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A Racially Biased Obstacle Course: *Apprendi* Transformed the Federal Sentencing Guidelines into a Series of Judicial Obstacles; Can Shame Reduce the Racial Disparities

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A RACIALLY BIASED OBSTACLE COURSE: *APPRENDI* TRANSFORMED THE FEDERAL SENTENCING GUIDELINES INTO A SERIES OF JUDICIAL OBSTACLES; CAN SHAME REDUCE THE RACIAL DISPARITIES?*

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We are delighted to celebrate the twentieth Anniversary of Apprendi v. New Jersey*, a case that sought to correctly enshrine the jury's role in a criminal trial by requiring the government both to plead in an indictment and prove to a jury beyond a reasonable doubt any facts triggering an increased statutory maximum penalty. As we note in Part I of our Essay, the members of the* Apprendi *majority unfortunately opined five years later in* United States v. Booker *that any facts contained in the Federal Sentencing Guidelines ("the Guidelines") and used to enhance sentences were also elements of an offense, and thus not sentencing factors. They also held that only advisory sentencing guidelines comport with the Fifth, Sixth, and Fourteenth Amendments. This second and erroneous holding has made two of the primary salutary goals of the Guidelines—(1) transparency and (2) elimination of unwarranted racial disparity—much more difficult to achieve. Though, on the bright side, this holding did allow federal district judges to temper the shockingly high sentences suggested by the Guidelines.*

Federal sentencing has become an obstacle course where all parties must jump through hoops for no apparent purpose. In Part II, we offer a solution to address the Guidelines' second goal by using knowledge and shame to solve racial disparities in sentencing. Since these disparities worsen with increasing judicial sentencing discretion, we aim our reform but not our blame at federal judges. We briefly consider and reject algorithms used primarily in bail hearings as the answer to fair sentencing, before landing upon our proposal to publish racial disparities in sentencing for each judicial district. Using shame as a tool to

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regulate behavior is not new, and there are reasons to believe it might be particularly appropriate in this situation.

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INTRODUCTION

Like many good decisions, *Apprendi v. New Jersey*[1] had unintended negative collateral consequences, specifically regarding federal sentencing. But as we note in Part I, *Apprendi* was rightly decided. It seems as clear to both of us now, as it was to one of us twenty years ago,[2] that only a jury can find a fact that requires a judge to sentence an offender above the legislatively enacted statutory maximum penalty contained in the penal code.[3] The unnecessary four opinions within the 5–4 decision in *United States v. Booker*[4] (merits majority, merits dissent, remedial majority, and remedial dissent) took the perfectly sound opinion in *Apprendi* and used it to topple the Federal Sentencing

1. 530 U.S. 465 (2000).

2. *See* Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1467 (2001) [hereinafter *Essential Elements*] (analyzing the then-recent *Apprendi* decision).

3. *See id.* One could argue that since the same legislature that drafted the Model Penal Code drafted the law allowing judges to sentence above the statutory maximum, the legislature is in fact raising the statutory maximum penalty by giving judges this authority. We find that argument unconvincing, primarily because there is more legislative concentration and public awareness of criminal penalties aimed at our citizenry than there is of "sentencing enhancements" aimed at the judiciary.

4. 543 U.S. 220 (2005).

Guidelines ("Guidelines"), in addition to all mandatory state guidelines.[5] In an attempt to appease Justice Breyer and uphold some measure of the Guidelines, the *Booker* Court instead severely damaged both of the primary goals of those Guidelines: mandating determinate and transparent sentencing that each offender's attorney could calculate from the Sentencing Manual[6] and eliminating unwarranted disparities in sentencing—that is, sentencing based upon an irrelevant factor, such as geography, race, gender, or ethnicity. The Supreme Court's attempt to salvage the Guidelines has instead transformed them into a series of bizarre obstacles for both the U.S. Probation and Pretrial Services System ("Probation Department") and judges. On one hand, the Probation Department interviews the defendant and their friends and family, and investigates claims regarding the offense and the offender, in order to determine which Guidelines mitigators and aggravators the defendant will have added to their base offense level. On the other, trial court judges must expend time and effort holding a sentencing hearing and correctly calculating a Guidelines-based sentence just to ignore it. Appellate court judges must then check all calculations as part of procedural review before making essentially standardless decisions on the substantive reasonableness of the sentencing decision.

We discuss in Part II the U.S. Sentencing Commission ("the Commission") Reports, which established that as the Guidelines became more advisory, racial disparity in sentencing increased. We do not blame judges alone for this disparity—it may be that federal prosecutors, mandatory minimum penalties, or the Presentence Reports ("PSRs") are equally at fault.[7] Instead, we identify judges as the actors with the greatest ability to overcome the disparity and therefore place the pressure on them. Sentencing algorithms, like those currently in use to determine bail, are not the answer, as they would simply

5. *Id.* at 245 ("[T]he federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp. IV), [is] incompatible with today's constitutional holding."). The *Booker* Court could have recognized that the Guidelines are not truly mandatory, and therefore the minimum and maximum penalties remain those codified in the U.S. Code. Though called "mandatory," Congress was in truth only giving strong advice to the judiciary, as judges could always depart up or down by articulating a justification.

6. A defendant will serve that sentence in full minus fifteen percent good time, as the Sentencing Reform Act of 1984, Pub L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. and 28 U.S.C.), eliminated parole, as well as de novo appellate review for conformity with the Guidelines. *See id.* §§ 212–213, 98 Stat. at 1988, 2008, 2012.

7. 18 U.S.C. § 3553(b)(1) (requiring a mandatory PSR by the Probation Department and the Bureau of Prisons for each prisoner); *see also* Anthony M. Kennedy, Sup. Ct. Assoc. Just., Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-09-03 [https://perma.cc/524J-UR46] (discussing the undue discretion of prosecutors via mandatory minimum penalties). *See generally* Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reform*, 126 HARV. L. REV. 150, 150 (2012) ("[P]rosecutors [are] unconstrained by judges or juries. Prosecutors' plea offers largely set sentences, checked only by defense lawyers." (footnote omitted)).

reproduce this bias.[8] Accordingly, we propose a method to control the increasing and unwarranted racial disparity in sentencing. This method would utilize the Sentencing Commission to maintain and publish data on racial disparities in sentencing for each district and circuit.[9] This proposal is carefully targeted to avoid stigmatization by refusing to name individual judges and by releasing data in waves to provide the necessary time for reform. Perhaps this information, and the shame accompanying it, could accomplish the goal of equality in sentencing that was surrendered when the Supreme Court turned the mandatory Guidelines into a judicial obstacle course.

I. *APPRENDI*'S EFFECT ON THE FEDERAL SENTENCING GUIDELINES: A JUDICIAL OBSTACLE COURSE

Before getting to the substance of our proposal detailed in Part II, we offer sufficient background supporting our position on sentencing reform and explaining why we should still celebrate the anniversary of *Apprendi*. In Section I.A, we briefly and favorably describe the *Apprendi* decision and outline the good it has rendered so far. We then explain why it need not have inexorably led to the *Booker* decision. The *Apprendi* dissenters' fear that legislatures would circumvent the holding by removing even more elements from criminal offenses proved unfounded. In Section I.B, we will discuss better paths the *Booker* Court could have taken, such as interpreting the Guidelines as advisory or simply allowing facts triggering mandatory minimum penalties and increasing statutory maximum penalties to be decided by the jury. It is highly unlikely that this would have increased the number of jury trials; rather, it would have given defendants more bargaining chips in their plea negotiations with prosecutors, which might have led to shorter sentences and helped curb mass incarceration. Finally, in Section I.C, we lament how *Booker*, in attempting to retain some benefits of the Guidelines binds district and appellate courts with impractical procedures and obstacles. Unfortunately, by shifting fact-finding authority to federal district judges, the Court has actually increased the racial disparity in sentencing. Nevertheless, judges are using their regained discretion to cut the lengths of sentences. But now we need new methods, such as the one proposed in Part II, to eliminate unwarranted disparity in a world of advisory guidelines.

8. *See infra* notes 118–24 and accompanying text.

9. And perhaps even for each judge and prosecutor, though not by name. 28 U.S.C. § 994(w)(3) sets forth the Commission's duty to collect empirical data on sentencing throughout the country and report it to Congress. *See* 28 U.S.C. § 994(w)(3). To view an interactive webpage with the publicly available data from the Commission, see *Interactive Data Analyzer*, U.S. SENT'G COMM'N, https://ida.ussc.gov/analytics/saw.dll?Dashboard [https://perma.cc/83QY-3ZFL].

A. *The Supreme Court Decided* Apprendi *Correctly*

The most surprising thing to us about *Apprendi* was its 5–4 division.[10] It appeared obvious to us that a judge could not, within the bounds of the Fifth, Sixth, and Fourteenth Amendments, sentence a defendant to twelve—or potentially twenty—years in prison when the jury found beyond a reasonable doubt only those elements of a firearm offense necessary for a maximum ten-year sentence.[11] Though the Court made one early mistake in 1988 with *McMillan v. Pennsylvania*[12] (a mistake that it later fixed), since *Apprendi* the federal justice system has possessed a workable and historically accurate bright-line rule to protect defendants' right to a jury's finding of each element of their crime. Under this elements rule, any fact that increases the applicable statutory maximum penalty is an element that must be admitted by the defendant or proven to a jury beyond a reasonable doubt.[13] This elements rule would not prevent a state from amending the penalty for an offense upward or downward based upon current notions of the seriousness of an offense and the moral blameworthiness of the defendant. Throughout the nineteenth century, courts consistently held that any fact other than a prior conviction that increased the statutory maximum sentence was an element of the offense that must be pled in the indictment and submitted to the jury. For instance, prosecutors were required to put before a jury such considerations as the value of stolen property, whether the victim of a murder was a public official, and whether the offense occurred in a certain location such as a church.[14]

10. Apprendi v. New Jersey, 530 U.S. 466, 488 (2000) (holding that any fact that increases the penalty for an offense beyond the prescribed statutory maximum must be admitted by the defendant or submitted to a jury and proven beyond a reasonable doubt).

11. Later cases have applied the elements rule to various situations. *See* United States v. Haymond, 139 S. Ct. 2369, 2373–75 (2019) (holding that a judge cannot make findings of fact in a supervised release revocation hearing that lead to a mandatory sentence higher than the one imposed by the jury for the original offense); S. Union Co. v. United States, 567 U.S. 343, 347–48 (2012) (holding that the jury must make factual findings that are necessary to the calculation of a criminal fine); Ring v. Arizona, 536 U.S. 584, 584 (2002) (holding that because Arizona law permitted the imposition of the death penalty only upon the presence of certain aggravating circumstances, those facts must be found by the jury). *But see* Almendarez-Torres v. United States, 523 U.S. 224, 226–27 (1998) (holding that if the fact at issue was the accused's previous conviction for a serious offense, the jury need not find that fact beyond a reasonable doubt).

12. 477 U.S. 79 (1986). The Court made this mistake by allowing, in a 5–4 decision, a judge to determine a fact triggering a statutory mandatory minimum penalty. *Id.* at 93. Because the judicial finding in *McMillan* that a visible possession of a firearm triggering a five-year mandatory minimum did not exceed the ten-year statutory maximum penalty for the underlying felony of aggravated assault, it did not violate due process. *Id.* at 81–84. This case and *Harris v. United States*, 536 U.S. 545 (2002), which held 5–4 that the *Apprendi* elements rule did not apply to mandatory minimum penalties in firearm offenses, *see id.* at 545, were both overturned by *Alleyne v. United States*, 570 U.S. 99 (2013). *See Alleyne*, 570 U.S. at 103 (holding that *Apprendi*'s elements rule did apply to facts triggering mandatory minimum penalties).

13. *See Apprendi*, 530 U.S. at 490.

14. *Essential Elements*, *supra* note 2, at 1472–73.

In her dissent, which was joined by three other justices, Justice O'Connor argued first that the *Apprendi* majority violated precedent because the Court had traditionally found legislative definitions dispositive.[15] Second—and more troubling—she argued that the *Apprendi* elements rule amounted to a "meaningless and formalistic" rule that could easily be avoided.[16] For example, she argued that the New Jersey legislature could escape the rigors of the jury requirement in *Apprendi* by doubling the sentence for the underlying crime. Finally, Justice O'Connor accurately predicted the application of *Apprendi* to mandatory sentencing guidelines and argued that the majority decision would undermine thirty years of sentencing reform.[17]

We disagree with Justice O'Connor's conclusions. First, we defend *Apprendi* on precedential grounds. It is simply a slightly different incarnation of—and was actually mandated by—two earlier Supreme Court cases: 1975's *Mullaney v. Wilbur*[18] and 1977's *Patterson v. New York*.[19] In *Mullaney*, the Court unanimously held that to be consistent with due process, Maine could not retain "malice aforethought" as an element of murder[20] while simultaneously requiring the jury to presume malice aforethought in all homicides unless the defendant proves by a preponderance of the evidence that they acted upon sudden provocation in the heat of passion.[21] Yet in *Patterson*, the New York legislature removed the traditional element of "malice aforethought" from the definition of murder but allowed the jury to reduce the crime to manslaughter if the defendant proved by a preponderance of the evidence that they acted upon sudden provocation in the heat of passion.[22] Nonetheless, there are factual distinctions between the cases: New York chose that year to adopt the Model Penal Code's expanded affirmative defense of extreme emotional distress

15. *Apprendi*, 530 U.S. at 524 (O'Connor, J., dissenting).

16. *Id.* at 541.

17. *Id.* at 549.

18. 421 U.S. 684 (1975).

19. 432 U.S. 197 (1977).

20. *Mullaney*, 421 U.S. at 693–96 (describing "malice aforethought" as the common-law notion that the defendant acted intentionally but in the heat of passion on sudden provocation by the victim); *see, e.g.*, Comber v. United States, 584 A.2d 26, 41–42 (D.C. App. 1990); People v. Morrin, 187 N.W.2d 434, 438–40 (Mich. Ct. App. 1971).

21. In such a case, the crime dropped to manslaughter and the statutory maximum sentence was significantly lowered. *Mullaney*, 421 U.S. at 703. To see this drop in sentencing, compare Maine's murder statute, ME. REV. STAT. ANN. tit. 17-a, § 1603 (Westlaw through emergency legis. through the 2021 1st Reg. Sess. and Chapter 45 of the 1st Spec. Sess. of the 130th Leg.) (life imprisonment), with Maine's manslaughter statute, *id.* § 1604 (imprisonment for not more than thirty years).

22. *Patterson*, 432 U.S. at 210 (holding, in a 4–3 decision that while a state may not instruct the jury to conclusively presume an element of an offense, the legislature may transform that element into an affirmative defense which the defendant must prove by a preponderance of the evidence). For example, compare New York's murder statute, N.Y. PENAL LAW § 125.27 (McKinney 1987), creating a class A-1 felony allowing a sentence of fifteen years to life imprisonment, with New York's manslaughter statute, *id.* § 70.00(2)(b), creating a class B felony allowing a sentence of eight to twenty-five years imprisonment.

(rather than the stricter and much more difficult to establish common-law heat-of-passion defense) along with twenty-five other new affirmative defenses that benefited defendants.[23] Thus, these new defenses shifted the burden of proof to the defendant but still required the jury to find that the facts supporting these defense elements existed. This was clearly not a case of a legislature trying to avoid a jury—most of the defenses were new and therefore had never been an element of any offense. These defenses were essentially a compromise: New York gave criminal defendants new defenses but required these defendants to prove the elements of such themselves because it was the defendants who had most of the necessary information. At their core, both cases required that a jury find elements of an offense, a holding fully defined later in *Apprendi*.

Both *Mullaney* and *Patterson*, like *Apprendi*, were correctly decided. The majority in *Patterson* shared a variant of the concern raised by the dissenters in *Apprendi*: "This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard."[24] As the *Patterson* opinion reveals, Justice O'Connor was technically correct in her A*pprendi* dissent: all a legislature must do to avoid reversal under *Mullaney* or *Apprendi* is to eliminate the element of malice aforethought—or any other traditional element of an offense—and transfer it into an affirmative defense or advisory sentencing factor.

One could go absurdly far with this kind of reasoning. For example, Texas could enact a statute making it a twenty-year felony to enter another person's house. If the defendant proved beyond a reasonable doubt to the jury or judge that they were invited, the sentence would drop to ten years; if the defendant proved they did not injure anyone, the penalty would decrease to five years; and if the defendant proved they brought a nice bottle of cabernet, all charges would be dismissed.

So, what is to stop a legislature from creating the kind of statute listed above? Professors Nancy King and Susan Klein attempted to explain as a historical matter why the constitutional line had not been crossed in *Patterson*, and yet the Sixth Amendment was violated by somewhat similar legislative

23. MODEL PENAL CODE § 210.3(1)(b) (AM. L. INST. 1962) (lowering murder to manslaughter when under extreme mental or emotional disturbance); *see* Daniel Shapiro, *Affirmative Defenses After* Mullaney v. Wilbur*: New York's Extreme Emotional Disturbance*, 43 BROOK. L. REV. 171, 191 (1976) (listing some of these twenty-five defenses—such as duress, renunciation, entrapment, claim of right, self-defense, defendant-abductor was relative of victim, and reasonable belief that the parties were unmarried—as defenses to bigamy and adultery charges).

24. *Patterson*, 432 U.S. at 210. Justice Powell, in his dissent, suggested a two-part test to determine whether the constitutional limit had been reached: (1) was there a substantial difference in punishment and stigma, and (2) has the fact in question historically been held so important that it must be an element of that particular crime. *Id.* at 225–27 (Powell, J., dissenting).

conduct in *Mullaney* and *Apprendi*.[25] Those authors' multi-factor test hinges on considerations including tradition; the historical elements of a lesser offense versus an aggravated offense; the distinction at common law between a misdemeanor and a felony; an evaluation of whether the penalty imposed is cruel and unusual or excessive under the Eighth Amendment; the allegations required by a grand jury; a comparison between the penalty range specified for the offense by the legislature and the penalty that can be imposed upon a finding of fact at sentencing; and a thorough examination of a public welfare offense carrying a felony penalty or any crime that dispenses with the requirement of mens rea or a voluntary act.

But, in fact, electoral politics is the most effective way to police the constitutional line between an element of an offense and some other extraneous factor.[26] No rational legislature would draft the above hypothetical statute. Representatives could easily imagine themselves or their friends violating it. The statute offends common-sense notions of justice, and whatever the statute accomplishes in terms of transforming elements into sentencing factors is not worth its potential injustices. The fact that each legislature would have to consider each crime in its code and assign the proper penalty for the particular elements included in each statute is itself quite a deterrent both because of the task's time-value cost and an expected difficulty building the necessary consensus to enact the reform.[27] Legislatures have therefore not amended statutes to circumvent *Apprendi*. At least in the federal system, Congress did not react to *Apprendi* at all. Federal prosecutors treat those facts in federal statutes subject to an *Apprendi* challenge as newly created elements which must go to the jury for a finding beyond a reasonable doubt. These prosecutors must now prove to the jury any fact that would statutorily increase the statutory maximum penalty or trigger a mandatory minimum penalty. These facts include the value defrauded in fraud cases; the drug type and quantity in cases under

25. *Essential Elements*, *supra* note 2, at 1536–42 (proposing due process limits in substantive criminal law through a multi-factor test).

26. *See* Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1557 (arguing that the final resolution of the power of the nation over the states should be left to the political branches, not the judiciary).

27. Every time Congress has appointed a committee to rationalize the U.S. Code, it ends up for naught. *See, e.g.*, NAT'L COMM'N ON REFORM OF FED. CRIM. L., FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS: A PROPOSED NEW FEDERAL CRIMINAL CODE (TITLE 18, UNITED STATES CODE), at xii–xiii (1971) (suggesting that Congress define the elements of each federal offense—such as robbery, extortion, or fraud—and then list all of the bases under which there was jurisdiction); *see also* Michael Edmund O'Neill & Linda Drazga Maxfield, *Judicial Perspectives on the Federal Sentencing Guidelines and the Goals of Sentencing: Debunking the Myths*, 56 ALA. L. REV. 85, 102–03 (2004) (discussing the different perceptions among sentencing stakeholders, such as prosecutors having a higher internal consensus than district court judges on the relative importance of sentencing goals).

the Controlled Substances Act;[28] the seriousness of an assault on a federal officer in federal assault cases; the types and use of firearms in relation to violent offense cases; and many more.[29]

It seems to us even less likely now than when *Apprendi* was decided that Congress would attempt to evade the Court's holding. Draconian sentences imposed before *Apprendi* and *Alleyne v. United States*,[30] with no input from a jury, appear too high to be just, especially in a world where many voters abhor mass incarceration and disparate racial incarceration and sentences are finally getting deserved attention.[31] Since there seems to be no movement to evade *Apprendi*, and because there are so few jury trials,[32] *Apprendi*'s elements rule actually gives defendants an additional bargaining chip during their plea negotiations.[33] Accordingly, we may continue to celebrate *Apprendi*.

28. Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended in scattered sections of 21 U.S.C.).

29. *See Essential Elements*, *supra* note 2, at 1547–53 app. B (collecting federal charges subject to *Apprendi* challenges).

30. 570 U.S. 99 (2013); *see supra* notes 11–12 and accompanying text.

31. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN AN AGE OF COLORBLINDNESS (10th Anniversary ed. 2020) (detailing the racial disparities embedded within mass incarceration and acknowledging that there is a growing number of advocates for upholding the basic civil rights of incarcerated men and women).

32. *See* John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR.: FACT TANK (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ [https://perma.cc/P9R6-ZKQ4] (stating that only two percent of defendants gamble the dice and risk paying list price for their offenses by insisting on trial). COVID-19 will likely further decrease the percentage of jury trials, but more importantly, all the carrots and sticks in prosecutors' arsenal will continue to diminish the number of trials. This will occur because a defendant aware of the draconian sentence they might receive if they actually assert any of their trial rights will likely accept any reasonable plea offer. *See* Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73 *passim* (2015) (noting that many prosecutors now demand not only the waiver of all trial rights but also appellate rights, the right to collaterally attack their conviction and sentence, and that some even demand waiver of the right to effective assistance of counsel as boilerplate in every plea offer—on a take-it-or-leave-it basis); *see also* Lafler v. Cooper, 566 U.S. 156, 170 (2012) (stating that "criminal justice today is for the most part a system of pleas, not a system of trials").

33. Some scholars argue that *Apprendi*'s elements rule actually hurts many criminal defendants by depriving them of sentencing hearings—often the only hearings they are likely to get—because if they risk trial, they lose acceptance-of-responsibility reductions and risk subjecting themselves to perjury and recidivism while also exposing themselves to other enhancements available under the Guidelines. *See, e.g.*, Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1100–01 (2001). This argument is unpersuasive because every ounce of the prosecutor's coercive power to force a guilty plea existed before *Apprendi*, just as it still exists after. The only new bargaining chip created by *Apprendi*—raising the burden of proof on aggravating facts—is given unequivocally to the defendant. Nancy J. King & Susan R. Klein, Apprendi *and Plea Bargaining*, 54 STAN. L. REV. 295, 295–96 (2001). This is not to contest that the prosecutor has inordinate power to encourage or perhaps coerce a plea deal. But forcing the government to prove one additional element beyond a reasonable doubt should cause a plea offer to be slightly more favorable to the defendant.

B. Booker*'s Nonsensical and Contradictory Merits and Remedial Majority Opinions*

Unfortunately, the Supreme Court later relied in part upon the *Apprendi* decision to wreak havoc on sentencing reform. Regardless of whether *Apprendi* or *Booker* ultimately caused the problem, reform measures like the one we propose in Part II can succeed in fixing the error. Before the enactment of the Sentencing Reform Act of 1984 ("SRA"),[34] sentencing was essentially lawless.[35] Most federal sentences had vast ranges—zero to twenty years or zero to life, for example.[36] The sentencing judge could select anywhere within that range based upon a preponderance-of-the-evidence standard and without employing the Federal Rules of Evidence.[37] Such judges based their decisions on a myriad of factors, including the character of the defendant or the facts of the case, no matter whether those factors were reasonable and shared by other judges or were idiosyncratic to a particular judge.[38] State and federal judges could impose sentences ranging from probation to the statutory maximum based upon factors they considered important, such as recidivism, remorse, injury to a victim, use of a weapon, judicial philosophy or ideology, judicial morality and policy preferences, and even community standards prevalent in the particular judge's

34. Pub L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. and 28 U.S.C.). The Act was upheld against a constitutional challenge based on anti-delegation grounds in *Mistretta v. United States*, 488 U.S. 361, 412 (1989). The Commission explained that it initially based the Guidelines on empirical analysis of past sentences. *See* U.S. SENT'G COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 16 (1987).

35. Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 1 (1972); Peter W. Low, Book Review, 87 HARV. L. REV. 687, 687 (1974) (reviewing MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973)) ("Sentences are generally thought to be the special prerogative of the trial judge or, in some states, the trial jury. Principle, in the form of stated norms to guide or control individual decisions, is nowhere to be found in traditional legal sources.").

36. Some examples include possessing, using, or carrying a firearm during a crime of violence or drug trafficking offense, 18 U.S.C. § 924(c) (imposing a mandatory minimum penalty of term from five years to a maximum of life), and mail fraud, *id.* § 1343 (imposing the penalty of a term from zero- to thirty-years imprisonment).

37. Apprendi v. New Jersey, 530 U.S. 466, 473–74 (2000).

38. Williams v. New York, 337 U.S. 241, 244 (1949) (raising defendant's sentence from life imprisonment as recommended by the jury to death based upon judicial findings that the defendant possessed "a morbid sexuality" and was a "menace to society"). The Court upheld the sentence in *Williams* both because the statute in New York designated death as the maximum penalty for first-degree murder (the charge found by the jury) and because relying on extraneous information to inform the death penalty did not violate the Due Process Clause. *See id.* at 252. Prior to 1987, when the Guidelines were implemented, federal judges did not need to provide any reason whatsoever for a sentence to be upheld, so long as it was within the minimum and maximum penalties provided by Congress or the state legislature. *See* Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 693 (2005) [hereinafter *Return of Federal Judicial Discretion*] ("America . . . g[ave] state and federal judges the authority to impose any sentence they chose within the very wide penalty range established by the legislature."); Kate Stith & Josè A. Cabranes, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 80 (1998) (finding that the doctrine of nonreviewable judicial sentences prevailed prior to the implementation of the Guidelines).

geographic location. At least one study found a significant differential in sentence length based upon whether the judge had "eat[en] a meal."[39]

Due to their sentencing experience, some judges believed they possessed well-honed and accurate intuitions about which offenders were truly remorseful and less responsible versus those who were the lying leaders of the conspiracy, even across socioeconomic, religious, gender, and racial lines.[40] Furthermore, some also subscribed to their own ideology regarding which offenses were truly serious and whether a particular offense was less worthy of punishment because the victim was careless.[41] Outside observers struggled to determine exactly why a particular sentence was imposed because a judge did not have to publicly state the reasons for such a sentence. Additionally, there was virtually no opportunity to appeal except, perhaps, in the rare instance where a judge admitted that they determined a sentence based explicitly upon the content of an offender's speech,[42] vindictively because the offender exercised their right to appeal,[43] prejudicially because of the color of the offender's skin,[44] or disproportionately because the sentence was so excessive it offended the Eighth Amendment's proportionality requirement.[45]

This system changed with the enactment of the SRA,[46] which transferred power over federal criminal sentencing from judges to the newly created Commission.[47] The laudable goals of the SRA were to restrict uncontrolled judicial discretion, allow for appellate review, eliminate unwarranted sentencing disparity, and make sentences transparent and determinate.[48] But a more blameworthy intent was to increase federal sentences full scale by abolishing parole, reducing probation, and erasing rehabilitation as a purpose of the

39. Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. U.S. 6889, 6892 (2011).

40. Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1493 (2008).

41. U.S. SENT'G GUIDELINES MANUAL § 5K2.10 (U.S. SENT'G COMM'N 2018) (allowing for downward departure where the victim's conduct contributed to provoking the offense).

42. *See* Wayte v. United States, 470 U.S. 598, 606 (1985).

43. North Carolina v. Pearce, 395 U.S. 711, 725 (1969).

44. United States v. Armstrong, 517 U.S. 456, 458 (1996).

45. Harmelin v. Michigan, 501 U.S. 957, 961 (1991). For more discussion on excessive and cruel and unusual punishments, see generally William W. Berry III, *The Sixth and Eighth Amendment Nexus and the Future of Mandatory Sentences*, 99 N.C. L. REV. 1313 (2021).

46. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

47. *See id.* §§ 212(a)(2), 217(a), 98 Stat. at 1990, 2017 (codified at 18 U.S.C. § 3553(a)(4), (b) and 28 U.S.C. § 991). The power to determine sentences soon landed, for a variety of reasons, in the laps of federal prosecutors. Susan R. Klein & Sandra Guerra Thompson, *DOJ's Attack on Federal Judicial "Leniency," the Supreme Court's Response, and the Future of Criminal Sentencing*, 44 TULSA L. REV. 519, 537 (2009) [hereinafter *DOJ's Attack*].

48. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4–5 (1988) (outlining the position of Justice Breyer, one of the original sentencing commissioners); O'Neil & Maxfield, *supra* note 27, at 88–89.

penitentiary. The only way for the Sentencing Commission to rationalize sentencing in a manner that would account for the slew of mandatory minimums, consecutive penalties, and "three strikes laws" enacted by Congress in the 1970s and 1980s was to integrate those laws into the Guidelines by raising all sentences.[49] The Commission was thus created as an administrative body within the judicial branch to write the Guidelines prescribed by the SRA. The Commission created the first Guidelines Manual by 1987,[50] basing the initial Guidelines on an empirical analysis of past sentences after collecting and digesting over 10,000 PSRs and 100,000 federal convictions from actual cases over a two-year period. Following its marching orders from Congress, the Commission imposed sentences that were much longer than those in any state court and universally recognized as shockingly high. On a positive note, the Commission devised mandatory guidelines for sentencing to promote fairness goals like "uniformity," which meant eliminating unwarranted disparities in sentencing similarly situated defendants by allowing considerations of factors such as geography, race, gender, socioeconomic status, and judicial philosophy. These mandatory guidelines helpfully provided transparent, determinate sentences that an attorney could calculate by reading the indictment.[51]

The Court's clear and correct elements rule from *Apprendi* need not have eliminated the Guidelines. But the die was cast a year earlier when the Court held in *Blakely v. Washington*[52] that those presumptive Guidelines factors that increased the penalty beyond what was listed in the state of Washington's penal code as the statutory maximum for an offense were subject to *Apprendi*'s elements rule.[53] *Booker* declared—through two conflicting and in fact contradictory majority opinions—that the Guidelines violated the Sixth Amendment elements rule as described in *Apprendi*. We will briefly describe

49. The Guidelines were sponsored by a strange conglomeration of Democratic and Republican senators (co-sponsored by Senator Strom Thurmond, who wanted harsher penalties, and Senator Edward Kennedy, who bemoaned the sentencing disparity). *See* SEN. REP. NO. 98-225, at 38 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3220; U.S. Sen'g Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, 17 FED. SENT'G REP. 269, 270–72 (2005) (explaining reasons for raising sentences for most categories of crimes)

50. The Guidelines became effective on November 1, 1987. U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A (U.S. SENT'G COMM'N 2018).

51. *See* Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 229–30 (2002). It would also help to have the latest Guidelines Manual and a copy of the client's PSR.

52. 542 U.S. 296 (2004).

53. *See id.* at 303–04 (holding that the statutory maximum for *Apprendi*'s elements rule is the sentence the judge "may impose without any additional findings" (emphasis omitted)). Thus, the Court found that Washington sentencing guidelines violated the Sixth Amendment because those presumptive guideline ranges were less than the statutory maximums in Washington's penal code. *Cf. id.* at 304 ("The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea.").

the *Booker* opinion, and then examine its effects on the Guidelines' laudable goals.

The Court in *Booker* provided four separate opinions.[54] The five-Justice merits-majority opinion, authored by Justice Stevens and joined by Justices Souter, Thomas, Scalia, and Ginsburg,[55] held that mandatory guidelines as described in the Guidelines violated the Sixth Amendment.[56] The defendant in *Booker* was found by the jury to have possessed 92.5 grams of crack cocaine. But at the sentencing hearing, the judge found by a preponderance of the evidence that the defendant also possessed the additional 566 grams of crack cocaine held by his codefendant.[57] The judge thus sentenced him to a term almost ten years longer than the term allowed by the jury. Justice Stevens, along with the same members of the majority in the *Apprendi* and *Blakely* decisions, held that sentencing the defendant to almost ten years longer than the jury's findings permitted was a constitutional violation.[58] Justice Stevens held that the true statutory maximum penalty is the one written in the Guidelines Manual and not the one stated in the U.S. Code.[59] Such a ruling could be required by *Apprendi* only if the statutory maximum penalty for each offense was found applicable to the defendant based on a 258-box sentencing table produced by the Commission,[60] rather than the penalty provided for each offense in the U.S. Code.

The four-member merits-minority opinion consisted of Chief Justice Rehnquist and Justices Breyer, Kennedy, and O'Connor. The minority held, consistent with its dissents in *Apprendi* and *Blakely*, that since the Sixth Amendment does not require jury fact-finding for sentencing factors, there is

54. United States v. Booker, 543 U.S. 220 (2005).

55. Or the "Notorious RBG," as she was fondly nicknamed. Allison Davis, *NYU Law Student Is Making Ruth Bader Ginsburg a Meme*, CUT (June 27, 2013), https://www.the cut.com/2013/06/NYU-law-student-is-making-bader-ginsberg-a-meme.html [https://perma.cc/S67W-TCH9].

56. *Booker*, 543 U.S. at 248.

57. *Id.* at 227.

58. *See id.* at 227–29.

59. *See id.* at 227 ("Sentencing Guidelines required the District Court Judge to select a 'base' sentence of not less than 210 nor more than 262 months in prison."). To view the appropriate provision in these circumstances, see 21 U.S.C § 846.

60. *See* U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A, sent'g tbl. (U.S. SENT'G COMM'N 2018). The defendant's place on the vertical axis, consisting of forty-three offense levels, is controlled by which offense(s) the prosecutor charged. SEE U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A. To maintain federal sentencing as a "real offense" and not "charged offense" system, the judge may consider "relevant conduct" (what the defendant actually did according to the PSR, not what the prosecutor had charged to the jury). *Id.* This was done to keep sentencing authority in the hands of the Commission, rather than allowing the prosecutor to determine the appropriate sentence by which offenses they charged (ones with or without mandatory minimums, ones that do or do not require concurrent sentences, and so on). The judge also had the power to depart from the Guidelines for good reason, though that became more difficult after the Feeney Amendment to the PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 U.S.C. and 34 U.S.C.). *See* U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A.

nothing unconstitutional about a mandatory sentencing guideline.[61] By the minority's reasoning, *McMillan* was correct and *Apprendi* was wrong.

In the five-justice remedial-majority opinion, the four *Apprendi* dissenters (led by Justice Breyer and joined by Justices Ginsburg, O'Connor, Kennedy, and Chief Justice Rehnquist) held that the remedy for the alleged constitutional violation found by the majority was not to treat the Guidelines facts that enhance sentences as elements of the offense, but rather to make the Guidelines advisory, so that the statutory maximums were what was provided by the U.S. Code.[62] To accomplish this, they "severed and excised" two provisions of the statute: (1) 18 U.S.C. § 3553(b)(1), which required the court to sentence within the Guidelines range (absent extraordinary circumstances that justified a departure) and (2) 18 U.S.C. § 3742(e), which required *de novo* appellate review of a sentencing judge's failure to comply with the Guidelines.[63]

Justice Stevens, though here writing the remedial-dissent opinion, would fix what he conceded was a constitutional violation by sending findings regarding type and quantity of controlled substances—at least ones that increased the statutory maximum available under the Guidelines—to the jury for a finding beyond a reasonable doubt.[64] He believed that the mandatory nature of the Guidelines could not be severed from the statute as a whole.[65]

Booker was indeed a "two-headed monster and conceptual monstrosity" as described by Professor Douglas Berman.[66] *Booker*'s two majority and two dissenting opinions were contradictory and peculiar. It is strange that *Booker* remedied the dearth of jury fact-finding (itself historically necessary to protect suspects from one government official's decision)[67] by taking even more facts away from the jury and giving them to the same lone government official: the judge. Thus, after *Booker*, in the rare instance where a jury hears a criminal case, it will have exactly the same authority to find facts as before *Booker*. That is, it will only determine the elements listed in the U.S. Code and not the more significant ones listed in the Guidelines Manual. *Booker* thus succeeds not in protecting the jury's role but in diminishing the power of the Commission, leading to more judicial discretion and therefore more unwarranted disparity in sentencing.

61. *Booker*, 543 U.S at 326 (Breyer, J., dissenting).

62. The same Justices who wrote the remedial-majority opinion in *Booker* are the same Justices who wrote the dissent in *Apprendi*. *See id.* at 244–45 (remedial-majority opinion); Apprendi v. New Jersey, 530 U.S. 466, 523 (O'Connor, J., dissenting).

63. *Booker*, 543 U.S. at 245–46.

64. *See id.* at 272–74 (Stevens, J., dissenting).

65. *Id.* at 272.

66. Douglas A. Berman, *Conceptualizing* Booker, 38 ARIZ. ST. L.J. 387 (2006).

67. *See* Carissa Byrne Hessick, *The Sixth Amendment Sentencing Right and Its Remedy*, 99 N.C. L. REV. 1195, 1233–35 (2021).

We believe that the Court could have prevented *Apprendi*'s negative effect on the Guidelines entirely either by admitting that they were not truly mandatory, and thus the real statutory minimum and maximum sentences remain the ones printed in the U.S. Code for each offense; or by sending the facts that increased the mandatory minimum penalty to the jury for a finding beyond a reasonable doubt. First, one can argue that the Guidelines were already advisory because judges could depart upward or downward from them and in fact were encouraged to do so in instances where the judge found "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[68] Moreover, a judge can depart downwards, even from an ostensibly mandatory minimum penalty, if they apply the safety valve[69] or if the government moves for a downward departure based upon the defendant's substantial assistance to authorities.[70]

Alternatively, it would have been wiser for the *Booker* merits-majority opinion to apply *Apprendi* to the Guidelines and then to have simply allowed these aggravating factors to go to the jury for a decision based on the beyond-a-reasonable-doubt standard, especially since most matters settle before trial anyway. The *Booker* Court would, like the *Apprendi* Court, have given several more bargaining chips to the defendant during their plea negotiations, which in today's context of extraordinarily high sentencing terms could only be an improvement. This is essentially an endorsement of Justice Stevens's position in his remedial dissent, though we would have been happier with a merits-majority opinion holding that the Guidelines were already advisory.

Why did the U.S. Supreme Court propound these odd decisions where the remedy does nothing to resolve the constitutional issue and in fact may make it worse? In other words, why did the celebrated liberal icon, Justice Ginsburg, change her vote? We believe it was at least partly to mollify Justice Breyer. In fact, *Booker* was Justice Breyer's fifth attempt to make the Guidelines advisory.[71] He was one of the architects of the Guidelines and ironically greatly

68. 18 U.S.C. § 3553(b)(1); U.S. SENT'G GUIDELINES MANUAL § 5K2.0 (U.S. SENT'G COMM'N 2018).

69. § 3553(f) (providing mechanism for downward departure for certain drug offenses); U.S. SENT'G GUIDELINES MANUAL § 5C1.2 (U.S. SENT'G COMM'N 2018). Safety valve reductions have been expanded beyond drug offenses in the recent enactment of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18 U.S.C. and 34 U.S.C.).

70. 18 U.S.C. § 3553(e); U.S. SENT'G GUIDELINES MANUAL § 5K1.1

71. The first four attempts were (1) drafting them as advisory in his role as chief counsel to the Senate Judiciary Committee in the late 1970s; (2) recommending advisory guidelines when, as a First Circuit judge, he was an original member of the Commission; (3) drafting appellate opinions interpreting the Guidelines as advisory while on the First Circuit; and (4) signing on to *Koon v. United States*, 518 U.S. 81 (1996). *See Return of Federal Judicial Discretion*, *supra* note 38, at 717–19 (2005) (detailing Justice Breyer's choices).

preferred an advisory role for the Guidelines (as well as guidelines that allowed the judge to sentence based upon real but uncharged offenses). The collegial environment among the Justices may explain the Court's reasoning. Supreme Court clerks and journalists describe Justices as one big happy family, despite their significant ideological differences and occasional scathing dissents.[72] For example, Justice Scalia often took "the Notorious RBG," may they both rest in peace, out to the opera.[73] They frequently ate lunch and attended parties together.[74] As previously chronicled, Justice Breyer was committed to retaining the Guidelines in some form because he had devoted years of his life to their enactment.[75] The Court helped him in a similar manner years earlier by reversing a lower court's decision on appellate review, holding that a sentencing court's decisions to depart should be reviewed on appeal for abuse of discretion instead of de novo.[76] Perhaps the Court did this because they are a civil and compassionate lot—at least when it comes to the eight people they see every day—and did not want to tromp on Justice Breyer's reputation and life's work.

In a post-*Booker* world, judges can still depart from the Guidelines but can also issue variances (entirely non-Guidelines sentences) based upon many of the factors actually discouraged by the Commission, such as family ties, a disadvantaged childhood, substance abuse, and prior good acts.[77] Since the

72. *See* Mark C. Miller, *Law Clerks and Their Influence at the US Supreme Court: Comments on Recent Works by Peppers and Ward*, 39 LAW & SOC. INQUIRY 741, 748 (2014) (describing how "[t]he clerks often refer to their justice as a 'mentor' and the law clerks as a 'family,' and they often describe the relationship as 'intimate' and 'personal'").

73. *See* Irin Carmon, *What Made the Friendship Between Scalia and Ginsburg Work*, WASH. POST (Feb. 13, 2016, 11:55 PM), https://www.washingtonpost.com/posteverything/wp/2016/02/13/what-made-scalia-and-ginsburgs-friendship-work/ [https://perma.cc/MSP8-YAWN].

74. *Id.*

75. *DOJ's Attack*, *supra* note 47, at 537. As one of us suggested in a previous article, the Court upheld the constitutionality of the guidelines in *Booker* not just to assist Justice Breyer in maintaining the Guidelines but, more importantly, in order to return the power over sentencing that Congress had transferred to the Department of Justice back to sentencing judges. *Id.*

76. *Koon*, 518 U.S. at 91.

77. Many of these considerations are actually banned by the Guidelines Manual. *See* U.S. SENT'G GUIDELINES MANUAL § 5H1.6 (U.S. SENT'G COMM'N 2018) (showing that "family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted" and are also not relevant in cases involving kidnapping of a minor, obscenity, sexual abuse, exploitation, and trafficking); U.S. SENT'G GUIDELINES MANUAL § 5H1.2 ("Education and vocational skills are not ordinarily relevant in determining whether a [downward] departure is warranted."); U.S. SENT'G GUIDELINES MANUAL § 5H1.5 ("Employment record is not ordinarily relevant in determining whether a departure is warranted."); U.S. SENT'G GUIDELINES MANUAL § 5H1.4 ("Drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure."); U.S. SENT'G GUIDELINES MANUAL § 5H1.10 (outlining that race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence."); U.S. SENT'G GUIDELINES MANUAL § 5H1.11 ("Civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant."); U.S. SENT'G GUIDELINES MANUAL § 5H1.12 ("Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted.").

Booker Court struck 18 U.S.C. § 3553(b), requiring application of the Guidelines in determining a sentence, federal district judges now rely upon 18 U.S.C. § 3553(a),[78] which asks them to consider the "nature and circumstances of the offense and the history and characteristics of the defendant," as well as the need for the sentence to: reflect the seriousness of the offense and to promote respect for the law; afford adequate deterrence; protect the public from further crimes by the defendant; provide the defendant "with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner"; consider the other kinds of sentences available; and "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[79] These provisions throw in everything but the kitchen sink and allow judges to justify any sentence with the mandatory minimum and statutory maximum provided by Congress. This much Court-sanctioned discretion allows a sentencing judge to do what they will in essentially every case. As Justice Scalia stated in his concurrence in *Rita v. United States*,[80] any substantive reasonableness review will result in some sentences being upheld only on the basis of additional judge-found facts, which violates *Booker*.[81]

C. Booker*'s Application of* Apprendi *to the Guidelines Has Made the Elimination of Unwarranted Racial Disparity More Difficult*

We are not convinced that the Court intended to return to the lawless days of pre-Guidelines sentencing. Instead, the Court hoped that interpreting the Guidelines as advisory with teeth in the form of appellate review would be a sufficient roadblock preventing the return of this unwarranted disparity in sentencing, especially one based upon race, gender, socioeconomic status, geography, and judicial philosophy. Alternatively, the Court believed that Congress would fix the problem and was as shocked as the rest of us scholars when it did not.[82]

78. 18 U.S.C. § 3553(a).

79. *Id.*

80. 551 U.S. 338 (2007).

81. *Id.* at 368–70 (Scalia, J., concurring).

82. Suggestions included that Congress retain the now advisory Guidelines but impose a series of mandatory minimum penalties for most offenses, *see* Judge William Pryor, *Returning to Marvin Frankel's First Principles in Federal Sentencing*, 29 FED. SENT'G REP. 95, 98 (2016) (speaking to the American Law Institute as Chair of Sentencing Commission), that Congress reinstate the mandatory nature of the Guidelines, increase penalties, and require the few remaining enhancements to go to the jury, *see* Nancy J. King & Susan R. Klein, *Beyond* Blakely, 16 FED. SENT'G REP. 316, 325–26 (2004), and that Congress reinstate the mandatory Guidelines increase all sentences to life, and then require judges to decrease sentences based upon lack of enhancements, *id.*

While advisory sentencing guidelines may serve as "a reminder or mental anchor"[83] by providing judges a starting point for their sentencing determinations, such guidelines sufficiently cabin judicial discretion. This explains why the mean sentence for a federal felony has decreased from fifty-four months at the time of *Booker* to forty-two months in 2019.[84] Judges for the most part disliked the mandatory Guidelines, particularly after the Feeney Amendment to the PROTECT Act,[85] which was enacted to blacklist them for any perceived leniency, and believed that Guidelines-based sentences were staggeringly high.[86] It also explains, as detailed in Section II.A, why adherence to the Guidelines fell from seventy percent when they were mandatory to forty-nine percent in 2017.[87] Federal district judges were happy to exercise discretion when it returned to them, mostly to individuate sentences and decrease sentencing length.

The *Booker* Court attempted to create stricter a stricter version of the Guidelines by providing a new substantive "reasonableness" mechanism for sentencing appeals.[88] However, this has increased the workload of every player in the criminal justice arena for an appellate review that is largely unhelpful. A federal district judge—or more accurately the Probation Department—must properly calculate the Guidelines. But the judge can sentence however they wish—within mandatory minimums and statutory maximums—so long as they provide a coherent statement of why they chose a particular sentence. Because mandatory Guidelines cannot be enforced in conformity with the Fifth and Sixth Amendments, any truly meaningful appellate review would be unconstitutional. Thus, this whole process is entirely unhelpful.

83. Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 779–80, 796 (2008).

84. U.S. SENT'G COMM'N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 219 (2019) [hereinafter 2019 ANNUAL REPORT].

85. Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 U.S.C. and 34 U.S.C.).

86. *See* MICHAEL TONRY, SENTENCING MATTERS 72 (1998) (calling the federal system "the most controversial and disliked sentencing reform initiative in U.S. history"). *See generally* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227–66 (1993) (providing legislative history and political realities of enacting sentencing reform pre- and post-FSG). The mandatory Guidelines transferred power from federal district judges to prosecutors, and *Booker* transferred much of it back again. *Return of Federal Judicial Discretion*, *supra* note 38, at 696. For discussion of the Feeney Amendment, see *infra* notes 144–49 and accompanying text.

87. *See* 2019 ANNUAL REPORT, *supra* note 84, at 219.

88. *See* Rita v. United States, 551 U.S. 338, 347 (2007) (holding that appellate courts may presume within-Guidelines sentences are reasonable); Gall v. United States, 552 U.S. 38, 47 (2007) (holding that appellate courts may not require extraordinary circumstances or rigid mathematical proportionality to review justifications for variances from the Guidelines); Kimbrough v. United States, 552 U.S. 85, 109 (2007) (holding that sentencing judges have leeway to use their own policy preferences as sentencing factors if no procedural errors are committed, even when those judges disagree with the Commission).

One wonders where the *Booker* Court got this authority. To our knowledge, there are no canons of statutory interpretation that allowed the Court to strike selected portions of a federal statute as unconstitutional and then create and impose entirely new judicial requirements that attempt to replicate the unconstitutional sections as closely as possible.[89] Likewise, the Court has no supervisory power over the administration of criminal justice broad enough to create new appellate authority and standards of review.[90] The creation of substantive reasonableness review provides a method for the Court to wink and nod at federal judges to make sure they realize that the Guidelines are not truly and completely advisory. Instead, the Probation Department must correctly calculate the Guidelines base offense and grounds for departure in each case, even where a judge intends to reject the Guidelines in imposing a sentence. Judges will be reversed if they make any procedural missteps or if an appellate court believes that the judge's sentence is not substantively reasonable. In short, the sentencing and appellate judges must move through a judicial obstacle course before they can truly treat an Guidelines range as advisory.

The Court created a monster that contradictorily attempts to retain the mandatory nature of the Guidelines as much as possible while still abiding by the Sixth Amendment. Because this balance is impossible unless the Court overturns *Apprendi* or *Booker*, the criminal justice system is left with the incoherent sentencing structure under which it suffers today. Because we can no longer cabin judicial discretion within advisory Guidelines, we need

89. *But see* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 596 (1992) (hypothesizing that the Court's use of canons and statutory construction is "one means by which the Court expresses the value choices that it is making or strategies it is taking when it interprets statutes," which suggests that the Court is no stranger to making decisions based on policy preferences nor is the Court a stranger to inventing its own authority).

90. For a discussion of the Court's largely unsuccessful attempt to use its supervisory power over the administration of justice, see Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1434–35 (1984) (maintaining that "the supervisory power doctrine has blurred the constitutional and statutory limitations on the authority of the federal courts and has fostered the erroneous view that the federal courts exercise general supervision over federal prosecutors and investigators" and that "there is no statutory or constitutional source of authority broad enough to encompass all of the supervisory power decisions."). *See also* Bank of Nova Scotia v. United States. 487 U.S. 250 (1988) ("In the exercise of its supervisory authority a federal court 'may, within limits, formulate procedural rules not specifically required by the Constitution of the Congress.' Nevertheless, it is well established that '[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions." (first quoting United States v. Hasting, 461 U.S. 499, 505 (1983); and then quoting Thomas v. Arn, 474 U.S. 140, 148 (1985))); United States v. Payner, 447 U.S. 727, 727 (1980) (holding that the Court had no authority under its supervisory power to exclude evidence from the grand jury that was intentionally stolen by IRS agents from defendant's foreign bankers, who had no Fourth Amendment standing); George E. Dix, *Nonconstitutional Exclusionary Rules in Criminal Procedure*, 27 AM. CRIM. L. REV. 53, 74–75 (1989).

something else consistent with the Sixth Amendment to eliminate unwarranted sentencing disparity. We offer that something else in Part II.

II. USING KNOWLEDGE AND SHAME TO SOLVE RACIAL DISPARITIES IN SENTENCING

In this part after first establishing that racial disparities exist and that these disparities worsen with increasing judicial sentencing discretion, we will discuss our own proposal for eliminating this unwarranted disparity. The Commission has produced three reports that examine correlations between the demographic factors of offenders and sentence length.[91] The latest report published in 2017 ("the 2017 Report") again details an alarming racial disparity in sentence length between Black and White male offenders.[92] Despite the general consensus that the race of the defendant should not affect a sentencing outcome, this sentiment is not reflected in our reality.[93] Black offenders should receive sentences that are equal in length to the sentences of similarly situated White defendants,[94] but they do not.[95] Though this racial disparity has existed since the Commission began collecting data, the disparity decreased as the Guidelines were more strictly enforced and increased significantly when the Guidelines became advisory.[96]

This part then details our proposal. While this Essay does not advocate for a return to the mandatory Guidelines era, it does recommend a similar

91. U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE *BOOKER* REPORT'S MULTIVARIATE REGRESSION ANALYSIS 11 (2010); U.S. SENT'G COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 11 (2012) [hereinafter 2012 REPORT]; U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 3 (2017) [hereinafter 2017 REPORT].

92. *See* 2017 REPORT, *supra* note 91, at 2.

93. People of color comprised only thirty percent of the U.S. population in 2012, yet they accounted for sixty percent of those imprisoned. Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States*, CTR. FOR AM. PROGRESS (Mar. 13, 2012, 9:00 AM), https://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states/ [https://perma.cc/9THX-ZUYL]. More recently in 2014, Black men comprised thirty-seven percent of the combined state and federal male prison population. E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2014, NCJ 248955, at 2 tbl.1, 15 (2015) (reporting that the federal government has 210,567 prisoners and states have 1,350,958).

94. We use the term "similarly situated" here to mean Black and White men with identical criminal history backgrounds who are convicted of identical offenses . This is the same terminology used by the Commission in its reports on *Booker*. *See* 2012 REPORT, *supra* note 91, at 112.

95. Only one in every 106 White adult males was incarcerated in 2012, compared to one in fifteen adult Black males. Kerby, *supra* note 93. This has certainly contributed to the passion of the Black Lives Matter movement.

96. Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from* Booker, 89 N.Y.U. L. REV. 1268, 1268 (2014); *see supra* notes 93–95 and accompanying text.

mechanism that will prompt judges to decrease unwarranted disparities in their sentences: requiring the Sentencing Commission to maintain and publish data on the racial disparities in sentencing for each judicial district. We briefly explain why automating sentencing with machine-learning algorithms, which has been suggested by many scholars and used in a few states,[97] would not remedy the problem.

Finally, this part identifies the "list of shame" proposal as the best method to alleviate some of the unwarranted disparities in sentencing. The Commission should keep track of those sentences in this data set that are reversed on substantive grounds on appeal by each circuit. Shame and transparency are the mechanisms through which America can accomplish equality in sentencing.

A. *Findings of the 2017 Commission Report*

The 2017 Report studies five time periods: (1) the *Koon v. United States*[98] period (1998–2003), when the Guidelines were mandatory but departures were reviewed under the lenient abuse-of-discretion standard; (2) the PROTECT Act period (2003–2004), when the Guidelines were mandatory and more strictly enforced with the help of the Feeney Amendment and a change in the standard to de novo review; (3) the *Booker* period (2005–2007), when the Guidelines were discretionary; (4) the *Gall* period (2007–2011), when the Guidelines were still discretionary after a number of decisions affirmed the *Booker* holding; and (5) the Post-2017-Report period (2011–2017).[99]

Unsurprisingly, when the Guidelines were mandatory, sentences were longer on average and more defendants received within-Guidelines sentences.[100] During the PROTECT Act period, when the Guidelines were the strictest, seventy percent of sentences were within the Guidelines.[101] After *Booker*, only sixty percent of sentences were within the Guidelines, and the average sentence length was down to fifty-four months.[102] In 2017, just forty-nine percent of sentences were within the Guidelines range, and the average sentence length was fifty-one months.[103]

97. *See* John Monahan & Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CLINICAL PSYCH. 489, 495–96 (2016); Nicholas Scurich & John Monahan, *Evidence-Based Sentencing: Public Openness and Opposition to Using Gender, Age, and Race as Risk Factors for Recidivism*, 40 LAW & HUM. BEHAV. 36, 36–37 (2016) (discussing evidence-based sentencing as a method to predict criminal recidivism).

98. 518 U.S. 81 (1996).

99. 2017 REPORT, *supra* note 91, at 2.

100. *See infra* notes 107–13 and accompanying text.

101. 2012 REPORT, *supra* note 91, at 24, 82.

102. *Id.* (providing the following average sentence lengths for various periods: *Koon* period: forty-nine months; PROTECT period: fifty-three months; *Booker* period: fifty-four months; *Gall* period: forty-nine months).

103. U.S. SENT'G COMM'N, 2017 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at S-178 (2017).

Sentences are decreasing in length for all defendants[104] and for that, most scholars and judges herald the *Booker* Court's decision to transform the Guidelines into true guidelines.[105] While reformers can and should be thankful that sentences are shorter on average, the racial disparity in sentencing increased once judges were given more discretion during sentencing.[106]

Black male defendants were given longer sentences than their similarly situated White male counterparts across all periods, but the gap was narrowest when the Guidelines were mandatory. During the *Koon* period, Black male offenders received sentences that were on average 11.2% higher than similarly situated White male offenders.[107] With the stringent standards set in the PROTECT Act period, the sentences of Black offenders were only 5.5% higher than White offenders.[108] This racial disparity in sentence lengths increased significantly when the Guidelines became discretionary.[109] During the *Booker* period, sentences for Black male offenders were 15.2% higher than sentences for White male offenders.[110] In the *Gall* period, the gap further increased, reaching 19.5%, before eventually appearing to stagnate around nineteen percent in the Post-2017-Report period.[111] Since then, this disparity has appeared to plateau.[112] However, a world in which Black men receive sentences that are on average 19% longer than the sentences given to White men is unacceptable. Currently, for every fifty-one months a judge gives a White man, a similarly situated Black man receives eight more. Eight additional months in federal prison is almost enough time for a new human to be conceived, grown, and born while that Black man pays a greater price than a White man for the same crime. Because these increased sentences for Black men are not the result of an increased degree of criminality, they result purely from racism.

104. *See DOJ's Attack*, *supra* note 47, at 554–55.

105. Even one of the authors joined that movement, ultimately accepting some disparity in favor of any reform that decreases mass incarceration. Susan R. Klein, *Sentencing Reductions Versus Sentencing Equality*, 47 U. TOL. L. REV. 723, 727 (2016). Both authors now hope to achieve both shorter and more equal sentences.

106. Yang, *supra* note 96, at 1275 n.32.

107. 2017 REPORT, *supra* note 91, at 8 fig. 2.

108. *Id.*

109. For the purposes of this Essay, we focus on the racial disparity between Black offenders and White offenders. Interestingly, and in furtherance of our point, Hispanic male offenders were on average given sentences that were 4.4% lower than their White male counterparts during the PROTECT Act period. There was no statistical difference between the groups during the *Booker* or *Gall* periods, but during the Post-Report period, Hispanic male offenders were given sentences that were 5.3% higher than similarly situated White male offenders. 2017 REPORT, *supra* note 91, at 8.

110. *See id.* at 8 fig. 2.

111. *Id.*

112. *Id.*

Of course, the 2017 Report explicitly disavows any claim that judges are motivated by race or sex when determining sentencing.[113] The 2017 Report notes that demographic factors may be correlated to sentencing outcomes, but the statistical models cannot show causation.[114] The 2017 Report points to employment records and family ties, which are explicitly excluded from Guidelines consideration, as possible explanations for the demographic differences in sentence length.[115] Additionally, some scholars have argued that prosecutorial decisions, mandatory minimums, or even the components of the PSR are more at fault than the judge for the racial disparity.[116] And it appears that sentencing *differences* between Black and White defendants are decreasing.[117] However, placing blame risks missing the forest for the trees

113. *Id.* at 18 ("Because multivariate regression analysis cannot control for all of the factors that judges may consider, the results of the analyses presented in this report should be interpreted with caution and should not be taken to suggest discrimination on the part of judges.").

114. *Id.* at 32. The Commission is officially part of the judicial branch of the federal government, and they share office space in the Federal Judicial Center, an administrative agency of the U.S. Courts, with its headquarters in downtown Washington, D.C.

115. *See* 2017 REPORT, *supra* note 91, at 38 n.10 (noting that prosecutorial decision-making may contribute to demographic differences in sentencing); *see also* Alexander Bunin, *Reducing Sentencing Disparity by Increasing Judicial Discretion*, 22 FED. SENT'G REP. 81, 82 (2009) (noting that judges often feel constrained by mandatory minimums). Some critics may point to other extraneous factors such as prior violent criminal history and deny an increase in racial sentencing disparity altogether. *See, e.g.*, Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2, 35–37 (2013) (criticizing the Commission's 2012 *Booker* Report's finding that judges who implement disparate sentences base their sentences on race, and instead, Professors Sonja Starr and M. Marit Rehavi claim these disparate sentences are based upon defendants' violent conduct, or if they are unwarranted, it is because of how prosecutors charge and engage in fact bargaining). However, the Commission's 2017 Report found that violence does not account for the racial disparity in sentencing. *See* 2017 REPORT, *supra* note 91, at 17. We found Professors Starr and Rehavi's study unconvincing. *See, e.g.*, Bunin, *supra*, at 81 (suggesting that in his experience as a federal public defender, mandatory guidelines increase judicial discretion because the Guidelines generally take no account of important personal characteristics in individual defendants); Sara Sun Beale, *Is Now the Time for Major Federal Sentencing Reform?*, 24 FED. SENT'G REP. 382, 384 (2012) [hereinafter *Is Now the Time*] (concluding that sentencing disparity is not unwarranted and that it is unclear whether any proposed solutions thus far would reduce the disparity).

116. *Is Now the Time*, *supra* note 115, at 384. These considerations were not ordinarily allowed as reasons to decrease sentences under the mandatory Guidelines (nor are they permitted under the current advisory guidelines, but that makes them easier to ignore); sources cited *supra* note 77; *see also* 18 U.S.C. § 3553(a) (listing what is appropriate to consider when imposing a sentence).

117. *See* Michael T. Light, *The Declining Significance of Race in Criminal Sentencing: Evidence from US Federal Courts*, SOC. FORCES 1, 1–3 (2021) (conducting a study finding that the average sentencing difference between Black and White defendants decreased from thirty-four months in 2009 to six months in 2018). Professor Michael Light believes this decrease is primarily attributable to increased sentences for White offenders, court and congressional changes to drug laws (especially regarding crack cocaine), and the lessened prosecutorial use of mandatory minimums. We note that this study does not contradict or weaken any of the Commission's *Booker* Reports, as the Commission studied only similarly situated Black and White offenders, while Professor Light's study examines sentencing differences. Moreover, another key finding from Professor Light's study supports our position: "In 2018, black offenders received an additional 1.3 mos. of incarceration relative to their white peers. In

because the racial disparity likely results from numerous factors. Detailing each factor is only a worthy endeavor if doing so leads to a workable solution. Further, we are not attempting in this Essay to rest blame for the racial disparity solely with judges. Instead, this Essay identifies judges as the actors with the most power and ability to end the disparity. The "list of shame" proposal puts pressure on judges because judges are positioned to override most of the previous decisions of other criminal justice players. The judge can be the solution to the problem without being a cause.

B. *Algorithms Are Not the Answer*

Many jurisdictions have begun to embrace algorithms to predict recidivism in all parts of the criminal justice system, from pretrial investigations to bail recommendations and ultimately posttrial sentencing and parole.[118] Several states have incorporated actuarial risk assessments—algorithms—into their sentencing guidelines.[119] However, scholars have levied compelling critiques of these algorithms, for the algorithm is only as good as the data entered.[120] As Professor Sandra Mayson explains, if the data you input is tinted with racial bias, then the algorithm will simply reproduce that racial bias.[121] The only change would be that, when compared with a person, the computer can perhaps more accurately and more consistently produce the biased result.

Our sentencing data already contains bias. A racial disparity manifestly exists in the average sentence length, so using an algorithm to calculate sentences would only perpetuate the problem. The algorithm would recognize that Black offenders are sentenced to longer sentences and perpetuate that problem.

Now, programmers could limit which data they input into an algorithm. For example, a sentencing algorithm could be programmed to only process data

drug cases, they received an additional five mos. These results are not explained by measures of offense severity, criminal history, or key characteristics of the crime and trial." *Id.* at 25.

118. *See* Monahan & Skeem, *supra* note 97, at 489–90.

119. Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 809 (2014) (noting that at least twenty states have begun to incorporate risk assessment into criminal sentencing).

120. For a full picture explaining how algorithms could reflect and project past and present racial bias in the criminal justice system and elsewhere, see Sandra G. Mayson, *Bias in, Bias out*, 128 YALE L.J. 2218, 2251 (2019). *See also* Kallie Klein, *Algorithms, Race, and Reentry: A Review of Sandra G. Mayson's Bias in, Bias out*, COLLATERAL CONSEQUENCES RES. CTR. (Nov. 5, 2019), http://ccresourcecenter.org/2019/11/05/algorithms-race-and-reentry-a-review-of-sandra-g-masysons-bias-in-bias-out/ [https://perma.cc/V3GU-AEXM] (critiquing Professor Sandra Mayson's analysis). Professor Bernard Harcourt offers a different critique on this issue. *See* Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 237 (2015) ("[R]isk [assessment] today has collapsed into prior criminal history, and prior criminal history has become a proxy for race. The combination of these two trends means that using risk-assessment tools is going to significantly exacerbate the unacceptable racial disparities in our criminal justice system.").

121. *See* Mayson, *supra* note 120, at 2251.

from the PROTECT Act era, when the disparity was at its lowest.[122] But, unhelpfully, that data reflects a period during which sentencing was the least discretionary,[123] so the sentences generated would resemble the pre-*Booker* draconian sentences. More to the point, a programmer could simply create an algorithm that imposed mandatory sentences without taking race—or proxies for race, such as prior offenses—into account. If the sentence length were the only concern accompanying mandatory Guidelines, then the algorithm could just remove a few years from each offense. But the anxiety surrounding mandatory Guidelines results not only from their draconian length but also from their impersonality. In attempting equality, the Guidelines failed to give the judge power to individualize sentences. The true problem with any algorithm is that it cannot take an offender's individual circumstances into account without also discriminating against certain offenders. This bias already exists, and machines are not smart enough to unlearn that bias on their own. Society needs judges because humans, unlike algorithms, are capable of changing their biases.[124]

C. *Our Proposal: Publish Racial Disparities in Sentencing for Each Judicial District*

We propose in this section that the Commission maintain and publish data on the racial disparities in sentencing for each judicial district. Through transparency, this proposal uses shame in an attempt to achieve equality in sentencing.[125]

Using shame as a tool to regulate behavior is far from a novel idea. Many psychologists encourage the use of shaming techniques in moderation because such techniques can teach or remind individuals of appropriate societal boundaries.[126] Shaming has been used in the criminal context since America's founding.[127] Today, cities create "walls of shame" for apartment buildings that

122. 2017 REPORT, *supra* note 91, at 8 fig.2.

123. *See* 2012 REPORT, *supra* note 91, at 24–25.

124. Pieter Van Dessel, Yang Ye & Jan De Houwer, *Changing Deep-Rooted Implicit Evaluation in the Blink of an Eye: Negative Verbal Information Shifts Automatic Liking of Gandhi*, 10 SOC. PSYCH. & PERSONALITY SCI. 266, 266–67 (2019).

125. We recognize that the rather timid Sentencing Commission is unlikely to adopt our suggestion on its own. The Commission might offer such a proposal to Congress in its next set of amendments to the Guidelines. However, this assumes that the Commission fills vacancies and proposes and discusses any post-2018 amendments. This scenario also incorporates an expectation that Congress rubber-stamps the amendments as usual. We also recognize the problem inherent in devising a mechanism to keep data secret under only certain circumstances.

126. Peter H. Huang & Christopher J. Anderson, *A Psychology of Emotional Legal Decision Making: Revulsion and Saving Face in Legal Theory and Practice*, 90 MINN. L. REV. 1045, 1064 (2006).

127. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 630–31 (1996) [hereinafter *Alternative Sanctions*] (detailing the use of public corporal punishment such as lashes and stocks used in early American history); *see also* David Ker, *England in Old Times*, N.Y. TIMES, Nov. 13,

violate safety regulations,[128] corporations that illegally dump waste,[129] businesses and individuals that fail to pay taxes,[130] and bars that remain open despite quarantine restrictions.[131] These walls of shame are aimed at encouraging compliance by negatively, publicly naming individuals and businesses that fail to meet expectations, hoping that the citizenry knows and cares enough to apply peer pressure. Even the Federal Drug Administration has created its own online blacklist for companies that are unethically or unlawfully impeding efforts by others to create generic versions of their high-priced brand-name drugs.[132]

In his 1996 article, Professor Dan Kahan explains how shaming sanctions could be used in lieu of imprisonment for criminal offenders.[133] Though he has since renounced (in part) his earlier position,[134] his idea of shame as a cheap and easy tool for curbing deviant conduct is too good of a solution to ignore. Some scholars advocate for the use of shaming techniques against prosecutors who overstep ethical boundaries.[135] One scholar explains how the Ninth Circuit may already be shaming prosecutors through aggressive and pointed questioning during oral arguments that are livestreamed and posted on YouTube.[136]

For the same reasons that shaming works for prosecutors and white-collar criminals,[137] it should also work for judges.[138] Shaming is most effective when it

1887, at 11 (describing the use of stocks and other forms of public corporal punishment in early American history).

128. Rong-Gong Lin II & Rosanna Xia, *San Francisco Tries 'Shaming' Building Owners on Quake Reinforcement*, L.A. TIMES (Sept. 15, 2014, 5:31 PM), https://www.latimes.com/local/la-me-quake-shaming-20140916-story.html [https://perma.cc/KT86-KWW9 (staff-uploaded archive)].

129. Emily Opilo, *Baltimore Rolls Out Illegal Dumping Hall of Shame, Naming the City's 10 Biggest Violators*, BALT. SUN (Feb. 5, 2020, 6:01 PM), https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-trash-shame-list-20200205-morkvhrapfexrbaget7wjapuoq-story.html [https://perma.cc/34CQ-KLPQ (staff-uploaded archive)].

130. Mark Arehart, *State Hopes To "Shame" Delinquent Taxpayers into Compliance*, DEL. PUB. MEDIA. (Sept. 20, 2016), https://www.delawarepublic.org/post/state-hopes-shame-delinquent-taxpayers-compliance [https://perma.cc/7BHA-9CML].

131. Daniel Villarreal, *Houston Mayor Announces Business 'Wall of Shame' for COVID-19 Non-Compliance*, NEWSWEEK (June 29, 2020, 6:03 PM), https://www.newsweek.com/houston-mayor-announces-business-wall-shame-covid-19-non-compliance-1514225 [https://perma.cc/9UGM-PST4].

132. Sharon Yadin, *Shaming Big Pharma*, 36 YALE J. ON REGUL. BULL. 131, 132 (2019).

133. *Alternative Sanctions*, *supra* note 127, at 630–31.

134. Dan M. Kahan, *What's* Really *Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2075 (2006) [hereinafter *Shaming Sanctions*].

135. Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys To Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1088–89 (2009).

136. Lara Bazelon, *For Shame: The Public Humiliation of Prosecutors by Judges To Correct Wrongful Convictions*, 29 GEO. J. LEGAL ETHICS 305, 334–35 (2016).

137. *See* Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 383–84 (1999).

138. Jeffrey J. Rachlinkski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 1, 9–10 (2017); *see infra* notes 164–69 and accompanying text.

threatens an individual's reputation.[139] In the legal profession, one's "reputation is the most valuable commodity."[140] Lawyers spend money and time investing in their reputations, which makes them uniquely "shame-sensitive."[141] Judges are already beholden to ethical standards.[142] If requirements for racial equality in sentencing were established as an additional standard,[143] then compliance with racial equality can be fostered by using shame.

History demonstrates that shaming works on judges. Consider the passage of the Feeney Amendment to the PROTECT ACT of 2003 (though its goal was less noble).[144] Congress believed that the increased number of downward departures from the Guidelines meant that judges were not applying mandatory uniform sentences and that they resented the restriction imposed on them by the Guidelines.[145] Accordingly, the Feeney Amendment (1) adjusted the standard of review of sentences outside the Guidelines from deferential to de novo (overruling *Koon*), (2) increased the reporting requirements imposed on federal judges and the statistics collection requirements by the Commission, and (3) limited the situations which previously would have allowed for downward departures.[146] Each district court's chief judge was required to submit a written report to the Commission (including supporting documents such as

139. James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1066–67 (1998).

140. *See* Gershowitz, *supra* note 135, at 1090–91.

141. Bazelon, *supra* note 136, at 312–13.

142. *See* Benjamin Johnson & John Newby Parton, *Judges Breaking the Law*, 99 N.C. L. REV. 1, 7 (2020) (discussing judges' ethical obligations to make financial disclosures). *See generally* 2 JUD. CONF. OF THE U.S., GUIDE TO JUDICIARY POLICY, at pt. A, ch. 2 (2019) (outlining the ethical standards of conduct that apply to federal judges).

143. We use the word "established" because the racial disparity extant in sentencing shows that equality is at most an aspiration, not a norm.

144. *See* PROTECT Act of 2003, Pub. L. No. 108-21, § 401(d), (h), (m), 117 Stat. 650, 670, 672, 675 (2003) (codified as amended at 18 U.S.C. § 3742 and 28 U.S.C. § 994). The Feeney Amendment was passed under the leadership of Representative Tom Feeney (R-FL) as an amendment to the PROTECT Act, effectively overruling *Koon*. Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power To Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY, 295, 295 n.1, 296 (2004); *see also* Robert Howell, *Sentencing Reform Lessons: From the Sentencing Reform Act of 1984 to the Feeney Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 1069, 1076–77 (2004) (noting that the Feeney Amendment was a response to the level of discretion trial judges were exercising in what should be mandatory Guidelines).

145. *See Oversight of the United States Sentencing Commission: Are the Guidelines Being Followed?: Hearing Before the Subcomm. on Crim. Just. Oversight of the Comm. on the Judiciary*, 106th Cong. 1–2 (2000) (statement of Sen. Strom Thurmond, Chairman, S. Comm. on the Judiciary), *reprinted in* 15 FED. SENT'G REP. 317, 317–18 (2003) (noting the legislative history of this amendment); Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 365 (1992) (discussing the opinion of an unknown judge from the Eastern District of New York that "[t]he Guidelines . . . have made charlatans and dissemblers of us all. We spend our time plotting and scheming, bending and twisting, distorting and ignoring *the law* in an effort to achieve a just result").

146. Protect Act of 2003, Pub. L. No. 108-21, § 401, 117 Stat. 650, 670, 672 (codified as amended at 18 U.S.C. § 3742(e)(3) and 28 U.S.C. § 994(w)).

the PSR and the plea agreement).[147] In compliance with the Feeney Amendment, the Department of Justice ("DOJ") adopted a policy whereby prosecutors were required to report any below-Guidelines sentence to Main Justice.[148] Attorney General John Ashcroft noted that federal prosecutors had an "affirmative obligation" to oppose any sentence where a judge departed from the Guidelines.[149]

The reaction by federal judges to this reputational damage was immediate. While a few got angry that the DOJ was essentially creating a "blacklist" of judges who imposed downward departures,[150] most acquiesced until they were freed years later by the *Booker* decision.[151] Thus, during the PROTECT Act period, seventy percent of sentences federal judges imposed were within the Guidelines, while after *Booker* only sixty percent were.[152] Similarly, a 2011 North Carolina statute requiring a "written finding of just cause" to support a decision to waive court fees was amended in 2014 to include what judges called a "shaming report" that listed each judge and the number of waivers to court fees they granted that year.[153] Data reveals that the amendment had its intended effect: the number of fee waivers in 2017 fell by nearly half of the number in 2016, falling again in 2018.[154]

147. *Id.* § 401(h), 117 Stat. at 672. These documents could be accessed by Congress without permission of the presiding judge. *See id.*

148. Memorandum from John Ashcroft, U.S. Att'y Gen., to All Fed. Prosecutors (July 28, 2003) (on file with the North Carolina Law Review).

149. *Id.*

150. *See* Elkan Abramowitz & Barry A. Bohrer, *White-Collar Crime; Challenging the Feeney Amendment: Judicial, Defense Responses; Effect of the Feeney Amendment; Judicial Outrage; Defense Strategy; Separation of Powers*,, N.Y.L.J., Jan. 6, 2004, Fativa, Doc. No. NYLJ000020040113e01600004 ("Judge Sterling Johnson of the U.S. District Court for the Eastern District of New York seal[ed] all documents in cases before him and forb[ade] their examination by Congress without his express approval."); Tom Perrotta, *Panel Laments Lack of Judicial Discretion*, N.Y.L.J., Oct. 28, 2003, Factiva, Doc. No. NYLJ000020031104dzas0003m (reporting on oral argument from the Second Circuit where the judge said "you'll probably take our names and report them to the [A]ttorney [G]eneral" if the panel did not follow the prosecution's sentencing recommendation); Ian Urbina, *New York's Federal Judges Protest Sentencing Procedures*, N.Y. TIMES (Dec. 8, 2003), https://www.nytimes.com/2003/12/08/nyregion/new-york-s-federal-judges-protest-sentencing-procedures.html [https://perma.cc/GHP2-RG9C (dark archive)] (discussing Chief Judge Michael B. Mukasey of the Southern District of New York's opinion that the DOJ "can have [its] blacklist . . . but we have life tenure").

151. United States v. Booker, 543 U.S. 220, 258–59 (2005) (severing 18 U.S.C. § 3742(e) from the SRA because the Feeney Amendment provided for de novo review of sentencing decisions).

152. *See supra* notes 98–99 and accompanying text. *See generally DOJ's Attack*, *supra* note 47 (explaining that the sentencing reform movement begun in the mid-1980's by way of conservative politics at the federal level).

153. *See* Current Operations and Capital Improvements Appropriations Act of 2014, 2014 N.C. Sess. Laws 328 (codified as amended at N.C. GEN. STAT. § 7A-304 (LEXIS through Sess. Laws 2021-16 of the 2021 Reg. Sess. of the Gen. Assemb.)); Gene Nichol, *Forcing Judges To Criminalize Poverty in North Carolina*, 4 UCLA CRIM. JUST. L. REV. 227, 229 (2020) (noting that judges believed the purpose of the law was to "constrain judges in (their) decision-making process" and to "embarrass" them).

154. Nichol, *supra* note 153, at 230–32 (citing ACLU OF N.C., AT ALL COSTS: THE CONSEQUENCES OF RISING COURT FINES AND FEES IN NORTH CAROLINA 14 (2019),

Unlike white-collar criminals or prosecutors who have committed egregious misconduct, judges who sentence Black defendants to higher sentences than similarly situated White defendants are not generally acting in violation of the law.[155] And, as noted earlier, there are factors that can explain such a sentencing choice. However, this Essay assumes that judges and the community at large see this racial disparity in sentencing as a problem that needs solving. Because judges are the actors with the most power over sentencing, they therefore are the target of the proposal.

We carefully target the proposal to avoid one of the most negative consequences of shaming: stigmatization. Federal judges have life tenure.[156] Unlike prosecutors who are subject to termination or discipline after exhibiting racial bias, the American criminal justice system is mostly stuck with the judges it has. Therefore, shaming techniques need to encourage reform and reintegration into the community. In the new age of "cancel culture,"[157] there is a risk that if data on racial disparities were connected to each individual judge and released to the public, some judges would be canceled and possibly ostracized by both their judicial and geographic community, not to mention Twitter and the internet at large.[158] As Professor Kahan notes, such stigmatization can have perverse effects, like promoting more of the disfavored conduct, because individuals feel there is no hope of rejoining their community.[159]

In order to avoid stigmatization, the Commission should publish data by judicial district in waves. The Commission, like every federal agency, will in all likelihood remain alive and well whatever happens to the SRA, which it was created to oversee. It is not an exaggeration to say that every federal agency, like a shark, never shrinks but always grows, ever eating up more resources.[160] Because the Commission already exists in both reality and in the U.S. Code, and, realistically, the federal code will never be comprehensively revised or

https://www.acluofnorthcarolina.org/sites/default/files/field_documents/aclu_nc_2019_fines_and_fees_report_17_singles_final.pdf [https://perma.cc/5XJ9-T3E6] (noting that fee waivers fell from 87,000 in 2016 to 45,882 the following year, and to just over 28,000 in 2018)).

155. *See supra* notes 42–45 and accompanying text.

156. U.S. CONST. art. III, § 1.

157. Ligaya Mishan, *The Long and Tortured History of Cancel Culture*, N.Y. TIMES STYLE MAG. (Dec. 3, 2020), https://www.nytimes.com/2020/12/03/t-magazine/cancel-culture-history.html [https://perma.cc/D8S6-KKC4 (dark archive)].

158. *See id.*

159. *See Shaming Sanctions*, *supra* note 134, at 2091–92 (explaining how one particular brand of shaming, restorative justice, can isolate individuals).

160. *See* Nancy Gertner, Apprendi/Booker *and Anemic Appellate Review*, 99 N.C. L. REV. 1371, 1381 (2021) ("The Commission's considerable resources post *Booker* have too often been devoted to justifying its own existence, monitoring guideline compliance to show the Guidelines still mattered even in cases when they should not.").

reformed (only added to)[161] and the Sentencing Commission performs its duties reasonably well by creating reports with useful information at a relatively low cost, it might as well implement the proposal. However, the Commission must first change its far too miserly policy withholding its raw data from scholars (just try to get an agreement to look through their plea agreements and PSRs, even redacted, and you will see what we mean).[162]

The Commission should publish data by judicial district so that individual judges can accept responsibility without complete stigmatization. Shaming does not work if the blame can be spread too thin or placed entirely on another group. The Commission has published two reports showing the nineteen-percent difference in sentences between Black men and similarly situated White men, but because the data is on a national scale, judges can simply assume that the offending sentences hale from other districts.[163] For individuals to assume responsibility, the data must be closely tied to them. Publishing data by district is a compromise between a circuit-level or national survey and an individualized system with data for each judge.

The Commission should release the data in waves: first to each district, then to the entire federal judiciary, and finally to the public. After each wave of data is released, there would be sufficient time for reform. The next wave would be released only if the district had not shown improvement. As long as the district continues to improve, the data is kept from the public at large, thereby avoiding unproductive stigmatization.

In fact, releasing the data showing improved numbers (a decrease in unwarranted disparity between Black and White offenders) could be beneficial to judicial reform by establishing a positive feedback system. On the other hand, if improved numbers are not forthcoming one might argue that the phased release disables the offending judge from seeking help with what might be unconscious bias. We anticipate that by at least the second data-release phase each judge will have ample opportunity to implement tools they might need to improve. The federal judiciary has significant resources for judicial education. Even if one is skeptical regarding whether a judge during phase one can readily access the help and knowledge they may need to fix the problem themselves, the lag between phase two and phase three gives them the time (and a push by

161. For a well-described review of this eleven-year failed effort, see GEORGE E. DIX, CRIMINAL LAW: CASES AND MATERIALS 12–13 (7th ed. 2015).

162. Scholars are able to access the Commission's documents and data by way of the Commission's public access policy. *See* Public Access to Sentencing Commission Documents and Data, 54 Fed. Reg. 51,279, 51,279–82 (Dec. 13, 1989). As Professor Klein knows from conducting her study, Susan R. Klein, Michael Gramer, Daniel Graver & Jessica Winchell, *Why Federal Prosecutors Charge: A Comparison of Federal and New York State Arson and Robbery Filings, 2006–2012*, 51 HOUS. L. REV. 1381 (2014), the Commission requires researchers to jump through many hoops before providing access to raw data.

163. *See supra* notes 109–10 and accompanying text.

their peers) to modify their sentencing. Each chief district judge will ensure that the other judges use the time and information they receive from phases one and two to improve before phase three, rather than allow it to be a built-in time for disparity to percolate longer than it otherwise might.

This shaming technique would work on three levels. First, each district would receive its own statistics. Reading the individualized numbers should, ideally, inspire guilt when warranted. Guilt is just shame without an audience; it is the shame felt because of internalized norms.[164] Guilt carries the lowest risk of stigmatization because the individual has the chance to reform before others are even aware of the deviant behavior.[165] As any mother will tell you,[166] guilt can be a powerful motivator. This first step would target judges who have already internalized racial equality in sentencing as a norm.

Second, if the district did not show improvement after some specified period of time, the data would be released to the entire judicial community. This intermediary step is important for two reasons. First, judges likely value the opinions of other judges over general members of the population.[167] While a judge might reject a social media jab by a layperson, or even a law review article from a scholar with no judicial experience, a severe rebuff from other members of the bench may prove influential. Second, the judicial community is better positioned to shame its members without stigmatization. People are naturally protective of their own social and professional groups.[168] Some scholars have gone so far as to claim that judges are reluctant to name prosecutors who committed misconduct in opinions because so many judges are former prosecutors and feel a lasting attachment to their former professional group.[169] Judges would be inclined to give each other the benefit of the doubt.

164. *See Guilt*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/guilt [https://perma.cc/552S-C8XT].

165. Stephen Parker & Rebecca Thomas, *Psychological Differences in Shame vs. Guilt: Implications for Mental Health Counselors*, 31 J. MENTAL HEALTH COUNSELING 213, 215–16 (2009).

166. And one of your authors has experienced both sides of this technique.

167. Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1789–91 (2005) (describing the impact female judges have on judicial decision-making when serving on appellate panels); Rachlinski & Wistrich, *supra* note 138, at 10; *see also supra* notes 144–47 and accompanying text.

168. *See* Riia Luhtanen & Jennifer Crocker, *A Collective Self-Esteem Scale: Self-Evaluation of One's Social Identity*, 18 PERSONALITY & SOC. PSYCH. BULL. 302, 303 (1992).

169. Gershowitz, *supra* note 135, at 1085. *But see id.* at 1067–68 (considering the complaint of Judge Alex Kozinski—who has himself been shamed and forced to retire—that prosecutors who violate *Brady* are not named or shamed). Judge Kozinski's own shame came when his former female law clerks came together as a group to call him out for watching porn at the office, making inappropriate comments, and for sometimes leering at them. Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html [https://perma.cc/5EFB-MQCG (dark archive)].

Therefore, the shaming would be less about humiliation for sport and more of a gentle but firm nudge in the right direction.

Third, if pressure from the judicial community failed to effect change, the district's data would be released to the public. This measure should only be employed as a means of ensuring that the first two measures—individual contemplation of the data and group shaming—are taken seriously. Given the ease of sharing messages on social media, the current turmoil surrounding the criminal justice system, and America's toxic cancel culture, the third measure verges on punitive. A district's poor statistics could go viral easily, at least in some circles. The permanency of internet posts coupled with the current cultural fixation on canceling over providing opportunity for rehabilitation[170] means that even if the district does reform in the future, it may have forever lost the trust of the community it serves. Thus, this third measure should serve as a strong deterrent, albeit a last resort.

When Professor Kahan withdrew his support for shaming sanctions, he mentioned the ability of such sanctions to create "objectionable forms of social stratification," as well as their potential to impose "suffocating" communal norms.[171] Society would devolve into two classes: a "normal" class doing the shaming and an under-class of oddballs being shamed. Such a conformist society would offend the American ideals of individuality and diversity. While we agree that this possibility may be concerning when it comes to shaming a criminal for a variety of low-level offenses, we think it presents much less of a concern when it comes to shaming judges for breaking one single norm: that similarly situated offenders should receive the same sentence, regardless of race. We want all judges to conform to that norm. This is not an area where society values an individualistic oddball.

Hopefully, the judges who already have aspirations of racial equality in sentencing will take their district's racially unequal data as a call to action and critically examine their own sentencing decisions. Furthermore, circulating data within the judicial community will help establish racial equality in sentencing as a norm for the entire federal judiciary. Judges will hold each other accountable in order to protect the legitimacy of the institution. Shame is a tool that communities can use to monitor themselves.[172] If judges self-regulate, there would be no need for Congress or another institution to intervene.

CONCLUSION

Now, over twenty years since *Apprendi*, judges can only increase a sentence's length beyond a statutory maximum based on a fact found by a jury

170. *See* Mishan, *supra* note 157.

171. *See Shaming Sanctions*, *supra* note 134, at 2087.

172. *See* Kahan & Posner, *supra* note 137, at 370.

beyond a reasonable doubt. The *Booker* Court, in attempting to be consistent with the *Apprendi* principle while still maintaining the ubiquitous use of the Guidelines in sentencing, created ample red tape for courts, attorneys, and the U.S. Probation Department. However, the obstacles were especially aimed at judges. By creating these obstacles, the Court undermined the lofty goals behind the Guidelines' creation: eliminating racial, gender, and ethnic gaps persistent in sentencing and creating a set of standards from which to objectively review the reasonableness of a sentence.

Though it often publishes one of the consequences of *Booker*—how closely the Guidelines are still being followed—the Commission also publishes many informational reports and amends the Guidelines annually. As analyzed in Part II of this Essay, the Commission generated three Reports devoted to various aspects of *Booker* in 2010, 2012, and 2017.[173] The biggest takeaway is that as the Guidelines became more advisory, racial disparity in sentences increased.[174] An increase of discretion on the judges' part in sentencing is one explanation for such disparities, but plenty of discretion and blame likely also falls at the feet of prosecutors, law enforcement officials, probation officers who write the PSRs, overworked defense attorneys, and other actors involved in maintaining the court system.[175] However, this proposal is not about blame. It is about empowering judges to resolve disparities in sentencing because they have the final word on sentencing length, regardless of what the Guidelines or the PSR predict, or even what the prosecutor charged (as the First Step Act of 2018[176] empowers a judge to sentence below any mandatory minimum).[177]

With great discretion comes great responsibility. Judges must hold themselves accountable and acknowledge how unconscious biases can affect the life-altering decisions they make. By collecting more specific data on which districts and circuits have the biggest racial gaps in sentencing, society can target those courts for reform without targeting specific judges for shaming. While it may be beneficial in some ways to publish data of the racial sentencing disparities of specific judges to righteously shame those with poor marks, as similar shaming has been shown to affect judges' decisions in other instances,[178] this Essay's proposal considers that stigmatization may have drastic effects. However, those effects can be mitigated by not publishing sentencing disparity numbers of individual judges, only collecting numbers by district or circuit, and then releasing that data over designated periods of time to create temporal

173. *See supra* note 91 and accompanying text.

174. *See supra* notes 106–13 and accompanying text.

175. *See supra* notes 47, 113–17.

176. *See* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amened in scattered sections of 18 U.S.C. and 34 U.S.C.).

177. *See id.* § 402, 132 Stat. at 5221 (allowing greatly expanded use of the safety valve in all drug cases).

178. *See supra* notes 167–68 and accompanying text.

goals. Unless the Supreme Court decides to change its stance on *Booker*, the publication and use of racial-disparity-in-sentencing data may be the most effective way to regain the consistency-seeking intent behind the original Guidelines.