

Sentencing Guidelines

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In the 50 years since Judge Frankel and others began questioning the theory and practices of wholly discretionary sentencing systems, there has been extraordinary evolution in the laws, policies, politics, and practices of U.S. sentencing systems nationwide. Though the uneven and often uninspired experiences of the federal system have often cast a negative light on the “guideline model” of sentencing reform, there still is no serious dispute that a well-designed guideline structure provides the best means for the express articulation of sound standards to inform and shape individual sentencing outcomes and to promote transparency and the rule of law throughout a jurisdiction’s sentencing system. There are challenges to designing and managing the particulars of an effective guideline sentencing system, but these are challenges that lawmakers should embrace, not avoid.

I. DEVELOPMENT OF THE GUIDELINE MODEL OF SENTENCING REFORM

A. LAWLESSNESS IN SENTENCING

For the first three-quarters of the 20th century, vast discretion was the hallmark of both state and federal sentencing. Trial judges had nearly unfettered authority to impose upon defendants any sentence from within broad statutory ranges provided for offenses, and parole officials had authority to release prisoners any time after they had served a portion of their nominal sentence.¹ Such a discretionary sentencing process was integral to a system that formally premised punishment decisions and offender treatments upon a rehabilitative model. Broad judicial discretion in the ascription of sentencing terms—complemented by parole officials exercising similar discretion concerning

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1. See generally S. REP. NO. 98-225, at 38-49 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3221-32 (reviewing federal sentencing before modern reforms); FRANCIS ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1981).

actual prison release dates—seemed necessary to ensure sentences could be individually tailored to the particular rehabilitative prospects and progress of each offender.²

In traditional discretionary sentencing systems, all three branches of government had a role in determining an offender's punishment, but fundamental issues of sentencing policy were never formally resolved and rarely even addressed. As Judge Marvin Frankel stressed in commentaries that fueled nationwide reforms, in discretionary systems no institution or individual was ever called upon to justify or explain any sentencing decision.³ Because legislatures had “not done the most rudimentary job of enacting meaningful sentencing ‘laws,’”⁴ sentencing judges and parole officials exercised broad discretion in the absence of any rules, standards, or criteria for assessing factors pertinent to sentencing decisions.

Judge Frankel's astute criticisms of discretionary sentencing systems were lodged in the early 1970s around the time academics and advocates were questioning the effectiveness and appropriateness of sentencing focused exclusively around the “rehabilitative ideal.”⁵ Criminal justice researchers were also growing acutely aware of disparities stemming from discretionary sentencing systems.⁶ Empirical and anecdotal evidence indicated that sentencing judges' exercise of broad and largely unreviewable discretion resulted in substantial and undue differences in the types and lengths of sentences meted out to similar defendants, and some studies found that personal factors

2. See Andrew von Hirsch, *The Sentencing Commission's Functions*, in *THE SENTENCING COMMISSION AND ITS GUIDELINES 3* (Andrew von Hirsch et al. eds., 1987) (“[W]ide discretion was ostensibly justified for rehabilitative ends: to enable judges and parole officials familiar with the case to choose a disposition tailored to the offender's need for treatment.”).

3. See MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CINN. L. REV. 1 (1972); see also Kevin R. Reitz, *Sentencing Reform in the States*, 64 U. COLO. L. REV. 645, 650 n.21 (1993) (calling Frankel's criticisms the “most influential work of criminal scholarship in the last 20 years [which] charted the general outline of sentencing reform through the 1980s and into the 1990s”). Senator Edward Kennedy dubbed Judge Frankel the “father of sentencing reform.” 128 CONG. REC. 26,503 (1982).

4. FRANKEL, *CRIMINAL SENTENCES*, *supra* note 3, at 7.

5. See AM. FRIENDS SERV. COMM., *STRUGGLE FOR JUSTICE* (1971); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976); JAMES Q. WILSON, *THINKING ABOUT CRIME* (1975); ERNEST VAN DEN HAAG, *PUNISHING CRIMINALS* (1975). See generally ALLEN, *supra* note 1, at 7-20 (discussing the “wide and precipitous decline of penal rehabilitationism” as a foundational theory for the criminal justice system); Francis T. Cullen, “Correctional Rehabilitation,” in the present Volume.

6. See Martin L. Forst, *Sentencing Disparity: An Overview of Research and Issues*, in *SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY 9-23* (Martin L. Forst ed., 1982) (reviewing research concerning sentencing disparity).

such as an offender's race, gender, and socioeconomic status were impacting sentencing outcomes and accounted for certain disparities.⁷

While some attributed sentencing disparities to the failure of judges to exercise their broad discretion soundly,⁸ Judge Frankel recognized that the disparity was a symptom of the greater disease of "lawlessness in sentencing." The failure of legislatures "even to study and resolve ... questions of justification and purpose" left sentencing judges "wandering in deserts of uncharted discretion," and thus necessarily produced "a wild array of sentencing judgments without any semblance of consistency."⁹ Disparity was the "inevitable" result of a system that lacked guiding standards and thereby forced each judge to rely upon his or her own individual sense of justice.¹⁰

B. SENTENCING GUIDELINES AND SENTENCING COMMISSIONS

Since "lawlessness" was the fundamental problem in discretionary sentencing systems, Judge Frankel stressed that the solution was to seek "some immediate, if not immutable, remedies by lawmaking."¹¹ Specifically, Frankel called for the development of a "code of penal law" that would "prescribe guidelines for the application and assessment" of "the numerous factors affecting the length or severity of sentences."¹²

7. See, e.g., Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 272-74 (1977) (explaining that "the data on unjust sentencing disparity have indeed become quite overwhelming"); Ilene Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 895-97 (1990) (detailing studies showing widespread, unwarranted sentencing disparities); William W. Wilkins, Jr. et al., *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 CRIM. L.F. 355, 359-62 (1991) (reviewing studies revealing the impact of racial discrimination at sentencing).

8. See Peter A. Ozanne, *Judicial Review: A Case for Sentencing Guidelines and Just Deserts*, in SENTENCING REFORM, *supra* note 6, at 185 (noting that "[p]roponents of sentencing reform have been quick to blame the courts for sentencing disparity").

9. FRANKEL, CRIMINAL SENTENCES, *supra* note 3, at 7-8.

10. See *id.* at 105-06 ("Without binding guides on such questions [concerning the purposes and justifications of criminal sanctions], it is inevitable that individual sentencers will strike out on a multiplicity of courses chosen by each decision-maker for himself."); Michael H. Tonry, *The Sentencing Commission in Sentencing Reform*, 7 HOFSTRA L. REV. 315, 323 (1978) ("Without other meaningful guidance, federal district court judges must rely primarily on their personal senses of justice and inevitably will impose widely disparate sentences.").

11. Frankel, *Lawlessness in Sentencing*, *supra* note 3, at 40.

12. FRANKEL, CRIMINAL SENTENCES, *supra* note 3, at 103-18; see also Marvin E. Frankel & Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655, 656 (1993) (statement of Marvin Frankel) (explaining that the "overriding objective" of sentencing guideline reforms "was to subject sentencing to law").

Embracing the spirit and substance of Judge Frankel's ideas, nearly all criminal justice experts and scholars soon came to propose or endorse some form of "sentencing guidelines."¹³ Frankel and others expected that, through the formulation of explicit sentencing rules, a guideline system would facilitate the development of clearly defined and principled sentencing law and procedures. In the words of another reform advocate, sentencing guidelines provided a "way of introducing policy and purpose into what has largely been a normless sanctioning system."¹⁴

Importantly, Frankel and others advised that legislatures—because of limited time and expertise, as well as the distorting influences of day-to-day politics—were not the ideal institution for developing all the particulars of a sentencing guideline system. Many reformers expressed particular concern that short-term "gettough" passions would create unavoidable political pressures upon legislatures to enact unduly severe sentences that would prove unwise and costly.¹⁵ Such concerns prompted Judge Frankel to propose the creation of a special administrative agency—a national "Commission on Sentencing"—to help address the problems of lawlessness in sentencing.¹⁶ Judge Frankel and other reformers reasoned that a permanent commission, consisting of knowledgeable experts insulated from political pressures with the opportunity to study sentencing, was well-suited to the sort of detailed sentencing lawmaking that the "guidelines model" required.

Minnesota became the first jurisdiction to turn Judge Frankel's ideas into a full-fledged reality when in 1978 the Minnesota Legislature established the Minnesota Sentencing Guidelines Commission to develop comprehensive

13. See, e.g., FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING 3-6 (1976) [hereinafter FAIR AND CERTAIN PUNISHMENT]; DAVID FOGEL, "...WE ARE THE LIVING PROOF...": THE JUSTICE MODEL FOR CORRECTIONS (1976); NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, MODEL SENTENCING AND CORRECTIONS ACT (1979) [hereinafter MODEL SENTENCING ACT]; PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM (1977); VON HIRSCH, *supra* note 5; see also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 3 (1988) ("At the federal level before 1985, scholars and practitioners in the criminal justice community almost unanimously favored the concept of guidelines.").

14. Von Hirsch, *supra* note 2, at 368.

15. Marvin E. Frankel & Leonard Orland, *Sentencing Commission and Guidelines*, 73 GEO. L.J. 225, 232-35 (1984); Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 1, 8-9 (1991) (detailing reformers' fears that "it was inevitable that the legislature would impose inappropriately stiff punishments in order to take a popular stand against crime").

16. See FRANKEL, CRIMINAL SENTENCES, *supra* note 3, at 118-24; see also Frankel, *Lawlessness in Sentencing*, *supra* note 3, at 50-54.

sentencing guidelines.¹⁷ Pennsylvania and Washington state followed suit,¹⁸ and the federal government joined this sentencing reform movement through the passage of the Sentencing Reform Act of 1984. Throughout subsequent decades, nearly every state adopted some form of structured sentencing that reflected and responded to Judge Frankel's call for the development of sentencing law. Though a number of states created sentencing law only through mandatory sentencing statutes, numerous states created sentencing commissions to develop comprehensive guideline schemes.¹⁹

Fast-forward nearly 50 years since Judge Frankel and others began questioning the theory and practices of discretionary sentencing systems, and there has been extraordinary evolution in the laws, policies, politics, and practices of U.S. sentencing systems nationwide. Though there is considerable variation in the form and impact of structured sentencing reforms, the overall transformation of the sentencing enterprise throughout the United States has been remarkable. The discretionary indeterminate sentencing systems that had been dominant for nearly a century have been replaced by a wide array of sentencing laws and structures that govern and control sentencing decision-making. And, throughout this sentencing reform revolution, the insights and recommendations of Judge Frankel have endured and thrived. This reality is evident in state and federal criminal codes where statements of sentencing purpose and various types of sentencing law and guidelines prominently appear. It is also clearly evidenced by the American Law Institute multi-year project to revise the *Model Penal Code's* sentencing chapter: The ALI's "model" reform is built around an institutional structure that, after articulating general sentencing purposes, calls for the creation of a sentencing commission to be tasked with the construction and revision of a guideline system to inform the ultimate decisions of sentencing judges.²⁰

17. See 1978 Minn. Laws ch. 723 (enabling statute); MINN. SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE (1980) (initial version of the Minnesota sentencing guidelines). See generally DALE PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES (1988) (discussing Minnesota's enactment and early experiences with sentencing guidelines).

18. See generally *A Summary of the Minnesota, Washington, and Pennsylvania Guidelines*, in THE SENTENCING COMMISSION AND ITS GUIDELINES 177-88 (Andrew von Hirsch et al. eds., 1987) (reviewing major components of guidelines developed in Minnesota, Washington and Pennsylvania).

19. See Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT'G REP. 69, 70 (2000) (providing table summarizing development of sentencing guidelines systems); SENTENCING GUIDELINES RES. CTR., www.sentencing.umn.edu (last visited Mar. 20, 2017).

20. See generally MODEL PENAL CODE: SENTENCING (Tentative Draft No. 1, 2007).

II. UPS AND DOWNS OF FEDERAL SENTENCING AND ITS GUIDELINES

The federal guideline sentencing system was built on Judge Frankel's sound foundational vision, but most scholars and practitioners have viewed the implementation and evolution of the system deeply flawed. Congress and the U.S. Sentencing Commission have been roundly criticized for producing sentencing laws and guidelines marked by excessive complexity, rigidity, and severity. A major Supreme Court ruling has at best tempered (or perhaps aggravated) the system's flaws by making the federal sentencing guidelines advisory rather than mandatory. Since their inception and to the present day, many have come to single out the federal sentencing guidelines in the landscape of sentencing systems primarily as an example of how *not* to implement Judge Frankel's reform ideas.

A. CONGRESS EMBRACES THEN DISTORTS A GUIDELINE SENTENCING SYSTEM

In 1975, Sen. Edward Kennedy introduced a bill to reform the federal sentencing system, calling for, among other things, the abolition of parole and the creation of a federal sentencing commission to produce sentencing guidelines.²¹ Kennedy's bill served as the foundation for what became, after a lengthy legislative process, the Sentencing Reform Act of 1984 (SRA). The SRA created the United States Sentencing Commission to develop the particulars of federal sentencing standards within a guideline regime, and the SRA's "sweeping" reforms seemed poised to, in the words of Norval Morris, "at last bring principle, coherence, predictability, and justice to sentencing criminal offenders."²²

Unfortunately, in the years that followed the passage of the SRA, Congress and the Sentencing Commission made mistakes large and small that contributed to myriad problems within the federal sentencing system. Congress's primary transgressions involved disrespecting and disrupting the SRA's institutional structure for sentencing lawmaking through the enactment of a series of severe and rigid mandatory minimum sentencing statutes. The same year it enacted the SRA, Congress also established mandatory minimum penalties for certain drug and gun offenses, and the 1986 Anti-Drug Abuse Act included mandatory minimum 5- and 10-year prison terms linked to precise drug quantities for

21. See S. 2699, 94th Cong. (1975).

22. Morris, *supra* note 7, at 285.

all trafficking offenses.²³ Over the next decade, Congress continued to enact new sentencing mandates—including the federal version of “three strikes and you’re out”—in successive federal crime bills.²⁴

As a matter of substantive sentencing policy, these mandatory sentencing laws have always been unwise. Researchers and practitioners have documented that, in practice, mandatory sentencing laws regularly produce unjust outcomes, both in the individual case and across a range of cases, because they base prison terms on a single factor and functionally shift undue sentencing power to prosecutors when selecting charges and plea terms.²⁵ In a cogent and comprehensive 1991 report, the U.S. Sentencing Commission confirmed that the mandatory sentencing laws Congress enacted throughout the 1980s were not achieving their purported goals.²⁶ In a 1995 report, the Sentencing Commission documented that Congress’s disparate treatment of powder cocaine and crack cocaine in mandatory sentencing laws had a disproportionate and unduly severe impact on minority defendants.²⁷

Beyond their substantive deficiencies, Congress’s enactment of mandatory sentencing statutes undermined the SRA’s structure and philosophy for sound sentencing lawmaking. Mandatory sentencing laws, which require a specific sentencing outcome based on one aspect of an offense, are inherently incompatible with the SRA’s guideline system calling for sentences based on “the nature and circumstances of the offense and the history and characteristics of

23. See Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 *STAN. L. & POL’Y REV.* 93, 99 (1999) (detailing all the mandatory minimum sentencing provisions enacted by Congress).

24. *Id.*; see also *Federal Mandatory Minimums*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/wp-content/uploads/2013/08/Chart-All-Fed-MMs-NW.pdf> (last visited Mar. 20, 2017).

25. See Erik Luna, “Mandatory Minimums,” in the present Volume; BARBARA S. VINCENT & PAUL J. HOFER, FED. JUDICIAL CTR., *THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS* (1994); Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 *CRIME & JUST.* 65, 65-66 (2009) (“Experienced practitioners, policy analysts, and researchers have long agreed that mandatory penalties in all their forms ... are a bad idea.... It is why nearly every authoritative nonpartisan law reform organization that has considered the subject, including the American Law Institute in the Model Penal Code (1962), the American Bar Association in each edition of its Criminal Justice Standards (e.g., 1968, standard 2.3; 1994, standard 18-3.21 [b]), the Federal Courts Study Committee (1990), and the U.S. Sentencing Commission (1991) have opposed enactment, and favored repeal, of mandatory penalties.”).

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

27. See U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995).

the defendant.”²⁸ Particularly problematic were the broad and severe mandatory drug-sentencing provisions Congress enacted while the Sentencing Commission was developing its initial guidelines. The Commission had to alter its initial guidelines in an effort to harmonize, as best it could, the mandatory sentences imposed by Congress with a sound guideline structure.²⁹ But because of the narrow focus of mandatory provisions, these statutes necessarily precluded the Commission from fulfilling fully the SRA’s commitment to “enhance the individualization of sentences [by requiring] a comprehensive examination of the characteristics of the particular offense and the particular offender.”³⁰

B. THE SENTENCING COMMISSION’S PROBLEMATIC GUIDELINE WORK

The U.S. Sentencing Commission’s approach to the construction and development of sentencing guidelines exacerbated problems Congress created through enactment of mandatory minimum statutes. The Sentencing Commission produced an initial set of guidelines that were lengthy and highly detailed, notable for their overall complexity. The initial *Guidelines Manual* comprised more than 200 pages, contained over 100 multi-section guidelines,

28. 18 U.S.C. § 3553(a)(1); see U.S. SENTENCING COMM’N, *supra* note 26, at 26 (“[M]andatory minimums are both structurally and functionally at odds with sentencing guidelines and the goals the guidelines seek to achieve.”); 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, 194 (1993) (“Whereas the guidelines permit a degree of individualization in determining the appropriate sentence, mandatory minimums employ a relatively narrow approach under which the same sentence may be mandated for widely divergent cases. Whereas the guidelines provide for graduated increases in sentence severity for additional wrongdoing or for prior convictions, mandatory minimums often result in sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record.”).

29. See Ronnie M. Scotkin, *The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses*, 26 CRIM. L. BULL. 50, 52 (1990) (explaining that Congress’s mandatory minimums “effectively restricted the Commission’s discretion in establishing guidelines for drug trafficking offenses”); William W. Wilkins, Jr. et. al, *Competing Sentencing Policies in a “War on Drugs” Era*, 28 WAKE FOREST L. REV. 305, 319-21 (1993) (detailing how mandatory minimums forced the Commission to alter its standard approach to guideline development).

30. S. REP. NO. 98-225, at 52-53 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235-36; see also Paul Hofer, *After Ten Years of Advisory Guidelines, and Thirty Years of Mandatory Minimums, Federal Sentencing Still Needs Reform*, 47 U. TOL. L. REV. 649 (2016) (detailing numerous ways mandatory minimum sentencing provisions have distorted the development and application of the federal sentencing guidelines).

and described a complicated nine-step sentencing process culminating in the determination of an offender's applicable sentencing range from within a 258-box grid called the "Sentencing Table."³¹

The substance of the U.S. Sentencing Commission's guidelines proved no more palatable to judges than their bulk. The federal guidelines' instructions to sentencing judges focus on precise offense conduct, requiring sentencing judges to add up points to determine which of 43 possible "offense levels" apply in a particular case.³² For many federal offenses—particularly drug crimes and financial crimes—the seriousness of the offense within the guidelines is assessed through quantitative measures: for drug crimes, the type and quantity of the drugs involved; for financial crimes, the amount of loss.³³ Without regard for an offender's role in this offense, greater quantities of drugs or larger losses result in a much more severe sentence, with these "quantified harms" often eclipsing all other sentencing factors in the determination of recommended prison terms.

The size, structure and substance of the initial *Guidelines Manual* prompted many federal sentencing judges to criticize the guidelines for setting forth "a mechanistic administrative formula"³⁴ that converted judges into "rubber-stamp bureaucrats" or "judicial accountants" in the sentencing process.³⁵ The strict language and intricacies of guideline provisions—which apparently reflected the original Sentencing Commission's concern that incorporating too

31. See U.S. SENTENCING COMM'N, SENTENCING GUIDELINES AND POLICY STATEMENTS §1B1.1 (1987) (setting forth nine steps to be followed for imposing a sentence on an offender) [hereinafter 1987 USSG]; *id.* ch. 5, pt. A, at 5.1-5.2 (setting forth Sentencing Table); see also Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 949 (1991) (lamenting that the "effort to produce guidelines or presumptive sentences for every case encouraged excessive aggregation" and suggesting that "the 258-box federal sentencing grid ... should be relegated to a place near the Edsel in a museum of twentieth-century bad ideas").

32. From the beginning and through today, the first four steps in the sentencing process described in the Guidelines Manual are concerned exclusively with offense conduct. See U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 1B1.1 (2016).

33. See *id.* § 2D1.1(c); *id.* § 2B1.1(b).

34. *United States v. Bogle*, 689 F. Supp. 1121, 1163 (S.D. Fla. 1988) (Aronovitz, J., concurring); see also *United States v. Russell*, 685 F. Supp. 1245, 1249 (N.D. Ga. 1988) (asserting guidelines "reduce the role of the sentencing judge to filling in the blanks and applying a rigid, mechanical formula").

35. Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 364 (1992); Ellsworth A. Van Graafeiland, *Some Thoughts on the Sentencing Reform Act of 1984*, 31 VILL. L. REV. 1291, 1293-94 (1986) (criticizing Commission's "sentencing by the numbers" as "too depersonalized, too complicated, too punitive, and too burdensome of application"); Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 99-100 (1988) (calling guidelines "a complex parlor game").

much of a role for judicial discretion could subvert efforts to reduce sentencing disparity³⁶—frustrated sentencing judges, as did the severity of prison terms resulting from guideline calculations.

Sentencing judges were particularly troubled by the Sentencing Commission's restrictive treatment of judicial authority to depart from the guidelines. Congress in the SRA provided that judges should be permitted to sentence outside guideline ranges whenever they identified an "aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission ... that should result" in a different sentence.³⁷ But, in discussing judges' departure authority in the initial *Guidelines Manual*, the Commission intimated that the guidelines were comprehensive and complete, and that judges would not and should not find many reasons or opportunities to deviate from their precise terms. The Commission indicated that guideline departures should be rare and that relatively few cases should involve factors that it had "not adequately taken into consideration."³⁸ And through a series of policy statements, the Commission declared many potentially mitigating characteristics "not ordinarily relevant" or entirely irrelevant to whether a defendant should receive a departure below the guideline sentencing range.³⁹

Throughout the first decade of guideline sentencing in the federal system, the Sentencing Commission further exacerbated concerns about the rigidity

36. See Barbara S. Meierhoefer, *Individualized and Systemic Justice in the Federal Sentencing Process*, 29 AM. CRIM. L. REV. 889, 891 (1992) ("The Sentencing Commission chose to issue very detailed Guidelines ... [a]s a result, the Guidelines lean heavily to the side of reducing disparity at the expense of sentencing flexibility."); Nagel, *supra* note 7, at 934 (explaining that, in formulating the guidelines, the Commission's "emphasis was more on making sentences alike"); Ronald F. Wright, *Complexity and Distrust in Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 617, 632 (1992) (noting that "the way that the Sentencing Commission read its statute and defined its task ... made uniformity the key objective of the guidelines").

37. 18 U.S.C. § 3553(b) (2012).

38. 1987 USSG, *supra* note 31, ch. 1, pt. A, intro. cmt. 4(b), at 1.7; see also KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 72-75 (1998) (detailing how "the Commission has gone out of its way to limit downward departures"); Terence F. MacCarthy & Nancy B. Murnighan, *The Seventh Circuit and Departures from the Sentencing Guidelines: Sentencing By Numbers*, 67 CHI.-KENT L. REV. 51, 56 (1991) (detailing how the guidelines "indicat[ed] the Commission's belief that courts will rarely in fact need to exercise their legal freedom to depart").

39. See 1987 USSG, *supra* note 31, §§ 5H1.1-1.6 (stating age, education, vocational skills, mental and emotional conditions, physical condition, previous employment record, family ties and responsibilities, and community ties are "not ordinarily relevant in determining whether a sentence should be outside the guidelines"); *id.* §5H1.4 (providing that drug dependence or alcohol abuse "is not a reason for imposing a sentence below the guidelines").

and severity of its guidelines through amendments that largely overruled judicial decisions developing possible grounds for departing downward from guideline ranges.⁴⁰ Advocacy from the U.S. Department of Justice, in courts, in Congress, and in the Sentencing Commission, further contributed to guideline amendments and statutory developments that preserved and reified the guidelines' inflexibility and toughness.⁴¹ And complexity concerns have persisted as the guidelines have been amended nearly 800 times in less than three decades,⁴² and as the *Guidelines Manual* has grown to more than 500 pages of sentencing instructions.⁴³

The scope and process for the consideration of offense conduct within the guidelines has been an additional factor and concern in the operation of the federal sentencing guidelines (and one that may have ultimately sparked new constitutional doctrines). Seeking to reduce the significance of prosecutorial charging and plea choices, the federal sentencing guidelines require consideration of all "relevant conduct" in the determination of applicable sentencing ranges.⁴⁴ Consequently, federal sentencing judges are required in guideline determinations to take into account certain conduct that was never formally charged or proven, and even must sometimes consider evidence related to a charge on which a defendant was acquitted at trial.⁴⁵

40. See Judy Clarke, *The Sentencing Guidelines: What a Mess*, FED. PROBATION, Dec. 1991, at 45 (reviewing Commission amendments which seemed to overrule judicial efforts consider offender characteristics).

41. See, e.g., Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1332-40 (2005) (lamenting that the "positions taken by the Department on sentencing, both in Congress and before the Sentencing Commission, have been notable for their almost invariable advocacy of ever-tougher sentencing rules and virtually unyielding opposition to any mitigation of existing sentencing levels"); Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENT'G REP. 310 (2003) (describing sentencing provisions of PROTECT Act championed by the Justice Department to limit judicial departures from the guidelines).

42. See U.S. SENTENCING COMM'N, GUIDELINES MANUAL app. C (2016).

43. See *id.*

44. See *id.* § 1B1.3.

45. See, e.g., *United States v. Watts*, 519 U.S. 148 (1997) (holding that the Constitution did not bar guideline increases in a defendant's punishment based on "conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence"); see also Laurie P. Cohen, *How Judges Punish Defendants for Offense Unproved in Court*, WALL ST. J., Sept. 20, 2004, at A1 (discussing individual federal cases in which defendants received large sentence increases based on unproved offense conduct).

C. THE SUPREME COURT'S CONSTITUTIONAL
JOLT TO GUIDELINE SYSTEMS

In 2004 and 2005, a somewhat unexpected turn in the U.S. Supreme Court's Sixth Amendment jurisprudence jolted state and federal guideline sentencing systems. Prior to the emergence of this new jurisprudence, the Supreme Court had repeatedly indicated that sentencing proceedings were to be treated constitutionally differently—and could be far less procedurally regulated—than a traditional criminal trial.⁴⁶ But after confronting new procedural issues as a result of new substantive sentencing laws, the Supreme Court started to express constitutional doubts about judicial fact-finding and traditionally lax sentencing procedures.⁴⁷ In 2000, the Supreme Court formally held in *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.”⁴⁸ The import and impact of this constitutional principle for guideline sentencing systems became apparent via the Supreme Court's 2004 ruling in *Blakely v. Washington*, which invalidated judicial fact-finding to enhance sentences within a state guideline system.⁴⁹ Shortly thereafter, in *United States v. Booker*, the Supreme Court declared unconstitutional the federal sentencing guideline system's reliance on judicial fact-finding.⁵⁰

The Supreme Court's landmark *Booker* decision—which had two majority opinions emerging from two distinct coalitions of Justices—first declared that the federal sentencing guidelines, by depending on judges to find facts at sentencing for determining applicable guideline ranges, violated the Sixth Amendment's jury trial right. But the prescribed remedy for this Sixth Amendment problem was not to require jury findings but rather to recast the federal sentencing guidelines as “effectively advisory.”⁵¹ So, through the dual rulings of dueling majorities, the Supreme Court in *Booker* declared that the federal sentencing system could no longer mandate sentences based on judicial fact-finding, but it remedied this problem by granting sentencing judges new authority to vary from guidelines ranges after engaging in the very same judicial fact-finding and guideline calculations they had conducted when the guidelines were mandatory.

46. See generally Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 388-401 (2006) (reviewing Supreme Court jurisprudence on sentencing procedures).

47. See *Jones v. United States*, 526 U.S. 227 (1999); Berman, *supra* note 46.

48. 530 U.S. 466, 490 (2000).

49. 542 U.S. 296 (2004).

50. 543 U.S. 220 (2005).

51. *Id.* at 245.

The development and application of the Supreme Court's modern Sixth Amendment jurisprudence to preclude judicial fact-finding in mandatory but not advisory guideline systems has stirred much controversy and debate among policymakers, practitioners, and academics.⁵² But after an initial wave of uncertainty and litigation, most state sentencing guideline systems have been able to make modest and manageable adjustments to their sentencing procedures to accommodate the Supreme Court's new constitutional rules.⁵³ In the federal sentencing system, the *Booker* decision's conversion of guidelines from mandates to advice has been largely perceived, especially by federal district judges, federal defense attorneys and some academics, as a positive improvement to a sentencing system long viewed as needing major reform.⁵⁴

District judges and defense attorneys have generally championed the post-*Booker* federal sentencing system largely because the "advisory" status of the guidelines helps alleviate sentencing rigidity and severity problems. Free from having to follow the guidelines and from having non-guideline sentences subject to searching appellate review, federal district judges now more regularly sentence below the guidelines' recommended prison terms, particularly in drug, fraud and child-pornography cases involving first-time offenders.⁵⁵ Sentencing judges have utilized their new post-*Booker* discretion to give greater attention to mitigating offender characteristics generally deemed off-limits

52. See generally Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37 (2006); Frank O. Bowman III, *Debauch: How the Supreme Court Has Mangled American Sentencing Law and How It Might yet Be Mended*, 77 U. CHI. L. REV. 367, 377 (2010); Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082 (2005).

53. See Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 785-88 (2008) (detailing that about half of the roughly states with sentencing schemes impacted by *Blakely* created means for jury determination of some aggravating sentencing factors while other made their guidelines advisory); see also Richard S. Frase, *Blakely in Minnesota, Two Years Out: Guidelines Sentencing Is Alive and Well*, 4 OHIO ST. J. CRIM. L. 73 (2007).

54. See U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES, JANUARY 2010 THROUGH MARCH 2010 (2010) (reporting large percentage of federal district judges favoring advisory guidelines to prior mandatory system or fully discretionary system); Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1667-81 (2012) (detailing the "success of advisory guidelines"); Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL'Y REV. 262 (2009).

55. See U.S. SENTENCING COMM'N, 2015 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at fig. G (2015); Jillian Hewitt, *Fifty Shades of Gray: Sentencing Trends in Major White-Collar Cases*, 125 YALE L.J. 1018, 1024-25 (2016) (noting how in certain fraud cases "the rate at which judges impose non-government-sponsored below-range sentences has increased dramatically").

by the guidelines, and many practitioners and academics have joined district judges in lauding the post-*Booker* system for having made a rigid and harsh federal sentencing system more balanced and proportional.

But not everyone sees federal sentencing after *Booker* as an improved guideline system worth preserving. Some are quick to note that the post-*Booker* system retains many of the complexity, severity, and procedural problems that drew wide criticisms before *Booker* while layering on the new problem of sentencing judges now having essentially unreviewable discretion to follow or ignore guideline recommendations as they see fit.⁵⁶ The U.S. Department of Justice and the U.S. Sentencing Commission have expressed concern that *Booker*'s jolt of judicial discretion has produced, over time, increased sentencing disparity as some sets of judges regularly follow the advisory guidelines while others regularly do not.⁵⁷ And though subject to much empirical debate, at least some research suggests that post-*Booker* increases in interjudge disparity has also served to increase racial sentencing disparity.⁵⁸ Perhaps most tellingly given their unique perspectives on the virtues and vices of the *Booker* advisory guideline system, the current Acting Chair of the U.S. Sentencing Commission (Judge William Pryor) and a former Commission Chair (Judge William Sessions) have both suggested in print major "fixes" to the post-*Booker* federal sentencing system through the creation of new, significantly simplified, binding guidelines.⁵⁹

56. See, e.g., Frank O. Bowman III, *Nothing Is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 FED. SENT'G REP. 356 (2012); Ryan W. Scott, *Booker's Ironies*, 47 U. TOL. L. REV. 695 (2016).

57. U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 8 (2012) (noting that after *Booker* "the rates of nongovernment sponsored below range sentences were sufficiently varied within each district to cause concern that similar offenders committing similar crimes were sentenced differently depending upon the judge"); Letter from Jonathan J. Wroblewski, Dir., Office of Pol'y & Legis., U.S. Dep't of Justice, to William K. Sessions III, Chair, U.S. Sentencing Comm'n (June 28, 2010) (expressing concern about federal sentencing fragmenting into "two separate regimes [which] leads to unwarranted sentencing disparities").

58. Compare Scott, *supra* note 56, at 717 (reviewing studies indicating "that racial disparities have increased in the aftermath of *Booker*"); with Hofer, *supra* note 30, at 689 (contending that "*Booker* contributed to a decrease in the most significant source of racial disparity" in the federal sentencing system).

59. See William Pryor, *Returning To Marvin Frankel's First Principles In Federal Sentencing*, 29 FED. SENT'G REP. 95 (2017) (calling for a new "system of presumptive guidelines, a radically simpler system with wider sentencing ranges and fewer enhancements"); William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J. L. & POL. 305 (2011) (urging reforms to "streamline individual guidelines ... and also simplify the Sentencing Table in Chapter Five of the Guidelines Manual to provide for fewer and broader sentencing ranges").

III. LESSONS LEARNED AND PERSISTENT CONCERNS

A. THE ENDURING WISDOM OF SENTENCING GUIDELINES

Despite the many ugly facets of the federal system's experience with guidelines, no policymaker or researcher has ever called for a return to a wholly discretionary system with judges having unfettered and unreviewable authority to impose any sentence from within broad statutory ranges. Despite a wide array of concerns and criticisms about a wide array of sentencing laws and procedures in state and federal guideline systems, nobody seems to believe—indeed, nobody has even been heard to suggest—that a return to the type of sentencing Judge Frankel decried as “lawless” is even worth considering.

The modern consensus supporting the creation of sentencing law includes a significant affinity for that law to take the form of formal guidelines. Policymakers, practitioners, and researchers often report or at least acknowledge many system-wide and case-specific benefits flow from modern guideline-type reforms in the nearly two dozen U.S. states (and the District of Columbia) using some form of this modern sentencing structure.⁶⁰ As Richard Frase has crisply explained, “state guidelines are popular because they have proven more effective than alternative sentencing regimes as a means to promote consistency and fairness, set priorities in the use of limited correctional resources, and manage the growth in prison populations.”⁶¹ As mentioned earlier, the American Law Institute's multi-year project to revise the *Model Penal Code's* sentencing chapter is built around what it calls the commission-guidelines model,⁶² and its reporter noted that “after five years of study, the commission-guidelines model became the cornerstone of the American Bar Association's Criminal Justice Standards for Sentencing, published in 1994 [and] in 2006, the bipartisan Constitution Project also recommended the commission-guidelines structure to federal and state policymakers as part of its ongoing sentencing initiative.”⁶³ In other words, every serious modern study of U.S. sentencing has reached the conclusion that a well-designed guideline structure provides the best means for the express articulation of sound standards to inform and shape individual sentencing outcomes and to promote transparency and the rule of law throughout a sentencing system.

60. See Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005).

61. *Id.* at 1192.

62. See MODEL PENAL CODE: SENTENCING (Tentative Draft No. 1, 2007).

63. *Id.*

The uneven federal experience with sentencing guidelines documents that the particularized implementation and application of a guideline system will significantly influence how, and how well, guidelines advance the consistent and deliberative application of proportionate punishments in individual cases and across an entire criminal justice system. The federal guideline system's emphasis on precise quantifiable offense harms and its de-emphasis of potential mitigating offender characteristics contributed to harmfully complex, rigid, and severe sentencing rules for federal judges. State guideline systems have generally been much more successful in the view of all stakeholders and researchers in part because state legislatures and commissions have kept guideline rules relatively simple: By focusing primarily on the offenses of conviction, and through the use of broader sentencing ranges and more liberal departure criteria, state guidelines have generally achieved a more sound and satisfying balance between sentencing directives and judicial discretion.

The wisdom of Judge Frankel's reform advocacy is reflected not only in enduring affinity for sentencing guidelines, but also in the widespread creation of sentencing commissions. Though state commissions have taken on various forms and assumed varying responsibilities, modern experiences have reinforced that a permanent and independent specialized agency is best positioned to develop, monitor, assess, and revise successful sentencing guidelines.⁶⁴ And the basic mandate for any commission, as well articulated by Michael Tonry, should be to develop "guidelines that classify offenses and offenders in reasonable ways, that authorize sentences that accord with the sensibilities of most of the judges and prosecutors charged to apply them, and that allow sufficient flexibility for the individualization of sentences to take account of special circumstances and of applicable rehabilitative and incapacitative considerations."⁶⁵

B. PROSECUTORIAL POWERS AND (OVER)RELIANCE ON IMPRISONMENT

Though prosecutors have always been able to exercise some control over a defendant's sentence through charging decisions and plea negotiations, guideline sentencing systems can formally and functionally enhance the power of prosecutors to dictate specific sentencing outcomes. Scholars have long expressed concerns that structured and determinate sentencing systems will

64. See, e.g., Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005); Robert Weisberg, *How Sentencing Commissions Turned Out to Be a Good Idea*, 12 BERKELEY J. CRIM. L. 179 (2007).

65. Michael Tonry, *The Functions of Sentencing & Sentencing Reform*, 58 STAN. L. REV. 37, 66 (2005).

problematically transfer undo sentencing authority and discretion from judges to prosecutors,⁶⁶ but no sentencing system has yet devised an easy or effective way to ensure prosecutorial power and discretion to influence sentencing outcomes is limited or always exercised in transparent, fair, and appropriate ways. Indeed, efforts to mute the impact of prosecutorial decisions in the federal system by requiring consideration of uncharged “relevant conduct” through intricate guideline sentencing criteria has, in various ways, only further enhanced the functional powers of prosecutors to influence sentencing outcomes.

The unique combination of intricate offense-oriented sentencing guidelines buttressed by numerous severe mandatory minimum sentencing statutes has given federal prosecutors many means to constrain or dramatically shape a judge’s sentencing decision-making.⁶⁷ But even in less complex and less severe state guideline systems, prosecutorial charging and plea-bargaining decisions can and will often significantly impact what particular sentence or ranges are available or likely to be imposed by a judge.⁶⁸ The very consistency and transparency that guideline sentencing structures foster enhance the ability of prosecutors to predict and assess the likely impact of their charging and bargaining decisions, and their functional power is further enhanced because, as the U.S. Supreme Court has noted, the “criminal justice today is for the most part a system of pleas, not a system of trials.”⁶⁹ Consequently, the goals of achieving greater sentencing consistency and proportionality through sentencing guideline structures will always be impacted, and can be dramatically undercut, by the discretionary, largely unreviewable, and often opaque charging and bargaining work of a jurisdiction’s prosecutors.

The modern move toward sentencing guideline systems drafted by legislatures and commissions has likely played at least some role in the modern American

66. See Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for “Fixed” and “Presumptive” Sentencing*, 126 U. PA. L. REV. 550, 550-51 (1978).

67. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009); Frank O. Bowman III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 244 (2005); Melissa Hamilton, *McSentencing: Mass Federal Sentencing and the Law of Unintended Consequences*, 35 CARDOZO L. REV. 2199, 2233-40 (2014); Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252-59 (2004).

68. See Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935 (2006); see also John F. Pfaff, “Prosecutorial Guidelines,” in Volume 3 of the present Report; Jenia I. Turner, “Plea Bargaining,” in Volume 3 of the present Report.

69. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). As the Supreme Court further noted, “ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.” *Id.*

reliance on incarceration (and lengthy terms of incarceration) as a first-order punishment option. In principle, a guideline system need not and should not be more penal than any other sentencing system—indeed, a well-designed and well-managed guideline system can play an important role in regulating prison growth and can also guide prosecutors and judges toward considering alternatives to imprisonment for certain classes of offenses and offenders. But, in practice, the modern sentencing guideline era has coincided with the modern American mass-incarceration era.⁷⁰ Various big and small factors may account for sentencing guidelines contributing, directly and indirectly, to excessive use and excessive terms of incarceration in recent decades. For example, months of prison time rather than alternative punishments are easier to map onto a guideline grid; legislatures and sentencing commissions, making pre-emptive decisions about crime and punishment, will always tend to be more punitive than judges in response to any real or perceived crime problem; and emphasis on sentencing uniformity fuels a “leveling-up” dynamic where distinctly lenient sentences lead to calls for consistently harsher guidelines while distinctly harsh sentences rarely lead to efforts to ensure more consistent leniency.⁷¹

Encouragingly, as the human, social, and economic costs of modern mass incarceration are becoming a greater concern for not only advocates but also policymakers, we are seeing growing efforts to modify and leverage guideline sentencing systems to reduce sentence severity and prison populations.⁷² But in both state and federal systems, significantly lowering whatever “prison numbers” are linked to particular offenses and offenders is still always a significant political and practical challenge, and there is continuing reason to fear that sentencing guideline systems’ institutional and substantive structures often make it much easier for sentences to be ratcheted up rather than ratcheted down.

C. HOBGOBLINS AND DEEPER VALUES

To parrot Ralph Waldo Emerson, one final profound criticism of modern sentencing reforms might be that a foolish consistency has become the hobgoblin of little guideline systems. Guideline sentencing reforms have

70. See generally Todd R. Clear & James Austin, “Mass Incarceration,” in the present Volume.

71. See Lynn Adelman & Jon Deitrich, *Marvin Frankel’s Mistakes and the Need to Rethink Federal Sentencing*, 13 BERKELEY J. CRIM. L. 239, 250-257 (2008) (arguing that “America’s history of harsh sentencing” and undue concern for sentencing uniformity made it inevitable that a guideline system would increase sentencing severity).

72. In the federal system, Congress’s passage of the Fair Sentencing Act of 2010 to reduce crack cocaine sentences, along with the U.S. Sentencing Commission’s reductions in the severity of the crack guidelines and then all the drug guidelines, has served to reduce the prison sentences of nearly a quarter of the federal prison population in recent years.

robustly responded to Judge Frankel's call to bring law to sentencing, but Judge Frankel's ultimate goal and advocacy was for sentencing decision-making to be informed by principle and purpose. Too often the development and evolution of guideline sentencing law has not been concerned sufficiently (or arguably concerned at all) with deeper values that go beyond superficial accounts of sentencing consistency or apparent disparities. As articulated recently by Richard A. Bierschbach and Stephanos Bibas, in more than a few modern guideline sentencing systems, it can seem that "math supplanted morality."⁷³

Once again, the federal sentencing system provides an example of this "values vacuity" problem and raises questions as to whether the guideline model itself or just its federal expression accounts for it. One member of the original U.S. Sentencing Commission famously dissented from the original federal guidelines because they failed to embrace a particular philosophy of sentencing,⁷⁴ and the original Commission's refusal to embrace any defined sentencing theory may in part account for the system's subsequent obsession with measures of disparity and guideline compliance rather than the achievement of deeper purposes. In turn, many years into the operation of the federal guideline system, Michael Tonry noted how "latent functions of sentencing policy—using sentencing to achieve personal, ideological, or politically partisan goals—sometimes fundamentally" eclipsed pursuit of principled overt goals by many practitioners and policymakers.⁷⁵ And even after the Supreme Court's *Booker* decision required federal sentencing decision-making to attend specifically to the provisions of the Sentencing Reform Act that articulate the traditional purposes of punishment,⁷⁶ tens of thousands of federal criminal defendants are sentenced each year without any serious, sustained, and explicit discussion among federal judges or other stakeholders about whether the federal sentencing process or specific sentencing outcomes are truly serving these purposes (or any other purposes).

Sentencing guideline systems should make it easier, not harder, for policymakers and practitioners to engage with substantive and structural

73. Richard A. Bierschbach & Stephanos Bibas, *What's Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447, 1455, 1465 (2016).

74. Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 18121, 18125-27 (May 1, 1987); see also Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1 (1987) ("system that adopts no distributive principle and relies upon a mathematical average of past sentences, provides 'bastardized' sentences").

75. Tonry, *supra* note 65, at 64.

76. 543 U.S. 220, 245 (2005) (explaining that judges, with the guidelines now advisory, must "tailor the sentence in light of other statutory concerns" set forth in § 3553(a)).

values more dynamic and deeper than just uniformity or disparity. Indeed, state guideline systems have been better-received by judges and practitioners, and have generally been perceived as more successful by researchers and commentators, when they have been developed by legislators and commissions with avowed policy commitments and systemic goals. Critically, an array of distinct types of goals can be pursued within guideline systems—guidelines might focus on substantive goals like retributivism and deterrence,⁷⁷ on procedural goals like transparency and giving voice to varied stakeholders in the sentencing process, on functional goals like managing prison populations or case-processing efficiency. But, while we now have no shortage of sentencing law throughout the United States, arguably there still is a shortage of principle and purpose in much of our nation’s sentencing decision-making. More than two decades ago, the American Bar Association during its revision of recommended sentencing standards observed that “without reasonably clear identification of goals and purposes, the administration of criminal justice will be inconsistent, incoherent, and ineffectual.”⁷⁸ Guideline systems hold great potential, though potential that is not always easily realized, in enabling the articulation of goals and purposes so that sentencing systems can be consistent, coherent, and effectual.

RECOMMENDATIONS

The forgoing review of the modern history of guideline sentencing reforms suggests at least the three following recommendations for lawmakers and policy advocates.

1. **Each jurisdiction should create a permanent sentencing commission with responsibility for creating and refining sentencing guidelines to guide and structure sentencing decision-making.** Throughout the United States, guidelines sentencing systems created and monitored by sentencing commissions have consistently proven more effective than alternative regimes at facilitating the development of sensible and transparent sentencing law that promotes consistency and fairness in individual sentencing outcomes and helps set penal priorities and manage the growth in prison populations over time.
2. **In their development and revision, sentencing guidelines should not be too intricate, too rigid, or too severe.** Across a number of metrics and in the view of nearly all stakeholders, relatively simple guideline structures

77. For discussions of these goals, see Jeffrie G. Murphy, “Retribution,” in the present Volume; and Daniel S. Nagin, “Deterrence,” in the present Volume.

78. AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: SENTENCING 18-2.1 cmt. (3d ed. 1994).

that focus primarily on conviction offenses, using broader sentencing ranges and providing liberal rules for departure from the ranges, have generally achieved a more sound and satisfying balance between sentencing directives and judicial discretion in operation.

- 3. Policymakers should ensure that a permanent sentencing commission is given sound policy direction, sufficient independence, and adequate resources to create, monitor, and modify guideline sentencing rules over time.** The myriad challenges in designing and managing the particulars of an effective guideline sentencing system not only demand the creation of a permanent sentencing commission, but also demand giving this commission the political freedom and procedural tools essential to its substantive work.