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# Beyond the "Heartland": Sentencing under the Advisory Federal Guidelines

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## INTRODUCTION

The Supreme Court's decision in United States v. Booker[1] made possible significant improvements in federal sentencing. There is no doubt that improvements are needed. Under the mandatory sentencing guidelines, the federal prison system became the largest in the nation.[2] It is filled far over capacity with large numbers of non-violent and first-time offenders,[3] the majority of whom were convicted of drug trafficking.[4] The increased spending on federal prisons has not been shown to decrease crime.[5] Sentences often fail to track the seriousness of the crime, the dangerousness of the offender, or any other purpose of sentencing. Unwarranted sentencing disparity—the problem that had motivated sentencing reform in the first place—was not reduced in the system as a whole.[6] The great experiment of the Sentencing Reform Act of 1984 [hereinafter "SRA"], which established the United States Sentencing Commission and directed it to promulgate sentencing guidelines, had veered off course. The political branches of government proved unwilling or unable to steer it toward the fair and cost-effective sentencing system that the SRA had promised.

In *Booker* and subsequent cases, the Supreme Court sketched a framework for increased judicial control of sentencing, but the framework is not complete or self-executing. It requires the active participation of judges, who are to evaluate the guidelines' recommendations against the principles and purposes of sentencing. It requires the participation of the Sentencing Commission, which

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1. 543 U.S. 220 (2005).

2. Bureau of Justice Statistics, Prisoners in 2007 (Dec. 2008) http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=903.

3. The Sentencing Project, *The Federal Prison Population: A Statistical Analysis*, http://www.sentencingproject.org/Admin/Documents/publications/inc_federalprisonpop.pdf.

4. *Transcript of Public Hearing Before the U.S. Sentencing Comm'n* at 9-10, 55 (Mar. 17, 2011) (testimony of Harley G. Lappin, Director Federal Bureau of Prisons, noting that fifty-two percent of federal inmates are serving "extremely long" sentences for drug related offenses, second in severity only to sex offenders).

5. Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 GEO. MASON L. REV. 1001, 1011 (2001) (noting that "the Commission has yet to address that task [of measuring the guidelines effectiveness] in any way"); Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV 1017, 1039 (2004) (arguing that "the guidelines have not been proven to be too severe" but acknowledging that "no comprehensive [cost/benefit] assessment of federal sentences has been performed").

6. *See* discussion *infra*.

is to learn from the feedback it receives from judges and amend the guidelines as necessary. It also requires the cooperation of the Department of Justice and Congress.

For *Booker* to reach its potential, judges must turn their attention from *calculating* the guideline range to *examining* the particular guideline—how it was developed, what the Commission says, or does not say, about how it achieves the purposes of sentencing, and the research evidence on its fairness and effectiveness. Not surprisingly, making this switch has been difficult. The first part of this paper will review some of the problems that plagued pre-*Booker* sentencing. The next part will summarize the framework sketched by the court in *Booker* and subsequent cases for the critical evaluation and evolution of the guidelines and contrasts this framework with pre-*Booker* jurisprudence. Finally, procedural obstacles and legalistic distinctions that have confused and needlessly complicated sentencing will be reviewed, with an eye toward convincing judges to embrace their new power to make the system more fair and effective.

## I. THE REALITY OF PRE-*BOOKER* SENTENCING

*Booker* rendered the guidelines "effectively advisory" by excising provisions of the SRA that required judges to sentence within the guideline range in ordinary circumstances. Sentencing judges were directed to implement remaining provisions, especially 18 U.S.C. § 3553(a), which requires judges to impose sentences that are "sufficient, but not greater than necessary," to comply with the purposes of sentencing and to "consider" a number of additional factors, including the federal sentencing guidelines and policy statements.[7] The Court also excised provisions that established a *de novo* standard of review for sentences outside the guideline range and directed appellate courts to review all sentences for "reasonableness."

These changes reduced the dominance of the guidelines in sentencing decisions. But Justice Breyer, the author of the remedial opinion and a former Sentencing Commissioner, argued that the advisory system would still move sentencing in the direction Congress intended when it enacted the SRA.[8] Excessive unwarranted disparities would be avoided even as individualization of sentenc-

7. 18 U.S.C. § 3553(a) (2010).

8. "[T]he Act without its 'mandatory' provision and related language remains consistent with Congress' initial and basic sentencing intent." *Booker*, 543 U. S. at 264.

es increased. The advisory guidelines would remain relevant, he reasoned, and judges would generally accept their recommendations because the procedures set out in the SRA for how the guidelines should be developed and amended help ensure that, at least in ordinary cases, the guidelines provide useful advice about what sentences best comply with 18 U.S.C. § 3553(a).[9] In addition to purpose-driven development, the guidelines were to be revised in light of feedback from judges[10] and other research.[11]

### *A. Realities of Guideline Development and Implementation*

This reasoning, however sound in theory, is curiously oblivious to actual experience and practice under the mandatory guidelines. The original Commission could not agree on a theory for the guidelines and instead turned to data on past sentencing practices.[12] Even then, only some of the initial guidelines were actually based on this data. Congress enacted mandatory minimum penalty statutes, which constrained and shaped the Commission's work. The Commission increased penalties for other types of crime on its own initiative, and excluded many relevant offense and offender characteristics that judges had historically taken into account. The Commission's *Fifteen Year Review* noted that "the Commission's priorities and policymaking agenda have been greatly influenced by congressional directives and other crime legislation" which "bypass the processes of policy development outlined in the SRA."[13] Congress betrayed sentencing reform through piecemeal legislation enacted in reaction to sensational crimes, such as the over-

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9. The statute states these purposes as:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2)(A)-(D) (2010).

10. The Commission was to periodically "review and revise [the guidelines], in consideration of comments and data coming to its attention . . ." 28 U.S.C. § 994(o) (2010).

11. The Commission was to develop guidelines to advance the purposes of sentencing and also develop "means of measuring the degree to which sentencing, penal, and correctional practices are effective in meeting" those purposes. 28 U.S.C. § 991(b)(2) (2010).

12. Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003).

13. U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 145 (2004) http://www.ussc.gov/Research/Research_Projects/Miscellaneous/15_Year_Study/15_year_study_full.pdf [hereinafter "*Fifteen Year Review*"].

dose death of basketball star Len Bias and other media-driven fears.[14] As a result, the guidelines today represent a hodge-podge of punishments, many directly influenced by legislation enacted without benefit of empirical research or input from judges. The guidelines are not carefully tuned instruments designed to comply with 18 U.S.C. § 3553(a).

Because the Commission did not, and often could not, explain how the guidelines were designed to recommend sentences "sufficient, but not greater than necessary" to advance the statutory purposes, judges were left without the intellectual tools needed for reasoned application of the guidelines to individual defendants.[15] How can judges recognize when a guideline is not working as intended if no one explains how it was meant to work? Probation officers and judges developed a habit of mechanical application, applying a guideline according to its literal terms without analysis of whether it truly complied with § 3553(a). Drug offenders, for example, were imprisoned based largely on amount and type of drug on the assumption that there was some unstated reason to expect this to satisfy the statute. The jurisprudence of departures—the theory of when a sentence outside the guideline range might be preferable to the guidelines' recommendations—developed around an ill-defined concept of "heartland" rather than a purpose-driven analysis of when the guidelines fail to comply with the statute. The guidelines became an *end* in themselves

14. Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde*, 40 FED. BAR NEWS & J. 158 (1993); Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006). Eric Sterling, counsel to the House Judiciary Committee at the time the Ant-Drug Abuse Act was passed establishing quantity-based mandatory minimum penalties for most drug offenses, described the process as "like an auction house . . . It was this frenzied, panic atmosphere—I'll see you five years and raise your five years. It was the crassest political poker game." Michael Isikoff & Tracy Thompson, *Getting Too Tough on Drugs: Draconian Sentences Hurt Small Offenders More Than Kingpins*, WASHINGTON POST, Nov. 4, 1990, at C1, C2.

15. The Commission asserted in its *amicus curiae* brief filed in *Rita* and *Claiborne* that it "has explained how it has taken the statutory purposes of punishment into account in formulating the Guidelines." Brief for the United States Sentencing Commission as *Amicus Curiae* in Support of Respondent, *Claiborne v United States* and *Rita v. United States* in the Supreme Court of the United States, Nos. 06-5618 & 06-5754 (Jan. 22, 2007). To support this proposition the Commission cited its *Fifteen Year Review, supra* note 13 which was written by the present author when he was employed at the Commission. However, the relevant portion of the *Fifteen Year Review* cites, and was based upon, a law review article also co-written by the present author, Hofer & Allenbaugh, *supra* note 12. This article makes clear that the Commission never explained how the guidelines comply with the statutory purposes and that it is up to judges to provide the rationalizing interpretation the Commission failed to supply and to reject particular guideline recommendations that are inconsistent with the statute.

rather than a *means* to the ends Congress had established in § 3553(a).

### *B. Failure to Achieve the Goals of Sentencing Reform*

These failures of implementation naturally resulted in failure to achieve the ambitious goals of the SRA. The *Fifteen Year Review* concluded that under the mandatory guidelines "the goals of sentencing reform have been only partially achieved."[16] While reduction of disparity was the most important goal of sentencing reform, there is little doubt that total unwarranted disparity was greater under the mandatory guidelines than it was prior to their implementation.[17] Unwarranted disparity must be defined in relation to the purposes of sentencing and assessed in the system as a whole and not merely at one stage or decision. By this measure, disparity from other sources increased even as disparities among judges due to philosophical differences were modestly reduced.

Disparities were created by prosecutors' charging and plea-bargaining decisions. If mandatory guidelines or statutes restrict judicial discretion while empowering prosecutors to control sentences through charging and plea-bargaining, sentencing disparity may actually increase. Congress directed the Sentencing Commission to promulgate policy statements to govern judicial review and acceptance of plea agreements to avoid this possibility.[18] But these policy statements and other mechanisms did not work or worked only in one direction—to increase sentences. The Commission's *Fifteen Year Review* concluded, "[j]udicial review of plea agreements . . . appears to be very limited" and "disparate treatment of similar offenders is common at presentencing stages."[19] The Department of Justice made feeble, and ultimately futile, attempts to control prosecutor decision-making, but soon came to appreciate the increased power that mandatory guidelines and penalty stat-

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16. *Fifteen Year Review*, *supra* note 13, at 144.

17. For an exhaustive summary of the empirical research, *see* Chapters Three and Four of the *Fifteen Year Review*, *supra* note 13.

18. *See* United States Sentencing Guidelines (USSG) Chapter Six, Part B. The Introduction to these policy statements explains that their purpose is "to ensure that plea negotiation practices . . . do not perpetuate unwarranted sentencing disparity." USSG § 6B1.1 Introductory Comment (2010).

19. *Fifteen Year Review*, *supra* note 13, at 144, 92; *see also* David N. Adair, Jr. & Toby D. Slawsky, *Looking at the Law, Fact-finding in Sentencing*, FED. PROBATION, Dec. 1991, at 58-72.

utes gave them.[20] Despite the evidence of prosecutor-created disparity, the Department of Justice and its allies in Congress increasingly focused on judicial discretion as the sole source of disparity.[21]

The mandatory system also created *structural* disparity, which results from rigid compliance with guidelines that fail to track the policies and principles of 18 U.S.C. § 3553(a). Many penalties recommended by the mandatory guidelines were far greater than necessary. The lengthy terms of imprisonment for distribution of crack cocaine treated less serious offenses the same as very serious ones.[22] The so-called career offender guideline treats repeat drug offenders the same as far more dangerous offenders, and imprisons them longer than data on their recidivism rates would justify.[23] One of the most shocking facts about the mandatory guideline era was that the gap between average sentences for African-American and other offenders actually increased, due to guidelines that had "a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system . . . prior to the guidelines implementation."[24]

### *C. The Need for a New Framework*

The many problems with the mandatory guideline system led practitioners and experts to declare federal sentencing reform a

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20. Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1425 (2008) (the guidelines system "provided prosecutors with indecent power relative to both defendants and judges, in large part because of prosecutors' ability to threaten full application of the severe Sentencing Guidelines.").

21. The apex of this collusion was passage of the sentencing provisions contained in the PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003), which eliminated judges' discretion to depart in sex offenses against children and reduced it across the board. *See* Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds —The Center Doesn't*, 117 YALE L.J. 1374, 1388 (2008) ("[T]he measure might be better characterized as a DOJ project in which congressional allies willingly joined. The sponsor, Congressman Tom Feeney (R. Fla.), appears to have been carrying water for a drafting group that included Justice Department officials and a former AUSA working for House Judiciary Chairman Sensenbrenner.").

22. Penalties for crack were finally reduced, although not equated with similar amounts of powder cocaine, subsequent to the Fair Sentencing Act of 2010, Pub. L. No. 111-220.

23. *See, e.g.*, *Fifteen Year Review*, *supra* note 13, at 133-134 (showing that the career offender guideline treats many less dangerous offenders the same as other offenders with a much higher recidivism rate); Amy Baron-Evans *et al.*, *Deconstructing the Career Offender Guideline*, 2 CHARLOTTE L. REV. 39 (2010).

24. *Fifteen Year Review*, *supra* note 13, at 135.

"disaster," a "mess," and "a cure worse than the disease."[25] Others were more moderate,[26] but very few found things to like.[27] Some who initially defended the system grew disillusioned as Congressional micro-management undermined even those guidelines that were developed by the Commission through research and impartial deliberation.[28] The question for federal sentencing today, therefore, is not whether the success of the mandatory guidelines will be lost in an advisory system, but whether the mandatory system's failures might be addressed while avoiding new and greater problems.

The key to success will be replacing the pre-*Booker* standard for departures from the guideline range with a framework that will support the needed critical evaluation and evolution of the guidelines. *Booker* excised the statutory departure standard, codified at 18 U.S.C. § 3553(b)(1), which had required judges to find 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

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25. *See generally,* Michael Tonry, *Sentencing Matters* (Oxford University Press 1998) (1996) (summarizing criticism of the guidelines by judges and academic commentators and noting that federal reform had proven a drag on the reform movement in the state courts); Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines,* 58 STAN. L. REV. 85 (2005); Judy Clarke, *The Sentencing Guidelines: What a Mess,* 55 FED. PROBATION 45 (1991); Gerald F. Uelman, *Federal Sentencing Guidelines: A Cure Worse than the Disease,* 29 AM. CRIM. L. REV. 899 (1992); American College of Trial Lawyers, *United States Sentencing Guidelines 2004: An Experiment That Has Failed* (2004), http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=58; Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heartland: The Long Search for Administrative Sentencing Justice,* 2 BUFF. CRIM. L. REV. 723 (1999); Erik Luna, CATO Institute, *Misguided Guidelines: A Critique of Federal Sentencing,* Policy Analysis, No. 458 (2002), http://www.cato.org/pubs/pas/pa458.pdf.

26. *See* General Accounting Office, *Sentencing Guidelines: Central Questions Remain Unanswered* (1992), http://archive.gao.gov/d33t10/147316.pdf; American Bar Association, Justice Kennedy Commission, *Reports With Recommendations to the ABA House of Delegates* at 35 (2004), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReports.Final.authcheckdam.pdf (rejecting federal guidelines model, noting that it is the "most criticized of all commission-guidance structures" and summarizing shortcomings); Kevin Reitz, *Model Penal Code: Sentencing, Report* (American Law Institute 2003) (supporting sentencing guidelines but summarizing criticisms of federal version; Kevin Reitz, *American Law Institute, Model Penal Code: Sentencing, Plan for Revision,* 6 BUFF. CRIM. L. REV. 525 (2002).

27. Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and Critique of Federal Mandatory Minimums),* 56 STAN. L. REV. 1017 (2004); Hon. Stewart Dalzell, *One Cheer for the Guidelines,* 40 VILL. L. REV. 317 (1995).

28. *Compare* Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines,* 1996 WIS. L. REV. 679, *with* Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis,* 105 COLUM. L. REV. 1315, 1319-20 (2005).

different than described" by the guidelines.[29] Read in context, the standard directs that a non-guideline sentence "should result" whenever a judge finds that this would better serve the statutory purposes.[30] One might have expected a vigorous jurisprudence to develop under this standard, with judges evaluating the adequacy of the Commission's consideration of a factor and testing the guidelines against the statute. Such evaluation, similar in some ways to the administrative law review courts apply to rulemaking by other independent agencies, was expected at least by Justice Breyer,[31] encouraged by academic commentators,[32] and initially attempted by a few courts.[33] But this never happened in the mandatory system.

### *1. Heartland Failure*

Instead, departure jurisprudence developed in a different, and unhelpful, direction. It focused on the metaphor of the guidelines' "heartland." The concept was introduced in passing in the original *Guidelines Manual* and nowhere defined by the Commission. In practice, multiple and conflicting "heartlands" soon developed and were never reconciled.[34] Cases falling outside the "heartland" were often characterized as "extraordinary" or "unusual" and thought to involve "atypical" circumstances. It was assumed that sentencing judges would develop a sense of what types of cases were typical under each guideline and recognize extra-ordinary cases. And it was assumed that the guidelines worked well when applied to typical cases falling under their literal terms.

None of these assumptions was justified. Most district judges do not see enough civil rights, environmental, or tax cases to de-

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29. 18 U.S.C. § 3553(b)(1) (2010).

30. *Id.*

31. United States v. LaBonte, 520 U.S. 751, 778 (1997) (Breyer, J., dissenting) (stating that the Commission's actions are "subject, of course, to the kind of judicial supervision and review that courts would undertake were the Commission a typical administrative agency.").

32. Marc Miller & Daniel J. Freed, *Honoring Judicial Discretion Under the Sentencing Reform Act*, 3 FED. SENT'G REP. 235 (1991); Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 1 (1991); Joseph Luby, *Reining in the "Junior Varsity Congress": A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 WASH. U. L.R. 1199 (1999).

33. *See, e.g.*, United States v. Davern, 937 F.2d 1041 (6th Cir. 1991), *vacated on rehearing*, 970 F.2d 1490 (1992); United States v, Bellazerius, 24 F.3d 698 (5th Cir. 1994).

34. *See* Paul J. Hofer, *Discretion to Depart After Koon v. United States*, 9 FED. SENT'G REP. 8 (1996) (distinguishing among "statistical," "intentional," and "normative" heartlands).

velop a sense of what a "typical" case looks like.[35] Many guidelines are applied so infrequently they may have no "heartland" at all. Nor does the typical case necessarily remain constant over time, as Department of Justice priorities and practices change. Applying a guideline to whatever type of offender is frequently brought under it allows prosecutors, rather than the Commission, to define the meaning of the guideline and the appropriate penalty for those offenders. The *typical* case may actually be different from the type of case *for which the guideline was written*, resulting in a complete disconnect between the theory or purpose of the guideline and its application.

### 2. *The Disconnect Between Guidelines and Purposes*

There were many examples of this severe disconnect before *Booker*, and it is remarkable how the departure mechanism failed to correct for them. The Commission reported in 1997 that a substantial number of cases sentenced under the then-effective money laundering guideline were run-of-the-mill fraud cases and *not* the types of cases for which the guideline had been intended, *i.e.*, "money laundering [activities] which are essential to the operation of organized crime."[36] Application of the guideline to these fraud offenders resulted in penalties grossly disproportionate to the seriousness of the offense. Yet the government opposed departure as long as a case fell under the guideline's literal definitions, and very few judges departed based on the obvious and documented disconnect between the guideline's intended scope and its mechanical application.[37]

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35. Frank O. Bowman, *Places in the Heartland: Departure Jurisprudence After Koon*, 9 FED. SENT'G REP. 19 (July/Aug. 1996)(demonstrating that the claim that district judges have a better sense of the statistical norm is dubious).

36. United States Sentencing Commission (USSC), *Sentencing Policy for Money Laundering Offenses, including Comments on Department of Justice Report* at 4 (Sept. 18, 1997), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Money_Laudering_Topics/19970918_RtC_Money_Laundering.PDF.

37. For examples of these exceptions, *see, e.g.*, United States v. Ferrouillet, 1997 WL 266627 (E. D. La. May 20, 1997) ("In examining whether a case falls outside of the heartland, a court should ask what type of case a particular guideline is intended to cover" using legislative history, guideline commentary, and other material that can shed light on the purpose of the guideline); United States v. Bart, 973 F. Supp. 691 (W.D. Tex. 1997) (similar). An attempt by the Commission to amend the guidelines to correct for this problem was rejected by Congress at the same time it rejected a proposed fix to the crack guidelines. After lengthy negotiations with the Department of Justice, a compromise was reached that partly corrected the disproportionality the Commission had identified. *See* USSC, *Report to Congress: Sentencing Policy for Money Laundering Crimes, including Comments on Department of Justice Report* (1997) *available at*

The most common disconnect was, and sadly continues to be, excessively long sentences for low-level drug trafficking offenders. As described in Commission reports,[38] the legislative history surrounding the Anti-Drug Abuse Act of 1986 (hereinafter "ADAA") shows that Congress believed ten-year minimum penalties were appropriate for "kingpins," "masterminds," those "who are responsible for creating and delivering very large quantities." [39] Five-year minimum penalties were intended for "managers of the retail traffic," [. . . ] "the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities."[40]

But as implemented by the Commission, the guidelines recommend for many low-level drug offenders prison terms that are appropriate only for managers or kingpins.[41] The ADAA established quantity thresholds for five and ten-year mandatory minimums based on erroneous information suggesting that certain amounts of drugs were commonly found with certain types of offenders.[42]

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http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Money_Laudering_Topics/19970918_RtC_Money_Laundering.PDF; U.S.C. App. C, Amend. 634 (Nov. 1, 2001).

38. *See, e.g* USSC, *Report to Congress: Cocaine and Federal Sentencing Policy* (1995) *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/199502_RtC_Cocaine_Sentencing_Policy/index.htm.

39. *Id.* at 119.

40. *Id.* at 120.

41. *See* USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 28-30 (2007), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf (showing large numbers of low-level crack and powder cocaine offenders exposed to harsh penalties intended for more serious offenders); *id.* at 28-29 (showing drug quantity not correlated with offender function); USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 42-49 (2002), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf (showing drug mixture quantity fails to closely track important facets of offense seriousness); *Fifteen Year Review, supra* note 13, at 47-55 (2004) (discussing evidence of numerous problems in operation of drug trafficking guidelines); Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. QUANT. CRIM. 155, 171 (2009) (drug quantity "is not significantly correlated with role in the offense.").

42. Hearing on Mandatory Minimum Sentencing Laws Before the H. Subcomm. on Crime, Terrorism and Homeland Security, H. Comm. on the Judiciary, 110th Cong. (2007) (statement of Eric Sterling, President, The Criminal Justice Policy Foundation), http://www.cjpf.org/crimemandmin6_26_07.pdf. In 1986, Mr. Sterling was subcommittee counsel principally responsible for developing the Anti-Drug Abuse Act of 1986, which created the five and ten-year mandatory minimum sentences for drug offenses. Specifically, Mr. Sterling testified that:

> The Subcommittee's approach in 1986 was to tie the punishment to the offenders' role in the marketplace. A certain quantity of drugs was assigned to a category of punishment because the Subcommittee believed that this quantity was easy to speci-

Moreover, the ADAA required that the weight of any "mixture or substance containing a detectable amount"[43] of a drug was to be included, arbitrarily counting talc, or sugar, or other dilutants the same as a drug. The Commission incorporated these erroneous thresholds and weighing methods into sentencing guideline § 2D1.1 and, with little explanation, linked the quantities to offense levels so that first time offenders with no aggravating factors receive recommended ranges falling entirely above the statutory minimum, and expanded the two statutory thresholds into seventeen levels in its Drug Quantity Table, extrapolating below, between, and above them.[44]

It soon became clear to both front-line practitioners and researchers that the drug trafficking guideline often resulted in excessive guideline ranges for many offenders.[45] The General Accounting Office reported that the drug trafficking guideline was the most often-cited problem with the sentencing guidelines.[46] Judges chafed at the unfair penalties they were asked to impose and the Judicial Conference of the United States criticized the guideline's emphasis on drug quantity.[47] However, despite the ob-

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fy and prove and 'is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain.' [H.Rep't. 99-845, Part 1, Sept. 19, 1986, pp. 11-12] However, we made some huge mistakes. First, the quantity triggers that we chose are wrong. They are much too small. They bear no relation to actual quantities distributed by the major and high-level traffickers and serious retail drug trafficking operations, the operations that were intended by the subcommittee to be the focus of the federal effort. The second mistake was including retail drug trafficking in the federal mandatory minimum scheme at all.

*Id.* at 4-5.

43. 21 U.S.C. § 841(b) (2010).

44. *Fifteen Year Review, supra* note 13, at 48-52.

45. *Special Issue: The Disproportionate Imprisonment of Low-Level Drug Offenders,* 7 FED. SENT. REP. (1994); Miles Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?* 7 FED. SENT. REP. 22 (1994); Peter Reuter and Jonathan Caulkins, *Redefining the Goals of National Drug Policy: Recommendations from a Working Group,* 85 AM. J. OF PUB. HEALTH 1059, 1062 (1995) (RAND corporation working group concludes "[f]ederal sentences for drug offenders are often too severe: they offend justice, serve poorly as drug control measures, and are very expensive to carry out . . . [t]he U.S. Sentencing Commission should review its guidelines to allow more attention to the gravity of the offense and not simply to the quantity of the drug."); Steven B. Wasserman, *Sentencing Guidelines: Toward Sentencing Reform for Drug Couriers,* 61 BROOK. L. REV. 6443 (1995); Jane L. Froyd, *Comment: Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines,* 94 NW. U. L. REV. 1471 (2000).

46. General Accounting Office, *Sentencing Guidelines: Central Questions Remain Unanswered* at 155 (1992), http://archive.gao.gov/d33t10/147316.pdf (harshness and inflexibility of drug guideline most frequent problem cited by interviewees; examples of unwarranted disparity attributed to guideline).

47. *See* Judicial Conference of the United States, *1995 Annual Report of the JCUS to the U. S. Sentencing Commission* at 2 (Mar. 1995) ("the Judicial Conference . . . encourages

vious disconnect between the guideline's recommendations and the purposes of sentencing, judges routinely imposed unnecessarily severe sentences because they felt bound to the literal terms of the guideline

As these examples demonstrate, departure analysis in the pre-*Booker* era failed to correct for errors and injustices that were mistakenly built into the guideline rules or that emerged in their day-to-day operation. "Heartland" analysis diverted attention from the purpose of the sentence to whether there was anything "extraordinary" about the defendant. Sadly, and ironically, if a guideline functioned *so badly* that most of the offenders falling under its literal terms were subject to penalties far greater than necessary to achieve any sentencing purpose, traditional departure analysis did not authorize a non-guideline sentence. The pre-*Booker* jurisprudence of departures clearly failed to provide the mechanism needed for critical evaluation and constructive evolution of the guidelines.[48]

## II. A NEW FRAMEWORK FOR FEDERAL SENTENCING

*Booker* was widely interpreted as granting sentencing judges greater "discretion." But this generality offers no guidance on how sentencing procedures and criteria should change to give substance to *Booker's* remedy while avoiding the "discordant symphony"[49] predicted by its critics. Much of the substance is found in the court's subsequent decisions, Rita v. United States, 551 U.S. 338 (2007), Gall v. United States, 552 U.S. 38 (2007), Kimbrough v. United States, 552 U.S. 85 (2007), Spears v. United States, 555 U.S. 261 (2009), Nelson v. United States, 555 U.S. 350 (2009), and most recently United States v. Pepper, 131 S. Ct. 1229 (2011). In these cases the Court made clear that the guidelines are the starting point for sentencing, but they are not to be presumed reasonable and judges must evaluate the guideline recommendation inde-

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the Commission to study the wisdom of drug sentencing guidelines which are driven virtually exclusively by the quantity or weight of the drugs involved.").

48. For additional discussion of the failures of pre-*Booker* departure jurisprudence, see Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heartland: The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723 (1999); Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. L. REV. 1441, 1455 (1997); 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 (1999).

49. *Booker*, 543 U.S. at 312 (Scalia, J., dissenting).

pendently in light of all of the § 3553(a) factors. Judges may reject unsound guidelines and policy statements, even in ordinary or typical cases, and substitute better policies of their own determination. To determine whether a guideline recommendation complies with the statute, judges can examine the method by which the guideline was developed, the rationale offered by the Commission for how the recommendation complies with the statute (if any), and a wide range of evidence on the fairness and effectiveness of a guideline for achieving the purposes of sentencing.

### *A. Consideration of the Guideline Recommendation*

*Booker* made 18 U.S.C. § 3553 the central framework for sentencing, so one approach would be to take up the seven factors in the statute in the order they are listed. This would highlight 1) "the nature and circumstances of the offense and the history and characteristics of the defendant," 2) the purposes to be served by the sentence, and 3) the kinds of sentencing options available by statute.[50] But this is not how the law has developed. The Sentencing Commission began training judges and probation officers just days after Booker in how to proceed in the advisory guidelines era. [51] The Commission proposed making the fourth statutory factor, "the kinds of sentence and the sentencing range" established by the Commission, the first step of post-*Booker* sentencing. This "guidelines first" approach was adopted by many courts,[52] and in *Gall* a majority of the Supreme Court agreed that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. . . . As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."[53]

Beginning with the guideline calculation has some practical benefit; it assures that some of the fact-finding required to establish the procedural reasonableness of a sentence is completed before moving on to other considerations. Giving temporal priority to the guideline calculation comes at a cost, however.[54] While the

50. 18 U.S.C. § 3553(a) (2010).

*51.* USSC, *Commonly Asked Questions Regarding Federal Sentencing Following* United States v. Booker (Feb. 2005) (on file with authors).

*52. See, e.g.,* United States v. Gunter, 462 F.3d 237, 247 (3d Cir. 2006) (describing three-step process); United States v. Washington, 515 F.3d 861, 865-66 (8th Cir. 2008); United States v. Wise, 515 F.3d 207, 216 (3d Cir. 2008).

53. *Gall*, 552 U.S. at 48 (internal citations omitted).

54. For additional discussion of problems with starting with the guidelines, *see* Jelani Jefferson Exum, *The More Things Change: A Psychological Case Against Allowing the Fed-*

Court made clear that a sentencing judge "may not presume that the Guidelines range is reasonable,"[55] both its primacy and its apparent precision increase the "gravitational pull" of the guidelines recommendation.[56] The recommendation results from an often-complicated mathematical process and is expressed as a range of months. Regardless of how arbitrary or unreliable are the factors determining that range, it can appear to provide a more objective standard for evaluating a sentence than the general statutory factors. Moreover, the guidelines' recommendation serves as a psychological "anchor," which appears to simplify or obviate the daunting task of evaluating the seriousness of the offense, the dangerousness of the offender, and other considerations relevant to the statutory purposes.[57] It is no surprise that judges would be grateful for a recommendation that purports to take into account the difficult considerations that bear on sentencing.

The Commission and some judges sought to increase the inherent attraction of the guidelines recommendation by further increasing its gravitational pull. They argued that the guidelines as a whole were carefully developed to recommend sentences that comply with 18 U.S.C. § 3553(a) and that their recommendations deserve "heavy"[58] or "substantial"[59] "weight." (Other judges coun-

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*eral Sentencing Guidelines to Stay the Same in Light of Gall, Kimbrough, and the New Understandings of Reasonableness Review*, 58 CATH. U.L. REV. 115 (2008).

55. *Gall*, 553 U.S. at 48-9; *see also Rita*, 551 U.S. at 338.

56. The gravitational pull of the guidelines' recommendation was also reflected in the Court's suggestion that "a major departure should be supported by a more significant justification than a minor one" even as it rejected any requirement of "extraordinary justification" for sentences that are mathematically more distant from the guideline range. *Gall*, 553 U.S. at 50.

57. *See* Hon. Nancy Gertner, Blackmun Lecture at the Ohio State University Moritz College of Law Barrister Club, *From Omnipotence to Impotence: American Judges and Sentencing* (Sept. 27, 2006), *in* 4 OHIO ST. J. CRIM. L. 523, 529 (2007); Hon. Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 YALE L.J. Pocket Part 127 (2006) ("Anchoring is a strategy used to simplify complex tasks, in which numeric judgments are assimilated to a previously considered standard. When asked to make a judgment, decision-makers take an initial starting value (i.e., the anchor) and then adjust it up or down. Studies underscore the significance of that initial anchor; judgments tend to be strongly biased in its direction."), http://www.thepocketpart.org/2006/07/gertner.html (quotations omitted); Panel Discussion, *Federal Sentencing Under "Advisory Guidelines": Observations by District Judges*, 75 FORDHAM L. REV. 1, 17-18 (2006) (Judge Lynch describing research on "anchoring." "Whether people like that number or not, even if they are angry about that number, does not matter; they will still be influenced by that number. That is the psychological fact. I think it is psychologically inevitable that the Guidelines will have a powerful influence on sentences, even if they are purely advisory.").

58. United States v. Wilson, 350 F. Supp. 2d 910, 925 (D. Utah 2005).

59. Prepared Testimony of Judge Ricardo H. Hinojosa, Chair, United States Sentencing Commission before the Subcommittee on Crime, Terrorism, and Homeland Security Com-

tered that they deserve only "some weight.").[60] This early issue of post-Booker sentencing turned away from the question: "How well does the recommendation comply with the statutory factors?," and substituted: "How mandatorily should the guidelines still be treated?" Analysis focused on the proper degree of judicial "discretion" rather than the reasonableness of the guidelines' recommendations.[61]

The Supreme Court's actual reasoning in the post-*Booker* cases reveals, however, that the debate over "weight" was far too simplistic. It is impossible to state a general rule about how much "weight," or deference, or respect judges should give to *all* guidelines' recommendations; it all depends on the particular guideline in question. The Court repeatedly linked the respect due a recommendation to the evidence of its connection to § 3553(a), as reflected in the method of the guideline's development, the data on which it was based, research on its fairness and effectiveness, and the quality of the Commission's explanations for the policies underlying the recommendation. These decisions make clear that the guidelines should not be given some overall "weight;" they should be given individualized scrutiny.

### *B. Why Some Guidelines may be Worth Following*

The Supreme Court clearly addressed *why* or *why not* sentencing judges might find the guidelines recommendation worth following. It noted that the Commission was charged in the SRA with a task similar, but not identical, to that of sentencing judges—recommending sentences that achieve the purposes of sentencing.[62] Thus, when the Commission uses the procedures in the SRA to carefully design a guideline—that is, when it acts in its

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mittee on the Judiciary, United States House of Representatives (Feb. 10, 2005), available at http://www.ussc.gov/sc_cases/bookertestimony.pdf (last viewed May 17, 2008).

60. Douglas Berman, "The weighty guidelines question after *Gall*," Sentencing Law, & Policy, Dec. 11, 2007, *available at* http://sentencing.typepad.com/sentencing_law_and_policy/2007/12/the-weighty-gui.html (last viewed May 17, 2008).

61. For a discussion of the various meanings of judicial discretion in the post-*Booker* environment, *see* Paul J. Hofer, *Immediate and Long-Term Effects of* United States v. Booker: *More Discretion, More Disparity, or Better Reasoned Sentences?* 38 ARIZ. S. L. REV. 425 (2006).

62. *See* 28 U.S.C. §§ 991(b), (f), (m). One notable distinction between the Commission's task and that of sentencing judges is that the Commission is not explicitly required to promulgate guidelines that produce sentences "not greater than necessary" to satisfy sentencing purposes.

"characteristic institutional role"[63] as an independent expert agency—it is "fair to assume" that the guidelines reflect a "rough approximation" of sentences that "might achieve 3553(a) objectives," at least in the ordinary case.[64] But conversely, if a guideline was not developed in this manner, there is no reason to think its recommendation represents any institutional expertise greater than that of the sentencing judge. The sentencing judge, after all, also has the advantages of knowing the particular facts of the case and the individual characteristics of the defendant better than any rule-maker in Washington, D.C.

*Rita, Kimbrough,* and *Gall* all rely on this rationale for when the guidelines deserve respect and when they do not. In *Rita,* the Court held that appellate courts may (but are not required) to presume a within-guideline sentence reasonable, because theoretically, such sentences should reflect both the sentencing judge's and the Commission's determination that a sentence within the range complies with 18 U.S.C. § 3553(a). Justice Breyer's description of how the guidelines were developed, like those he gave when he was a Commissioner, accentuates the reasoned processes of the SRA and ignores or minimizes the many times those processes were subverted or ignored.[65]

In *Kimbrough*, the court acknowledged that the Commission "has the capacity courts lack to 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.'"[66] However, some guidelines "do not exemplify the Commission's exercise of its characteristic institutional role."[67] When a guideline is not the product of "empirical data and national experience," it is not an abuse of discretion to

63. *Kimbrough*, 552 U.S. at 109.

64. *Rita*, 551 U.S. at 348-49.

65. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 19-20 (1988). The account in this article mirrors the one in the original introduction to the *Guidelines Manual.* Both emphasize the Commission's study of data on past practice as well as compromises among competing views, but say little or nothing about how mandatory minimum statutes or specific directives from Congress affected the Commission's deliberations. This difference between theory and actual practice led one former Commissioner to remark, "the methodology described in the original introduction less aptly reflects most of the current guidelines than the U.S. Supreme Court seems to realize. The proliferation of Congressional directives and other statutory changes, and the Commission's implementation of both, along with some important Commission initiatives along the way have changed sentences for many offenses substantially from the averages of pre-guideline practice." *An Interview with John R. Steer, Former Vice Chair of the U.S. Sentencing Commission*, 32 *The Champion* 40, 42 (2008).

66. *Kimbrough*, 552 U.S. at 109 (internal citations omitted).

67. *Id.* at 109.

conclude that it fails to achieve the § 3553(a)'s purposes, even in "a mine-run case."[68] In *Gall*, Justice Stevens repeats *Rita's* description (the guidelines are "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions"[69]) but goes on to add an important caveat: "Notably, not all of the Guidelines are tied to this empirical evidence. For example, the Sentencing Commission departed from the empirical approach when setting the Guideline range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes."[70]

This analysis of the pedigrees of different guidelines—not a blanket declaration that all guidelines deserve equal respect—is at the heart of the Supreme Court's post-*Booker* cases. It is the only approach consistent with judges' duties under 18 U.S.C. § 3553(a) and with *Booker's* rationale for why judges will find *some,* but not all, guidelines worth following.

### *C. New Reasons for Sentencing Outside the Range*

The Court's reasoning in the post-*Booker* cases requires recognition of many new types of reasons for sentencing outside the guidelines range. In *Rita,* Justice Breyer outlined several types of arguments for such sentences that judges must consider. A party may argue that "the case at hand falls outside the 'heartland' to which the Commission intends individual Guidelines to apply."[71] Unlike the mandatory era, parties may argue that the guideline was not intended to apply to cases like the present one, even if it is statistically typical or ordinary. Parties may argue that the guidelines "do not generally treat certain defendant characteristics in the proper way"[72] or neglect or do not properly treat certain circumstances of the offense or offender.[73] If the government argues that a particular restriction on consideration of an offender

68. *Id.* at 109 (citations omitted).
69. *Gall*, 552 U.S. at 46.
70. *Id.*
71. *Rita,* 551 U.S. at 344. Note that this description of the heartland as cases "to which the Commission *intends* individual Guidelines to apply" (emphasis supplied) differs from the common understanding of "heartland" in the mandatory era. If taken seriously, this clarification could help avoid some problems of pre-*Booker* jurisprudence, which commonly conceived of the heartland as statistically common or "ordinary" cases.
72. *Rita,* 551 U.S. at 357.
73. *Pepper*, 131 S. Ct. at 1242-43; *Gall*, 552 U.S. at 59; *Rita*, 552 U.S. at 357.

characteristic contained in the Commission's policy statements prevents such consideration, the court may find that that restriction is unsound, as the Supreme Court held in *Pepper*.

Alternatively, a party can argue that a non-guidelines sentence is appropriate, even in a typical case to which the guideline was intended to apply and even in the absence of particular mitigating factors, "because the Guidelines sentence itself fails properly to reflect the § 3553(a) considerations," and thus "reflect[s] an unsound judgment."[74] The Court invites advocates to demonstrate that a particular guideline is generally ineffective or disproportionate in a wide range, or even the majority, of cases subject to it. The Court makes clear that judges may consider a wide variety of evidence to make this determination. In an important passage, Justice Breyer notes that the presumption of reasonableness of within-range sentences that appellate courts are permitted to make is *not* the type that "leads appeals courts to grant greater fact-finding leeway to an expert agency than to a district judge."[75] When deciding if a guideline recommendation complies with the statute, courts can hear evidence of the type the Commission itself might use in developing, evaluating, or amending a guideline, including research on the relationship between the guideline and the purposes of sentencing.

The Court itself discussed this kind of empirical evidence in *Kimbrough*: "[t]he 100-to-1 ratio rested on assumptions about 'the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that *more recent research and data no longer support*. . . [emphasis supplied]. . . The Commission furthermore noted that 'the epidemic of crack cocaine use by youth never materialized to the extent feared.' . . . the crack/powder disparity is inconsistent with the 1986 Act's goal of punishing major drug traffickers more severely than low-level dealers."[76] In *Pepper*, where amicus appointed by the Court to defend the decision below to prohibit consideration of post-sentencing rehabilitation argued that the decision could be upheld based on a Commission policy statement prohibiting such consideration and mirroring circuit law, Justice So-

74. *Rita* at 357. Justice Breyer adds, somewhat mysteriously, that courts might also find that a non-guideline sentence may be appropriate "regardless." *Id.* at 357. This may have been added to assure other justices that no judicial fact finding was necessary for judges to sentence outside the range, which was a crucial aspect of the remedy's solution to the Sixth Amendment problem identified in the merits opinion.

75. *Id.* at 347.

76. *Kimbrough*, 552 U.S. at 86 (internal citation omitted).

tomayor reviewed the Commission's explanations for this policy statement and found that "the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted."[77]

These critical analyses of the pedigree of each guideline refocuses attention from the facts of the case to the support for the guideline, that is, to the research and stated rationale on which any given guideline is based. This turn away from traditional "heartland" analysis is the key to *Booker's* potential.

## III. OBSTACLES TO EVOLUTION OF THE GUIDELINES

After *Booker*, many judges used their increased sentencing authority to take greater account of offense and offender characteristics that were deemed irrelevant or off-limits under the mandatory system.[78] The Commission has begun to respond to this judicial feedback by softening some of the unnecessary restrictions in its policy statements, which had ruled many of these characteristics "not ordinarily relevant" and others prohibited altogether.[79] Some judges have turned a critical eye to particular guidelines and imposed sentences outside the recommended range, even in "heartland" or "mine-run" cases.[80] After *Kimbrough* made clear that judges can indeed reject guideline recommendations even if based on Congressional policies, Congress amended one of the worst of these—the 100-to-1 quantity ratio between powder and crack cocaine—which led to amendment of the corresponding guideline to reduce penalties for most crack offenders.[81]

But despite this progress, significant problems and questions remain. Some advocates and sentencing judges continue to de-

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77. *Pepper*, 131 S.Ct. at 1247.

78. Paul J. Hofer, *Booker as a Natural Experiment: Using Empirical Research to Inform the Federal Sentencing Policy Debate*, 6 CRIMINOLOGY & PUB. POL'Y 433 (2007).

79. USSC, *Guidelines Manual* Appendix C, Amendment 739.

80. For example, the guideline for possession or distribution of child pornography has come under particular scrutiny. *See* United States v. Grober, 624 F.3d 592 (3d Cir. 2010) (upholding variance from § 2G2.2 as procedurally reasonable); United States v. Dorvee, 616 F.3d 174 (2d Cir. 2010) (reversing guideline sentence under § 2G2.2 as substantively unreasonable); United States v. Tutty, 612 F.3d 128 (2d Cir. 2010) (reversing guideline sentence under § 2G2.2 because district court erred in holding that it did not have the authority to impose a non-guideline sentence based on policy considerations); United States v. Olhovsky, 562 F.3d 530 (3d Cir. 2009) (reversing below-guideline sentence in child pornography case as procedurally unreasonable and unreasonably harsh).

81. USSC, *Supplement to the 2010 Guidelines Manual* (Nov. 1, 2010) (containing guideline amendment pursuant to the Fair Sentencing Act of 2010, Pub. L. 111-220. This amendment has been re-promulgated as a proposed permanent amendment, and will be effective Nov. 1 2011 if Congress does not disapprove it.

scribe sentencing in terms nearly indistinguishable from pre-*Booker* practice—calculation of the guidelines followed by a search for anything "unusual" or "atypical" about an offense or defendant that might take the case out of the "heartland" and justify a sentence outside the guidelines range.[82] Entrenched concepts and habits have locked some courts into an approach to sentencing that remains disconnected from the statutory purposes. And despite clear authority to reject unsound guidelines on policy grounds, some judges remain reluctant to do so.

The best example of judges' reluctance to embrace their new authority may be sentencing under the guideline for crack cocaine in the years after *Booker* but prior to the recent amendment. It was well known that the Commission itself had repeatedly shown that the assumptions on which the guideline was based were false, that the guideline recommended terms of imprisonment that were unjustifiably harsh, and that this unfairness fell largely on African-American defendants.[83] In *Kimbrough*, the Supreme Court approvingly reviewed this and other evidence to conclude that judges could reasonably reject the guideline recommendation even in ordinary cases.[84] In *Spears*, the court reiterated that judges could reject the policy categorically and substitute a better one.[85] Even the Attorney General stated that the guideline was unfair and that the disparity should be eliminated.

Yet in fiscal year 2009, which fell completely after the decision in *Kimbrough*, 42.9% of crack defendants *continued to be sentenced within or above the guidelines recommended range,* even in cases where no trumping mandatory minimum penalty required such an excessive penalty.[86] Moreover, no appellate court ever

82. The present author has heard judges report that after *Booker* they "look to see if there is anything unusual about a case that might justify a departure." The Department of Justice's most recent guidance on charging and plea bargaining echoes similar language, saying that prosecutors should generally argue for a sentence within the guideline range "[i]n the typical case." Eric H. Holder, Memorandum to All Federal Prosecutors, May 19, 2010, at 2.

83. USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (1995); USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* (2002); USSC, *Report to Congress: Cocaine and Federal Sentencing Policy* (2007).

84. *Kimbrough*, 552 U.S. at 94 (citing Commission report finding that the effects of prenatal exposure to cocaine were not as harmful as believed with the 100:1 powder to crack quantity ratio was developed, and anomalous result of retail crack dealers getting longer sentences than their wholesale powder cocaine suppliers).

85. *Spears*, 555 U.S. 261 (2009).

86. USSC FY2009 Monitoring Dataset (analyses conducted by the author). This dataset is publicly available from the Federal Justice Statistics Resource Center, *available at* http://fjsrc.urban.org/index.cfm.

held that the crack guideline recommendation was categorically unreasonable in the ordinary cases to which it applied, even though by 2009 no one was arguing that the guideline *was* reasonable.[87] Did the judges in these cases believe, contrary to the considerable evidence documented by the Commission, that the recommended sentence *was* fair? On what did they base this conclusion? Or, as seems more likely, did they continue to believe that the guideline, for some reason, deserved deference from judges?

All of this raises questions about what is hindering development of a robust post-*Booker* sentencing jurisprudence that could identify guidelines that are disconnected from the purposes of sentencing and contribute to meaningful evolution of the system.

### *A. The Commission's Recalcitrance*

Part of the problem has been the Commission's attempts to maintain the language and procedures of the mandatory era, while stigmatizing the exercise of judges' new powers as "outside the system." For almost four years, the *Guidelines Manual* did not mention *Booker* or subsequent cases at all. Policy statement § 5K2.0, which identifies grounds for departure, continues to this day to mirror the language of the statutory standard that was excised by *Booker* ("there exists an aggravating or mitigating circumstance, of a kind or to a degree, not adequately considered by the Sentencing Commission"). When mention was finally made of *Booker* and later decisions in 2008, the Commission emphasized the parts that underscored the "continuing importance" of the guidelines and remained silent on how judges might identify unsound recommendations, provide feedback to the Commission, and improve the sentences they impose.[88] In 2010, the Commission admonished judges that mitigating offender characteristics should not be given "excessive weight" and that their "most appropriate use" is "not as a reason to sentence outside the applicable guideline range," but to determine the sentence within the guideline range. Rather than embrace judges' new powers to critically eval-

87. *See e.g*, United States v. Roberson, 517 F.3d 990, 995 (8th Cir. 2008) (holding that a district court does not "acts unreasonably, abuses its discretion, or otherwise commit error if it does not consider the crack/powder sentencing disparity"); United States v. Burks, 377 Fed. Appx. 548, 550 (7th Cir. 2010).

88. U.S.C, App. C. Amend. 717 (Nov. 1, 2008).

uate guidelines as an engine of feedback and constructive change, the Commission attempted to stifle it.

*1. Departures" and "Variances"*

As discussed in Part II, the Commission began to train judges and probation officers soon after *Booker* to begin the sentencing process with calculation of the guideline range. This step was then followed by two others, which the Commission has recently incorporated into the *Guidelines Manual* at § 1B1.1 (Application Instructions) as follows:

> (a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines . . . ";
>
> (b) "The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence"; and
>
> (c) "The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole."

Background commentary was also added stating that, "[i]f, after step (c), the court imposes a sentence that is outside the guidelines framework, such a sentence is considered a 'variance.'" This amendment thus attempted to formalize a distinction between "departures" and "variances" that has dominated, and confused, jurisprudence in the advisory guideline era.[89]

Prior to the amendment, most courts used the term "variance" and distinguished it from "departure," but one circuit said that the departure concept was "obsolete."[90] After initially ignoring the distinction,[91] the Supreme Court in Irizarry v. United States[92] applied it, divorced from its initial function, with the effect of nar-

89. *See* Paul J. Hofer, *How Well Do Sentencing Commission Statistics Help in Understanding the Post-Booker System?* 22 FED. SENT.'G REP. 89 (2010) for examples of how the distinction has confused data collection and interpretation.

90. *See* United States v. Johnson, 427 F.3d 423, 426 (7th Cir. 2005); *see also* United States v. Arnaout, 431 F.3d 994 (7th Cir. 2005); *see also* United States v. Toliver, 183 Fed. Appx. 745, 747 n. 2 (10th Cir. 2006) ("Our circuit still uses 'departure' terminology in certain circumstances, but not with the same vitality and force that it had pre-*Booker*.").

91. Justice Breyer wrote in *Rita* that a judge "may depart" either "pursuant to the Guidelines" *or* by imposing a "non-Guidelines sentence" pursuant to *Booker*. *Rita,* 551 U.S. at 350. Justice Stevens' majority opinion in *Gall* used the terms interchangeably. *Gall,* 552 U.S. at 46, 51.

92. 553 U.S.708 (2008).

rowing procedural rights.[93] The distinction has misled many commentators to think of departures or variances as types of *sentences*, rather than categories of *reasons*, even though many sentences are based on a combination of reasons from both categories.[94]

Judges and advocates disagree on the wisdom and necessity of engaging in a departure analysis at step two distinct from a variance analysis at step three. Practice appears to vary from court to court.[95] Some advocates have likened the second and third steps to "two bites at the apple;" if a judge is not convinced at step two to depart based on a particular circumstance, an argument can be made at step three for a variance based on that circumstance. Those defense attorneys who favor a separate departure step believe it is easier to convince some judges to depart than to vary, at least when their clients clearly fall under a policy statement or commentary encouraging departure in the *Guidelines Manual.* Judges who favor a separate departure step appear to believe that departures are more acceptable than variances to Congress, or to the appellate courts, as well as to the Commission.

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93. In *Irizarry* a 5-4 majority held that Fed. R. Crim. P. 32(h), written prior to *Booker* to give parties notice of a court's intention to "depart" from the guidelines, did not extend to "variances." Justice Stevens termed "departure" a "term of art" that "refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." *Irizarry*, 553 U.S. at 714. Justice Breyer's dissenting opinion argued that departure/variance was a distinction without much of a difference. He noted that the reasons justifying a "departure" had always been open-ended and included factors unmentioned in the *Guidelines Manual*. *See* 18 U.S.C. § 5K2.0(a)(2)(B). Moreover, the *purpose* of requiring notice—to ensure adversarial testing of matters relating to the sentence—applied with equal force to both "variances" and "departures." *See also* Melissa Healy, *A Continuing Right to Notice: Why Irizarry v. United States Should Not Be the Last Word for District Courts Imposing Post-Booker Variance Sentences,* 50 ARIZ. L. REV. 1147 (2008).
*Irizarry* effectively narrowed the scope of the right to notice, because the definition of "departure" shifted after *Booker*. Prior to the decision in FY2005, 5.0 percent of sentences were upward (0.7%) or downward departures not sponsored by the government (4.3%). U.S. Sent'g Comm., *Sourcebook of Federal Sentencing Statistics* (2005), Tbls 26, 26A. In the most recent quarter, the percentage of departures is 2.8 percent (0.4% above and 2.4% below). U.S. Sent'g Comm , Preliminary Quarterly Data Report, First Quarter FY2011 (*available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2011_1st_Quarter_Report.pdf ). Some cases called "departures" prior to *Booker* are being classified as "variances" by judges and the Commission today.

94. *See Supplement to the 2010 Guidelines Manual, supra* note at 83, for a detailed discussion of the confusion and complexities involved in categorizing sentences using this distinction.

95. Panel on Departures and Variances, National Seminar on the Sentencing Guidelines, St. Petersburg Florida, May 13, 2010. The author was a participant on the panel with judges and sentencing advocates from around the country.

Congress's concerns, however, have historically centered on the sheer *rate* of below-range sentences, even when all were called departures, and it is far from clear that the distinction between departures and variances will matter to Congress. Defense attorneys who are skeptical of a separate departure step have noted that commentary in the guidelines usually encourages upward departures,[96] and only rarely encourages downward departures.[97] Moreover, the commentary and policy statements that authorize downward departures often limit the circumstances in which they apply and the extent of reduction that is permissible.[98] Encouraging judges to consider them needlessly risks invoking these and other limitations from pre-*Booker* case law.[99] The three-step analysis also risks fruitlessly prolonging sentencing hearings and generating pointless appeals. It is hard to see the advantage of considering a circumstance within the unexplained strictures of the commentary and policy statements governing "departures," only to revisit the same factor at step three, under the rubric of "variance," free from those strictures.[100]

At this point, it seems reasonable to ask whether the departure/variance distinction and the Commission's three-step procedure have proven informative and productive or whether they have gotten post-*Booker* jurisprudence off on the wrong foot. Rather than starting anew with the purposes of sentencing, there is

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96. *See e.g.* 18 U.S.C. § 2A2.4 (Obstructing or Impeding Officers), comment. (n. 3) ("The base offense level does not assume any significant disruption of government functions. In [such cases] an upward departure may be warranted.").

97. *See e.g.* 18 U.S.C. § 2N2.1 (Food and Drug Regulatory Violations), comment. (n. 1) ("This guideline assumes a regulatory offense that involved knowing or reckless conduct. Where only negligence was involved, a downward departure may be warranted.").

98. *See e.g.* 18 U.S.C. § 5H1.6, p.s. (Family Ties and Responsibilities) (limiting applicability of departure and requiring, *e.g.*, "substantial, direct, and specific loss of essential caretaking or essential financial support"); § 5H1.20, p.s. (Aberrant Behavior) (precluding departure in cases of, *e.g.*, a "serious drug trafficking offense.").

99. Lee D. Heckman, *The Benefits of Departure Obsolescence: Achieving the Purposes of Sentencing in the Post-Booker World*, 69 OHIO ST. L J. 149 (2008) (pre-*Booker* case law on departures largely failed to address § 3553(a)).

100. *See, e.g.*, United States v. El-Homsi, No. 06-5213, 2008 WL 747595 (3d Cir. Mar. 21, 2008) (district court rejected a "variance" in language indicating it was applying the departure standard for diminished capacity under USSG § 5K2.13, leading the defendant to argue on appeal that the judge erred at "step three" by allowing the departure standard to limit his discretion under § 3553(a), to which the court of appeals responded that the judge clearly understood the distinction); United States v. Akers, 261 Fed. Appx. 110 (10th Cir. 2008) (analyzing refusal to impose below-guideline sentence under the departure standard, then under § 3553(a)). Some appellate judges have encouraged sentencing judges to simply state at the end of their departure analysis that they would impose the same sentence under § 3553(a), essentially collapsing the two steps.

danger that litigation could again bog down parsing the meaning of "variance," "heartland," and other concepts carried over from the mandatory era. Even worse, the three-step framework suggests that sentencing judges should consider the purposes of sentencing only *after* the *Guidelines Manual* has been consulted, when in fact the guidelines, policy statements, and commentary cannot be presumed reasonable and must *all* be assessed in light of the statute. Doing otherwise continues to treat the guidelines as a series of diktats divorced from any account of *what* they are trying to accomplish and *how* they aim to accomplish it.

### 2. *Feedback Failure*

Another obstacle to evolution of the system is the failure to develop a robust mechanism for feedback about problems with the guidelines. Under the SRA, judges have always been required to give reasons for their sentences, which were then subject to appellate review. As described in Part II, *Booker* and its progeny expanded the types of reasons that can justify sentences outside the guideline range. A challenge for post-*Booker* sentencing is to find a way to document and learn from this rich and informative proliferation of reasons.[101] Written sentencing opinions from District Court judges, although more frequent than under the mandatory guidelines, remain too rare to provide robust feedback.[102] Explanations for sentences announced at the sentencing hearing are not necessarily turned into transcripts. Even when they are, they are not necessarily sent to the Commission. And even when they are sent to the Commission, the Commission does not review them.

The principal mechanism for reporting reasons for a sentence is the Statement of Reasons form developed by the Judicial Conference of the United States working with the Commission, which was revised shortly after *Booker*.[103] Unfortunately, the revision has discouraged rather than captured specific feedback about problems with the guidelines. To match the different kinds of rea-

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101. For a discussion of how the law has developed to discourage judges from offering careful explanations of their sentences, *see* Michael M. O'Hear, *Explaining Sentences,* 36 FLA. ST. U. L. REV. 459 (2009).

102. The need for more detailed explanations of the reasons for sentences is discussed in Steven L Chanenson, *Write On!*, 115 YALE L.J. 146 (Supp. 2006).

103. A copy of the form can be found in Appendix A of the Commission's report on Booker, USSC, Final *Report on the Impact of United States v. Booker on Federal Sentencing* (Mar. 2006), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/200603_Booker/Booker_Report.pdf .

sons for sentences outside the guideline range outlined in *Rita*, *Gall*, *Kimbrough* and *Pepper*, the new form should provide ways for judges to convey: 1) facts about the offense or offender that are relevant to the purposes of sentencing and justify a sentence outside the guidelines range, 2) problems with the guidelines that make the recommended range excessive or otherwise out of line with the statutory purposes, 3) policies that the judge finds unsound. Instead, the new form adds a page for reporting a "Court Determination for Sentence Outside the Advisory Guideline System" that provides checkmarks that track the broad provisions of 18 U.S.C. § 3553(a).

This revision was intended to ease judges' reporting requirements, but it also discouraged collection of more detailed explanations of the reasons for a sentence. It is hard to see what useful can be learned from a judge simply checking a box indicating that the sentence was imposed "to reflect the seriousness of the offense" or "to protect the public from further crimes of the defendant."[104] Indeed, these are the purposes that the statute requires judges to consider in *every* case; singling out one or more says little about why the judge found the guideline recommendation out of line with the statute in that particular case. Although the form provides space for judges to write in more detailed explanations, this is labeled as only for "facts justifying a sentence outside the advisory guideline range" and does not include problems with the guidelines or the unsound policies on which they are based. The revised SOR has simply not provided the robust feedback needed to identify and quantify specific problems with the guidelines.[105]

Other methods for identifying problematic guidelines are either very coarse or are problematic in other ways. The Commission has conducted surveys of judges, which is helpful for identifying general problem areas but not for specifying exactly how guidelines go

104. For a detailed description of this and other problems with the Commission's data collection, *see generally*, Hofer, *supra* note 80.

105. Empirical evidence of this feedback failure is found in the area of crack cocaine sentencing. The Commission developed categories for the reasons indicated by judges. Most of these categories track guideline provisions concerning departures ("4A1.3 Pending Cases"), are very general ("Local conditions"), or simply punt ("As stated on the record."). Only a few identify particular problems with the guidelines. One that did, however, was "crack/powder/cocaine disparity," which identified the well-known problem with the crack guideline. In FY2008, however, a year when many judges were sentencing below the range in light of this disparity, Commission data identified "crack/powder/cocaine disparity" as a reason for a below-range sentence *in just sixty-three cases*—a clear underestimate of the extent to which this guideline was viewed as problematic. For a complete list of the categories of reasons, *see* U.S. Sentencing Commission, *Variable Codebook for Individual Offenders* (revised Apr. 30, 2009) available from the Commission and on file with the author.

wrong.[106] The sheer rate of sentences outside the guideline range is often used as a rough proxy. But this is influenced by other factors, such as the number of adjustments the guideline takes into account or the portion of cases brought under a guideline to which it was never intended to apply. The best vehicle for feedback remains thoughtful sentencing opinions, but this fails to represent either the full caseload or the opinions of the judiciary as a whole.

### *B. The Commission, Congress, and Judicial Action Under § 3553(a)*

Finally, some judges appear reluctant to critically evaluate the guidelines because of two contradictory convictions. The first is that the guidelines deserve respect because they represent the considered judgment of the *Commission* acting in its capacity as an independent expert agency. The Commission has done much to encourage this conviction, but as discussed in Part I, it is not an accurate description of how most guidelines were developed. The second conviction is that the guidelines deserve respect because they represent the policy choices of *Congress* to which judges are institutionally, if not legally, bound to defer. The Commission has also encouraged this conviction, even though it contradicts the first. Neither conviction should prevent judges from critically evaluating and rejecting unsound guidelines recommendations.

#### *1. Should the Guidelines be Followed Because they Represent Congressional Policies?*

In the same *amicus* brief in which the Commission argued that it designed the guidelines using a "deliberative administrative process," the Commission makes clear that the chief reason it believes the guidelines should be followed is that they reflect the will of Congress.[107] This reasoning attempts to make an asset of the fact that many guidelines reflect the influence of Congress and the Department of Justice, expressed through mandatory minimums, statutory directives, or sheer political pressure.[108] The Commis-

106. USSC, *Results of Survey of United States District Judges January 2010 through March 2010* (June 2010).

107. USSC, *Report to Congress*, *supra* note 39 at 18, 20, 27, 28, 30.

108. For an informative account of how the Department and its allies in Congress have pressured the Commission to create sentencing rules that are not based on empirical evidence or experience, *see* Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315 (2005).

sion argued that judges should presume, *ipse dixit,* that guidelines based on Congressional judgments comply with § 3553(a) because Congress cannot act contrary to its own statute. Moreover, the Commission argued that *all* guidelines could be presumed to incorporate the § 3553(a) factors because the guidelines are reviewed by Congress and, if not disapproved, can be presumed to comply with the statute. Followed to its logical conclusion, this reasoning suggests judges should *never* impose a non-guidelines sentence because they disagree with an unsound policy, since the guidelines must be presumed to incorporate all of the statutory factors in the manner Congress wants, which judges are bound to respect. This would make the guidelines more mandatory than before *Booker,* however, and thus clearly unconstitutional.

Whatever merit such an argument may have had, *Kimbrough v. United States*[109] demonstrates that a judge can reject a guideline sentence because it reflects an unsound policy, even if Congress initially made the policy. And the Court's holding is not limited to crack; many other guidelines share a similar pedigree, and similar infirmities, as did the crack guideline.[110] A Congressional pedigree cannot end the judicial inquiry as to whether a guideline recommendation is fair and effective.

Congress can legislate statutory minimums and maximums,[111] and those outer limits bind judges and trump any inconsistent guideline range.[112] Congress can enact specific directives, which bind the Commission to writing guidelines that conform, even if the Commission itself believes the directive does *not* comply with 18 U.S.C. 3553(a).[113] But these directives to the Commission do

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109. 552 U.S. 85 (2007).

110. *See* Amy Baron-Evans & Jennifer Coffin, *Judges are free to disagree with any guideline, not just crack, including guidelines, that are the product of congressional directives to the Commission* (Nov. 9, 2010) *available at* http://www.fd.org/pdf_lib?Free%20to%20Disagree%20with%20Any%20Guideline.pdf.

111. See United States v. Evans, 333 U.S. 483, 486 (1948) (observing that "as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions"); Ex parte United States, 242 U.S. 27, 41-42 (1916) (stating that "the authority to define and fix the punishment for crime is legislative," while the "right . . . to impose the punishment provided by law, is judicial"); United States v. Wiltberger, 18 U.S. 76, 95 (1820) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment."); *United States* v. *Hudson,* 11 U.S. 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.").

112. *See* 18 U.S.C. § 5G1.1. Mandatory minimum penalties do *not* bind the Commission, although it has often acted as if they do. *See Kimbrough,* 552 U.S. at 102-05; Neal v. United States, 516 U.S. 284, 295 (1996).

113. *See United States v. LaBonte,* 520 U.S. 751 (1997) (invalidating as inconsistent with an unambiguous statutory directive part of the career offender guideline, which the Com-

*not* bind judges.[114] When Congress uses the Commission as a conduit for a specific sentence or sentencing increase, the resulting guideline is but one factor to be considered under § 3553(a), and is subject to the same critical analysis as other guidelines.

## CONCLUSION

The guidelines, as originally envisioned in the SRA, were supposed to be the product of a reasoned deliberative process by an independent expert agency in the judicial branch.[115] But often they are not. By arguing that the guidelines are both the product of its own reasoned deliberations *and* the policy choices of Congress, the Commission acted as apologist for the political branches and added a veneer of *post hoc* rationalization to sometimes ill-informed and arbitrary political choices. The warning in Mistretta v. United States[116]—the case that upheld the constitutionality of

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mission had tailored to avoid unwarranted disparity caused by the literal terms of the directive).

114. In commentary in Chapter One, Part A.2 of the *Guidelines Manual*, added in 2008, the Commission appears to suggest that Congress can bind judges to guideline ranges by issuing specific directives to the Commission: "Congress retains the authority to require certain sentencing practices and may exercise its authority through specific directives to the Commission with respect to the guidelines." To support this proposition, the Commission cited a passage from *Kimbrough*. Read in context and in full, however, this passage responds to a government argument that the Anti-Drug Abuse Act "implicitly" required the Commission to write guidelines corresponding to the mandatory minimums. The Court said: "Drawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required the Sentencing Commission to set Guideline sentences for serious recidivist offenders 'at or near' the statutory maximum. See e.g., 28 U.S.C. § 994(h)." *Kimbrough*, 552 U.S. at 571.

The Court did not mean that judges must follow guidelines based on statutory directives. Even the government recognized that this would make the resulting guideline mandatory, and is thus impermissible. *See* Brief of the United States at 29, *Kimbrough v. United States* ("As long as Congress expresses its will wholly through the Guidelines system, the policies in the Guidelines will best be understood as advisory under *Booker* and subject to the general principles of sentencing in section 3553(a)"). *See also* Letter stating position of the United States on the career offender guideline, docketed March 17, 2008, in *United States v. Funk*, No. 05-3708, 3709 (6th Cir.) (the "position of the United States" is that "*Kimbrough*'s reference to [§ 994(h)] reflected the conclusion that Congress intended the Guidelines to reflect the policy stated in Section 994(h), not that the guideline implementing that policy binds federal courts.") (emphasis in original), available at http://www.fd.org/pdf_lib/Funk_ausa_Letter.pdf.

115. The Supreme Court upheld the promulgation of the Guidelines by the Commission against Separation of Powers challenge, "not without difficulty," based in part on a prediction that the Commission would not be enlisted in the work of the political branches, but instead would bring "judicial experience and expertise" to the "neutral endeavor" of sentencing, "the Judicial Branch's own business." *Mistretta v. United States*, 488 U.S. 361, 407-08 (1989).

116. 488 U.S. at 407.

the Commission against a separation of powers challenge—has too often gone unheeded:

The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.

Sentencing judges considering a particular guideline's recommendation cannot change its pedigree, but they should not ignore it.

A contrast between mandatory minimum statutes and the guidelines helps highlight judges' responsibilities under the advisory guidelines. Judges are sometimes required to impose mandatory minimum statutory penalties that they view as excessive and unfair. Many have explained in open court that they disagree with the sentence, but are nonetheless bound by the law.[117] While the excessive sentence must still be imposed, responsibility for the unfair policy is clear to the defendant, his or her family, and the voting public.

Defendants receiving a sentence within a guideline range should be able to expect that it reflects the independent, neutral judgment of the Sentencing Commission, as promised in the SRA, as well as the independent judgment of the sentencing court that the guideline recommendation satisfies the principles and purposes of sentencing, given the facts of the defendant's case. Judges who do not test the guideline recommendation against the statute risk adding another veneer of impartiality to recommendations that may not, in fact, have been developed by the Commission to identify the sentences that are "sufficient, but not greater than necessary" to achieve the purposes of sentencing. More than ever, after *Booker*, sentencing judges are the final guardians of fair, effective, and impartial sentencing.

117. David M. Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons from Republican Judicial Appointees in the Guidelines Era*, 79 U. Colo. L. Rev. 1 (2008); David M. Zlotnick, *Shouting into the Wind: District Court Judges and Federal Sentencing Policy*, 9 Roger Williams U.L. Rev. 645 (2004).