APPRENDI/*BOOKER* AND ANEMIC APPELLATE REVIEW*

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The Supreme Court's case law following Apprendi v. New Jersey *and* United States v. Booker*, and the decisional law of the federal appellate courts, have had unintended and less than salutary results. While the appellate courts were uniquely suited to offer a meaningful critique of the Federal Sentencing Guidelines ("Guidelines") as well as substantive guidance about what non-Guidelines sentencing might involve, they have largely abdicated those roles. Judicial critiques of the Guidelines could have made the U.S. Sentencing Commission more accountable and could have imposed the kind of review that other agency rules and criminal statutes receive by requiring that the Guidelines be aligned with the purpose of sentencing and based on studies and data. But since the appellate law requires nothing more than that the district courts compute the Guidelines correctly, there is no incentive to critique them. Nor have appellate courts provided any substantive guidance concerning what non-Guidelines sentencing should involve or what principles should inform non-Guidelines sentences. The result is that interpretation of the Guidelines has stalled, on the one hand, and the substantive law of sentencing is chaotic, on the other.*

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INTRODUCTION

Apprendi v. New Jersey[1] and *United States v. Booker*[2] were watershed opinions without watershed results. Beginning with *Apprendi*, the U.S. Supreme Court ruled that the Constitution required what appeared to be a new role for the twentieth-century jury—namely, a role in sentencing. Justice Stevens, writing for the Court, held that the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment required that any fact (other than a prior conviction) which increases the maximum penalty for a crime must be found by a jury beyond a reasonable doubt rather than by a judge by a preponderance of the evidence.[3]

A year later, in *Booker*, the Court concluded that the facts a jury had to decide under the Sixth Amendment now included those that the Federal Sentencing Guidelines ("Guidelines") made relevant.[4] Since the core constitutional violation in *Booker* was that judges, not juries, were finding sentencing facts with determinative sentencing consequences fixed by the U.S. Sentencing Commission ("Commission"), the cure, according to Justice Breyer, was to make the Guidelines advisory.[5] While that result was heralded by district court judges, like me, who chafed under the Guidelines, it has not led to meaningful change in a deeply, *deeply* flawed federal sentencing system.[6]

1. 530 U.S. 466 (2000).

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

3. *Apprendi*, 530 U.S. at 490.

4. *Booker*, 543 U.S. at 233.

5. *Id.* at 245. In a mandatory guidelines regime, what the judges did at sentencing looked exactly like what juries do—finding facts with determinate consequences, thereby usurping the jury's role according to the *Booker* majority. *Id.* at 243–44. Indeterminate sentencing had not raised constitutional alarms, although it had other problems. Juries found facts subject to strict procedural rules; conversely, judges had a flexible role in individualized sentencing, with more lenient rules and lower standards. Nancy Gertner, *Thoughts on Reasonableness*, 19 FED. SENT'G REP. 165, 165 (2007). *See generally* Nancy Gertner, *Juries and Originalism: Giving "Intelligible Content" to the Right to a Jury Trial*, 71 OHIO ST. L.J. 935, 937–38 (2010) (discussing the jury's historical role in sentencing and arguing that the jury's key role in determining sentences for crimes subject to mandatory minimums should require courts to give juries at least a cursory explanation of possible punishments).

6. *See* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 908 (1991) (providing a general critique of the Guidelines); Nancy Gertner, *Against These Guidelines*, 87 UMKC L. REV. 49, 51–52 (2018) [hereinafter Gertner, *Against These Guidelines*] (same). The Guidelines elevated the avoidance of sentencing disparity over all other purposes, like justice, fairness, and proportionality. And to accomplish this purpose, the Commission keyed sentencing to ostensibly objective factors like drug quantity, the amount of the fraud, or the offender's criminal record, without meaningful consideration of what that quantity reflected (such as dealing drugs to get school supplies) or the racial bias that criminal records masked (such as "driving while Black" or over-policing in communities of color). Pre-Guidelines factors like mens rea, mental illness, trauma, and even drug or alcohol addiction were largely left out of the analysis. Important drivers of offending were ignored, creating a false uniformity in which unlike offenders were treated alike. The differential treatment between defendants charged with crack-cocaine sales (disproportionately Black) and defendants charged with cocaine sales (disproportionately White) was exacerbated. Finally, the Guidelines led to higher and higher sentences for these offenses, dramatically increasing mass

Booker and *Apprendi* created space for judicial discretion in the application of the Guidelines, altogether a good first step in my judgment. The critical question was what the next steps would be. Judicial discretion could have informed the development of sentencing in two respects. First, it could have provided a critique of the Guidelines, subjecting them to the kind of review that other agency rules and other criminal statutes receive. And by critiquing the Guidelines, courts could have made the Commission more accountable, forcing the Guidelines it promulgated to be more consistent with the Sentencing Reform Act of 1984 ("SRA")[7] and more aligned with the purposes of sentencing than they have ever been.

That is what I tried to do while I was on the bench in the years before *Booker* and especially after. I wrote opinions that critically evaluated the Guidelines: Since only "extraordinary family circumstances" would qualify for a departure from the Guidelines—and a reduced sentence—it seemed important to critically analyze the term.[8] What does "extraordinary family circumstances" mean after all?[9] What did the Guidelines' drafters see as the benchmark

incarceration for all offenders and especially for people of color. Until 2014, the Commission used mandatory sentences as the base levels for the Guidelines, pushing sentences even higher than the Congressional minimums. Although the Guidelines are advisory now, they continue to exert an outsized influence on sentencing outcomes. Mass incarceration and racial disparities continue virtually unabated. Gertner, *Against These Guidelines*, *supra*, at 52–55. Notably, no other state or country has adopted the Guidelines model. Indeed, even the American Law Institute's revision of the Model Penal Code on Sentencing expressly rejected the Guidelines model because it failed to provide adequate room for judicial sentencing discretion. *See* MODEL PENAL CODE: SENT'G § 6B.06 cmt. a (AM. L. INST., Proposed Final Draft 2017) ("Under the revised Code, the commission has no power to forbid or require the consideration of any sentencing factor."); MODEL PENAL CODE: SENT'G REP. 115–25 (AM. L. INST. 2003). Other critiques of the Guidelines include that the Guidelines treat in like manner offenders who are not at all alike, do not reflect in any coherent way the purposes of sentencing; ignore salient factors that could impact culpability; and finally, lead to extraordinarily harsh sentences without regard to proportionality. *See, e.g.*, KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 104 (1998); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 836 (1992).

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

8. The Guidelines indicated that a departure for family circumstances was not "ordinarily relevant" but never defined what that the "ordinary family" was; there were no commentaries, no application notes, no examples, no findings, not even a rationale offered by the Commission. U.S. SENT'G GUIDELINES MANUAL § 5H1.6 (U.S. SENT'G COMM'N 2018). As Judge Jack Weinstein noted, "Given the multiplicity of family arrangements in New York City, the use of the term 'ordinary' in the Guidelines gives the judge little guidance." Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 COLUM. J. GENDER & L. 169, 177–78 (1996). I tried to define the term and understand its relationship to the sentencing structure. I had to. I was sentencing individuals. *See, e.g.*, United States v. LaCarubba, 184 F. Supp. 2d 89, 91 (D. Mass. 2002); United States v. Thompson, 74 F. Supp. 2d 69 (D. Mass. 1999), *vacated*, 234 F.3d 74 (1st Cir. 2000).

9. Chapter 5, Part H of the Guidelines listed offender characteristics which were "not ordinarily relevant" to whether a sentence should be outside the Guidelines range, including "family ties and responsibilities." U.S. SENT'G GUIDELINES MANUAL § 5H1.6; *see also* United States v. Pereira, 272

"ordinary" family? On what data was this factor based? The Guidelines made distinctions between minimal and minor participants in a crime (different reductions in the Guidelines points for each), essentially picking numbers out of the air, largely without explanation.[10] Why were the reductions for mitigating roles set where they were? One finding which could lead to an increase in the Guidelines score was that someone was an organizer or leader of an "extensive organization." What does "extensive organization"[11] mean, and where did this concept come from? In my view, the Guidelines were incoherent, offering the illusion of rationality and a thoughtful arithmetic exercise while actually providing "back of the envelope" calculations.[12] I was not alone in these observations.[13]

Second, increased judicial discretion post-*Booker* could have effected meaningful change in sentencing by creating a common law of sentencing:[14] a judge-made sentencing framework supplementing, and perhaps supplanting, the Guidelines. Such a framework would go beyond my prior critiques, which amounted to describing what *not* to do, noting that this or that guideline was without basis or ambiguous. It would also outline what *to* do: namely, how to consider issues that the Guidelines had trivialized or excluded from the sentencing calculus, like mental health; neuroscientific insights into addiction

F.3d 76, 81 (1st Cir. 2001) (excluding parental care from "extraordinary circumstances" for Guidelines departures); *LaCarubba*, 184 F. Supp. 2d at 91 ("[C]ourt[s] must measure the defendant against all other defendants, no matter the crime of his or her conviction, and determine whether he or she is 'irreplaceable.'"); *Thompson*, 74 F. Supp. 2d at 75–76 (defining extraordinary circumstances flexibly to reflect judges' own past experiences as well as other cases of similarly situated offenders).

10. U.S. SENT'G GUIDELINES MANUAL § 3B1.2; *see* United States v. Cabrera, 567 F. Supp. 2d 271, 277 (D. Mass. 2008) (stating that the Guidelines do not define "minimal" or "minor" and that the number of "points" seems "wholly arbitrary"); United States v. Jurado-Lopez, 338 F. Supp. 2d 246, 254 (D. Mass. 2004) (reducing the Guidelines role adjustment for a woman who was used as a drug mule).

11. The government could seek an increase in the Guidelines range—which means a higher sentence—if a defendant was "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S. SENT'G GUIDELINES MANUAL § 3B1.1(a); *see* United States v. Footman, 66 F. Supp. 2d 83, 92–94 (D. Mass. 1999) (interpreting the meanings of "participant" and "otherwise extensive"); *see also Panel III: Accomplishing the Purposes of Sentencing—The Role of Courts and the Commission*, 15 FED. SENT'G REP. 179, 179 (2003).

12. For a similar critique of the Guidelines' false rationality, see Michael Tonry, *The Questionable Relevance of Previous Convictions to Punishments for Later Crimes*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES 91, 92 (Julian V. Roberts & Andrew von Hirsch eds., 2010).

13. Louis F. Oberdorfer, *Mandatory Sentencing: One Judge's Perspective—2002*, 40 AM. CRIM. L. REV. 11, 17–18 (2003) (arguing that the Guidelines were flawed and suggesting that a common law of sentencing would produce fairer results).

14. *See* Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 94 (1999) (arguing that a common law of departures could eventually emerge from appellate review of reasoned departures); Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 419–20 (1992) (criticizing the Commission for failing to articulate a sentencing philosophy).

or childhood adversity; or the advancement of sentencing theories, such as principles of proportionality, that the Guidelines' drafters ignored.

Neither alternative happened. Rather, post-*Booker* sentencing is what Professor Paul Hofer, former Senior Research Associate for the Commission, has described as a chaotic, "tragic mess."[15]

This Article examines the problems with post-*Booker* sentencing, specifically keying in on the role of the federal appellate courts. While they were uniquely suited to offer both a meaningful critique of the Guidelines as well as substantive guidance about what non-Guidelines sentencing might involve, they have largely abdicated those roles. Part I briefly explains the shortcomings of the Guidelines today. Part II addresses how institutional actors like district courts and Congress have exacerbated these shortcomings. Part III builds on my prior work by explaining the role of the appellate courts in our current state of post-*Booker* Guidelines confusion.

I. THE STATE OF SENTENCING TODAY

If there ever was a moment for judges to critique the Guidelines, the years after *Booker* were it.[16] If there ever was a moment for the emergence of a robust body of law that evaluated the Guidelines,[17] the statutory purposes behind them, the basis for their promulgation, and whether that record was adequate or inadequate, the years after *Booker* were it.[18] But that revolution did not

15. Paul Hofer, *After Ten Years of Advisory Guidelines, and Thirty Years of Mandatory Minimums, Federal Sentencing Still Needs Reform*, 47 U. TOL. L. REV. 649, 649 (2016) [hereinafter Hofer, *After Ten Years*].

16. This was the kind of judicial input that some of the individuals who had participated in the Guidelines movement envisioned. *See, e.g.*, Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1694 (1992) (arguing that Congress envisioned a more interactive process for Guidelines development involving the Commission, judges, prosecutors, and defense attorneys).

17. For examples of cases in which this kind of analysis did take place, see United States v. Vanvliet, 542 F.3d 259, 271 (1st Cir. 2008) (holding that a district court can justify a sentence below the Guidelines' sentencing ranges by citing disagreement with the Guidelines' policy); United States v. White, 551 F.3d 381, 386 (6th Cir. 2008) (finding that a district court may choose a sentence outside of the Guidelines if the Guidelines range is too high or too low to accomplish the purposes of punishment); United States v. Garrison, 560 F. Supp. 2d 83, 87 (D. Mass. 2008) (finding that the Guidelines overemphasized the quantity of drugs possessed by the offender and underemphasized the offender's minor role in the drug distribution organization); United States v. Grober, 595 F. Supp. 2d 382, 412 (D.N.J. 2008) (holding that the Guidelines range was inapplicable in a case involving child pornography); United States v. Ennis, 468 F. Supp. 2d 228, 238 (D. Mass. 2006) (finding that the Guidelines' career-offender provisions inadequately addressed the purposes of punishment).

18. Even the *Booker* promise of administrative procedural review of the Guidelines—wherein the Guidelines are stripped of the force of law, and the Commission is transformed into a more traditional administrative agency subject to review akin to that required by the Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.)—was largely unfulfilled. *See* Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217, 217 (2005).

happen. Ironically, this lack of action was the product of the Supreme Court's efforts to structure sentencing in a two-step process post-*Booker*. Under this process, step one involved calculating the Guidelines range and identifying any departures that were specifically addressed in the Guidelines book.[19] Step two involved looking at the factors in 18 U.S.C. § 3553(a),[20] such as the need for the sentence to "promote respect for the law," "to protect the public," and "to avoid unwarranted sentencing disparities."[21] Then, and only then, could the judge decide whether to vary from the Guidelines range.[22]

In short order, it was clear that a sure-fire way to get reversed by the courts of appeals—even in the enlightened post-*Booker* world—was to incorrectly calculate the Guidelines in step one. As a result, most district court judges—even those who were dissatisfied with the Guidelines computation—took no chances. Better to vary from the Guidelines under *Booker* at step two than to try to carve out new interpretations for departures from the Guidelines at step one. Indeed, the path of least resistance for judges would be to take the most crabbed, even discretion-limiting view of the Guidelines' provisions possible at step one (usually the government's position) and proceed directly to a step-two variance, where judges may take many more factors into account with less rigorous appellate review.[23]

There are parallels here with the evolution of qualified immunity decisional law under 42 U.S.C. § 1983. After the Supreme Court held in *Pearson v. Callahan*[24] that courts resolving government officials' qualified immunity claims do not have to decide whether the plaintiff's facts make out a violation of constitutional right (the merits prong) before asking whether the right was "clearly established" (the immunity prong),[25] many courts simply stopped articulating the metes and bounds of § 1983 violations.[26] The result was what

19. Gall v. United States, 552 U.S. 38, 49 (2007) ("[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range[;] . . . the Guidelines should be the starting point and the initial benchmark.").

20. *Id.* at 49–50.

21. 18 U.S.C. § 3553(a)(2)(A), (a)(2)(C), (a)(6).

22. *Gall*, 552 U.S. at 49–50.

23. *See* Irizarry v. United States, 553 U.S. 708, 714–15 (2008) (citation omitted) ("Although the Guidelines, as the 'starting point and the initial benchmark,' continue to play a role in the sentencing determination . . . there is no longer a limit . . . on the variances from Guidelines ranges that a district court may find justified under the sentencing factors set forth in 18 U.S.C. §3553(a).").

24. 555 U.S. 223 (2009); *see also* Reichle v. Howards, 566 U.S. 658, 664 (2012) (affirming *Pearson*'s procedure and noting that deciding qualified immunity issues on the basis of the right not being "clearly established" by prior case law "comports with our usual reluctance to decide constitutional questions unnecessarily").

25. *Pearson*, 555 U.S. at 236.

26. *See, e.g.*, City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1775 (2015) (declining to decide a constitutional question and concluding only that the officer's "failure to accommodate" mental illness during an arrest did not "violate[] clearly established law"). Christensen v. Park City Mun. Corp., 554 F.3d 1271 (10th Cir. 2009), involved a visual artist who attempted to display and sell his

two scholars described as "constitutional stagnation": "Because many constitutional issues arise in cases subject to qualified immunity, if courts were simply to resolve such claims on the ground that there is no clearly established right, then the constitutional rights may *never* be clearly established—especially when new fact patterns and technologies are at issue."[27]

Likewise, few post-*Booker* courts were reexamining the contrived Guidelines rules themselves in any depth; they could compute them in as straightforward a manner as possible and vary if they did not like the result. Why bother to challenge what "extraordinary family circumstances" meant after all, or the Talmudic distinctions between minor or minimal participants, or take issue with the Guidelines' failure to consider addiction, when you could go directly to the sentence you wanted to impose—as a variance.

The second problem is that when judges chose to vary in the second stage of the analysis, few theorized about what they were doing and where their decision fit in a rational sentencing policy; they did not have to. Neither 18 U.S.C. § 3553(a) nor the Supreme Court gave them much guidance. Judges had discretion. They could consider non-Guidelines factors and weigh them as they saw fit. Their decisions would be reviewed for "reasonableness" under an "abuse of discretion" standard, the most lenient appellate test.[28]

But giving judges more discretion says nothing about how they should exercise it—based on what principles, under what theory, and with what

artwork on public property. He was arrested for violating a city ordinance; the charges were eventually dropped. Christensen sued claiming a violation of the First Amendment. The Tenth Circuit declined to decide whether the artwork in question was protected by the First Amendment, determining instead that the right, whatever it was, was not clearly established. *Id.* at 1277; *see also infra* notes 90–91 and accompanying text.

27. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 4 (2015). Professors Aaron Nielson and Christopher Walker performed a statistical review of the post-*Pearson* cases, concluding that: first, there is some empirical foundation for the concerns about constitutional stagnation; second, "there is disparity among [the] circuits regarding whether and how courts are reaching constitutional questions"; and third, there is an asymmetry in the development of the doctrine—judges who hold certain substantive views are more likely to decide the constitutional question than others. *Id.* at 6–7.

28. Gall v. United States, 552 U.S. 38, 46 (2007). "Abuse of discretion" review gives the trial judge the widest latitude in deference to the fact that the trial judge is in the best position to find the facts, to know the individual defendant, and to make credibility determinations. Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 14 (2008). While that is surely true, it also leads the appellate court to be overly deferential to the trial court, abdicating any responsibility to articulate substantive sentencing standards. Professors Carissa Byrne Hessick and F. Andrew Hessick describe the standard this way: "Abuse of discretion applies to those decisions that call upon the district court to exercise discretion, such as when the law does not prescribe a rule of decision other than to direct a court to balance competing interests in rendering judgment." *Id.* Under an abuse of discretion standard, the "appellate court's task is not to render a decision by reweighing the competing interests, but only to ensure that the district court's weighing was permissible." *Id.* At the same time, Professors C. Hessick and A. Hessick note that "reasonableness" review is actually inconsistent with an "abuse of discretion" standard. *Id.* at 16–17.

methodology. "Judicial discretion," after all, is not a criminal justice policy; it simply describes who ought to make the decision about sentencing, *not what the decision should be*. Small wonder the result was chaotic, the continuation of Guidelines-speak in some courts or a cacophony of factors, depending upon who the judge was:

> Without a sentencing framework independent of the Guidelines by which to evaluate them, there is no way of understanding when they should be rejected or adjusted, what alternatives are appropriate and available, or what evidence-based practices can inform sentencing. Without an alternative framework, in short, calling the Guidelines "advisory" is a ruse.[29]

In effect, old habits that predated the Guidelines persisted—habits like not fully explaining sentences (beyond Guidelines-speak), not meaningfully engaging with any kind of coherent methodology like proportionality review,[30] not writing opinions, and not being trained in the exercise of the new discretion.[31]

Which sentencing players could have stepped into the breach and provided that framework and coherence on both fronts—critical Guidelines analysis and a substantive theory of sentencing? The district courts, courts of appeals, the Commission, Congress? I have written about why district courts, the Commission, and surely Congress did not do so.[32] Here, I focus on the appellate courts. Why have our courts of appeals not been able to provide meaningful substantive review of sentences when courts of appeals in other common-law

29. Gertner, *Against These Guidelines*, *supra* note 6, at 54–55.

30. Proportionality review, for example, might involve evaluating the gravity of the sentence relative to the offense, how the sentence compares with penalties for crimes of equal or greater seriousness within the same jurisdiction, or how the sentence compares with the sanctions imposed for the same offense in other jurisdictions. It might also entail determining whether the punishment is inconsistent with an accepted penological goal. *See, e.g.*, Bruce W. Gilchrist, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1124 (1979).

31. I have previously argued that the Guidelines fundamentally changed federal judges' approaches to sentencing. After decades of the Guidelines, federal judges began to behave like expert clerks in a civil code system:

> The Federal Sentencing Guidelines have been interpreted more like civil code than a statute in a common law regime: They were viewed as comprehensive; they were the work of "experts," and if there were gaps, the experts, notably, the Sentencing Commission, had to fill them. The Commission would resolve circuit conflicts; the Commission would answer all questions. The judges were to be clerks, not interpreting the document, which after all, was essentially perfect, but simply providing sentencing "answers." The premises were flawed.

Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 534 (2007) [hereinafter Gertner, *Omnipotence to Impotence*]; *see also* United States v. Jaber, 362 F. Supp. 2d 365, 371–76 (D. Mass. 2005) (criticizing the premises about the Guidelines that had been accepted uncritically by the federal bench).

32. *See generally* Gertner, *Omnipotence to Impotence*, *supra* note 31, at 532–35 (describing the myriad challenges faced by courts and Congress in providing a coherent framework for the Guidelines).

countries, like Canada or Australia, have? Sentencing history and confusing Supreme Court guidance provide some—not all—of the answer.

But before I address the appellate courts, I provide a quick review of why district courts, the Commission, and Congress did not provide meaningful sentencing guidance, which made the appellate courts' potential role all the more significant.[33]

II. THE DISTRICT COURTS

The Guidelines reshaped the way that district court judges approached sentencing so that even when the Guidelines became advisory, most judges still followed them. Judges credited the Commission with a competence that it did not have and with work in promulgating the Guidelines that it did not do. Judges believed the Commission had expertise, had considered all aspects of sentencing, and that the Guidelines it promulgated were grounded in a careful empirical analysis—none of which was true.[34] Twenty years of Guidelines sentencing had desensitized judges to longer and longer sentences. The issue was not "should this individual go to prison?"; more often, it was, "how much time?'' By 2005, when *Booker* was decided, compliance with the Guidelines was at an all-time high.[35] To be sure, there were exceptions in judges who criticized the Guidelines and who regularly departed from the Guidelines, but they were in the minority.[36]

33. Gertner, *Against These Guidelines*, *supra* note 6, at 54–55. As I noted, the fact is that

> [t]he Guidelines were not intended to be, and were not in fact, comprehensive. There were gaps, which the drafters acknowledged. They were not drafted by sentencing experts . . . . The Commission did not review the efficacy of sentences: Why ten years for one offense, five for another? . . . To the extent the guidelines were based on "scientific" data, the data was skewed, and at times, ignored. The Commission simply calculated the average length of sentences . . . and then increased them. The Guidelines were not even a restatement of existing sentencing standards. The Commission did not look closely at what factors judges actually used in calculating sentences. It simply compared gross sentencing outcomes and decided what factors *must have* been significant.

Gertner, *Omnipotence to Impotence*, *supra* note 31, at 534–35.

34. Gertner, *Against These Guidelines*, *supra* note 6, at 56; *see also* STITH & CABRANES, *supra* note 6, at 38–39, 110–12 (challenging the expertise of the Guidelines drafters, critiquing the empirical basis of the Guidelines, and suggesting that rather than being comprehensive, they were at best a rough cut of what a sentencing system should be).

35. *See* U.S. SENT'G COMM'N, U.S. SENTENCING COMMISSION FINAL QUARTERLY DATA REPORT 10 fig.A (2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_2010_Quarter_Report_Final.pdf [https://perma.cc/YF3R-UQ77]; *see also* U.S. SENT'G COMM'N, SPECIAL POST-*BOOKER* CODING PROJECT 7 (2006), http://www.ussc.gov/Blakely/postBooker_052306.pdf [https://perma.cc/2JTC-F9U3].

36. *See* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 79 (2003) (describing the fact

Booker changed that pattern to a degree but not in a way that would contribute to a rational national-sentencing policy. It is not an oversimplification to say that there are two broad categories of district court judges after *Apprendi* and *Booker*: Guidelines judges and non-Guidelines judges.[37] Guidelines judges recite the mantra, "Yes, I have discretion to depart or vary from the Guidelines, but no, I never or very rarely do." In jurisdictions with crowded dockets (or where there is that perception) and in jurisdictions that suffered from rigorous Guidelines enforcement before *Booker*,[38] the Guidelines are an easy default.[39] Simply "do the numbers," as the NPR program on the stock market suggests, and you can be efficient and avoid criticism.[40] Do the opposite—depart from the Guidelines or vary—and you may have to hold hearings and explain yourself in written opinions because you are bound to invite appellate scrutiny.[41] In fact, requiring the judge to compute the numeric Guidelines in the first instance—as Supreme Court case law directs—

that judges took advantage of the discretion that the Guidelines provided pre-*Booker*); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1447–48 (2008).

37. In part, this derives from the circuit in which the districts are located. Six circuits have adopted a "presumption of reasonableness" for within-Guidelines sentences. *Compare* United States v. Johnson, 445 F.3d 339, 341 (4th Cir. 2006) (adopting a presumption of reasonableness for within-Guidelines sentencing), United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006) (same), United States v. Williams, 436 F.3d 706, 708 (6th Cir. 2006) (same), United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005) (same), United States v. Lincoln, 413 F.3d 716, 717–18 (8th Cir. 2005) (same), *and* United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006) (same), *with* United States v. Fernandez, 443 F.3d 19, 27 (2d Cir. 2006) (rejecting the presumption of reasonableness while noting that a within-Guidelines sentence will typically be upheld as reasonable).

38. Hofer, *After Ten Years*, *supra* note 15, at 650 ("*Booker* did not, however, establish the balance needed in federal sentencing. Mandatory minimums remain in effect and continue to override judicial discretion, and the guidelines recommendations, in thousands of cases a year. . . . Other guidelines recommendations reflect congressional directives, or the Commission's own unsound decisions. The advisory guidelines exert a gravitational pull even when they recommend sentences far greater than necessary. Sentencing reform was a good idea, but the federal system has yet to try it.").

39. In fact, after *Booker*, the Commission took pains to tout judicial compliance with the Guidelines. In 2011, the Commission Chair testified to Congress that 80.4% of all federal sentences from the prior year were "within the applicable advisory guideline range or below the range at the request of the government," with 55.0% of all cases falling within the applicable range and 25.4% receiving a government-sponsored, below-range sentence (although that number includes variances to which the government agreed). *See Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After* U.S. v. Booker*: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 10 (2011) (statement of Judge Patti B. Saris, U.S. Sent'g Comm'n), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/testimony/20111012_Saris_Testimony.pdf [https://perma.cc/W6UP-AQJS]; *see also* Michael Tonry, *The U.S. Sentencing Commission's Best Response to* Booker *Is To Do Nothing*, 24 FED. SENT'G REP. 387, 393 (2012). I would suggest that the Commission adjust its focus to judges who never, or very rarely, depart or vary. Those judges are arguably violating the constitutional proscriptions of *Booker*.

40. *See* Nancy Gertner, *Judicial Discretion in Federal Sentencing–Real or Imagined?*, 28 FED. SENT'G REP. 165, 165 (2016).

41. *Id.* at 165.

necessarily "anchors" judicial decision-making.[42] And with respect to the non-Guidelines judges, too many exercise their discretion without doing much beyond listing the § 3553(a) factors, with a perfunctory explanation that passes muster in most circuits.[43] Worse, these judges will often vary in a way that is not reproducible by others—without writing an opinion.[44]

III. THE COMMISSION

The Commission's considerable resources post-*Booker* have too often been devoted to justifying its own existence, which means monitoring compliance with the Guidelines to show that the Guidelines still mattered even in cases when they should not.[45] The Commission's training modules and reports highlighting Guidelines compliance remained virtually unchanged.[46] To attend a Commission sentencing conference, as late as 2017, or to review Commission training of judges, is to think you are in a time warp, as if *Booker* and its progeny

42. *See* Gertner, *Omnipotence to Impotence*, *supra* note 31, at 535; *see also* Mark Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 503–13 (2014); Nancy Gertner, *What Yogi Berra Teaches About Post-*Booker *Sentencing*, 115 YALE L.J. POCKET PART 137, 138 (2006) [hereinafter Gertner, *What Yogi Berra Teaches*]; Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901, 949 (2015).

43. As Professor Hofer notes, "*Booker* empowered judges to critically evaluate the Guidelines' recommendations, but many sentencing judges continue to be anchored to the Guidelines' distorted starting point, and reluctant to engage in the critical policy analyses needed to evaluate the guidelines' fairness and effectiveness." Hofer, *After Ten Years*, *supra* note 15, at 693; *see also* William W. Berry III, *Discretion Without Guidance: The Need To Give Meaning to § 3553 After* Booker *and Its Progeny*, 40 CONN. L. REV. 631, 664 (2008). The First Circuit made clear that a judge's reasons for a sentence do not even have to be explicit—they can be "inferred by comparing what was argued by the parties or contained in the pre-sentence report with what the judge did." United States v. Coelho, 212 F. App'x 7, 8 (1st Cir. 2007) (quoting United States v. Jiménez-Beltre, 440 F.3d 514, 519 (1st Cir. 2006) (en banc)).

44. *See* Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL'Y REV. 261, 270, 278 (2009) (describing continued Guidelines sentencing as the result of "the habits ingrained during twenty years of mandatory Guideline sentencing" and noting that "after the SRA, judges were trained only in the Guidelines"); Stith, *supra* note 36, at 1496–97 (concluding that "the gravitational pull of the Guidelines on the pendulum of sentencing practice remains strong" based, in part, on the reluctance of "incumbent sentencing decision makers" who were obliged to follow the Guidelines for two decades).

45. *See* Gertner, *Against These Guidelines*, *supra* note 6, at 53; *see also* J.C. Oleson, *Blowing Out All the Candles: A Few Thoughts on the Twenty-Fifth Birthday of the Sentencing Reform Act of 1984*, 45 U. RICH. L. REV. 693, 725–26 (2011) ("But, curiously, even post-*Booker*, there has been a great deal of attention paid to rates of departures and variances. Judges worried that if they took a 'free at last, free at last' approach, Congress might respond with a '*Booker* fix' even more restrictive than the mandatory Guidelines. So judges monitored sentencing trends closely, as did the Commission and a vigilant Congress. Even now, the Commission presents its data by comparing post-*Booker* statistics against pre-*Booker* rates of departures, even though pre-*Booker* Guidelines achieved their compliance rates by violating the Sixth Amendment.").

46. U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 7–8 (2020) [hereinafter U.S. SENT'G COMM'N, THE BASICS], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/202009_fed-sentencing-basics.pdf [https://perma.cc/SAA8-LM7J].

never happened.[47] The Commission regularly issues reports—which many have criticized—suggesting that racial bias has seeped into judicial decision-making with the *Booker* regime, as if it were absent before then.[48] Furthermore, the Commission's website and training ignore lower court decisions of those judges who have in fact tried to theorize about sentencing.[49] The Commission does not showcase meaningful alternatives to incarceration, describe the programs that are the most efficacious, or encourage judges to consider them. If they did, they would be encouraging noncompliance with the Guidelines, their raison d'être.

It did not have to be this way. The Commission could have used whatever expertise it had to conduct studies reflecting (to the extent possible) what works to deter crime and restore offenders, undo the effects of mass incarceration, and reduce racial sentencing disparities. And those reasoned studies, and the proposals for sentencing they would generate, could be used to guide the new judicial discretion rather than to justify unquestioned Guidelines following.[50] The Commission could become the repository of studies from other credible sources on recidivism, alternatives to incarceration, and evidence-based practices; it could gather information about the developing common law of

47. Gertner, *Against These Guidelines*, *supra* note 6, at 54.

48. *See* Paul J. Hofer, *The Commission Defends an Ailing Hypothesis: Does Judicial Discretion Increase Demographic Disparity?*, 25 FED. SENT'G REP. 311, 312 (2013) (suggesting that there was disparity, including racial disparity, pre-*Booker*); 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, 5 (2013) (identifying the role of prosecutors' charging decisions in racial disparity); 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 113–14 (2004) [hereinafter U.S. SENT'G COMM'N, FIFTEEN YEARS], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf [https://perma.cc/K3WD-ZZ39]. Commission reports also focus only on the Guidelines' factors; if a judge considers a factor outside of the Guidelines, such as educational background or post-traumatic stress disorder, that judge's analysis is not covered by or included in the Commission studies. Nancy Gertner, *Judge Identifiers, TRAC, and a Perfect World*, 25 FED. SENT'G REP. 46, 46 (2012).

49. *See, e.g.*, U.S. SENT'G COMM'N, THE BASICS, *supra* note 46, 28–29 (mentioning departures and variances without explaining courts' stated reasons for varying or providing examples); *Search Results: "Gertner"*, U.S. SENT'G COMM'N, https://www.ussc.gov/search/site/gertner [https://perma.cc/42PA-GB5H] (revealing that none of Judge Gertner's opinions critiquing the Guidelines appear when searching her name on the Commission's website).

50. Gertner, *Against These Guidelines*, *supra* note 6, at 50–51.

sentencing, analyzing the reasons for and results of judges' departures from the Guidelines.[51] None of that has happened.[52]

IV. CONGRESS

The *Booker* remedial majority acknowledged that the "ball now lies in Congress' court" to create a sentencing system compatible with the Constitution.[53] Congress, however, dropped the proverbial ball. It refused to repeal all mandatory minimum sentences, instead making only minor adjustments to such sentences through bills like the First Step Act.[54] It approved reductions in the Guidelines ranges proposed during the Obama Administration,[55] but these reductions—while helpful—were limited. Neither Congress nor the Commission has considered a more substantial overhaul—a better-articulated statement of sentencing principles undergirding the Guidelines, grounding specific Guidelines provisions in administrative findings of fact and empirical studies, and considering a wide range of evidence-based sentencing alternatives. Again, history is relevant: Prior to the Guidelines, Congress reflected a hands-off attitude to sentencing, providing broad sentencing ranges per offense with virtually no guidance as to how a judge

51. *See, e.g.*, Michael S. Tunink, *A New Role for the United States Sentencing Commission in Post-*Booker *Sentencing*, 40 ARIZ. ST. L.J. 1429, 1430 (2008) ("[T]he Commission must develop a framework that establishes a dialogue between the Commission and the judiciary by incorporating departures and variances as amendments to the Guidelines in an attempt to reflect current judicial sentencing practice. Second, the Commission should further cultivate judicial compliance by articulating the specific penological reasons for the existing Guidelines and for each subsequent amendment to the Guidelines. This will provide the foundation for a collaborative dialogue between the judiciary and the Commission . . . .").

52. Compare the work of the Commission with that of the Victoria (Australia) Sentencing Advisory Council. *About Us: Establishment and Functions*, SENT'G ADVISORY COUNCIL, http://www.sentencingcouncil.vic.gov.au/about-us [https://perma.cc/AJ4Z-2U5J]. In 2014, for example, the Victoria prosecutor who serves as the Director of Public Prosecutions, applied to the Victoria Court of Appeal for a "guideline judgment." *See Boulton v The Queen* (2014) 42 VR 308, 311–12 (Austl.). This judgment was, in effect, an advisory opinion on the standards for using a community correction order (similar to a probationary sentence). *Id.* While the Victoria Sentencing Advisory Council mainly generates high quality studies on a variety of sentencing issues, in this instance it was asked to participate in the guideline judgment process by providing its views to the Director of Public Prosecutions and to the court. *Id.* The court carefully considered the proposed guideline judgment and adopted it, both to resolve the cases before the court and to establish a precedent for similar cases. *Id.*

53. United States v. Booker, 543 U.S. 220, 265 (2005).

54. Pub. L. No. 115-391, 132 Stat. 5194 (2018) (codified as amended in scattered sections of 21 U.S.C.); *id.* § 102, 132 Stat. at 5220–21 (reducing certain enhanced mandatory minimum penalties for some drug offenders); *see also* NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 8–9 (2019) (describing the limited sentencing reforms enacted under the First Step Act).

55. *See, e.g.*, Fair Sentencing Act of 2010, Pub L. No. 111-220, §§ 5–7, 124 Stat. 2372, 2373–74 (codified as amended in scattered sections of 18 U.S.C.).

should sentence within them.[56] With the Guidelines, a switch was flipped, and Congress took a totally hands-on approach, creating new mandatory minimum sentences and even directing the Commission—the "expert agency" to which it had turned to rationalize sentencing—to increase sentencing ranges.[57]

V. APPELLATE REVIEW

A. *Before* Booker

The history of sentencing appellate review, which I touch on briefly below, is critical to understanding why the courts of appeals behaved as they did post-*Booker*. Before the implementation of the Guidelines, there was essentially no appellate review of federal sentencing.[58] As a 1964 note in the *Yale Law Journal* stated, "It appears well settled that federal appellate courts will not review a sentence that is within statutory limits."[59] The appellate courts even refused "to disturb an obviously excessive sentence within statutory limits."[60] Without meaningful appellate review, lower courts had no incentive to articulate consistent sentencing standards or theories, laying the groundwork for the sentencing critique of reformers in the 1970s and 1980s.[61]

While other countries' common-law appellate courts regularly reviewed sentences of lower courts using the principles of proportionality and developed

56. *See, e.g.*, Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 696 (2010) (discussing the discretion given to judges in determining sentences).

57. *See, e.g.*, Sex Crimes Against Children Prevention Act of 1995, Pub. L. No. 104-71, §§ 2–4, 109 Stat. 774, 744 (1995) (codified at 28 U.S.C. § 994) (directing the Commission to increase the base offense level for certain sexual offenses against children); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6454, 102 Stat. 4181, 4372 (1988) (codified at 28 U.S.C. § 994) (directing the Commission to increase the minimum offense level for drug offenses involving minors). *See generally* U.S. SENT'G COMM'N, FIFTEEN YEARS, *supra* note 48, at B-1 to -11 (listing the congressional directives given to the Commission after the enactment of the Sentencing Reform Act).

58. *See, e.g.*, STITH & CABRANES, *supra* note 6, at 111 ("Federal appellate courts had no occasion to develop or expound general principles of sentencing justice."). The doctrine of nonreviewability of sentences "prevailed from 1891 until 1987" when the Guidelines were passed. Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1444 (1997).

59. Note, *Appellate Review of Sentencing Procedure*, 74 YALE L.J. 379, 381 (1964).

60. Comment, *Appellate Modification of Excessive Sentences*, 46 IOWA L. REV. 159, 160 (1960).

61. *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973).

a common law of sentencing,[62] the United States had no such tradition.[63] Indeed, some scholars have suggested there was general hostility to the idea: Professor Vicki Jackson notes that the reticence was caused by the U.S. legal "culture of authority, in which the only question is whether the government actor has jurisdiction."[64] Some would argue proportionality was an approach that was not even within the competence of the American judiciary, although other common law courts had no comparable problem.[65] On this view, proportionality was too policy-centered, even "activist"—a normative task better left to the legislature.[66] Professor Michael Tonry suggests that these attitudes were exacerbated by America's fraught race relations: crime was "racialized" in political campaigns, especially in the Republican party's Southern strategy to win over White voters.[67] No one, least of all the courts, was about to second guess the decisions of the political branches, no matter how biased.[68]

Into the mix came the SRA and the Guidelines. The SRA introduced appellate review of Guidelines sentencing, even substantive appellate review.[69] For appellate judges who had had no prior experience in sentencing and no other framework by which to evaluate district court sentences—such as a proportionality principle—the eight-hundred-plus-page Guidelines manual was all there was. It was no surprise that for the first two decades of the Guidelines, appellate review almost exclusively mandated compliance with the Guidelines

62. *See* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3186 (2015) (examining Canadian cases in which the courts applied their "own judge-made rule of 'gross proportionality'" to all criminal punishments); *see also* Briana Lynn Rosenbaum, *Sentence Appeals in England: Promoting Consistent Sentencing Through Robust Appellate Review*, 14 J. APP. PRAC. & PROCESS 81, 85 (2013) ("The English Court of Appeal—Criminal Division has a hundred-year-long history of appellate-court development of sentencing principles through common-law review of sentencing decisions.").

63. *See* Marissa L. Marandola, Appellate Review of Sentences: Towards a Proportionality Approach to Substantive Reasonableness Review 6 (unpublished manuscript) (on file with author) ("In the absence of substantive appellate review, no common law of sentencing developed in the United States, even as other common law countries moved ahead with the project of introducing proportionality review in their respective appellate bodies.").

64. Vicki C. Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding and Proportionality*, 130 HARV. L. REV. 2348, 2367 (2017).

65. *See* Nancy Gertner, *On Competence, Legitimacy and Proportionality*, 160 U. PA. L. REV. 1585, 1585–86 (2012).

66. Professor Jackson describes this as "value skepticism" which leads to a "hesitation to deal head-on with the relative importance of different constitutional values" in the judicial venue. Jackson, *supra* note 64, at 2368, 2375.

67. Michael Tonry, *Explanations of American Punishment Policies: A National History*, 11 PUNISHMENT & SOC'Y 377, 386–89 (2009).

68. *Id.*

69. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 213(a), 98 Stat. 1987, 2011–13 (1984) (codified as amended at 18 U.S.C. § 3742).

and reversed judicial departures.[70] The result: While the appellate courts held district court judges strictly accountable to the Guidelines, they did not hold the Commission accountable to the language of the SRA or the general purposes of sentencing, nor did they demand the Commission provide data for the sentencing rules it promulgated. The appellate courts eschewed any kind of meaningful review.[71]

B. *After* Booker

The *Booker* remedy required that appellate courts review sentences to ensure that they are both substantively and procedurally "reasonable" with regard to statutorily enumerated sentencing factors.[72] Procedural review was easy; review of Guidelines computations was what the appellate courts had been doing for decades. But substantive review raised new possibilities, a new way to refresh and reconsider the flawed Guidelines framework. Even properly computed Guidelines sentences could be "unreasonable." (In fact, "unreasonable" was the mild way to describe some properly computed Guidelines sentences; more appropriate terms were unjust, unfair, and disproportionate.)[73]

70. *See, e.g.*, Gertner, *What Yogi Berra Teaches*, *supra* note 42, at 137 ("Like the Commission, the appellate courts fixated on Guideline enforcement. Most decisions were formulaic; few ever mentioned sentencing purposes. The goal of departure review was to circumscribe it."). Some courts were more forgiving about Guidelines departures, even pre-*Booker*. *See, e.g.*, United States v. Roberson, 872 F.2d 597, 597 (5th Cir. 1989); United States v. Weaver, 920 F.2d 1570, 1570 (11th Cir. 1991).

71. *See* Marandola, *supra* note 63, at 1.

72. United States v. Booker, 543 U.S. 220, 261 (2005). Justice Breyer's decision converted the Guidelines to an advisory regime by excising two provisions of the SRA that made the Guidelines binding: 18 U.S.C. §§ 3553(b)(1) and 3742(e). *Id.*

73. *See* Nancy Gertner, *How To Talk About Sentencing Policy—and Not Disparity*, 46 LOY. U. CHI. L.J. 313, 323 (2014). I have written about one of the men I sentenced, Damien Perry. *Id.* at 320. He was accused of distributing crack in small quantities on a street corner. For over a year, undercover officers rode bicycles to buy crack from him and others on the block. *Id.* He had no weapon, and he could not cooperate with the government because he did not know enough. *Id.* at 320–21. The government wanted to "count" not only the drug distributions to which he pled guilty, but also other instances for which they did not charge him. While he had no record, the government argued that he should get over ten years—which was the Guidelines mandated sentence based on the drug quantity, both charged and uncharged. *Id.* at 322. But the Guidelines did not account for the fact that Perry had a bullet in his brain that could not be removed or that he was only twenty-one-years-old at the time of the crime. *Id.* at 321, 323. There was no place on the grid for the fact that he did not know his mother very well, she was seventeen when he was born, and she was addicted, a prostitute, and later jailed. *Id.* at 321. He did not have any contact with his father until he was nearly ten. He was out of school by the tenth or eleventh grade, with little or no support network. *Id.* The Guidelines sentence, even if properly computed, was plainly unjust and substantively unreasonable by any measure in a rational sentencing system. In another case, *United States v. Wilkerson*, 183 F. Supp. 2d 373 (D. Mass. 2002), the defendant, a nonviolent street dealer, was convicted of distribution of crack cocaine. *Id.* at 373. Wilkerson, homeless at fourteen-years-old, sold crack to buy school supplies for his siblings. *Id.* at 375. The government wanted 140 to 175 months, increasing the mandatory minimum sentence of 120 months. *Id.* at 375–76. The mandatory sentence was triggered by a prior minor district court drug offense. *Id.* I wrote: "The tragic bottom line is that for a non-violent street dealer for whom dealing

Given the pre-Guidelines history of appellate review of sentencing fairness—or, more accurately, the lack thereof—it was especially important for the Supreme Court to provide guidance as to what "reasonableness" meant in the context of "substantive review." It did not.[74] In *United States v. Rita*,[75] in which the Court affirmed a within-Guidelines sentence, the Court allowed but did not require appellate courts to adopt a rebuttable presumption that a sentence within the Guidelines range is reasonable.[76] The presumption, the Court emphasized, did not mean that appellate courts ought to give deference to the Commission similar to that enjoyed by administrative agencies (or, indeed, the deference that the Commission received prior to *Booker*).[77] That disclaimer notwithstanding, *Rita*'s message was that following the Guidelines still trumped all other approaches. Even in jurisdictions where the appellate courts did not adopt a "presumption of reasonableness," *Rita* provided a continued justification for deference to the Guidelines.[78] According to Justice Breyer, one of the Guidelines' authors, deference was entirely appropriate because the Guidelines reflected a "rough approximation of sentences that might achieve § 3553(a)'s objectives."[79] While the Court also announced that the standard of review would be a forgiving one—abuse of discretion[80]—that lenient standard hardly made a meaningful difference for judges' computations under the Guidelines. As I describe below, few judges were exercising their discretion to critique the Guidelines at all.

Gall v. United States[81] was one of the first of *Booker*'s progeny, offering the promise of articulating what the post-*Booker* world of sentencing would look like. In *Gall*, the Court affirmed the sentence of a trial judge who had varied on non-Guidelines grounds,[82] the kind of decision that would not have passed muster pre-*Booker*. But the Court then proposed to structure post-*Booker* appellate discretion in a way that substantially impacted the development of non-Guidelines substantive sentencing theory. Under *Gall*, courts were obliged to use a two-step process on appeal: First, appellate courts should review the procedures used to impose the sentence, including failure to calculate or improperly calculating the Guidelines range.[83] Then and only then, if there is

drugs, although wrong, may well have meant survival, Mr. Wilkerson will be obliged to serve ten years in jail." *Id.* at 376.

74. *See* Carissa Byrne Hessick, Booker *in the Circuits: Backlash or Balancing Act?*, 6 HLRE: OFF REC. 23, 31–33 (2015) [hereinafter Hessick, Booker *in the Circuits*].

75. 551 U.S. 338 (2007).

76. *See id.* at 338–39.

77. *See id.* at 347, 351.

78. *See id.* at 350.

79. *Id.*

80. *See Id.* at 361 (Stevens, J., concurring).

81. 552 U.S. 38 (2007).

82. *See id.* at 38–39.

83. *Id.* at 51.

no procedural defect, the court should look to substantive reasonableness.[84] With respect to the latter step, the Supreme Court did not have much to say except to consider "the totality of the circumstances, including the extent of any variance from the Guidelines range."[85]

The emphasis on Guidelines computation, after a twenty-year tradition of rigorous Guidelines enforcement, coupled with the absence of any tradition of appellate review and the vagueness of the second prong—a variance in the light of the general purposes of sentencing in 18 U.S.C. § 3553(a)—had a predictable result. Federal judges—both trial and appellate—knew how to do Guidelines analysis; what they knew less about were the substantive standards for variance. The Supreme Court did not help.

After *Gall*, and just as before, it was clear that a federal judge would be reversed if they got the numbers wrong, no matter what else they did at the second step. And just as before, if they did the computations correctly, virtually any sentences conforming with the Guidelines would receive near-blanket deference, often without reference to any reasons other than the existence of the Guidelines themselves.[86] Appellate courts, after looking at the column of figures that is Guidelines analysis, rarely say that a sentence is disproportionate to the offense or the characteristics of the offender.[87] Appellate judges who never did such substantive analysis pre-Guidelines, and did not have to do it in the mandatory Guidelines regime, were unable or reluctant to engage in it post-*Gall*. The most important questions were still: "Did you calculate the Guidelines accurately?" "Did you make any mistakes?" No one asked: "Did you appropriately deal with the defendant's addiction?" "Did you consider alternatives to incarceration?"

84. *Id.*

85. *Id. Kimbrough v. United States*, 522 U.S. 85 (2007), decided on the same day as *Gall*, affirmed a trial judge who departed from the Guidelines based only on policy disagreements with the Commission. *See id.* at 91. It seemed to expand the area for judicial discretion; the Court was willing to tolerate "some departures from uniformity" as a "necessary cost of the remedy" to the constitutional violation identified in *Booker*. *Id.* at 108. What "some departures from uniformity" meant was less than clear.

86. *See, e.g.*, United States v. Harry, 816 F.3d 1268, 1284 (10th Cir. 2016) ("[W]hen a district court imposes a within-Guidelines sentence, the court must provide only a general statement of its reasons, and need not explicitly refer to either the § 3553(a) factors or respond to every argument for leniency that it rejects in arriving at a reasonable sentence." (quoting United States v. Lente, 647 F.3d 1021, 1034 (10th Cir. 2011))); Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 171 (2005) (concluding that the post-*Booker* Guidelines "remain as restrictive of judicial sentencing discretion as any system in the United States"). Professor C. Hessick highlights how little is asked of a within-Guidelines sentence in her description of the "brief, but legally sufficient," explanation provided by the lower court in *Rita*. Hessick, Booker *in the Circuits*, *supra* note 74, at 28–29.

87. Paul J. Hofer, *Empirical Questions and Evidence in* Rita v. United States, 85 DENV. U. L. REV. 27, 31–32 (2007) ("Data gathered by the NYCDL showed that, of 1,152 appeals of within-guideline sentences in the post-*Booker* period, . . . only *one* . . . was because the sentence was found substantively unreasonable.").

C. *Guidelines Interpretation Stalls*

As such, district court judges now have every incentive to adopt the most conservative calculations possible under the Guidelines and to address any resulting "unreasonable" sentences during a two-step variance. Interpretation of the Guidelines, let alone critiques of the Guidelines, is nonexistent. Sadly, even post-*Booker*, the Commission gets a pass for Guidelines that are vague, inconsistent with the purposes of sentencing, not empirically justified, or simply invented by the Commission without a reasonable explanation.

When I teach sentencing to judges, I ask, "Why didn't you consider this or that Guidelines enhancement? Did it not make sense, or was it ambiguous?" They say, "Why bother?" and "Why risk reversal?" Rather than struggle with the Guidelines that still frame sentencing, they would rather vary at the second step in a space without any standards.[88] So, in the case of a drug addict charged with a drug offense, it would be easier to accept the Guidelines' admonition that "drug or alcohol dependence or abuse is not a reason for a downward departure,"[89] calculate the Guidelines sentence without that adjustment, and then take addiction into account as one of the factors under § 3553(a).

The result of this standardless variance is the kind of murkiness in the decisional law that one also sees in cases under § 1983. The Supreme Court in *Pearson* provided the lower courts with the freedom to avoid the merits question in civil rights cases—whether there was a violation of a constitutional right—and go directly to the second prong of the qualified immunity analysis—whether the constitutional right at issue was "clearly established."[90] The result of this merits avoidance was that constitutional rights were not clarified, and the decisional law stalled.[91]

While here, the trial court is obliged to decide the Guidelines computation, but they are not required to delve too deeply. Whatever the computation is—typically, the most rigid, discretion-limiting interpretation—district court judges will accept it and save their concerns for the variance stage.

D. *Substantive Standards (Apart from the Guidelines) Fail To Develop*

The variance standards (the § 3553(a) factors) likewise could not be any vaguer.[92] Section 3553(a) is, in effect, just a catalogue of *all* the purposes of sentencing, in no particular order and with no particular direction. This is an "everything-you-wanted-to-consider-in-sentencing-but-were-afraid-to-ask" list: the nature and circumstances of the offense and the history and

88. *See supra* Part I (discussing the lack of coherent theory behind second-stage variance).

89. U.S. SENT'G GUIDELINES MANUAL § 5H1.4 (U.S. SENT'G COMM'N 2018).

90. *See* Pearson v. Callahan, 555 U.S. 223, 225 (2009).

91. *See supra* notes 24–27 and accompanying text (discussing this process in the context of *Pearson*).

92. *See* 18 U.S.C. § 3553(a).

characteristics of the defendant;[93] the need for the sentence imposed to "reflect the seriousness of the offense,"[94] to effect deterrence,[95] to promote public safety,[96] and to provide the defendant with needed services;[97] the need to avoid sentencing disparity;[98] and the need to provide victims with restitution.[99] In many jurisdictions, procedural review of variances is perfunctory: the district court does not have to say much to justify a variance.[100] In others, the appellate courts require at least some reasonable explanation.[101] And as to substantive review, while *Gall* acknowledges its importance in the second prong on the two-part test, the Supreme Court did not expand on it beyond calling for judges to look at the "totality of the circumstances."[102] On the rare occasions when the appellate courts do determine that an outside-the-Guidelines sentence is unreasonable, the analysis is muddy.[103] For example, courts rarely lay down principles that would help district court judges impose "reasonable" sentences in future cases.[104] Some appellate courts—but not all—reflect the same hostility to substantive review as we saw with respect to proportionality analysis, viewing substantive review as "an invitation to mischief by tinkering with any sentence that appellate judges simply do not like."[105] Indeed, that may well be why some

93. *Id.* § 3553(a)(1).

94. *Id.* § 3553(a)(2)(A).

95. *Id.* § 3553(a)(2)(B).

96. *Id.* § 3553(a)(2)(C).

97. *Id.* § 3553(a)(2)(D).

98. *Id.* § 3553(a)(6).

99. *Id.* § 3553(a)(7).

100. In *United States v. Dean*, 414 F.3d 725 (7th Cir. 2005), the Seventh Circuit indicated that a detailed consideration of the § 3553(a) factors would double the work of a sentencing judge. *Id.* at 729. The court reasoned that district courts required to consider the factors would continue to have to compute the Guidelines sentence as before but would not also have to specifically address each of the § 3553(a) factors, which are "vague and, worse perhaps, hopelessly open-ended." *Id.* Instead, the Seventh Circuit required only an "adequate statement of the judge's reasons"—whatever that means. *Id.*

101. *See, e.g.*, Carrie Leonetti, *De Facto Mandatory: A Quantitative Assessment of Reasonableness Review After* Booker, 66 DEPAUL L. REV. 51, 60 (2016). In describing the doctrinal uncertainty post-*Booker*, Professor Carrie Leonetti noted, "Some circuits vest an inordinate amount of discretion at the district court level, which is unreviewable in practice. At the other end of the spectrum, some circuits vest much more discretion at the appellate level." *Id.*

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

103. *See supra* notes 28–31 and accompanying text.

104. *See, e.g.*, United States v. Martinez, 821 F.3d 984, 989–90 (8th Cir. 2016) (holding that the defendant's criminal history and gang membership could not justify an above-Guidelines sentence without "sufficient justifications" while also declining to give examples of such justifications for future courts).

105. United States v. Rigas, 583 F.3d 108, 123 (2d Cir. 2009). In fact, while warning about appellate courts going too far in "tinkering" with district court sentences, the panel outlined a standard for substantive review quite similar to the standards in other common-law high courts:

> The manifest-injustice, shocks-the-conscience, and substantive unreasonableness standards in appellate review share several common factors. First, they are deferential to district courts and provide relief only in the proverbial "rare case." Second, they are highly contextual and do not

courts conflate the requirements for substantive and procedural reasonableness; American jurisprudence is far—*far*—more comfortable with procedural review.[106]

The result is a U.S. sentencing system that is neither fish nor fowl. It provides neither a robust Administrative Procedure Act[107]-like review of the Guidelines, holding them up for critical analysis, nor is it a fulsome, substantive sentencing theory based on proportionality, as one might find in other common-law countries. We have seen U.S. sentencing swing from indeterminate sentencing in the 1980s, when a trial judge's sentencing discretion was virtually unlimited, to the opposite: the rigid Guidelines and mandatory minimum system. And without a meaningful common law of sentencing independent of the Guidelines to homogenize sentencing to some degree and create a core of common principles, there is a risk that the Guidelines will continue to be the default.[108] In that case, the Guidelines regime that will make its full-throated return could well include incoherent sentencing definitions and standards which should have been challenged long ago.

> permit easy repetition in successive cases. Third, they are dependent on the informed intuition of the appellate panel that applies these standards. In sum, these standards provide a backstop for those few cases that, although procedurally correct, would nonetheless damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law.

Id. For a critique of a comparable "manifestly excessive" or "manifestly inadequate" standard in Australia, see Sarah Krasnostein & Arie Freiberg, *Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?*, 76 L. & CONTEMP. PROBS. 265, 274–75 (2013). But the difference between the Australian appellate courts and the few U.S. appellate courts that have adopted a "manifestly excessive" or "manifest injustice" standard is the expertise of the respective courts and the law they interpret. Australian appellate courts have "an extensive sentencing jurisprudence, as well as principles to guide appellate intervention." *Id.* at 274. The "intuitions" of the court have been honed by appellate review of sentences over decades. And Australian appellate courts are interpreting judge-made rules, which they can alter as the cases require. They are not interpreting the contrived guidelines of a flawed Commission to whom too much deference has already been paid.

106. *See United States v. Ressam*, 593 F.3d 1095, 1107 (9th Cir. 2010), *amended by* 629 F.3d 793 (9th Cir. 2010), *vacated en banc*, 679 F.3d 1069 (9th Cir. 2012), which Professor Leonetti identified as "a good example of how this confusion stemming from *Booker* and subsequent Supreme Court decisions play out in practice." Leonetti, *supra* note 101, at 58; *see also* Setser v. United States, 566 U.S. 231, 244 (2012) (holding against petitioner in part because he identified "no flaw in the District Court's decisionmaking process"); Tim Cone, *Substantive Reasonableness Review of Federal Criminal Sentences: A Proposed Standard*, 33 N. ILL. U. L. REV. 65, 72 (2012) (reflecting procedural and substantive confusion by suggesting that substantive reasonableness was about the "soundness of the decision-making process that led to a sentence" rather than the end result).

107. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

108. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

A Cure Worse than the Disease, 29 FED. SENT'G REP. 104, 104 (2016) (acknowledging and responding to Judge Pryor's argument for a return to "a version of the pre-*Booker* mandatory Guidelines with strict appellate review of Commission-controlled departures").