree that the judge's role was transformed to "just" finding the facts, now with Commission-ordained consequences, what the *judge* was doing began to look precisely like what the *jury* was doing, only with fewer safeguards, less formality, and far less legitimacy. With respect to this area—fact-finding with determinate consequences—the judge had no specialized role, added no unique expertise to the process. The only difference—and it was a troubling one—was that judicial decision-making took place in what has been described graphically as the "second string fact-finding process."

United States v. Mueffelman, 327 F. Supp. 2d 79, 83 (D. Mass. 2004) (internal citations omitted).

36. 530 U.S. 466 (2000).

37. 124 S. Ct. 2531 (2004).

38. STITH & CABRANES, *supra* note 7, at 95 (describing the Guidelines as a set of "administrative diktats" that the Commission "promulgated and enforced ipse dixit").

39. United States v. Booker, 125 S. Ct. 738, 742 (2005).

This constitutional defect required severance of the provisions of the SRA that made the Guidelines mandatory, namely, 18 U.S.C. § 3553(b)(1).[40] The Guidelines are now to be deemed "advisory," such that courts are to "consider" Guideline ranges,[41] but are permitted to tailor sentences in light of other statutory concerns.[42] Significantly, § 3553(a) remains, requiring a sentencing judge to "consider" a number of factors, including "the nature and circumstances of the offense and the history and characteristics of the defendant."[43] The sentencing court must also weigh the purposes of sentencing listed in the SRA, including the need for the sentence to "reflect the seriousness of the offense," deter future criminality, protect the public, and provide the defendant with needed training, medical care, or other correctional treatment.[44] The Guidelines and its policy statements are now factors to be weighed among the others. This is an extraordinary moment for sentencing, but to decide its significance we have to tally up the institutional players again. Will the same pattern be repeated?

2. *How Will the Players Behave?*

Courts: As I described, federal judges have been the architects of their own fate by allowing standardless, indeterminate sentencing and then slavishly enforcing the Guidelines. Where there were too few rules in indeterminate sentencing, there were too many rules afterwards. Where will they be now? I have a suggestion.

One way to identify what is permissible in an advisory framework is to first identify what is impermissible. Sentencing approaches can now be tracked along a continuum. At one end lies the mandatory extreme. To the extent that judges enforce the Guidelines without exercising any discretion, i.e., as if they are "mandatory," the *Blakely-Booker* line of cases suggests that judges are behaving in an unconstitutional manner. They are arrogating to themselves fact-finding decisions that appropriately belong to juries. *Booker* has effectively constitutionalized this end of the continuum.

On the other end is what I have come to describe as the "free at last" regime, or a return to pre-1984 indeterminate sentencing. Put another way, this end describes an approach to sentencing in which judges feel free to disagree about the fundamental premises of sentencing, and to implement their own perceptions of what policies should drive punishment. The "free at last" mentality is character-

40. 18 U.S.C. § 3553(b)(1) (2000) provides:

> (b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—
> The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or 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.

41. *See id.* § 3553(a)(4).

42. *See id.*; *see also* United States v. Booker, 125 S. Ct. at 757-69.

43. 18 U.S.C. § 3553(a)(1) (2000).

44. *See id.* § 3553(a)(2)(A)-(D).

ized by comments like, "I won't sentence according to the Guidelines because I simply don't agree that sale of marijuana deserves such severe penalties,"[45] or "I won't sentence according to the Guidelines because I simply don't agree that sale of marijuana deserves such penalties."

Advisory guidelines should fall somewhere between these poles. They should constitute a regime based on rules of general application—what many have described as a common law of sentencing, supplementing, not supplanting, the Guidelines.[46] To be sure, in this regime, the existing set of rules—the Guidelines—are very important, but they cannot be outcome-determinative without running afoul of *Booker*.

I agree with the Second Circuit in *United States v. Crosby*,[47] that it is not useful to determine in advance the weight that sentencing judges should give to applicable Guideline ranges. Rather, in *Crosby*, the court concluded that it is "more consonant with the day-to-day role of district judges in imposing sentences and the episodic role of appellate judges in reviewing sentences . . . to permit the concept of 'consideration' in the context of the applicable Guideline range to evolve . . . ."[48]

At the same time, I have concerns about the approach in the *Wilson*[49] decisions (*Wilson I* and *Wilson II*) adopted in *United States v. Wanning*.[50] In *Wilson I*

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45. As I wrote in *United States v. Jaber*:

> In *United States v. Gonzalez*, No. 03-10027, the defendant [pleaded] guilty to illegal reentry after deportation and passing false social security cards. The applicable statute, 8 U.S.C. § 1326, already distinguished between defendants who had simply reentered the country, and those who did so after conviction of a crime. Mr. Gonzalez's reentry had not followed the conviction of a crime. Counsel did nothing to individualize Mr. Gonzalez (i.e., to suggest why he was different from all others in that category of offense). In my judgment, her argument translated into—"I don't agree that people who have committed these offenses ought be punished so severely." While I agreed with counsel's predilections, I rejected that approach. It was not a judgment for me to make, so I sentenced according to the Guidelines.

United States v. Jaber, No. CRIM.02-10201-NG, 2005 WL 605787, at *15 n.11 (D. Mass. Mar. 16, 2005).

46. *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 (1999) (arguing that a common law of departures could eventually emerge from appellate review of reasoned departures); Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 419 (1992) (criticizing the Sentencing Commission for failing to articulate a sentencing philosophy); Louis F. Oberdorfer, *Mandatory Sentencing: One Judge's Perspective—2002*, 40 AM. CRIM. L. REV. 11, 17-18 (2003) (arguing that the Guidelines are flawed and suggesting that a common law of sentencing would produce fairer penalties).

47. 397 F.3d 103 (2d Cir. 2005).

48. *Id.* at 113. The Court outlined a few general principles and approaches to sentencing post-*Booker*: (1) the Guidelines are no longer mandatory, (2) sentencing judges are to consider them alongside all of the other factors in § 3553(a), (3) "consideration" of the Guidelines will normally require a determination of the applicable Guideline range and policy statements, (4) after considering the Guidelines and the factors in § 3553(a), the sentencing judge should decide whether to impose the sentence that would have been imposed under the Guidelines (meaning either a sentence within the range or within the permissible departure authority), or to impose a non-Guidelines sentence, and (5) the sentencing judge is entitled to find all facts appropriate for determining a Guidelines sentence or a non-Guidelines sentence. *Id.*

49. United States v. Wilson, 350 F. Supp. 2d 910 (D. Utah 2005) [hereinafter *Wilson I*], *reaff'd by* 355 F. Supp. 2d 1269 (D. Utah 2005) [hereinafter *Wilson II*].

50. 354 F. Supp. 2d 1056 (D. Neb. 2005).

(reaffirmed in *Wilson II*), the court noted that the Guidelines are entitled to "heavy" weight and that deviation from Guideline ranges is only appropriate in unusual cases for clearly identified and persuasive reasons.[51] As a practical matter, the *Wilson* method comes perilously close to the mandatory regime found to be constitutionally infirm in *Booker*. As a legal matter, the *Wilson* approach is based on faulty premises.[52]

In this new regime there will be "reasonable" sentences entirely framed by the Guideline and "reasonable" sentences outside the Guidelines' framework. Likewise, some Guideline results will be "unreasonable" in a given case, as will some non-Guideline sentences.

Interpretation. Too often common law judges have applied the Guidelines "linguistically" and thus entirely out of the context in which they were promulgated. This was partly because of the phenomenon I have described. The Commission invented concepts and failed to justify them adequately. There were no answers to questions like why it increased the penalties for "extensive organization," much less what "extensive organization" really means.[53] Indeed, if courts saw the words "extensive organization" in a statute defining an offense they would have been far more analytical than they have been with respect to the Guidelines. Judges should now look more critically at the Guideline categories.

Quantity and Value. Sentences imposed by the Guidelines are driven by "objective" data, like quantity and amount. Plainly, if a judge believes that those findings alone will determine the sentence, then he or she risks running afoul of *Booker*.[54] Sometimes quantity and amount are appropriate proxies for culpability. If you steal more, you are more culpable than if you steal less. Sometimes they are not—as in the case of the warehouseman paid a pittance to steal the computer equipment, an amount totally out of proportion to the value of the contraband (which a co-defendant is reaping) and out of proportion to the minor "role" adjustment that the Guidelines permitted.[55]

Heartland Analysis. The Guidelines have always permitted departures for

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51. *Wilson I*, 350 F. Supp. 2d at 912. In *Wilson I* (reaffirmed in *Wilson II*), the court noted that the Guidelines are entitled to "heavy" weight for a number of reasons: (1) they were promulgated by an "expert agency," (2) that expert agency promulgated "comprehensive guidelines", and (3) these Guidelines directly reflected the congressionally-mandated purposes of the SRA. *Id.* at 914-15. In addition, the court suggests that the Guidelines implemented the public's perception of appropriate punishment and contributed to the declining crime rate. *Id.* at 916-18.

52. From the court's perspective, there was nothing more a trial judge could do to effectuate the purposes of the statute in a given case than to impose the Guideline sentence. *Id.* at 932. As I described in *United States v. Jaber*, No. CRIM.02-10201-NG, 2005 WL 605787, at *4 (D. Mass. Mar. 16, 2005), this was not the case. The Commission did not behave as an expert agency but as a junior varsity legislature; the Guidelines were in fact not comprehensive and could not be; and there was absolutely no attempt to implement any of the purposes of the SRA except one—uniformity. Neither did the Guidelines implement the public's view of appropriate punishment. The Commission's own studies suggested that when the public knew what judges knew—about the facts of the offender and not just the offense—it no longer agreed with the ranges of the mandatory Guidelines. And crime rates which declined nationwide could hardly be attributable to the Guidelines, when federal prosecutions comprised a small percentage of nationwide prosecutions, and states had a wide variety of guideline regimes.

53. *See* United States v. Footman, 66 F. Supp. 2d 83, 93 (D. Mass. 1999).

54. *See* United States v. Emmenegger, 329 F. Supp. 2d 416, 427-28 (S.D.N.Y. 2004).

55. *See* United States v. Costello, 16 F. Supp. 2d 36 (D. Mass. 1998).

"aggravating or mitigating circumstance[s] . . . that [were] of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission."[56] Such leeway was described in the introduction to the Guidelines:

> The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. 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.[57]

Prior to *Booker*, if you asked the Commission, "what were the cases defining the heartland of these offenses," it would have said, "decide for yourself." Indeed, that is precisely what courts need to do post-*Booker*—this time, hopefully, with the Commission providing meaningful information.

Sentences Outside the Guidelines' Framework. It is now possible for courts to look critically at the Guidelines and consider the factors that the Commission excluded from consideration in the light of 18 U.S.C. § 3553(a), but not with a "free at last" approach, i.e., "I disagree with the Commission's conclusions." Here is a suggestion for one rule-based approach: The Guidelines prohibit consideration of "prior disadvantaged youth" because the vectors of this factor point in two directions. On the one hand, this factor could explain an awful record; on the other hand, it could predict recidivism. If you have a case in which the vector points only in one direction, i.e., a defendant whose life is substantially different now than it was in the past, then you might be in a position to say: While the Guidelines may be correct in prohibiting this factor in most cases, *this case is different.*

In addition, courts are regularly reviewing administrative regulations to determine their fealty to the underlying statute. In effect, that is what a court considering a discouraged factor under the Guidelines is doing. Are the crack-cocaine guidelines consistent with the applicable provisions of the SRA? The role adjustments? The exclusion of drug addiction?

Opinions and a Sentencing Information System. Central to the creation of this new regime of general rules are the kinds of communications that we have seen in the e-mail exchanges among 900 federal judges just after *Booker* was announced. Indeed, I am developing a proposal for a sentencing information system that will allow judges across the country to access a database (of statements of reasons, transcripts, opinions, and, with appropriate protections, presentence reports) to learn what other judges are doing in like cases. We can marry the technology we already

56. U.S. SENTENCING GUIDELINES MANUAL § 1A1.4(b), introductory cmt. (2003) (quoting 18 U.S.C. § 3553(b) (2000)).

57. *Id.*

have to the concerns of *Booker* and create real sentencing precedents that district courts can apply, the Courts of Appeal can evaluate, and the Commission can test.[58]

Too often in the Guidelines' regime, sentencing was all about outcomes—what was the Guidelines "answer"? In this post-*Booker* world sentencing needs to be about reasons as well—reasons that satisfy the individual judge, the appeals court, other judges, and the public, as well as reasons that could provide precedent in like cases.

Commission: As noted above, the Commission has not set sentencing ranges through anything remotely like sophisticated crime control analysis. Initially, the ranges were nothing more than average sentences throughout the United States, tweaked upward in many, many cases, based on the Commission's sense of what "just desserts" required. Since then, sentences have climbed further, again without data about what works (whether "twenty to life" is really required to change behavior, etc.).

I challenge the Commission, the advocates, and the courts to do empirical studies about sentencing, sentencing ranges, and sentencing alternatives. We have jumped from the frying pan into the fire: We have moved from a regime that insisted everyone could be rehabilitated, even though we had no idea how, or had tested any alternatives, to one in which rehabilitation, deterrence, etc. is entirely irrelevant, not considered, and worse, not examined. Now is the time to do better.

Executive: It is too early to understand how these changes will affect the power of the prosecutor and, in particular, plea bargaining. Predictions in this area are notoriously inaccurate. After the passage of the Guidelines it was assumed that there would be more trials and fewer pleas; with determinate sentencing, a counsel would be more likely to take a chance on trials. In fact, the opposite occurred.

Congress: Here is the great question mark. It is not at all clear how Congress will respond to the "advisory regime." Most judges, academics, and indeed, the very reformers whose efforts brought about the SRA, would urge Congress to defer taking any action until the impact of *Booker* can be fully understood.

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58. As Norval Morris said:

> More information on current sentencing practice and the effects of different punishments is essential, and this should be of two kinds: statistics in each state regarding the sentences imposed by different courts (related at least to the crimes committed, to the ages of the criminals sentenced and to their criminal records), so that individual judges and magistrates may be able to see clearly where they stand in relation to their brethren; and follow-up studies of the later histories of samples of convicted criminals, so that the effectiveness of different punishments for different types of criminals may be gauged and enlightened rather than fortuitous individualization of punishment become possible.

Norval Morris, *Sentencing Convicted Criminals*, 27 THE AUSTL. L.J., 186, 200 (1953); *see also* Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1263 (2004); Marc L. Miller, *Sentencing 'Reform Reform' Through Sentencing Information Systems* in THE FUTURE OF IMPRISONMENT IN THE 21ST CENTURY (Michael Tonrey ed., 2004).

III. CONCLUSION

I end where I began. Sentencing is different. It cannot be fully addressed through mandatory, uniform nation-wide rules. It is not surprising that the drafters of the SRA spoke in terms of "unwarranted" disparity. How often did judges have the experience of totaling up the Guidelines as if a person were a column of figures, and then looking at the "total" in horror, arriving at a result that was wholly inappropriate to the case at bar?

And the sentencing system *is* a system: We cannot have mandatory guidelines without undermining juries and giving untoward power to prosecutors. We cannot require one party, the judges, to be totally rule-bound when no one else is without distorting the system.

But, having said all of the above, I have absolutely no doubt that, however one characterizes the Guidelines, their advantages and their flaws, the Guidelines will continue to play an important part in sentencing. They have shaped the vocabulary we use to describe sentences and the standards we use to evaluate and compare cases. Because there were no alternative rules prior to the 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. At the same time, the only way for courts to truly "consider" the Guidelines, rather than to follow them by rote, is to do in each case just what the Commission failed to do—to explain, correlate to the purposes of sentencing, cite to authoritative sources, and be subject to appellate review. As for the Commission, it can now return to what it was supposed to do as well—studying the impact of sentences on crime control, as well as monitoring disparity.

The SRA sought to eliminate "unwarranted disparity" between "similarly situated offenders." It did not call for *identical* sentences from one end of the country to another. Differences justified by "differences among offenses or offenders" are *warranted* differences.[59] Differences in the treatment of offenders based on identifiable, sustainable standards that are articulated in decisions, statements of reasons, or transcripts, and that are subject to review, or even testing, are not "unwarranted."

In the final analysis, I want this "advisory" regime, not because I want more power, but because I want more justice.

59. S. REP. NO. 98-225, at 45 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3183, 3228 ("Sentencing disparities that are not justified by differences among offenses or offenders are unfair both to offenders and to the public.").