

THE FEDERAL SENTENCING GUIDELINES: SOME  
VALEDICTORY REFLECTIONS TWENTY YEARS  
AFTER *APPRENDI*\*

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*This Article reflects on the author’s professional experience and intellectual evolution in relation to federal sentencing policy and the Federal Sentencing Guidelines before and after the Supreme Court’s decision in Apprendi v. New Jersey.*

*The account begins with the author’s first encounters with the Guidelines when he was a zealous Assistant U.S. Attorney, continues through his transition to teacher, scholar, policy advocate, and occasional sentencing consultant, and concludes with the author pessimistic about the prospects of meaningful federal sentencing reform.*

*The utility, if any, of these musings will lie partly in the fact that the author has been deeply involved with federal sentencing policy and practice for thirty years but mostly in the fact that he has felt obliged to change his mind as events and experience challenged his previous convictions. Some reconstruction of the evolution of the author’s thinking as the Guidelines arose, failed, and died—but then achieved an enduring afterlife as law that lingers even though it cannot bind—may be of modest use when the time finally comes to build something truly new.*

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## INTRODUCTION

I have been practicing or writing about federal criminal law for over forty years. For three-quarters of that period, the United States Sentencing Guidelines (“Guidelines”) have been a dominant feature of the lives of federal practitioners, judges, and defendants. Because the Guidelines loomed so large, they were the primary focus of my writing for some fifteen years after I made the transition from practicing lawyer to academic. I still think about them occasionally, and help update a treatise on the subject annually,<sup>1</sup> but I confess that, over the last decade or so, my attention has wandered. The Supreme Court’s 2005 decision in *United States v. Booker*<sup>2</sup>—a distorted emanation of the subject of this retrospective symposium, *Apprendi v. New Jersey*<sup>3</sup>—found the Guidelines unconstitutional and caused a huge rumpus during which (for better or worse) I had a great deal to say.<sup>4</sup> But within about five years, the dust settled. To the surprise of practically everyone, the mandatory-turned-advisory system that the courts jury-rigged from *Booker*’s conclusion that advisory guidelines would be constitutionally acceptable became not an interim placeholder pending a thorough overhaul but an accepted and (so far) enduring replacement for the pre-*Apprendi-Booker* regime.<sup>5</sup>

I think the persistence of the advisory federal sentencing Guidelines in their current form is regrettable. Leave to one side the fact that the *Booker* decision and its subsequent embellishments are a constitutional bait and switch in which the Supreme Court disguised a judicial will to power behind a pretended concern for the Sixth Amendment jury right. Far more important than dissection of *Booker*’s doctrinal gobbledygook is the practical consideration that it makes little sense to maintain a fact-intensive, procedurally complex, time-and-resource-consuming sentencing framework that was designed to tightly constrain judicial discretion *after* the Supreme Court has declared that

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1. ROGER W. HAINES, JR., FRANK O. BOWMAN, III & J. DOUGLAS WILSON, FEDERAL SENTENCING GUIDELINES HANDBOOK (2020).

2. 543 U.S. 220 (2005).

3. 530 U.S. 466 (2000).

4. See, e.g., Frank O. Bowman, III, *Debate: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367 (2010) [hereinafter Bowman, *Debate*]; Frank O. Bowman, III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 HOUS. L. REV. 279 (2006) [hereinafter Bowman, *Year of Jubilee*]; Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149 (2005) [hereinafter Bowman, *Beyond Band-Aids*]; Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235 (2005); Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315 (2005) [hereinafter Bowman, *Failure of the Guidelines*].

5. See generally Frank O. Bowman, III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUS. L. REV. 1227 (2014) [hereinafter Bowman, *Dead Law Walking*] (describing both the changes wrought by the *Booker* opinion and the overall lack of material differences in sentencing procedures and outcomes).

the system is only legal if it places no enforceable constraints on judicial discretion. Worse still, even though judges are no longer legally bound by the sentencing ranges generated by Guidelines calculations, in practice, they remain heavily influenced by those numbers,<sup>6</sup> and the administrative apparatus that created and continues to tend the Guidelines long ago failed in its mission of calibrating sentencing outcomes to rational policy goals. Years before *Booker*, the Guidelines drafting process became a one-way upward ratchet producing recommended sentencing ranges that are too often higher than can be justified by any of the accepted rationales for criminal punishment.<sup>7</sup> The persistence of the Guidelines regime, even in advisory form, perpetuates and normalizes levels of sentence severity that should long since have been comprehensively reconsidered.

I recognize that a good many practitioners defend the post-*Booker* federal advisory system. Defense counsel laud it as an improvement over mandatory guidelines and sometimes as a least-bad alternative to what they fear Congress might do in creating a wholly new sentencing structure.<sup>8</sup> Federal prosecutors, who generally despised *Booker* when it was decided, have learned to live with a system that, in practice, continues to offer the government many of the advantages of the pre-*Booker* arrangements.<sup>9</sup> And they, too, I suspect, are leery of what Congress might do if encouraged to start from scratch. With rare elderly exceptions, the current federal bench has never known any sentencing system except the Guidelines. Judges are used to it. It prescribes quantitative benchmarks for the inherently squishy and indeterminate exercise of imposing punishment. And *Booker* enables judges who chafe at the Guidelines'

6. *Id.* at 1245–50 (detailing the continued correlation between Guidelines sentencing ranges and sentences actually imposed, as well as stability in lengths of sentences imposed across multiple crime categories between fiscal year 2008 and fiscal year 2013).

7. See generally Bowman, *Failure of the Guidelines*, *supra* note 4 (explaining how the statutory structure of federal sentencing law and the interaction of federal institutions like Congress, the Justice Department, the judiciary, and the U.S. Sentencing Commission have produced an upward-ratchet effect on federal sentence severity); Frank O. Bowman, III, *Nothing Is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 FED. SENT'G REP. 356, 356 (2012) [hereinafter Bowman, *Nothing is Not Enough*] (“[The] architecture and institutional arrangements [of the pre-*Booker* federal sentencing system] predisposed the Commission’s rule-making process to become a one-way upward ratchet that raised sentences often and lowered them virtually never.”).

8. See, e.g., Robb London, *Aftermath*, HARV. L. BULL. (July 1, 2005), <https://today.law.harvard.edu/feature/aftermath/> [<https://perma.cc/839M-2KWY>] (“[*Booker*] could turn out to be a case of ‘Be careful what you wish for’ . . . because if sentences now start looking lenient, Congress could decide to jump in with even tougher mandatory minimum penalties.”).

9. See, e.g., Bobby Scott, *United States v. Booker: System Failure or System Fix?*, 160 U. PENN. L. REV. PENNUMBRA 195, 200, 203 (2011) (noting low rate of prosecutorial objection to non-Guidelines sentences post-*Booker*); *An Offer You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants To Plead Guilty*, HUM. RTS. WATCH (Dec. 5, 2013), <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead> [<https://perma.cc/2U35-G228>] (discussing how mandatory minimum sentences, which remain despite the *Booker* decision, confer significant plea-bargaining leverage on federal prosecutors).

prescriptions to ignore them in any case where they have a mind to do so. The Sentencing Commission has an institutional interest in maintaining the current system and, in any event, has long been reluctant even to propose significant changes without guarantees of bipartisan congressional support. As for Congress itself, a significant modification of the federal sentencing system would be a heavy lift in any period. The passage of the Sentencing Reform Act of 1984,<sup>10</sup> back in an era when Congress remained a working legislative body, was something of a miracle.<sup>11</sup> Today, with a Congress so riven with partisan rancor that it cannot perform even routine functions like passing a budget, it is hard to imagine the national legislature taking up a task as technically complex and politically touchy as comprehensive sentencing reform. Thus, the smart money has to be on advisory guidelines rumbling along largely unchanged for years to come.

As a Guidelines treatise writer and occasional sentencing consultant, the continued survival of the current Guidelines suits my narrow self-interest. But wearing my other hats as legal scholar, policy analyst, and concerned citizen, I find the current stasis exasperating and frankly rather depressing. The flaws in the advisory Guidelines regime have been well understood for years.<sup>12</sup> Frankly, there is almost nothing to say on this subject that could not have been said, and indeed was said, five or even ten years ago. Each year brings a new batch of data from the Sentencing Commission, but none of it materially alters the picture of the advisory system visible for the past decade.<sup>13</sup> Likewise, the plausible

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10. Pub. L. No. 98-473, 98 Stat. 1987 (codified in scattered sections of 18 U.S.C., 19 U.S.C., 21 U.S.C., 28 U.S.C., 31 U.S.C., 34 U.S.C.).

11. See Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning To Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 680–91 [hereinafter Bowman, *Quality of Mercy*] (describing the evolution of sentencing thinking that produced the Sentencing Reform Act of 1984 and, in due course, the Guidelines); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8–31 (1988) (describing the key compromises that were made during the drafting process); see also Norm Ornstein, *Henry Waxman: A Relic of the Era when Congress Used To Work*, ATLANTIC (Feb. 6, 2014), <https://www.theatlantic.com/politics/archive/2014/02/henry-waxman-a-relic-of-the-era-when-congress-used-to-work/283630/> [<https://perma.cc/83EQ-C7JW>] (recounting instances in the past when “real legislators craft[ed] real legislation” and noting that today’s Congress has become “deeply dysfunctional”).

12. See, e.g., Bowman, *Failure of the Guidelines*, *supra* note 4, at 1328–49 (describing the Sentencing Guidelines’ “irremediable substantive defects”).

13. The U.S. Sentencing Commission issues detailed sentencing statistics annually in a publication now called the Annual Report and Sourcebook of Federal Sentencing Statistics. See, e.g., U.S. SENT’G COMM’N, 2020 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2021). For discussions of the statistical changes in the system since *Booker*, see, as an example, Bowman, *Dead Law Walking*, *supra* note 5, at 1235–38; Bowman, *Year of Jubilee*, *supra* note 4, at 309–14.

alternatives to the current system have long been reasonably well articulated.<sup>14</sup> But nothing happens.

That being so, I had to ask myself what is there for me to say in this Article that I have not said before, and on some points said many times? After chewing on the matter awhile, I concluded that perhaps the most useful thing I could offer was a kind of valedictory reflection on my own intellectual journey with the Guidelines, which began when I was a zealous Assistant U.S. Attorney; continued through my transition to teacher, scholar, policy advocate, and occasional sentencing consultant; and seems likely to end with me in the role of disillusioned curmudgeon muttering about might-have-beens as I shuffle towards my dotage. The utility, if any, of these musings will lie partly in the fact that I have been up to my neck in Guidelines minutia for thirty years, but mostly in the fact that I have felt obliged to change my mind as events and experience challenged my previous convictions. Some reconstruction of the evolution of my thinking as the Guidelines arose, failed, and died, but then achieved an enduring afterlife as law that is not really law at all, may be of modest use when the time finally comes to build something truly new.

#### I. THE ADVENT OF THE FEDERAL SENTENCING GUIDELINES

When I started my legal career back in 1979 with the Criminal Division of the Justice Department, sentencing was almost entirely within the discretion of the district judge.<sup>15</sup> Prosecutors concerned themselves primarily with obtaining convictions and spent relatively little time, resources, or emotional energy on trying to secure particular sentences. That was the judge's business. The same was true during my later stint as a state prosecutor with the Denver District Attorney's Office. By the time of my second pass through the Justice Department as an Assistant U.S. Attorney in Miami, Florida, beginning in 1989, the Federal Sentencing Guidelines drafted by the U.S. Sentencing Commission as required by the Sentencing Reform Act had been in effect for only two years.<sup>16</sup> But those Guidelines (in combination with the mandatory

14. See, e.g., Bowman, *Beyond Band-Aids*, *supra* note 4, at 198–215 (describing a, frankly unwieldy, successor to the *Booker* advisory guidelines); Bowman, *Nothing Is Not Enough*, *supra* note 7, at 362–64 (describing constitutionally permissible alternatives to the *Booker* advisory guidelines, including one originally proposed by the Constitution Project Sentencing Initiative and later endorsed by Judge William Sessions, former Chair of the U.S. Sentencing Commission); Frank O. Bowman, III, *'Tis a Gift To Be Simple: A Model Reform of the Federal Sentencing Guidelines*, 18 FED. SENT'G REP. 301, 301–07 (2006) (describing the work and conclusions of the Constitution Project's Sentencing Initiative and summarizing a detailed proposal for a simplified version of the Guidelines authored by an ad hoc working group consisting of Beverly Dyer, Michael O'Hear, Steven Chanenson, Mary Price, Nora Demleitner, and Frank Bowman).

15. See Bowman, *Quality of Mercy*, *supra* note 11, at 682–83.

16. Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, § 217(a), 98 Stat. 1987, 2019 (codified as amended in scattered sections of 18 U.S.C., 19 U.S.C., 21 U.S.C., 28 U.S.C., 31 U.S.C., and 34 U.S.C.). The Sentencing Reform Act of 1984 created the United States Sentencing

minimum sentences in the Anti-Drug Abuse Act of 1986<sup>17</sup>) had already radically altered federal criminal practice.

The Sentencing Reform Act wrought two major conceptual changes and a host of lesser ones. First, the Guidelines brought law to the sentencing phase of federal criminal cases. One fundamental attribute of “law” is a set of rules or standards that correlate some legal outcome or range of outcomes to proof of some pre-identified fact or set of facts. The rules or standards need not decree an automatic congruence between facts and outcomes to count as law. The correlation can be mandatory, as in: “Once Fact A is proven, Consequence B must be imposed.” It can be permissive, as in: “Consequence B cannot be imposed unless Fact A is proven.” It can also be presumptive, as in: “If Fact A is proven, a presumption arises that Consequence B should follow.”<sup>18</sup> Nonetheless, law, at least as ordinarily understood, requires established correlations—mandatory, permissive, or presumptive—between facts and outcomes. It also requires a mechanism, in our system customarily a process of appellate review, for enforcing the correlative rules.

Prior to the Sentencing Reform Act and the Guidelines, federal sentencing was, practically speaking, lawless.<sup>19</sup> Judges could sentence a convicted defendant to any term of years, fine, forfeiture, or other penalty above the minimum and below the maximum specified by statute for the offense or offenses of conviction.<sup>20</sup> To be sure, those maximums and minimums imposed hard legal limits on the defendant’s sentence. But within the very broad range between minimum and maximum, the judge had virtually absolute, and almost unreviewable, discretion to impose any sentence that comported with his or her sense of justice.<sup>21</sup> Moreover, judges were not even obliged to explain why they

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Commission and charged it with drafting sentencing guidelines. *Id.* § 991; see HAINES ET AL., *supra* note 1, at 1–2. The Commission did so, and Congress ratified the result effective on November 1, 1987.

17. Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801 et. seq.); Bowman, *Failure of the Guidelines*, *supra* note 4, at 1329–32.

18. All true presumptions can be overcome by other facts or considerations. We sometimes speak of an “irrebuttable presumption.” However, a presumption that cannot be rebutted is not really a presumption at all, but a rule: “If Fact A is proven, Consequence B must follow. No exceptions allowed.”

19. This point was made first, or at least most famously, by Judge Marvin Frankel in his 1973 book. See generally MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973) (describing the inconsistency of federal sentencing at the time).

20. See, e.g., Bowman, *Debate*, *supra* note 4, at 370–71.

21. See, e.g., Bowman, *Beyond Band-Aids*, *supra* note 4, at 152–53. Even pre-Guidelines, judges could not impose a sentence based on unconstitutional or otherwise illegal considerations, such as race or religious affiliation. *Id.* But absent proof of grossly improper motive, the judge’s sentencing discretion was almost unreviewable. See *id.*; see also *Koon v. United States*, 518 U.S. 81, 96 (1996) (“Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal.” (first citing *Dorszynski v. United States*, 418 U.S. 424, 431 (1974); and then citing *United States v. Tucker*, 404 U.S. 443, 447 (1972) (same))).

imposed the sentences they did.<sup>22</sup> Certainly, there existed no set of rules, standards, or guidelines identifying facts that should matter in deciding on a sentence and establishing some required or even recommended correlation between proof of those facts and the sentence a judge must or should impose.<sup>23</sup>

Judges were variously envisioned as quasi-medical prescribers of the proper type and dose of rehabilitative treatment<sup>24</sup> or as performing acts of “moral reasoning.”<sup>25</sup> On neither theory was it thought proper to constrain judges with standardized rules or even to insist on norms of due process such as prior notice of the facts that would be of legal consequence at sentencing and their probable effects if proven, a requirement of reasoned explanation of the outcome, or access to meaningful review on appeal.<sup>26</sup>

The Guidelines changed all that.<sup>27</sup> Into the interval between statutory minimum and maximum sentences where, for long years, no law had limited judicial discretion, the Guidelines inserted an extraordinarily detailed and highly prescriptive structure tying proof of designated facts to precisely calibrated increases or decreases in sentence severity.<sup>28</sup> In essence, the Guidelines are a long set of instructions for a table of sentencing ranges.<sup>29</sup> The vertical axis contains a series of numbers representing an aggregate score of weighed factors measuring offense seriousness.<sup>30</sup> The horizontal axis has a smaller set of numerical categories measuring the defendant’s prior criminal

22. Bowman, *Beyond Band-Aids*, *supra* note 4, at 153.

23. Bowman, *Failure of the Guidelines*, *supra* note 4, at 1322.

24. Bowman, *Quality of Mercy*, *supra* note 11, at 684–85.

25. See KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 78–79 (1998). I have been jousting collegially with Professor Stith and Judge Cabranes about this concept of the judicial role in sentencing for a long time. See Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 319–26 (2000) [hereinafter Bowman, *Fear of Law*]. I have probably moved somewhat in their direction over the years, but as the later passages in this Article show, I remain a fan of at least presumptive legal guidance for judges at sentencing.

26. To be fair, in their influential critique of the Federal Sentencing Guidelines, Professor Stith and Judge Cabranes argue that the Guidelines’ regime should be replaced by one with broad judicial discretion, explanations of results, and some form of appellate review. STITH & CABRANES, *supra* note 25, at 170–72. But that was not the system before the Sentencing Reform Act of 1984, and the forced disassociation between facts and sentencing outcomes instituted by the *Apprendi-Blakely-Booker* regime now makes any such system with even presumptive a priori sentencing rules or standards and meaningful appellate review constitutionally suspect.

27. For an excellent account of the formulation of the Federal Sentencing Guidelines, see generally Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993) (chronicling the passage of the Federal Sentencing Guidelines, including its embrace by criminal justice reformers, legislative efforts, and the limited role of the judiciary in its development). For a summary of the basic structure and operations of the Guidelines, see generally HAINES ET AL., *supra* note 1, at 1–12 (detailing the principles, mission, and authority behind the Guidelines).

28. See HAINES ET AL., *supra* note 1, at 1–2.

29. See U.S. SENT’G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT’G COMM’N 2018).

30. *Id.*

history.<sup>31</sup> The sentencing judge finds facts necessary to apply the rules for calculating offense seriousness and criminal history and assigns values on both axes.<sup>32</sup> Once that task is complete, a sentencing range is generated.<sup>33</sup> Of course, judges can sentence outside of the Guidelines-calculated sentencing range,<sup>34</sup> but in the Guidelines' original iteration, they could do so only through a "departure" process carefully delimited by the Guidelines and enforced by the courts of appeals.<sup>35</sup>

Key to understanding everything that followed the advent of the Guidelines is recognition that Congress imposed the law of the Guidelines on an area of criminal practice that had for a very long time been the virtually exclusive province of the judiciary.<sup>36</sup> Of course, the guideline rules themselves were drafted by the U.S. Sentencing Commission, theoretically an independent agency in the judicial branch, but the Commission's foundational choices were constrained both by the statutory framework of the Sentencing Reform Act and the necessity of securing congressional approval for their handiwork.<sup>37</sup> After the Guidelines were first approved in 1987, the hundreds of amendments approved by the Commission over the ensuing three decades also had to survive congressional scrutiny, and many were crafted by the Commission in direct response to congressional directives or strong suggestions.<sup>38</sup>

31. *Id.*

32. See HAINES ET AL., *supra* note 1, at 1–2.

33. *Id.*

34. *Id.* at 2.

35. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 3553(b), 98 Stat. 1983, 1990 (codified as amended at 18 U.S.C. § 3553(b)(1)) ("The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines and that should result in a sentence different from that described."); see also Frank O. Bowman, III, *Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 12–13 (1999) [hereinafter Bowman, *Departing*] (describing judicial departure authority prior to *Booker*); Frank O. Bowman, III, *Places in the Heartland: Departure Jurisprudence After Koon*, 9 FED. SENT'G REP. 19, 19 (1996) [hereinafter Bowman, *Heartland*] (explaining that the *Koon* majority attempted "to justify a reallocation of authority over departure decisions away from both the Sentencing Commission and the courts of appeals," but that this shift "rest[ed] on a series of claims that [we]re either legally or factually unsupportable").

36. See Bowman, *Fear of Law*, *supra* note 25, at 310–16 (discussing historical fluctuations in the degree of judicial control of sentencing in American history and noting that the period where judicial control was greatest was between the late 1800s and the enactment of the Sentencing Reform Act in 1984).

37. See HAINES ET AL., *supra* note 1, at 1–2.

38. This pattern is observable across offense types. For a list of congressional directives to the Sentencing Commission, see U.S. SENT'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 app. B (2004). But congressional intervention has proven especially obvious and problematic in the area of economic crime sentencing. See Frank O. Bowman, III, *Pour Encourager les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the*



In short, with the Guidelines, Congress—quite consciously—wrested from judges control over a function they had long seen as quintessentially their own. Judges were so committed to this vision that, during the year or so following the Guidelines enactment, many found the whole structure unconstitutional.<sup>39</sup> When the Supreme Court disagreed in *Mistretta v. United States*,<sup>40</sup> the lower courts grudgingly settled into the new regime.<sup>41</sup> But the original resistance to *any* meaningful constraint on judicial sentencing discretion remained an undercurrent of discontent<sup>42</sup> and was greatly exacerbated by the extreme detail and prescriptiveness of the Guidelines' structure.<sup>43</sup> Moreover, the Commission itself, partly in defensive response to the judges' initial hostility to its work, developed a sense of mission in which judges were often seen as a recalcitrant opposition, rather than as partners in development of an experimental system.<sup>44</sup>

The second major conceptual change effected by the Sentencing Reform Act was the virtual elimination of all discretion from the “back end” of sentencing—the decision about when an incarcerated person will be released back into the community.<sup>45</sup> Before the Act, authority over the actual amount of time a defendant would serve was split between the judge, who announced a sentence expressed as a term or range of months or years, and the parole authorities, who later decided, subject to some statutory restrictions and administrative regulations, what fraction of the judicially determined term the defendant would really serve.<sup>46</sup> The Act abolished the U.S. Parole Commission and decreed that henceforth federal defendants would serve roughly eighty-five percent of their imposed sentences, with only tiny adjustments for good or bad

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*Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 OHIO STATE J. CRIM. L. 373, 376–77 (2004) [hereinafter Bowman, *Pour Encourager*].

39. Matthew Van Meter, *One Judge Makes the Case for Judgment*, ATLANTIC (Feb. 25, 2016), <https://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380/> [https://perma.cc/M95D-7QL3] (noting that some 200 federal judges wrote opinions finding the Federal Sentencing Guidelines unconstitutional).

40. 488 U.S. 361 (1989).

41. See Van Meter, *supra* note 39 (“After a brief judicial revolt in the late 1980s, most judges quietly fell into compliance with the guidelines.”).

42. See *id.* (“[*Mistretta*] was terribly frustrating . . . I started screaming at the top of my lungs. I have been screaming ever since . . .”).

43. See *id.* (describing that, although one judge “sentenced mostly within the prescribed range, . . . he railed against the guidelines in his opinions and tried to bend the rules when he thought he could get away with it”).

44. See Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1750 (1992) (urging the Sentencing Commission to reverse its policy of opposing the judiciary and, instead, arguing that it “should cooperatively develop sentencing guidance *with* the judiciary, rather than unilaterally prescribe guidelines *for* the judiciary”).

45. See HAINES ET AL., *supra* note 1, at 8.

46. Bowman, *Fear of Law*, *supra* note 25, at 302 (describing the pre-Sentencing Reform Act federal parole system); Stith & Koh, *supra* note 27, at 228–29 (discussing the genesis and operation of the federal parole guidelines).

behavior while in prison.<sup>47</sup> Structurally, the federal system transformed from an indeterminate to a determinate sentencing regime.<sup>48</sup> At the risk of oversimplifying the reasons for this choice, it rested largely on the twin conclusions that: (1) the quantum of punishment should primarily be determined by considerations of desert, deterrence, and incapacitation; and (2) rehabilitation was passé, a personal transformation judges could not predict, correctional authorities promote, or parole boards recognize.<sup>49</sup>

I have always believed that the decision to introduce law to front-end judicial sentencing choices was correct. The pre-Guidelines federal system of unlimited and unreviewable judicial sentencing discretion was rationally insupportable. The basic difficulty stems from the fact that, while there is a generally recognized set of traditional sentencing purposes (retribution or just deserts, deterrence, incapacitation, and rehabilitation),<sup>50</sup> there is no general agreement about how, or even whether, those purposes can be achieved, or even about whether any or all purposes of sentencing are relevant to any particular case or class of cases.

For example, if our objective is imposing a punishment commensurate with a defendant's deserts, that can be achieved (if at all) only through an exercise in moral calculus in which even the relevant factors are debatable and their appropriate weight even more so. For example, does determination of what a defendant deserves turn primarily on the seriousness of the crime he committed? If so, how is that seriousness to be measured? By the magnitude of the harm caused, and if so, what kinds of harm to whom? Should the state of the defendant's mind before, during, or after the time the crime was committed also count? Should the measure of a defendant's deserts also include other factors about the defendant's personal characteristics, upbringing, social status, or prior history of good or bad behavior? Critically, how should the menagerie of factors we finally decide to insert into the calculus of deserts be weighed against each other and then correlated to a particular quantum of punishment?

Likewise, if our objective is crime control, and we are unwilling to declare that all criminals should be locked up forever or killed outright, the choice of a term of imprisonment (or other restriction on liberty) less than life imprisonment ought to rest on data proving, or at least strongly suggesting, that the type and length of the sentence imposed correlates positively with lowered

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47. See *supra* note 46 and accompanying text.

48. William W. Wilkins, Jr., Phyllis J. Newton & John R. Steer, *Competing Sentencing Policies in a "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305, 306 (1993) ("The [Sentencing Reform Act] reflected Congress' desire for honesty in sentencing by abolishing parole and by substantially reducing and restructuring good behavior adjustments. This represented a change from an indeterminate to a determinate, 'real time' sentencing system.").

49. Bowman, *Quality of Mercy*, *supra* note 11, at 688–89, 692–93.

50. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 15–18 (7th ed. 2015). Some might add a reprobative or expressive purpose. *Id.* at 18–19.

recidivism for persons like the defendant at bar. If our theory is that crime reduction can be achieved through deterrence, what evidence exists correlating particular types and lengths of sentences with greater or lesser deterrence? If we favor the view that crime can be lowered by rehabilitating former offenders, what do we know about that? The conventional wisdom in the period the Guidelines were adopted was that “nothing works” to achieve rehabilitation, or at least that no one could demonstrate particular approaches worked materially better than others for identifiable classes of defendant.<sup>51</sup> In recent years, some researchers have become more hopeful about the prospects of rehabilitation at least for some defendants,<sup>52</sup> but those advances are often tentative and certainly do not extend to all classes of crime or offender.<sup>53</sup> Even if we seek to achieve crime control only through the crude mechanism of incapacitation, the decision about how long to hold a defendant in a prison and away from the general population ought to be informed by considerations like the propensity of even prolific offenders to “age out” of crime and the disutility of holding such persons at public expense after they are statistically unlikely to reoffend.<sup>54</sup>

My point is not that the multiplicity of sentencing objectives, each with its own measure of uncertainty, makes rational sentencing impossible. Although, let’s face it—the reality is that declaring a particular set of acts with a particular state of mind and a particular set of resultant harms by a particular defendant equates to a particular term of years in a cell will always be an exercise in metaphysics or intuition more than logic. The best any sentencing system can do is demystify the process and push it in the direction of reasonable consistency and evidence-based rational choice. Nonetheless, in a system of *law*, the decision about whether to consider each of the potentially relevant factors in any given case and, if so, how to weigh it, ought not be left to the unguided discretion of individual judges. Without direction, they will inevitably make different choices at every turn in the sentencing process and thus produce widely disparate results justified on widely disparate grounds. Judge Marvin Frankel was right when he said of pre-Guidelines federal sentencing that “the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.”<sup>55</sup> A law of sentencing requires some standardization, some *a priori* choices that bind, or at least guide, all decision

51. See Bowman, *Quality of Mercy*, *supra* note 11, at 688–89.

52. Meghan J. Ryan, *Science and the New Rehabilitation*, 3 VA. J. CRIM. L. 261, 289–90 (2015).

53. For an empirical look at the prevalence of rehabilitative correctional programs from the 1970s to the mid-2000s, see Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 L. & SOC’Y REV. 33, 35, 44–46 (2011).

54. U.S. SENT’G COMM’N, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS pt. 1 (2017) (“Older offenders [are] substantially less likely than younger offenders to recidivate following release.”).

55. FRANKEL, CRIMINAL *supra* note 19, at 5.

makers about what factors should count, how they should weigh against each other, and how, at least presumptively and in the absence of countervailing facts, they should correlate to punishment severity.

That said, the very multifactorial complexity of the sentencing calculus simultaneously argues against complete delegation to individual judges and requires some measure of discretion on the part of judges to weigh the competing considerations that arise in individual cases. The need for some judicial discretion is made even plainer by the underappreciated reality that facts which aggravate offense seriousness (and thus presumably sentence severity) tend to be discrete and often quantifiable, readily provable, and unidirectional. By unidirectional, I mean that proof of such a fact almost invariably points toward a higher sentence. For example, selling more drugs, stealing more money, robbing more victims, or smuggling more immigrants all increase offense severity.<sup>56</sup>

By contrast, a great many of the personal considerations that defendants traditionally offer in mitigation are more subjective and, crucially, can be viewed as either aggravating or mitigating depending on the case and the disposition of the judge. For example, young age might be viewed as a mitigating factor by one judge on the theory that inexperience and incomplete emotional development renders a defendant less blameworthy. A different judge, more focused on crime control and recognizing that criminal activity is far more common in one's teens and twenties, might consider youth as a factor requiring longer incarceration past the statistically crime-prone phase of life. Conversely, relative old age might be viewed by some judges in some cases as an aggravating factor because with maturity should come better judgment, while other judges in other cases might find old age mitigating both because recidivism is very low among the elderly and because incarcerating the old is expensive as their medical needs increase with time. Run down the list of traditional mitigators—education level, mental and emotional conditions, addictions, employment history, ties to family and community, lack of guidance as a youth, and so forth—and virtually every one can be a double-edged sword. If consideration of these factors is to be allowed at all, it almost has to be as an exercise of case-by-case discretion.<sup>57</sup>

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56. In theory, I suppose, one could create a system in the basic sentencing level for any class of offense based on some “average” quantity of drugs, money, victims, or immigrants and then adjust the guideline range up for more than the average and down for less. Not only would it be very tough to gather reliable evidence necessary to set such averages, but the basic orientation of the structure would be the same—every added quantum of whatever measurable quantity you identify makes offense seriousness worse.

57. This reasoning is the basis for the declarations in Chapter 5H of the original Guidelines that most such considerations were “not ordinarily relevant” to the judge’s decision of whether to depart outside the applicable guideline range. *See, e.g.*, U.S. SENT’G GUIDELINES MANUAL § 5H1.1 (U.S. SENT’G COMM’N 1987) (“Age is not ordinarily relevant in determining whether a sentence should be

Finally and crucially, law, or at least law with pretensions of achieving justice, requires not only rules that help categorize more and less serious crimes and criminals but some room for mercy, whether wholly earned or bestowed as an exercise of grace. In short, a sound system of sentencing law requires both workable rules constraining judicial discretion and a sensible amount of room for discretion's exercise.

## II. THE GUIDELINES AND THE COMMISSION OVER TIME

When I first encountered the federal sentencing Guidelines as an Assistant U.S. Attorney in Miami back in 1989, I thought that, in their then-current form, they did a reasonable job of meeting these fundamental requirements. My last assignment with the Justice Department was a detail as Special Counsel to the Sentencing Commission from 1995 to 1996, and I got a look under the hood of the body which writes the Guidelines. When I left the Department and became a legal academic in the mid-1990s, I repeatedly defended most features of the Guidelines system,<sup>58</sup> with the notable exception of the length of many drug sentences.<sup>59</sup> And between 1995 and 2001, I was deeply involved, first inside the Commission and then as academic advisor to the Criminal Law Committee of the U.S. Judicial Conference, in the long process of consolidating and rewriting the guidelines governing economic crimes that culminated in the so-called "Economic Crimes Package of 2001."<sup>60</sup>

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outside the guidelines."). Post-*Booker* amendments have made the Guidelines' text more hospitable to outside-the-range sentences on such grounds. See, e.g., *id.* (stating that age may be relevant in determining whether a departure is warranted under certain conditions).

58. See, e.g., Frank O. Bowman, III, *Defending Substantial Assistance: An Old Prosecutor's Meditation on Singleton, Sealed Case, and the Maxfield-Kramer Report*, 12 FED. SENT'G REP. 45, 45 (1999); Bowman, *Departing*, *supra* note 35, at 7–9; Bowman, *Fear of Law*, *supra* note 25, at 300; Bowman, *Quality of Mercy*, *supra* note 11, at 679–80; Frank O. Bowman, III, *To Tell the Truth: The Problem of Prosecutorial "Manipulation" of Sentencing Facts*, 8 FED. SENT'G REP. 324, 327 (1996).

59. See, e.g., Bowman, *Quality of Mercy*, *supra* note 11, at 740–45; Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1130–32, 1136 (2001).

60. To review the materials I published during this period, see generally Frank O. Bowman, III, *Back to Basics: Helping the Commission Solve the "Loss" Mess with Old Familiar Tools*, 10 FED. SENT'G REP. 115 (1997); Frank O. Bowman, III, *Coping with "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461 (1998) [hereinafter Bowman, *Coping with "Loss"*]; Frank O. Bowman, III, *A Judicious Solution: The Criminal Law Committee Draft Redefinition of the "Loss" Concept in Economic Crime Sentencing*, 9 GEO. MASON L. REV. 451, 451–53 (2000) [hereinafter Bowman, *A Judicious Solution*]; Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5 (2001) [hereinafter Bowman, *Analysis and Legislative History*]; Frank O. Bowman, III, *Briefing Paper on Problems in Redefining "Loss"*, 13 FED. SENT'G REP. 22 (2001).

A. *Early Admiration for the Guidelines*

Looking back now, my long enthusiasm for the Guidelines stemmed from a number of factors. The first was that, although it is now easily forgotten, the Guidelines achieved something quite remarkable. The federal criminal code was and remains an unholy mess. Indeed, there is no “federal criminal code” as such, only an ad hoc, disorganized grabbag of hundreds of statutes carrying criminal penalties sprinkled across at least twenty-six titles of the U.S. Code<sup>61</sup> and referencing innumerable other passages of the Code of Federal Regulations. Multiple efforts to rationalize this legal morass have failed. In particular, Congress has never even sorted the multitude of federal crimes into the kind of standardized seriousness categories virtually all states employ.<sup>62</sup> Instead, every federal criminal statute has its own idiosyncratic penalty package.<sup>63</sup> Moreover, some criminal statutes cover a striking array of types and degrees of criminal conduct while also prescribing very wide ranges between their minimum and maximum sentences.<sup>64</sup> And overlaid on all of this is a set of trumps in the form of mandatory minimum sentencing statutes.<sup>65</sup> As a result, before the Guidelines, there was no way to meaningfully compare federal offense severity across crime types or calibrate the relative severity of different criminal incidents within a crime type.

The original Sentencing Commission and its staff performed something of a miracle by imposing order on this morass. In what is now Chapter Two of the Guidelines, the Commission grouped virtually every statutory crime into a set of crime types; assigned a basic seriousness level to each type; and then identified and quantified the sentencing value of nonelement factors that, in the Commission’s view, ought to affect the final seriousness assessment for particular criminal incidents within each type.<sup>66</sup> Then, in Chapter Three, they

61. U.S. SENT’G GUIDELINES MANUAL app. A (U.S. SENT’G COMM’N 2018).

62. For example, Missouri crimes are sorted into five felony and four misdemeanor classes, each of which is assigned a penalty range. MO. REV. STAT. § 557.016 (Westlaw through the end of the 2020 2d Reg. Sess. and 1st and 2d Extraordinary Sess. of the 100th Gen. Assemb.).

63. *See, e.g.*, 18 U.S.C. § 81 (“Whoever [commits arson within the special maritime and territorial jurisdiction of the United States] shall be imprisoned for not more than 25 years, fined the greater of the fine under this title or the cost of repairing or replacing any property that is damaged or destroyed, or both.”); *id.* § 1111(b) (“Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life.”); *id.* § 1956(a)(1) (“Whoever [engages in money laundering] shall be sentenced to a fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.”).

64. For example, the federal mail fraud statute covers an almost incommensurable array of conduct and has a statutory sentencing range of zero to thirty years. *See* 18 U.S.C. § 1341.

65. *See generally* U.S. SENT’G COMM’N, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2011), <https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system> [<https://perma.cc/BN26-G63K>] (explaining the role of mandatory minimums in the federal criminal justice system).

66. U.S. SENT’G GUIDELINES MANUAL § 2 (U.S. SENT’G COMM’N 2018).

wrote rules for factors likely to occur across crime types,<sup>67</sup> followed in Chapter Four by rules about how to treat a defendant's prior criminal history.<sup>68</sup> Chapter Five contains rules on how to calculate a final sentence, including how to deal with multiple counts of conviction and the circumstances under which judges could depart from the prescribed sentencing range.<sup>69</sup> However much one may decry the constraints the Guidelines placed on judicial discretion or dislike the sentencing outcomes they prescribed, they rationalized at least the sentencing end of federal criminal law into a de facto new criminal code. In that sense at least, the Guidelines were and remain "in many respects a marvel of the legislative art."<sup>70</sup>

The second source of my initial admiration for the Guidelines was, surely, that my introduction to the Guidelines was as a federal prosecutor practicing in Miami, Florida. As is by now universally recognized, the combination of Guidelines rigorously enforced by courts of appeals, mandatory minimum sentences, and government control over the availability of downward departures for cooperation provided U.S. Attorney's Offices with immense leverage to induce guilty pleas and (perhaps more important from my perspective) secure testimony from co-conspirators in multi-defendant cases.<sup>71</sup> South Florida was then (and remains) thick with crime and corruption.<sup>72</sup> The Guidelines were a splendid weapon in battles that needed (and still need) to be fought. Moreover, South Florida was such a target-rich environment that our office had the luxury of declining most of the minor and middling cases that make up the bread and butter of most districts and accepting only cases that would be a really big deal most anywhere else. In that setting, using the Guidelines' leverage to turn cooperators and make significant cases in which defendants received hefty Guidelines sentences felt not just appropriate, but downright virtuous.

#### B. *The Economic Crime Package: An Inside Look*

In the next phase of my Guidelines life, beginning in 1995 and continuing for roughly another ten years, I was a U.S. Sentencing Commission insider and participant in many of its major debates. I saw immediately that the Commission had some obvious deficiencies, but it seemed then to me an agency capable of making progressive incremental improvements in the system. The experience that first buttressed—and then eroded—my faith in the Commission

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67. *Id.* § 3.

68. *Id.* § 4.

69. *Id.* § 5.

70. Bowman, *Failure of the Guidelines*, *supra* note 4, at 1346.

71. See Bowman, *Departing*, *supra* note 35, at 13–16.

72. U.S. SENT'G COMM'N, 2019 ANNUAL REPORT AND 2019 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 35 tbl.1 (2020) [hereinafter SENT'G COMM'N, 2019 REPORT].

and the Guidelines system was the creation and implementation of the so-called Economic Crime Package of 2001.

When I served as Special Counsel to the Commission from 1995 to 1996, the Commission began a reconsideration of the primary guidelines then governing economic offenses: Section 2B1.1 (theft crimes) and Section 2F.1 (fraud).<sup>73</sup> Over the next six years, the Commission worked with representatives of the judiciary, the Justice Department, the defense bar, and sentencing academics and interest groups to address at least four major criticisms of the existing Guidelines:

- (1) There was no sound reason to have separate guidelines for “theft” and “fraud” crimes.
- (2) The most important consideration in the existing theft and fraud guidelines was the harm inflicted by the crime, as measured by the amount of “loss” suffered by theft and fraud victims. However, some felt loss was a bad proxy for offense seriousness, and even those like me who thought loss should remain central to economic crime sentencing agreed that the then-current Guidelines’ definition of the term was an archaic relic of common-law larceny that was unhelpful in most federal economic crime cases.
- (3) There was considerable criticism of the sentencing ranges produced by former Sections 2B1.1 and 2F1.1—some thought the sentences for low-level, low-loss offenders were too high, while others thought the sentences for high-level, high-loss offenders were too low.
- (4) The Guidelines at the time produced troublingly high sentence levels for economic crime defendants who were also convicted of money laundering.<sup>74</sup>

The result of a long, careful, collaborative process was a single consolidated economic crime guideline, Section 2B1.1, with a revised, causation-based definition of loss; revised specific offense characteristics; and adjustments of the loss table that reduced sentences for some low-loss offenders while markedly increasing them for mid- to high-loss defendants.<sup>75</sup> I was heartened by the Economic Crime Package because it proved, so I thought, that the Commission could use data and stakeholder input to reconsider and restructure the guidelines covering a major crime type. The ability to fundamentally rethink its own work is key to any healthy administrative agency, and the economic

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73. U.S. SENT’G GUIDELINES MANUAL §§ 2B1.1; 2F.1 (U.S. SENT’G COMM’N 1995).

74. For complete accounts of the criticisms of the former separate theft and fraud guidelines and the long process by which they were consolidated and amended, see generally Bowman, *Analysis and Legislative History*, *supra* note 60, Bowman, *Coping with “Loss”*, *supra* note 60, and Bowman, *A Judicious Solution*, *supra* note 60.

75. U.S. SENT’G GUIDELINES MANUAL § 2B1.1 (U.S. SENT’G COMM’N 2001); *see also* Bowman, *Analysis and Legislative History*, *supra* note 60, at 29–30.



crime debate seemed to showcase an agency on a path to institutional health. Later events soured me on that happy conclusion.

In the first place, the Economic Crime Package proved to be an anomaly, the only occasion in the over thirty years the Guidelines have been in existence that the Commission succeeded in materially overhauling the guidelines for any major crime type. Moreover, although I believe the Economic Crime Package had a great many strengths, we made some significant mistakes. Two in particular stand out. First, loss, though far better defined in the new Section 2B1.1, retained too much influence on the final sentencing range. In particular, 2001 adjustments to the loss table unreasonably inflated sentencing ranges in high-loss cases.<sup>76</sup> Second, and even more crucially, we failed to appreciate the cumulative effect of the new loss table and the multiplicity of other customizing specific offense characteristics, almost all of them aggravating factors, written into the new economic crime guideline. Particularly, because many of these factors—multiple victims, use of sophisticated means, receipt of more than one million dollars in gross receipts, securities law violations, and others—correlate with large victim losses, the Guidelines effectively double-counted the fact of a big fraud. This effect was exacerbated by the logarithmic structure of the Guidelines sentencing table, in which each move up the offense-level axis of the table represents a larger incremental increase in sentence length than the one before.<sup>77</sup> The result was Guidelines' sentences for large frauds that were higher than judges would be likely to feel comfortable imposing, and in some cases absurdly high, with offense levels literally off the top of the sentencing table chart.<sup>78</sup>

76. For an explanation of why this was so and illustrative cases, see generally Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 FED. SENT'G REP. 167 (2008).

77. For example, adding one offense level to the total of a first-time offender who previously had an offense level of nineteen (the original 1987 maximum under Section 2F1.1) increases his minimum sentence by three months and his maximum by four months. The same one-level increase from an offense level of thirty increases the defendant's minimum sentence by eleven months and his maximum by fourteen. And a one-level increase for an offender with an offense level of forty increases his minimum by thirty-two months and his maximum by forty months. U.S. SENT'G GUIDELINES MANUAL § 5(A) (U.S. SENT'G COMM'N 2001).

78. FRANK O. BOWMAN, III, COMMENT ON PROPOSED AMENDMENTS TO ECONOMIC CRIME GUIDELINE, § 2B1.1, at 2 (2015), <https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/Bowman.pdf> [<https://perma.cc/L7UA-4AQE>]; *Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines Before the U.S. Sent'g Comm'n*, 114th Cong. 174–77 (2015) (statement of Frank O. Bowman, III), <https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/transcript.pdf> [<https://perma.cc/TBL4-3PKJ>]. At the same hearing, a representative of the Justice Department conceded that eliminating the top four levels on the loss chart might be a pretty good idea. *Id.* at 119–20 (statement of Benjamin B. Wagner, U.S. Attorney, E.D. California); see also Leah McGrath Goodman, *Nonsensical Sentences for White Collar Criminals*, NEWSWEEK (June 26, 2014, 3:18 PM), <http://www.newsweek.com/2014/07/04/nonsensical-sentences-white-collar-criminals-256104.html> [<https://perma.cc/DJ9T-7GLF>].

This flaw in the 2001 Economic Crime Package amendments should not have been fatal to the success of the project. A Commission capable of the original overhaul should have been capable of recognizing the errors and correcting them in subsequent amendment cycles. Circumstances conspired to prevent that beneficent result. First, by unhappy coincidence, in December 2001, only a month after the Economic Crime Package went into effect, the Enron corporation collapsed,<sup>79</sup> followed in 2002 by a series of other high-flying companies which had diddled their stock valuations.<sup>80</sup> The cascade of corporate scandals drew the attention of Congress, which rapidly passed the Sarbanes-Oxley Act of 2002.<sup>81</sup> Parts of Sarbanes-Oxley, notably its regulatory aspects, are excellent. But Congress, egged on by the Bush Administration which wanted to paint the spate of scandals as the work of a few criminally bad actors rather than as a regulatory failure, could not resist the urge to include penalty increases for white-collar crime.<sup>82</sup> Some of these took the form of largely symbolic increases in statutory maximum sentences for crimes like mail and wire fraud.<sup>83</sup> But some were directives to the Sentencing Commission strongly urging increases in guideline sentences for economic offenses.<sup>84</sup>

Critically for the present narrative, these directives to the Commission were included in the legislation even though Congress received extensive testimony from representatives of law enforcement (including then-U.S. Attorney for the Southern District of New York, James B. Comey, Jr.) and the legal academy telling them that the Economic Crime Package passed only months before had already increased white-collar Guidelines' sentences to more than adequate levels.<sup>85</sup> Congress was undeterred and, in the Sarbanes-Oxley Act, put pressure on the Commission to raise penalties even more. Perhaps unsurprisingly, the Commission responded and in 2003 amended Section 2B1.1 to make it still more punitive.<sup>86</sup> In the years that followed, the Commission has proven incapable of making material corrections to the flaws in original 2001

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79. Ron Rimkus, *Enron Corporation*, CFA INST. (Dec. 7, 2016), <https://www.econcrises.org/2016/12/07/enron-corporation-2001/> [<https://perma.cc/T6FX-3FGL>].

80. Montange Portfolio, *Financial Statement Fraud in Enron, WorldCom Scandals, Fraud Motivation Triangle and the SOX Act 2002*, MEDIUM (Jan. 31, 2017), <https://medium.com/@MontangeUpdate/financial-statement-fraud-in-enron-worldcom-scandals-fraud-motivation-triangle-and-the-sox-act-f055a507f89> [<https://perma.cc/T8HZ-QANL>].

81. Pub. L. No. 107-204, 116 Stat. 765 (2002) (codified in scattered sections of 15 U.S.C. and 18 U.S.C.).

82. Bowman, *Pour Encourager*, *supra* note 38, at 398–401.

83. *Id.* at 400–01.

84. *Id.* at 405–11.

85. *Penalties for White Collar Crime Offenses: Are We Really Getting Tough on Crime?: Hearing on Penalties for White Collar Crime Before the S. Comm. on the Judiciary, Subcomm. on Crime and Drugs*, 107th Cong. 18–20, 23–26 (statements of Joseph R. Biden, Jr., James B. Comey, Jr., and Bradley W. Skolnik) (2002).

86. Bowman, *Pour Encourager*, *supra* note 38, at 431–35.

Economic Crime Package or of rolling back the later congressionally induced enhancements of white-collar sentencing levels. They have discussed the question endlessly, and nibbled at the edges, but no more.<sup>87</sup>

The same pattern has long been evident for other crime types. The sentences for drug cases prescribed by the very first iteration of the Guidelines started out too high, largely due to the Commission's choice to build drug sentencing levels around congressionally mandated quantity-based mandatory minimums.<sup>88</sup> Very high drug sentences created an immediate sore point, and as the years passed, the Guidelines became increasingly punitive for virtually all classes of cases. Because of the design and institutional siting of the Sentencing Commission, that body proved persistently incapable of responding creatively to any of its constituencies except the Justice Department and Congress. The result was a system in which the Guidelines were amended routinely and copiously but almost always in the direction of making them more punitive for defendants.<sup>89</sup> The Commission, with rare exceptions, proved incapable of materially lowering Guidelines' sentencing levels even for classes of cases that were broadly agreed to be overpunished, notably drugs<sup>90</sup> and child pornography.<sup>91</sup>

87. See generally Frank O. Bowman, III, *Damp Squib: The Disappointing Denouement of the Sentencing Commission's Economic Crime Project (and What They Should Do Now)*, 27 FED. SENT'G REP. 270 (2015) (discussing the critiques of the consolidated fraud and theft guideline).

88. Bowman & Heise, *supra* note 59, at 1059–62.

89. The Commission has to some extent recognized this problem, describing it as “factor creep.” U.S. SENT'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 137 (2004), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15\\_year\\_study\\_full.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf) [<https://perma.cc/SNB8-P5KJ>] (quoting Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines—Psychological and Policy Reasons for Simplification*, 7 PSYCH., PUB. POL'Y, & L. 739–75 (2001)).

90. For discussion of high drug sentences and the response by the Sentencing Commission, prosecutors, and courts, see Bowman & Heise, *supra* note 59. The Commission has acted from time to time to reduce drug sentences. *Id.* at 1074–80 (describing increased acceptance of responsibility adjustment, the 1994 elimination of the top two levels of the drug quantity table, adjustments to marijuana guidelines in 1995, and change in the “mixture or substance” definition). Many of the Sentencing Commission's more recent actions in the area have related to cocaine sentencing, particularly the sentences of crack cocaine offenders. See, e.g., *US: Crack Cocaine Ruling a Victory for Rights*, HUM. RTS. WATCH (July 1, 2011, 11:47 AM), <https://www.hrw.org/news/2011/07/01/us-crack-cocaine-ruling-victory-rights> [<https://perma.cc/3LVL-K6HE>] (discussing a decision to allow retroactive application of new crack cocaine sentencing guidelines).

91. See U.S. SENT'G COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 1 (2009), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030\\_History\\_Child\\_Pornography\\_Guidelines.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_History_Child_Pornography_Guidelines.pdf) [<https://perma.cc/5LCF-LBQT>] (providing the history of the child pornography guidelines); U.S. SENT'G COMM'N, QUICK FACTS: CHILD PORNOGRAPHY OFFENDERS 1 (2019), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Child\\_Pornography\\_FY19.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Child_Pornography_FY19.pdf) [<https://perma.cc/G6T6-8LVE>] (“The average sentence of child pornography offenders was 101 months; 99% were sentenced to prison.”).

Even these defects need not have been fatal to the guideline system had the judiciary been provided more leeway to sentence outside the ranges prescribed by the Guidelines' rules. But throughout the pre-*Booker* era, the Commission remained quite resistant to what it sometimes saw as judicial disregard of the Commission's mandates. More importantly, both the Justice Department and Congress (particularly when controlled by Republicans) were consistently and aggressively hostile to any effort by the judiciary to escape the strictures of the Guidelines.

In 1996, the Supreme Court in *Koon v. United States*<sup>92</sup> tried to loosen the reins a bit and confer increased judicial departure discretion.<sup>93</sup> Prosecutors in the Clinton Justice Department grumbled a bit, but when President George W. Bush won the presidency in 2000, his Justice Department began taking active measures both to train prosecutors to press for within-Guidelines sentences and to constrain district judge discretion.<sup>94</sup> Likewise, in 2003, Congress—then controlled by Republicans<sup>95</sup> who were in a particularly punitive mood—passed the Feeney Amendment to the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (“PROTECT”) Act of 2003,<sup>96</sup> which effectively reversed the *Koon* decision, eliminated a number of grounds for departure, and imposed a de novo standard of review on appeals of downward departures.<sup>97</sup>

I took a number of sobering lessons from all this. The most important was that the ideal of sentence levels set and continually adjusted by a neutral body of experts that inspired the creation of the Sentencing Commission has proven ineffective, at least in the federal setting. Congress, which largely deferred to the Sentencing Commission for some years following its creation, long since stopped doing so. Rather, it quickly resumed the habit, natural to legislatures, of upping penalties for whatever crime type is grabbing public attention. And the Guidelines structure, with its forty-three offense levels and hundreds of sentencing factors, turns out to provide an ideal vehicle for congressional

92. 518 U.S. 81 (1996). See generally Bowman, *Heartland*, *supra* note 35, at 19.

93. See *Koon*, 518 U.S. at 91–100 (holding that an appellate court should not review de novo a decision to depart from the Guidelines sentencing range but instead should ask whether the sentencing court abused its discretion).

94. Edward Lazarus, *Ashcroft's New Charging, Plea Bargaining, and Sentencing Policies: Consideration Necessary, but Criticism Overstated*, CNN (Oct. 3, 2003, 1:02 PM), <https://www.cnn.com/2003/LAW/10/03/findlaw.analysis.lazarus.ashcroft/> [<https://perma.cc/G8QF-RTML>].

95. *Congress Profiles*, HISTORY, ART & ARCHIVES: U.S. HOUSE REPRESENTATIVES, <https://history.house.gov/Congressional-Overview/Profiles/108th/> [<https://perma.cc/V3HU-EKPN>].

96. Pub. L. No. 108-21, 117 Stat. 650 (codified as amended at 18 U.S.C. § 3742(e)(3)).

97. *Id.* § 401(d)(1), 117 Stat. at 670. For an overview of the Feeney Amendment and the controversy it provoked, see Douglas A. Berman, *Locating the Feeney Amendment in a Broader Sentencing Reform Landscape*, 16 FED. SENT'G REP. 249, 249 (2004); see also M.K.B. Darmer, *The Federal Sentencing Guidelines After Blakely and Booker: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S. CAL. L. REV. 533, 565–66 (2005) (discussing the Feeney Amendment).

micromanagement. Crucially, the Commission itself has proven to have limited ability to resist congressional pressure. The Commission has had its own internal pathologies, but the primary obstacle to its maturation into a meaningfully independent body has been Congress, both in what it has done and in what the Commission constantly fears it might do. The result was a Guidelines system that became in practical effect a one-way upward ratchet. In 2005, I accepted this inescapable reality and concluded that structural flaws in the design of the Guidelines consigned them to inevitable failure.<sup>98</sup>

### C. *Reflections on Booker*

And then came *Booker*, which was, of course, the culmination of a line of thinking opened by the Supreme Court's decision five years before in *Apprendi*.<sup>99</sup> *Apprendi* was, on its facts, no more than an application of the long-standing rule that judges may not impose sentences higher than the statutory maximum sentence prescribed by the legislature.<sup>100</sup> The peculiarity of the statute at issue in the case was that it purported to allow a sentence higher than the otherwise-applicable statutory maximum based on a purely judicial finding of fact (that the defendant had acted from racial animus).<sup>101</sup> That oddity invited the Court to wrestle further with the long-standing question of how to define an "element" of a crime which, under *In re Winship*,<sup>102</sup> the prosecution must prove to a jury beyond a reasonable doubt.<sup>103</sup> Justice Stevens' majority opinion in *Apprendi* intimated—without actually so holding—that facts designated by structured sentencing regimes to direct judicial sentencing choices inside traditional statutory maximum and minimum sentencing ranges might be deemed "elements" subject to the jury trial right of the Sixth Amendment.<sup>104</sup>

I think it key to remember that *Apprendi* was decided in 2000. In my view, had the Sentencing Commission, Congress, and the Justice Department (particularly under President Bush) been more cautious and more respectful of judicial sensibilities, the latent potential of Justice Stevens' *Apprendi* opinion to upend the federal Guidelines, and indeed structured sentencing in all state systems, might never have been realized. In combination, the cumulative actions of these institutions were a direct challenge—even an insult—to the values and spirit of the federal bench. And all of them failed to recognize that

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98. Bowman, *Failure of the Guidelines*, *supra* note 4, at 1319–20.

99. 530 U.S. 466 (2000).

100. *See id.* at 491–92.

101. *Id.* at 468–69.

102. 397 U.S. 358 (1970).

103. *Id.* at 368.

104. *See* Bowman, *Debate*, *supra* note 4, at 399–403 (discussing Justice Stevens' opinion in *Apprendi*).

judges, too, can be pushed only so far and that immense self-protective power can be summoned from the general language of the Federal Constitution.

As discontent with the Guidelines percolated among federal judges, so too did the possibilities of *Apprendi*'s logic. In 2004, in *Blakely v. Washington*,<sup>105</sup> the Supreme Court invalidated a Washington state guidelines system that barred judges from imposing a sentence in excess of the presumptive guideline range but beneath the statutory maximum, without first finding facts in addition to the fact of conviction.<sup>106</sup> Such additional facts, said the Court, were "elements" because they permitted a higher sentence than would be possible in their absence and thus required a jury finding beyond a reasonable doubt.<sup>107</sup> The path from *Blakely* to the invalidation of the federal guidelines in *Booker* was plain. The Court took it.<sup>108</sup> In my view, the Court's choice to move from the unexceptional decision in *Apprendi* to defend the traditional understanding of a statutory maximum sentence to the radical adventure of invalidating the entire structured sentencing movement—both state and federal—cannot be understood without appreciating the psychological overhang of the Federal Sentencing Guidelines. In *Blakely* and *Booker*, the Court crafted a constitutional rationalization for lifting what a good many judges felt to be the yoke of the Federal Sentencing Guidelines from their necks. But in doing so, it did far more than defenestrate a structure federal judges found particularly galling to themselves. Together, *Apprendi*, *Blakely*, and *Booker* effectively ban law and reify judicial discretion in sentencing.

This is not the place to rehash my many criticisms of the Supreme Court's tortured, constitutionally threadbare rationale for first finding the Guidelines unconstitutional as violative of the Sixth Amendment jury trial requirement and then, in the same opinion, resurrecting them as advisory by judicially amending the Sentencing Reform Act.<sup>109</sup> I hope the day will come when the Court will revisit the mess they made and substitute, as they might have from the outset, a constitutional theory that allows for a sensible balance of law and judicial discretion in criminal sentencing. For that project, a judicious combination of Sixth Amendment and due process principles would be a far more sensible vehicle than the *Apprendi-Booker* line's torture of the Sixth Amendment.<sup>110</sup> But for now and the immediately foreseeable future, the constitutional questions are water over the dam. *Booker* reigns. Any

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105. 542 U.S. 296 (2004).

106. *Id.* at 305.

107. *Id.* at 306–08.

108. Over, I may say, my frantic and wholly impotent objections. See Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217, 219–20 (2004) (addressing the federal implications of *Blakely*).

109. For an extended critique of *United States v. Booker* and the cases preceding and following it, see generally Frank O. Bowman, III, *Debacle*, *supra* note 4.

110. *Id.* at 473–75.

modifications of federal (or state) sentencing law must accommodate the central holding of *Booker* and its progeny that no fact found by a judge rather than a jury can create a binding, or indeed even presumptive, limitation on the upper or lower bounds of a criminal sentence.<sup>111</sup>

Which brings me to the final and most notable failure of the U.S. Sentencing Commission. In 1987, it brought forth a system expressly designed to set narrow and strongly presumptive limits on judicial sentencing choice. Every aspect of the system as originally created and progressively amplified over the next seventeen pre-*Booker* years was premised on that objective. Yet in the *fifteen years* since the Supreme Court decreed that this—the Guidelines’ *raison d’être*—was constitutionally impermissible, the Commission has refused to do the obviously necessary thing: recraft the federal sentencing system to accommodate the *Booker* holding either by designing a guidelines structure in which sentencing factors are triable to a jury or by rethinking the Guidelines as a purely advisory system. Instead, the Commission has remained paralyzed. It has proposed no new system, and only a few tiny modifications of the existing one that grudgingly acknowledge its advisory status.<sup>112</sup> The result is that lawyers, probation officers, and courts are obliged to go through the whole highly detailed ritual of finding Guidelines facts and applying Guidelines rules to generate a Guidelines sentencing range that, by law, the sentencing judge is prohibited from formally giving any more weight than any other sentencing consideration.<sup>113</sup> Appellate courts can, in theory, reverse sentences as substantively unreasonable,<sup>114</sup> but they scarcely ever do. Most of the small percentage of appellate reversals on sentencing grounds are for errors in applying the Guidelines rules, not appellate disagreement with the substance of the outcome. For example, in fiscal year 2019, of 6,793 cases resolved on appeal, only 357 were reversed or remanded on grounds related to sentencing; of those, 308 were reversed for improper calculation of the guideline range and *only six* were reversed for unreasonableness.<sup>115</sup>

Moreover, I can attest from my annual review of appellate decisions required to revise a sentencing treatise that the *quality* of appellate work in the area falls steadily with each passing year. The courts of appeals palpably expend ever-declining amounts of intellectual energy on careful analysis of sentencing issues. It is plain that appellate judges have internalized the view that the

111. *United States v. Booker*, 543 U.S. 220, 244 (2005).

112. *E.g.*, U.S. SENT’G GUIDELINES MANUAL § 1B1.1, cmt. background (U.S. SENT’G COMM’N 2018) (belatedly recognizing that a sentence outside the Guidelines range that was not justifiable as a departure would be characterized as a “variance”).

113. Weirdly, under *Rita v. United States*, 551 U.S. 338 (2007), an appellate court can, but need not, afford a properly calculated guideline range a presumption of correctness, but a district cannot do so, and can be reversed if it is so impolitic as to say that this was the case. *Rita*, 551 U.S. at 351–56.

114. *Gall v. United States*, 552 U.S. 38, 51 (2007).

115. SENT’G COMM’N, 2019 REPORT, *supra* note 72, at 177 tbl.A-1, 188 tbl.A-6.

Guidelines are entirely advisory and that district court sentencing choices are, in the last analysis, almost completely discretionary. The result is a body of appellate law that is less and less useful to litigants and courts and signals, through its very superficiality, that district judges are free to do pretty much what they like. As I wrote six years ago in language even more apt today,

In practical fact, district court judges are now at liberty to adhere to or ignore guideline ranges as the spirit moves them, subject only to the requirement that a sentence outside the range be accompanied by some explanation which (a) is couched in the gloriously inclusive terminology or 18 U.S.C. § 3553(a), and (b) is not on its face barking mad.<sup>116</sup>

That being said, if the federal judiciary had totally cast the Guidelines aside, paying them no attention at all when setting sentences, the requirement of applying the Guidelines to every case would merely be a deplorable waste of time and resources. But in the fifteen years since *Booker*, the Guidelines have proven astoundingly resilient, even if somewhat less determinative of sentences in individual cases. Since *Booker*, the percentage of defendants sentenced within the sentencing range calculated by the court has slowly but steadily declined, from 72% in 2004,<sup>117</sup> the year before *Booker*, to 51.4% in 2019;<sup>118</sup> and the aggregate average (mean) length of federal sentences across all offense types has drifted downwards as well, from 56.8 months in 2003<sup>119</sup> to 46 months in 2019.<sup>120</sup> But within most offense types, sentence lengths have held remarkably stable, particularly for economic crimes, most firearms offenses, and every drug type except crack cocaine.<sup>121</sup> Much of the decline in the national average (mean) sentence has been driven by changes in the case mix among all federal offenders

116. Bowman, *Dead Law Walking*, *supra* note 5, at 1232–34.

117. U.S. SENT'G COMM'N, 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl.26 (2004), <https://www.ussc.gov/research/sourcebook/archive/sourcebook-2004> [<https://perma.cc/Z5AM-Q568>]. The Commission compiled separate data for the periods before and after the *Blakely* decision. *Id.* For the pre-*Blakely* period, the percentage of cases sentenced within-range was 72.2%. For the post-*Blakely* period, the percentage was 71.8%. *Id.*

118. SENT'G COMM'N, 2019 REPORT, *supra* note 72, at 88 tbl.29.

119. U.S. SENT'G COMM'N, AVERAGE LENGTH OF IMPRISONMENT FOR OFFENDERS IN EACH CRIMINAL HISTORY CATEGORY BY PRIMARY OFFENSE CATEGORY: FISCAL YEAR 2003, [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2003/table14\\_0.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2003/table14_0.pdf) [<https://perma.cc/Q4EF-2TZW>].

120. SENT'G COMM'N, 2019 REPORT, *supra* note 72, at 82 tbl.28.

121. *See id.* at 126 fig.D-5 (illustrating the sentence length of drug-trafficking offenders by major drug over time and showing little change in average sentence lengths between 2010 and 2019 for any drug type except crack cocaine); *id.* at 137 fig.I-3 (illustrating sentence length of immigration offenders over time and showing very modest changes in average sentence length for immigration offenders except in simple illegal-reentry cases where average sentence declined by about eleven months between 2010 and 2019); *id.* at 162 fig.E-4 (illustrating sentence length of economic offense offenders over time and showing average fraud sentences increased and sentence lengths for other economic crime offenses held largely static between 2010 and 2019); *id.* at 150 fig.F-5 (illustrating sentence length of firearms offenders over time).



and, in particular the increased percentage of relatively low-sentence immigration cases.<sup>122</sup>

It turns out that even when judges sentence outside the applicable guideline range, their sentences tend to cluster near that range.<sup>123</sup> In one way this is hardly surprising. Even if the Guidelines are no longer law, they look and feel like law. They are written as rules and their application requires findings of fact. They bear the imprimatur of both Congress and a supposedly expert agency. They provide benchmarks, however nominally advisory, for the inherently metaphysical exercise of matching crime to punishment. And they are what the judges are used to, both in process and result.

All of which might be fine if we agreed that the penalty ranges recommended by the Guidelines—the ranges judges continue to use as the baseline for their sentencing decisions—were substantively desirable. But in that respect, virtually nothing of real consequence has changed since *Booker*. If one thought that the Guidelines were categorically too punitive in 2005 when *Booker* was decided, one's opinion on that point will certainly be the same today. Granted, there have been a few ameliorating tweaks over the past few years, but the changes are limited and marginal. Likewise, nothing about the Guidelines-amendment process has materially changed. The Commission is structurally identical. Its subordinate relation to the Justice Department and Congress remains unchanged. In important classes of cases, statutory mandatory minimum sentences continue to cabin the Commission's options, even if it wanted to be more adventurous.

In short, the federal sentencing regime we have—birthed from the interplay of congressional desires, Sentencing Commission shortfalls, and the constitutional constraints imposed by a Supreme Court determined to reaffirm judicial sentencing authority—is a painfully unsatisfactory relic.

### III. LOOKING AHEAD

What, then, can we reasonably expect of the federal sentencing system in the near future? I would very much like to see a complete rethinking of the existing structure. Such a reexamination should go back to basics and consider the lessons that the current Guidelines' genesis, structure, and history teach about a series of basic questions:

- (1) Ought sentencing to involve law in the ordinary sense at all, or ought it be entrusted entirely to the personal discretionary judgment of individual judges?

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122. Bowman, *Dead Law Walking*, *supra* note 5, at 1237–41.

123. *Id.* at 1244–50.

- (2) If there is to be a law of sentencing, how fact-driven ought it to be and how restrictive of judicial discretion?
- (3) If there is to be a law of sentencing, who should assume the primary responsibility and authority to make the rules: judges themselves, either through rulemaking (like that which generated the Federal Rules of Evidence) or through a case-by-case common-law process; an independent expert agency; the legislature; or some combination of judges, experts, and legislature?
- (4) If a reimagined structured system is to replace the current Guidelines, how can one accommodate what I see as the need for law in sentencing with the peculiar constraints created by *Apprendi*, *Blakely*, and *Booker*?
- (5) Should we reinstitute back-end discretionary release authority, in effect resurrecting some version of parole?
- (6) Finally, and most importantly, what objectives are we trying to achieve in federal criminal sentencing and how can we reconceive the sentencing process and, where appropriate, recalibrate the prison sentences that will inevitably be the lot of most federal defendants to better achieve those objectives?

My view is that we need a contemporary reboot of the process that produced the Sentencing Reform Act itself. But for that to occur and produce genuinely transformative results, two improbable things would have to happen. First, the Supreme Court would need to reconsider the *Apprendi-Booker* line of cases and address intelligently the real source of its concern—the appropriate level of constraint a legislature may place on judicial sentencing discretion in the intervals between true statutory minimum and maximum sentences. If that were done, and done properly, there would be constitutional space to create sensible new sentencing schemes for both federal and state courts. Sadly, I have no expectation that the Court will do this. They abandoned serious consideration of their *Apprendi-Booker* project years ago and have confined their attention to tidying it up around the edges.<sup>124</sup> Probably for two reasons. To begin, the pure pragmatists probably believed that the objective of defanging the federal Guidelines and returning functional control over individual sentencing choices to federal trial judges had been largely accomplished. Further, the wiser heads have, I suspect, realized that the *Blakely-Booker* extension of *Apprendi* is a logical mess and that untangling it and putting something more sensible in its place would involve a long, tedious project of

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124. See generally Bowman, *Debate*, *supra* note 4, at 447–59 (discussing several Sixth Amendment sentencing cases where the Court bound itself more firmly to the *Booker* logic); see also United States v. Haymond, 139 S. Ct. 2369, 2380 (2019) (applying the *Blakely-Booker* line of cases to supervised release revocation); Alleyne v. United States, 570 U.S. 99, 103 (2013) (holding facts generating mandatory minimum sentences require jury finding).

reimagining the whole area of law. They have, to date, signaled no stomach for such a venture.

Second, fundamental reform of federal sentencing, whether constrained by or freed from the *Apprendi-Booker* straitjacket, would require executive initiative and congressional action. If of an optimistic turn of mind, one could hope that the recent change in administration and in control of Congress might open a window during which this kind of comprehensive reevaluation would be welcomed, or at least not rejected out of hand, by those who control the critical levers of federal power. Were that to occur, and were a new administration and new Congress to give appropriate direction to the Sentencing Commission or some other independent body, it is just possible that, after another long and painful interval, a revived federal sentencing could be born. But to be painfully honest, my best bet is that our current national circumstances of partisan polarization and government dysfunction will prevent a meaningful federal initiative anytime soon. Therefore, I sorrowfully expect to continue co-authoring my sentencing guidelines treatise for many years to come. And should I live so long, to recycle these remarks at a symposium on the 30th and 40th anniversaries of *Apprendi*.

