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The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion

ABSTRACT. Early scholarship on the Federal Sentencing Guidelines focused on the transfer of sentencing authority from judges to the Sentencing Commission; later studies examined the transfer of discretion from judges to prosecutors. Of equal significance are two other institutional competitions for power: one between local federal prosecutors and officials in the Department of Justice in Washington (“Main Justice”), and the other between Congress and the Supreme Court. Congress’s enactment of the Feeney Amendment in 2003, in reaction to sentencing data and decisions appearing to reveal that sentencing judges were willfully ignoring the Guidelines, represented a direct challenge to every level of the federal judiciary, to the Sentencing Commission, and to front-line federal prosecutors. By design, this legislation simultaneously empowered Main Justice, which was Congress’s partner in the endeavor to achieve nationwide “compliance” with the Sentencing Guidelines. In its 2005 decision in *United States v. Booker*, the Supreme Court undid the Feeney Amendment, introduced the opportunity for judges openly to exercise judgment independent of the Guidelines, constrained the leverage that inheres in prosecutors in a mandatory sentencing regime, and counteracted the centralizing impulse of Main Justice. The Court’s recent decisions elaborating *Booker* confirm that, once again, sentencing is to a significant extent a “local” event. The Sentencing Commission and Main Justice may still be calling signals but the decision makers on the playing field—judges and prosecutors—need not follow them. The pendulum of sentencing practice may increasingly swing back toward the exercise of informed discretion as newly appointed local decision makers are able to see beyond the narrow and arbitrary “frame” of the Federal Sentencing Guidelines.

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INTRODUCTION

In the federal criminal justice system, both prosecutors and judges have historically exercised broad discretion—prosecutors in charging (or not charging), and judges in sentencing. Both prosecutorial and judicial discretion in the criminal process date back to the very beginnings of the Republic.¹ For most of our history, the exercise of discretion has simply been taken for granted by judges, by prosecutors, and most importantly, by Congress, which has created a system of criminal laws that requires—and has always required—the exercise of discretion. Unlike the civil system in continental Europe, the common law has never featured or claimed to feature mandatory exercise of prosecutorial power.

In the modern era, we have grown suspicious of discretion. To a formalist, discretion seems the very antithesis of law. To a realist who views law as simply power, discretion is, at best (in Judge Marvin Frankel’s memorable book title), “law without order.”² A central campaign of the modern age—extending far beyond sentencing and the criminal justice system—has been to reduce the discretion of government officials.³

I use the term “power” to refer to lawful authority to take action against an individual. “Discretion,” on the other hand, is the authority *not* to exercise power. In the context of the criminal law, to exercise discretion means, most simply, to decide not to investigate, prosecute, or punish to the full extent available under law. Discretion in federal criminal law *enforcement* is so great and so difficult to constrain because it is a necessary concomitant of the *substantive* federal criminal law.⁴ That is, federal statutory criminal law has

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1. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 n.7 (1993). Indeed, the first federal criminal law used the word “discretion” in referring to the federal judge’s sentencing authority to pronounce any sentence below the statutory maximum. See KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 9 (1998) (quoting the federal Bribery Law of 1789, 1 Stat. 29, 46-47 (1789)).
 2. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).
 3. See Kate Stith-Cabranes, *Fear of Discretion*, 1 GREEN BAG 2d 209 (1998) (reviewing PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994)).
 4. See Wayne R. LaFave, *The Prosecutor’s Discretion in the United States*, 18 AM. J. COMP. L. 532, 533 (1970) (discussing the “overcriminalization” of laws the legislature does not wish to be enforced); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 746 (1996) (arguing that legislatures, “by creating too many policy choices, have effectively abdicated public policy-making to the prosecutor since it is the prosecutor, and not the legislature, that has the final decision in determining which public policy, if any, is breached by an individual’s conduct”); Daniel C. Richman & William J.

great breadth and has always included both lesser-included offenses and overlapping offenses. Moreover, the federal criminal law has always been an adjunct to state criminal law; most conduct that violates federal law also violates state law. Thus, in many instances, federal prosecutors must decide both whether to intervene in potential state prosecutions and, if they do choose to intervene, which crimes to charge. Federal prosecutorial decision makers (whoever they may be—line prosecutors, U.S. Attorneys, or officials and bureaucrats in the Department of Justice) necessarily have broad charging discretion. Concomitantly, sentencing authorities (whoever they may be—judges, administrative agencies, or prosecutors) necessarily have broad discretion over punishment. As Congress well understands when it enacts federal criminal proscriptions, both prosecutorial and sentencing discretion are inevitable because of the broad reach of these proscriptions and the severity of authorized punishments.⁵ Resource constraints as well as prudence dictate the conclusion that the federal criminal law cannot be applied in its full rigor.⁶ Someone has to exercise authority to decide what to investigate, what to prosecute, what to charge, and how great punishment will be.

The inevitable exercise of charging and sentencing discretion in the federal criminal justice system has been a recurring theme in the saga of the Federal Sentencing Guidelines, whose recent transformation by the Supreme Court from a “mandatory” to an “advisory” regime⁷ I consider in this essay. I do not

Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 584, 639 (2005) (arguing against an “overexpansion of the federal criminal code,” allowing prosecutors who suspect a person of one crime to “charge and convict him of a different crime, unrelated to and less severe than the first”). Even with its expansion over centuries, and especially in the past fifty years, federal criminal law does not reach all conduct that is criminalized by states. See *infra* note 31.

5. See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 789-810 (1999) (noting that Congress has more control over federal prosecutors than scholars generally recognize, but that it is in Congress's interest to allow for significant federal prosecutorial discretion and regional variation in prosecutorial policies); Nicholas Parrillo, *The Rise of Non-Profit Government in America: An Overview and a Case Study* 112-124 (Jan. 8, 2008) (unpublished manuscript, on file with author) (demonstrating that Congress in 1896 changed the compensation of U.S. Attorneys from fee per-case to annual salary in order to *encourage* the exercise of prosecutorial discretion).
6. There is a good argument that federal law is properly broad and, if applied in full, severe. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2137-38 (1998); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. (forthcoming June 2008).
7. *United States v. Booker*, 543 U.S. 220 (2005); see also *Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007); *Rita v. United States*, 127 S. Ct. 2456 (2007).

view the Court's recent Guidelines decisions only from an internal perspective—that is, in terms of the competing constitutional doctrines expounded in these cases. Rather, I consider the recent decisions against the backdrop of inevitable, ongoing institutional rivalries. The institutions in play include not only the inferior federal courts (both trial and appellate), Congress, and the U.S. Sentencing Commission, but also the Supreme Court, federal prosecutors in the ninety-four U.S. Attorneys' offices, and, importantly, the U.S. Department of Justice in Washington, D.C. ("Main Justice"). Early scholarship on the Federal Sentencing Guidelines focused on the transfer of sentencing authority from judges to the Sentencing Commission; later studies have examined the transfer of discretion from judges to prosecutors. Of equal significance are two other ongoing competitions for power: one between local federal prosecutors and officials in Main Justice, the other between Congress and the Supreme Court. In its 2005 decision in *United States v. Booker*⁸ and its recent decisions elaborating the new sentencing regime constructed in *Booker*, the Supreme Court asserted the significant responsibility and authority of sentencing judges, local prosecutors, and the Supreme Court itself.

In Part I, I seek to identify the critical decisions made in constructing and implementing the Guidelines, decisions that ultimately resulted in increased prosecutorial power and discretion. This discretion could, and would, be used to influence defendants to plead guilty or face remarkably severe Guidelines sentences. Although it was not the goal either of sentencing reformers or of Congress, the actual result of the Guidelines regime that took effect in late 1987 was to transfer sentencing authority not to the U.S. Sentencing Commission, but to federal prosecutors in general and—particularly in recent years—to Main Justice.

Because I have elsewhere expressed skepticism about the project of uniform application of sentencing rules,⁹ I do not dwell here on the issue that motivated the Sentencing Reform Act¹⁰—the existence of "disparity" among judges in sentencing. Disparity unquestionably exists. But requiring judges to apply national sentencing rules risks masking both the continued significance of the individual judge in sentencing and the increased leverage over defendants afforded to prosecutors in plea bargaining. The federal effort to stamp out

8. 543 U.S. 220 (2005).

9. See STITH & CABRANES, *supra* note 1, at 78-177.

10. Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. II, 98 Stat. 1837, 1987 (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586, 28 U.S.C. §§ 991-998 (1988)).

judicial disparity through the Guidelines was probably not successful.¹¹ In any event, the decades-long enterprise provided prosecutors with indecent power relative to both defendants and judges, in large part because of prosecutors' ability to threaten full application of the severe Sentencing Guidelines.

Part II explains why neither appellate decisions nor raw sentencing data are an accurate tool to measure the Guidelines' success in achieving greater national uniformity in sentencing—nor even for measuring the extent to which the Guidelines are actually implemented. Each criminal sentencing is ultimately highly “local,” a result of the strategic decisions of the prosecutor, the defense attorney, and the judge—all acting within the factual confines of the case at hand as well as the larger norms and practices of the judge's courtroom, of the federal district, and of the relevant circuit. Further, the sentencing decisions of the courts of appeals—including the “win/loss” ratio for defendants and the government—tell us very little about law on the ground. Few sentencing decisions are appealed by defendants, and even fewer are appealed by the government.¹² While courts of appeals may use these cases to signal to district courts how rigorously they should apply the Guidelines, this signal is imperfect at best and may be ignored altogether in cases that are not likely to be appealed. Indeed, even ground-level sentencing data—the sort of data assiduously compiled by the Sentencing Commission for every sentence in the federal courts—is a poor measure of the extent of Guidelines implementation and compliance. Although we can count the case reports submitted by judges, and thereby determine the ratio of reported Guidelines sentences to reported non-Guidelines sentences, there is no way to judge how accurate these reports are—or even what “complying” with the Guidelines would mean.

The unreliability of appellate decisions and raw sentencing data as portrayals of actual practice has not always been appreciated. Interested political observers, in particular, have looked to appellate case law and to the frequency of reported non-Guidelines sentences as a measure of the extent to which judges have “complied” with the Guidelines and thus implemented Congress's design to reduce sentencing disparity. Part III recounts Congress's 2003 decision—in reaction to sentencing decisions in particular white-collar cases and to nationwide data that appeared to reveal that sentencing judges were willfully ignoring the Guidelines in a growing proportion of cases—to enact legislation that represented a direct challenge to every level of the federal judiciary, the Sentencing Commission, and local prosecutors. By design, this

11. See *infra* Section II.B.

12. See *infra* Section II.A.

legislation, known as the Feeney Amendment (“Feeney”),¹³ simultaneously empowered Main Justice, which was Congress’s partner in the endeavor to limit if not eliminate the exercise of discretion by decision makers in the field. Feeney added language to the Sentencing Reform Act to overturn a unanimous Supreme Court case, *Koon v. United States*,¹⁴ that appeared to encourage judicial disregard of the Guidelines. Feeney also directed the Sentencing Commission to amend the Guidelines to reduce judicial discretion to impose below-Guidelines sentences, and directed the Department of Justice to monitor the sentencing advocacy of prosecutors and the sentencing decisions of judges—all in aid of reducing the opportunities for individual judges and prosecutors to exercise discretion outside the confines of the Guidelines.

I explain in Part IV why *Booker* (as well as *Booker*’s immediate predecessor, *Blakely v. Washington*,¹⁵ and *Booker*’s progeny of 2007¹⁶) can be understood as an institutional response by the Supreme Court—which for more than a decade had been loath to intervene or even seriously analyze constitutional and other issues raised by the Guidelines—to several developments that threatened the integrity of federal criminal sentencing and, indeed, of the whole federal criminal justice system. In a dramatic exercise of judicial power, *Booker* undid the Feeney Amendment, limited the power that inheres in prosecutors in a regime of mandatory sentencing rules, and counteracted the centralizing impulse of Main Justice. The doctrinal basis of *Booker*’s holding that mandatory Guidelines are unconstitutional, sounding primarily in the jury-trial right of the Sixth Amendment, had been elaborated over the course of several years—beginning in the late 1990s, continuing with *Apprendi* in 2000,¹⁷ and most importantly with *Blakely* in 2004. But it is not a mere coincidence, in my view, that both *Blakely* and *Booker*—including the latter’s unexpected remedy that left the Guidelines in place but assertedly made them “advisory”—occurred in the wake of Congress’s own extraordinary intervention in 2003 and Main Justice’s subsequent restrictions (required by Feeney) on local prosecutorial autonomy.

The Supreme Court’s three federal sentencing decisions of 2007 reaffirm that *Booker* restored significant judicial power, and thus permits the exercise of

13. The Feeney Amendment, introduced by Representative Tom Feeney of Florida, was enacted as Title IV of the Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650, 667.

14. 518 U.S. 81 (1996).

15. 542 U.S. 296 (2004).

16. *Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007); *Rita v. United States*, 127 S. Ct. 2456 (2007).

17. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

judicial discretion, over sentencing; post-*Booker* discretion is greater even than that which existed under the pre-Feeney Guidelines, though not nearly as great as that which existed in the pre-Guidelines era. By introducing the opportunity for federal trial judges openly to exercise judgment independent of the Guidelines, *Booker* and its progeny not only allow judges to provide a counterweight to prosecutorial leverage over defendants, but also counteract the constraints that Main Justice imposed on line prosecutors in the wake of the Feeney Amendment.¹⁸ Once again, sentencing is to a significant extent a “local” event. After *Booker*, the Sentencing Commission and Main Justice may still be calling signals but the decision makers on the playing field—judges and prosecutors—need not follow them.

I. TRY AND CATCH THE WIND: EFFORTS TO LIMIT DISCRETION IN FEDERAL CRIMINAL SENTENCING

Neither sentencing reformers nor their supporters in Congress set out to transfer sentencing discretion from judges to prosecutors. The idea of Marvin Frankel, then a judge in the Southern District of New York and later exalted as the “father of sentencing reform” by Senator Edward M. Kennedy,¹⁹ was simply to make criminal sentencing subject to “law.” Judge Frankel did not foresee (or at least did not discuss) the possibility that written sentencing rules could have the effect of transferring sentencing discretion to prosecutors. But the drafters of the Sentencing Reform Act (including then-Professor Stephen Breyer, on leave from Harvard Law School and serving on Kennedy’s staff when the Senator introduced sentencing reform legislation in the late 1970s) were aware of this possibility. They sought to give the new administrative agency charged with writing sentencing rules, the U.S. Sentencing Commission, authority to ensure that these rules, and not the charging decisions of prosecutors, would determine federal sentences. Likewise, the original members of that Commission (who included then-Judge Stephen Breyer of the Court of Appeals for the First Circuit) made earnest efforts on several fronts to cabin not only the discretion of judges but also, to a lesser extent, the discretion of prosecutors. The Commission was assisted in this effort by Main Justice, which directed U.S. Attorneys and front-line prosecutors to limit their exercise of discretion, and thereby achieved a measure of centralized control over federal prosecutorial charging and sentencing decisions.

18. See *infra* text accompanying notes 193-201.

19. 128 CONG. REC. 26,503 (1982).

A. *The Sentencing Reform Act of 1984: Sentencing Rules To Control Judges*

The most direct method of limiting discretion is to spell out in detail the rules that decision makers must apply, so as to reduce the need or opportunity for the exercise of judgment. A paradigmatic example is the Federal Sentencing Guidelines,²⁰ whose overriding purpose was to reduce inter-judge sentencing disparity by reducing judicial discretion.²¹ The Guidelines are an extraordinarily complex set of sentencing factors, with weights attached to each factor that judges were instructed to apply to calculate each offender's "applicable [G]uideline[s] range."²² The Sentencing Reform Act required that judges sentence within this range unless there was a lawful ground for "departure," either specified by the Sentencing Commission in the Guidelines themselves or, residually, if the case involved highly atypical and extraordinary factors not taken into account by the Commission in its Guidelines.²³ In order to ensure that sentencing judges faithfully and fully applied the Guidelines, including their requirement of "real offense" sentencing and their limitations

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20. In each year since 1987, the U.S. Sentencing Commission has published the *Federal Sentencing Guidelines Manual*. See, e.g., U.S. SENT'G COMM'N, GUIDELINES MANUAL (2007). Inasmuch as the Commission often amends the Guidelines, Guidelines law changes from year to year. As a general matter, defendants are sentenced on the basis of the Guidelines in force at the time of the crime of conviction.
 21. See 28 U.S.C. § 994(f) (2000) ("The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities."); S. REP. NO. 98-225, at 38 (1983) (noting that legislation provides for "detailed guidelines for sentencing similarly situated offenders in order to provide for a greater certainty and uniformity in sentencing" (quoting testimony of Att'y Gen. William French Smith)).
 22. U.S. SENT'G COMM'N, GUIDELINES MANUAL, *supra* note 20, § 1B1.2(b).
 23. The Guidelines list more than ten factors warranting upward departure and generally discourage all downward departures save those explicitly provided for in the Guidelines, which include "Substantial Assistance to Authorities," U.S. SENT'G COMM'N, GUIDELINES MANUAL, *supra* note 20, § 5K1.1, and partial justification or excuse, *see id.* § 5K2. Residual departure authority was limited by the Sentencing Reform Act to "aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b) (2000). This provision was "severed and excised" by the Supreme Court in *United States v. Booker*, 543 U.S. 220, 245 (2005). In addition, until the Feeney Amendment, the courts tended to treat as residual departure authority the finding of "aberrant" behavior (which the Guidelines Manual never listed as a basis for departure, but which was mentioned in the introductory chapter of the original Manual and was subsequently transferred to an Application Note in the chapter on departures); the Feeney Amendment directly amended the Guidelines to narrow the basis of the "aberrant" behavior departure. See U.S. SENT'G COMM'N, GUIDELINES MANUAL, *supra* note 20, § 5K2.20.

on departures from the calculated Guidelines range, the Sentencing Reform Act provided, for the first time, that both the defendant and the government would have the right to appeal. Appeals could be based either on the ground that the sentencing judge had misapplied the Guidelines in calculating the range or on the ground that the judge had departed from this range for a reason not expressly sanctioned by the Guidelines or the Sentencing Reform Act.²⁴ In other words, district judges had an obligation to implement the Guidelines, and the courts of appeals would be available in every case to “police” the sentencing judges.²⁵

Accordingly, from their inception, the Sentencing Commission’s proclamations were not merely “guidelines” or recommendations, but enforceable rules that sentencing judges were legally obliged to follow. Even the sentencing judge’s authority to impose a sentence outside the calculated Guidelines range (to “depart”) was itself the subject of Guidelines, technically called “Policy Statements,”²⁶ issued by the Commission. Opportunities for departure did exist. In the most important of these, the judge was released of all obligation to give a sentence in the Guidelines range when the government made a motion (the “5K1 motion,” as it became known, after the section of the Guidelines authorizing such motions)²⁷ for a downward departure on the ground that the defendant had substantially assisted in the prosecution of others. Beyond such government-sponsored departures for cooperators, however, the original Guidelines limited interstitial opportunities to depart for reasons not expressly permitted by the Guidelines themselves. Indeed, inasmuch as departures not expressly permitted by the Guidelines were available only in cases exhibiting extraordinary circumstances or aberrant behavior,²⁸ the Guidelines were for all intents and purposes “mandatory” for most defendants other than cooperators. As Justice Antonin Scalia recognized in his 1989 dissent in *Mistretta* (involving a challenge to the constitutionality of

24. See 18 U.S.C. § 3742(e). This provision was “severed and excised” by the Supreme Court in *Booker*, 543 U.S. at 245.

25. See Kate Stith, *The Hegemony of the Sentencing Commission*, 9 FED. SENT’G REP. 14, 16 (1996) (noting the responsibility of courts of appeals to “police” departures).

26. The Sentencing Commission has authority to issue “Guidelines” and “Policy Statements,” and it also issues “Commentary”; in virtually all legal respects the three types of rules are equivalent, and were equally binding on judges prior to the decision in *United States v. Booker*. See *Stinson v. United States*, 508 U.S. 36, 41-47 (1993); *Williams v. United States*, 503 U.S. 191, 210 (1992); U.S. SENT’G COMM’N, GUIDELINES MANUAL, *supra* note 20, § 1B1.7. Hence this essay follows convention in referring to all three types of Commission-issued rules as “Guidelines.”

27. U.S. SENT’G COMM’N, GUIDELINES MANUAL, *supra* note 20, § 5K1.1.

28. See *supra* note 23.

the Guidelines regime on separation-of-powers grounds),²⁹ and as Justice Harry Blackmun's majority opinion refused to acknowledge, the Guidelines were law.³⁰

The intentions of the Sentencing Commission notwithstanding, reducing judicial discretion through sentencing rules—whether promulgated by a legislature or by an administrative agency such as the Commission—threatens to enhance prosecutorial authority over sentencing: once the rules are published, the prosecutor, through her discretionary charging authority, effectively determines what the defendant's Guidelines sentencing range will be. To be sure, prosecutorial charging practices have always affected the sentence, but when judges had discretion to impose any sentence up to the statutory maximum or down to the statutory minimum, prosecutorial power was potentially limited or counterbalanced by the possibility of judicial discretion. Moreover, it is an overstatement to suggest that a federal prosecutor ever has unlimited discretion in selecting charges or determining the sentence. Though certainly broad-ranging, even the federal criminal law is limited in its scope and often detailed in its specification of elements of an offense; as a result, evidentiary and resource constraints necessarily limit the charges that a prosecutor can bring in any given case.³¹

Yet there is no doubt that because they set forth the consequences of each statutory charge and each specified sentencing factor, the Federal Sentencing Guidelines had the potential to effect a transfer of discretion over the severity of punishment from the judge to the prosecutor. Indeed, even as Congress set about in the late 1970s and early 1980s to construct a system in which judicial discretion would be severely limited, the architects of that system realized the possibility that the effect of their reform efforts could be to transfer decision-making power not to the bureaucratic institution they were creating to write

29. *Mistretta v. United States*, 488 U.S. 361, 413-17 (1989) (Scalia, J., dissenting).

30. See generally Kate Stith, *United States v. Mistretta: The Constitution and the Sentencing Guidelines*, in *CRIMINAL PROCEDURE STORIES* 455, 475-80 (Carol S. Steiker ed., 2006).

31. See, e.g., *United States v. D'Angelo*, No. 02Cr399, 2004 U.S. Dist. LEXIS 2239, at *2-3 (E.D.N.Y., Feb. 18, 2004) (Gleeson, J.) (granting judgment of acquittal in a RICO prosecution because the government failed to prove that the defendant committed the murder in connection with a "racketeering enterprise"). On the other hand, within the scope of federal criminal law, federal prosecutorial authority is nearly plenary. See Bruce A. Green, "Hare and Hounds": *The Fugitive Defendant's Constitutional Right To Be Pursued*, 56 *BROOK. L. REV.* 439, 505 (1990) ("The prosecution enjoys virtually unfettered discretion in deciding how to allocate investigative and prosecutorial resources.").

sentencing rules (namely, the U.S. Sentencing Commission), but to federal prosecutors.³²

In the early years during which Congress debated Senator Kennedy's sentencing reform bill, the Justice Department may not have fully realized the potential of sentencing rules to enhance prosecutorial power. The Department did not oppose efforts to reform sentencing, but a review of the legislative materials indicates that, at best, sentencing reform was not high on the legislative agenda of the Carter Administration.³³ The Department's Criminal Division was in any event preoccupied with other concerns, which ultimately did lead to incremental first steps in the centralization of prosecutorial discretion in Main Justice. In the wake of the ABSCAM investigation, which ensnared and convicted several members of Congress and led to oversight hearings highly critical of the underlying investigation,³⁴ the Criminal Division in 1979 promulgated nationwide regulations on the use of informants and

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32. See S. REP. NO. 98-225, at 63 (1983) (noting that “[s]ome critics expressed the concern that a sentencing guidelines system will simply shift discretion from sentencing judges to prosecutors. . . . The Bill contains a provision designed to avoid this possibility. . . . [T]he Sentencing Commission is directed to issue policy statements for consideration by Federal judges in deciding whether to accept a plea agreement.”); *id.* at 167 (similar). One of the earliest warnings that sentencing rules would transfer discretion to prosecutors came from Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for “Fixed” and “Presumptive” Sentencing*, 126 U. PA. L. REV. 550 (1978).
33. Throughout the Carter Administration, the Department strongly supported the nearly decade-long effort to reform federal criminal law through the ambitious route of recodifying all of Title 18 of the U.S. Code. See *Legislation To Revise and Recodify Federal Criminal Laws: Hearing on H.R. 6869 Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 95th Cong. 37 (1978) (Department of Justice Memorandum on the Provisions of Chapters 1 Through 18 of the Criminal Code Reform Act of 1978) (“As the Department of Justice previously has made clear, we attach tremendous importance to this legislation. The federal criminal justice system can operate only as fairly and effectively as is permitted by the statutory law itself. There is no doubt that the existing laws are greatly in need of substantive revision. With the continued, concentrated work of this Subcommittee, the creation of a modern Federal Criminal Code can be achieved before the end of this Congress. The task, as noted by Chairman [Peter W.] Rodino, is ‘monumental’; the result, as noted by Attorney General [Griffin] Bell, will be ‘one of the greatest legislative feats of modern times.’”).
34. See *FBI Undercover Guidelines: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. (1981). As to ABSCAM generally, see Federal Bureau of Investigation, ABSCAM, <http://foia.fbi.gov/foiaindex/abscam.htm> (last visited April 3, 2008) (“During the 1970’s, the FBI conducted a high-level investigation of public corruption and organized crime, code-named ABSCAM. This investigation resulted in the arrest and conviction of a senator, six congressmen, and additional public officials. ABSCAM generated considerable controversy relating to the government’s undercover operations and entrapment issues.”).

undercover agents by the FBI.³⁵ Of even greater potential significance, the Criminal Division prepared and published in 1980, under the signature of Attorney General Benjamin Civiletti, the first general policy statement to guide the exercise of prosecutorial discretion within each of the ninety-four districts. The 1980 *Principles of Federal Prosecution* provided somewhat abstract guidance relevant to all types of federal prosecutions, while conceding the importance of local control over prosecutorial priorities and saying very little about sentencing.³⁶

In these years, the ninety-four U.S. Attorneys exercised significant local autonomy both in charging and in setting prosecutorial priorities. While approval from Main Justice was required by statute in some circumstances (for instance, prior to seeking a court-authorized wiretap),³⁷ and by internal regulation for prosecution of certain offenses (for instance, where the conduct has already been prosecuted in state court),³⁸ for the most part there was little centralized control of line prosecutors – Assistant U.S. Attorneys – beyond that which a U.S. Attorney might choose to exercise within his own district.³⁹ The Justice Department itself had no policies related to criminal sentencing. Indeed, the 1980 version of *Principles of Federal Prosecution* cautioned prosecutors not to make “sentencing recommendations” unless required to do so by a plea agreement or where warranted by “the public interest.”⁴⁰

Under the Reagan Administration, however, the Department included the Sentencing Reform Act in its pending crime control proposals.⁴¹ The Department strongly supported sentencing guidelines as a means of achieving nationwide sentencing uniformity and ensuring more severe punishment of

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35. See U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES ON FEDERAL BUREAU OF INVESTIGATION UNDERCOVER OPERATIONS (2002), available at <http://www.usdoj.gov/olp/fbiundercover.pdf>.
 36. See U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION (1980). The current much-revised and expanded version is found in §§ 9-27.001-.760 of the U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL (2007), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrn.htm.
 37. See Wire and Electronic Communications Interception and Interception of Oral Communications, 18 U.S.C. §§ 2510, 2516 (2000).
 38. See, e.g., U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL, *supra* note 36, § 9-2.031 (discussing the “Petite Policy” on dual federal and state prosecutions).
 39. See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1543-44, 1562-63 & n.136 (1981).
 40. See U.S. DEP'T. OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION, *supra* note 36, at 50.
 41. See S. 1762, 98th Cong. tit. 2 (1983). Other titles of the 1984 legislation included bail reform providing for preventive detention, criminal forfeiture, and limitations on the federal insanity defense. See S. 1762, 98th Cong., tits. 1, 3, 4 (1983).

violent and white-collar crime; departmental spokesmen expressly noted and approved the prospect of guidelines that would be based not just on the offense of conviction, but also on the offender's criminal history and the particular facts of his criminal conduct.⁴² As enacted, the Sentencing Reform Act of 1984 provided that a representative of the Department of Justice would sit *ex officio* on the Commission.⁴³

The 1984 legislation included provisions that sought to ensure that the advent of sentencing guidelines would not simply transfer sentencing authority to line prosecutors in their plea bargaining with defendants. The Sentencing Reform Act specifically authorized the Commission to issue policy statements governing judicial review of plea agreements under Rule 11 of the Federal Rules of Criminal Procedure.⁴⁴ The accompanying Senate Report explained, "This guidance will assure that judges can examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines."⁴⁵ Of equal significance, the statute contained several admonitions that in effect urged the Sentencing Commission to adopt sentencing rules that were based not only on the offense of conviction (which would give individual prosecutors significant control over the sentence by exercising their charging

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42. See *Federal Sentencing Revision: Hearings on H.R. 2013, H.R. 3128, H.R. 4554, and H.R. 4827 Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 98th Cong. 802, 804 (1984) (testimony of Stephen S. Trott, Assistant Att'y Gen., Criminal Division) (testifying that under proposed legislation "sentences would be imposed by judges pursuant to a sophisticated guideline system" and the guidelines would take into account "the particular history and characteristics of the defendant and the particular circumstances of the offense"); *Hearings on S. 829 Before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary*, 98th Cong. 7 (1983) (statement of William French Smith, Att'y Gen. of the United States) (proposing "sentencing reform in order to reduce the considerable disparity in the sentencing process and also to restore truth in sentencing," and noting that the bill would abolish parole, establish uniform and determinate sentencing, authorize government sentencing appeals, provide mandatory sentencing for violent crime, and "enhance the deterrent effect of imprisonment . . . in the area of 'white collar' crime").
43. 28 U.S.C. § 991(a) (2000). This provision also provided that at least three of the seven commissioners would be federal judges. It was amended by the Feeney Amendment, in 2003, to provide that "no more than" three federal judges could be commissioners. See *infra* note 188 and accompanying text.
44. See 28 U.S.C. § 994 (a)(2)(E) (1988). Federal Rule of Criminal Procedure 11 governs the guilty-plea hearing and the acceptance of guilty pleas; it requires, *inter alia*, that all plea agreements be placed on the record and that the court ascertain the "factual basis" for the plea. FED. R. CRIM. P. 11.
45. See S. REP. NO. 98-225, at 63 (1983).

discretion), but also on additional aspects of the offender's "real offense,"⁴⁶ in order to avoid undue control of sentences by prosecutors.

*B. The Sentencing Commission: "Real Offense" Sentencing To Control
Prosecutorial Undermining of Sentencing Rules*

The Sentencing Commission, too, well understood from the beginning that sentencing rules could simply transfer discretion to prosecutors.⁴⁷ Yet many thoughtful reformers⁴⁸—apparently including Judge Breyer, one of the original members of the Commission—doubted the feasibility of regulating prosecutorial charging authority through the simple mechanism of *ex ante* rules. In the introductory chapter of the Guidelines, widely understood to have been written by Judge Breyer, the Commission asserted that it had "decided that these initial guidelines will not, in general, make significant changes in current plea agreement practices."⁴⁹ While a strong proponent of the Guidelines "real offense" approach,⁵⁰ Breyer was apparently of the "incrementalist"⁵¹ view that both judicial and prosecutorial discretion could not simultaneously be limited. In any event, the Commission was busy enough just trying to write from scratch sentencing rules for judges, and it is highly

46. See, e.g., 28 U.S.C. § 994(b)(1)(B), 994(c) (2000); see also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8-12 (1988); William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 501 (1990).
47. See Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 238 (1989) ("Virtually no one denied the existence of the problem.").
48. See, e.g., THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 24-27 (1976) (proposing that legislators should require prosecutors to issue internal guidelines on charging policies); James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 678-83 (providing a similar account); see also Franklin E. Zimring, *Principles of Criminal Sentencing, Plain and Fancy*, 82 NW. U. L. REV. 73 (1987) (expressing skepticism about sentencing guidelines).
49. U.S. SENT'G COMM'N, GUIDELINES MANUAL, *supra* note 20, § 1.A1.1 (Commentary, Application Note § 4(c)). The original Introduction to the Guidelines Manual was moved to an application note in 2000.
50. See Breyer, *supra* note 46, at 8-14, 18-20, 28-31. Breyer referred to the Guidelines approach as "modified real-offense" sentencing, apparently because one Commissioner had proposed that sentences be based entirely on "real offense" harms, with no consideration of other factors. See *id.* at 10-12.
51. See Ilene H. Nagel, Foreword, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 913-39 (1990) (discussing "incrementalist" reformers).

unlikely that the Department of Justice would have continued to support the enterprise if the Commission had sought to constrain directly the discretion of prosecutors as well as judges.

The Commission did, however, make a powerful attempt to restrain prosecutorial discretion *indirectly*, by accepting Congress's invitation to use the offense of conviction only as the *starting point* for the calculation of an offender's Guidelines sentence. The final Guidelines, promulgated in mid-1987 to take effect on November 1, 1987, provided that the ultimate sentence would be calculated on the additional basis of a host of supplementary aggravating factors (and a few mitigating factors), including consideration of the offender's criminal behavior related to the crime of conviction (even if not charged or convicted) and his prior criminal convictions.⁵² Paradoxically, the Commission sought to limit *prosecutorial* control of sentencing by imposing additional controls on the *judge*—specifically, requiring her to sentence not on the basis of the offense of conviction alone, but also on the basis of “real offense” factors beyond the offense of conviction. The idea was that these “real offense” factors either existed or did not exist in any given case; it did not matter whether the prosecutor charged them or not. In this way, a sentence would be based on the rules set forth by the Commission, not on the exercise of discretion by either the judge or the prosecutor.

Stephen Breyer has been perhaps the most influential supporter of some sort of Guidelines regime. He has many times explained—first as a judge and Commissioner,⁵³ and most recently as a justice in his *Apprendi* and *Blakely* dissents⁵⁴ and his *Booker* remedy opinion⁵⁵—that the reason that the Guidelines require “real offense” instead of “charged offense” sentencing is to ensure that punishment is not based on the arbitrary value judgments of the judge *or* the prosecutor. Rather, sentencing is to be based on the value judgments of the expert agency whose rules are written in advance without any particular defendant in mind. To ensure that judges sentence on the basis of “actual” offense conduct, rather than what the prosecutor charges, the particular sentencing rules created by the Commission were based on easily ascertainable factors such as prior convictions, and on quantifiable criteria such as amount of drugs or amount of monetary loss. The Guidelines largely ignore—indeed,

52. See U.S. SENT'G COMM'N, GUIDELINES MANUAL, *supra* note 20, § 1B1.3 (setting forth factors relevant to “determin[ing] the Guidelines Range”).

53. See *Id.* §§ 1.1-1.9; Breyer, *supra* note 46, at 8-12.

54. See *Blakely v. Washington*, 542 U.S. 296, 330-31 (2004) (Breyer, J., dissenting); *Apprendi v. New Jersey*, 530 U.S. 466, 555-56 (2000) (Breyer, J., dissenting).

55. *United States v. Booker*, 543 U.S. 220, 254-57 (2005) (Breyer, J.).

generally prohibit consideration of—less objective criteria such as those relating to the character or personal history of the offender.⁵⁶

Moreover, chapter six of the Guidelines included several admonitions to judges designed to avoid prosecutorial undermining of the enterprise of “real offense” sentencing. While these instructions were clearly in tension with the assertion in the introduction of the Guidelines that the Commission did not intend to interfere with plea bargaining, the chapter six policies addressing these bargains were directed to the judge rather than to the prosecutor.⁵⁷ A judge could accept a plea agreement to drop or withhold some charges only if “the remaining charges adequately reflect the seriousness of the *actual* offense behavior.”⁵⁸ Similarly, the judge could accept an agreement providing for departure from the Guidelines range only if there was a “justifiable” reason⁵⁹ for the departure, as provided in the Sentencing Reform Act or the Guidelines themselves. A third rule required that all plea agreements accepted by a judge must “set forth the relevant facts and circumstances of the *actual* offense conduct” and “not contain misleading facts.”⁶⁰ Finally, the Commission asserted that the sentencing judge is not bound by factual stipulations of the parties, but instead is to determine “the facts.”⁶¹

C. *The Inquisitorial Implications of “Real Offense” Sentencing*

It is one thing to tell the judge that she must sentence on the basis of “the facts.” It is something else altogether to ensure that she knows what “the facts” are. The prosecutor and defense attorney in a common law, adversarial system of justice do not, separately or in tandem, perform the function assigned to an investigating magistrate in an inquisitorial system. In particular, as long as defendants are allowed to plead guilty and as long as prosecutors do not operate under a requirement of “mandatory” prosecution, it will be in the interest of both parties in many cases to arrive at a settlement that involves less than full application of the law. Where a negotiated settlement has been

56. See U.S. SENT’G COMM’N, GUIDELINES MANUAL, *supra* note 20, § 1B1.3 (specifying which factors are relevant to “determin[ing] the Guidelines Range”). See generally STITH & CABRANES, *supra* note 1, at 66-77; Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992).

57. See U.S. SENT’G COMM’N, GUIDELINES MANUAL, *supra* note 20, § 6B (“Plea Agreements”).

58. U.S. SENT’G COMM’N, GUIDELINES MANUAL, *supra* note 20, § 6B1.2(a) (emphasis added).

59. *Id.* § 6B1.2(b)(2), (c)(2).

60. *Id.* § 6B1.4(a) (emphasis added).

61. *Id.* § 6B1.4(d).

reached, neither the defense attorney nor the prosecutor has any incentive to inform the sentencing judge of facts beyond those corresponding to the elements of the offense to which the defendant has pled guilty and the Guidelines factors that the parties have agreed are relevant. The judge in the common law tradition is not an independent investigator, but rather, a neutral factfinder on the basis of the evidence brought to her attention by the parties in the case.

The Sentencing Commission was aware of this problem. To overcome it, the Commission adopted a further inquisitorial procedural innovation by enlisting a third party—beholden neither to the prosecutor nor to the defendant—to assist the judge in ferreting out “the facts” of the case. This third party was the probation officer, an employee of the judicial branch whose task during the era of discretionary sentencing was to provide the judge with a presentence report containing, in addition to a social history of the defendant, an outline of the two “versions” of the facts—those pressed by the prosecutor and those pressed by the defendant. The Sentencing Commission boldly sought to transform both the role of the probation officer and the content of the presentence report. Henceforth it would contain only one version, presumably that of the probation officer himself, noting facts in dispute. Moreover, the probation officer was assigned the task of determining the “actual” facts of the case, independent of the parties. Finally, the Commission took great pains to teach probation officers around the country the content and application of the hundreds of pages of Guidelines rules, so that each one could perform for the judge an initial calculation of the defendant’s Guidelines range and any lawful bases for departure up or down from this range.⁶²

A final inquisitorial innovation was to *require*—rather than merely *allow*—judges to base the sentence on the “actual” facts (the “real offense”).⁶³ Accordingly, the judge as factfinder was explicitly empowered to range beyond the factual assertions of the parties, and even beyond whatever additional facts the probation officer might have brought to her attention, through *sua sponte* inquiries into the existence of aggravating or mitigating Guidelines factors that no one else had raised.

In the early years of the Guidelines, complaints from defense counsel suggested that this system was working as envisioned by the architects of the Guidelines. There were suggestions that the probation officer was a “third

62. The transformed role of the probation officer is discussed in STITH & CABRANES, *supra* note 1, at 85–91, 133; and Sharon M. Bunzel, Note, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933 (1995).

63. U.S. SENT’G COMM’N, GUIDELINES MANUAL, *supra* note 20, § 1B1.1 (“Application Instructions”).

adversary in the courtroom,”⁶⁴ advising the judge of facts that neither the defense attorney nor the prosecutor sought to bring to the judge’s attention. And there was concern in many quarters that the Guidelines’ list of sentence enhancements—ranging from the amount of monetary loss in a fraud case to the defendant’s “role in the offense”⁶⁵ or “obstructive”⁶⁶ conduct in the whole gamut of federal criminal cases—essentially created new “Guidelines crimes.”⁶⁷ The defendant would, in effect, be held “accountable”⁶⁸ and punished for these crimes—yet without any formal charge by prosecutorial authorities, much less the opportunity to demand a trial by jury and proof beyond a reasonable doubt.

The sentencing hearing in the *Blakely* case, under Washington State’s statutory regime of mandatory guidelines (which closely resembled the federal system in structure), provides an example of the inquisitorial approach in practice. There, the defendant pleaded guilty to kidnapping, and neither the prosecutor nor the probation officer chose to allege at the sentencing stage that the kidnapping was “aggravated,” a finding that would have supported a sentencing enhancement. But the judge knew enough about the case, which had been widely publicized,⁶⁹ to raise the issue on his own, and he ordered the prosecutor to present evidence of aggravation, resulting in a three-day hearing at the end of which the judge applied the sentencing enhancement.⁷⁰ The sentencing in *Blakely* proceeded as it would in an inquisitorial system, in which

64. Jerry Denzlinger & David Miller, *The Federal Probation Officer: Life Before and After Guideline Sentencing*, 55 FED. PROBATION 49 (1991).

65. See U.S. SENT’G COMM’N, GUIDELINES MANUAL, *supra* note 20, § 3B.

66. See *id.* § 3C.

67. This is the term used in STITH & CABRANES, *supra* note 1, at 3 and thereafter, to describe the Guidelines’ specification and provision of punishment for antisocial or other aggravating behavior. Justice Scalia’s dissent in *Mistretta* did not use the term but certainly captured the idea. See *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

68. This is a new criminal law term invented by the Sentencing Commission, roughly equivalent to the term “liable” or “guilty.” See U.S. SENT’G COMM’N, GUIDELINES MANUAL, *supra* note 20, § 1B1.3 cmt. n.1 (“The principles and limits of sentencing accountability under this [Relevant Conduct] guideline are not always the same as the principles and limits of criminal liability.”).

69. *Armed Man Sought; Wife Reported Abducted*, SEATTLE TIMES, Oct. 27, 1998, at B2; *Kidnapped Woman Is Freed; Estranged Husband Arrested*, SEATTLE TIMES, Oct. 28, 1998, at B5; *Rancher Is Accused of Kidnapping Wife*, N.Y. TIMES, Nov. 8, 1998, at A31.

70. See Kate Stith, *Crime and Punishment Under the Constitution*, 2004 SUP. CT. REV. 221, 268 (2005) (“Consider the peculiarity of that three-day sentencing hearing in *Blakely*, where the prosecutor had to call witnesses to prove an accusation, spelled out in the criminal code, that he had never charged.”).

the judge is charged not merely with fact-finding, but with *finding out* the facts.⁷¹

From a comparative law perspective, it is not surprising that mandatory real offense sentencing was adopted in large part to limit the discretion of prosecutors. Hallmarks of inquisitorial systems, in theory if not practice,⁷² include the ideals of “mandatory” prosecution and of the dossier compiled by an independent, investigatory factfinder.⁷³

The U.S. Constitution, however, was not written to delineate the powers of government and the rights of the accused in an inquisitorial system of justice. Under the accusatorial approach embedded in our eighteenth century Constitution, an individual cannot be formally punished for crimes with which she was not duly charged and convicted. As discussed in Part IV, in its belated constitutional awakening to the realities of regimes featuring determinate sentencing enhancements, the Supreme Court held in *Apprendi*, *Blakely*, and *Booker* that punishment for conduct for which the defendant has not been charged and convicted—that is, for conduct that a judge decides, on a lesser standard of proof, a defendant “really” did—is incompatible with the adversarial procedures guaranteed by the Fifth and Sixth Amendments. In retrospect, it is astounding that for a decade this basic constitutional defect of the Guidelines system escaped the notice of every member of the Supreme Court but one.⁷⁴

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71. See Thomas Weigand, *Is the Criminal Process About Truth?: A German Perspective*, 26 HARV. J.L. & PUB. POL'Y 157, 161-62 (2003). *But see also infra* note 73.
72. See, e.g., Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three “Inquisitorial” Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977); Abraham S. Goldstein, Tribute, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009 (1974).
73. See John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: “Myth” and Reality*, 87 YALE L.J. 1549 (1978); John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974). Ironically, in continental systems, the “inquisitorial” approach is apparently limited to the investigatory and adjudicatory stages, while sentencing authorities have broad discretion to sentence up to the lawful maximum. See, e.g., Thomas Weigand, *Sentencing and Punishment in Germany*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 188, 203-206 (Michael Tonry & Richard Frase eds., 2001); see also Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 536 (2007).
74. See *United States v. Watts*, 519 U.S. 148, 159 (1997) (Stevens, J., dissenting); *Witte v. United States*, 515 U.S. 389, 407 (1995) (Stevens, J., concurring in part and dissenting in part). In two other cases that, at least in hindsight, raised issues similar to *Apprendi*, *Blakely*, and *Booker*, the Court was unanimous. See *Edwards v. United States*, 523 U.S. 511 (1998); *United States v. Dunnigan*, 507 U.S. 87 (1993); see also *McMillan v. Pennsylvania*, 477 U.S. 79, 95 (1986) (Stevens, J., dissenting) (finding constitutional infirmity in a state sentencing

D. Main Justice: Constraints on Prosecutors and the Pursuit of Centralized Control

As noted, the Guidelines' requirement of "real offense" sentencing and nonadversarial judicial fact-finding directly constrained only judges. There were no comparable directions to prosecutors. Yet the new regime could succeed only if prosecutors refrained from encouraging pleas of guilty by agreeing not to bring to the judge's (or the probation officer's) attention one or more available "Guidelines crimes"⁷⁵—aggravating Guidelines factors that required additional punishment. Whatever the desires of Congress and the Sentencing Commission, prosecutors have a strong incentive to settle cases, if only to be able to investigate and prosecute the next case in the long line of matters awaiting their attention. Moreover, plea bargaining norms and practices, and the relationships among probation officers and prosecutors, varied greatly among the ninety-four federal districts in the country and among judges and prosecutors within particular districts.⁷⁶ If the Sentencing Guidelines were to achieve the goal of reducing inter-judge disparity throughout the federal system, it would be necessary to attend more directly to wide variances in prosecutorial charging and plea bargaining.

Main Justice swiftly came to the rescue.⁷⁷ Although it had never before sought to direct or monitor routine charging and plea decisions across the land, the Department of Justice in 1989 issued a new directive that sought to hold all federal prosecutors to the Guidelines' regime of "real offense" sentencing, and in particular sought to prohibit "fact bargaining" over sentencing enhancements.⁷⁸ To be sure, the "Thornburgh Memorandum," as it came to be

enhancement statute); *id.* at 93 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting) (similar). These cases are also discussed *infra* text accompanying notes 219-223.

75. See *supra* note 67.

76. See Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1135 (2001) ("[I]n place of a single uniform national sentencing system, the Guidelines have created a network of separate local and regional systems."); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 793 (2003).

77. In fact, Main Justice issued a hundred-page "Prosecutor's Handbook on Sentencing Guidelines" on the very day that the Sentencing Guidelines went into effect, November 1, 1987. Two days later, the Assistant Attorney General in charge of the Criminal Division, Stephen Trott, issued a parallel policy statement. The 1989 Thornburgh Memorandum, discussed and quoted in text, largely repeated the admonitions of the two earlier memoranda, but was issued under the signature of Attorney General Richard Thornburgh.

78. Tony Garoppolo, *Fact Bargaining: What the Sentencing Commission Hath Wrought*, 10 BNA CRIMINAL PRACTICE MANUAL 405 (1996); see also *id.* at 406 ("If Mother Teresa became an

known after the Attorney General who issued it, was not the first step toward centralization of policies on prosecutorial charging discretion. As previously noted, in the final days of the Carter Administration, the Department had issued general “principles” to guide federal prosecutors.⁷⁹

But the Thornburgh Memorandum contained more specific and more prescriptive language concerning both plea bargaining and (unlike the 1980 *Principles*) sentencing bargaining. On charging and charge bargaining, it directed that “a federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant’s conduct. Charges should not . . . be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of the defendant’s conduct.”⁸⁰ On sentencing, Main Justice went even further in its instructions to prosecutors than the Sentencing Commission had in its limitations on judges. Prosecutors were instructed “only to stipulate to facts that accurately represent the defendant’s conduct” because Congress “could not have . . . intended the reforms [it] enacted to be limited to the small percentage of cases that go to trial.”⁸¹ A slightly milder variant of this new national policy on bargaining of charges and sentences was reissued by Attorney General Janet Reno in 1993.⁸² The Reno Memorandum was left in place by the administration of President George W. Bush until after Congress enacted the Feeny Amendment in 2003.⁸³

The motivation behind these internal limits on prosecutorial charging authority is uncertain. To be sure, credible voices from various quarters had long called for either legislative or internal limits on the exercise of prosecutorial discretion, in particular on prosecutors’ charging discretion.⁸⁴ It is also likely that officials and others in Main Justice had become true believers in the overriding mission of the Sentencing Reform Act, to achieve uniform (and severe) sentences nationwide.

Assistant U.S. Attorney . . . she would at least be sorely tempted, in some cases, to disingenuously misrepresent the facts or her ability to prove the facts, in order to manipulate the guideline computations to achieve a result that induces a defendant to plead guilty.”).

79. See *supra* note 36.

80. Memorandum from Richard Thornburgh, Attorney Gen., to Federal Prosecutors (Mar. 13, 1989), reprinted in 6 FED. SENT’G REP. 347, 347 (1994).

81. *Id.* at 348.

82. Janet Reno, Reno Bluesheet on Charging and Plea Decisions (Oct. 12, 1993), reprinted in 6 FED. SENT’G REP. 352 (1994).

83. See *infra* Part III.

84. See, e.g., Vorenberg, *supra* note 39, at 1522; see also *supra* note 48.

But it is also true that the interests of the Department's leaders and bureaucrats in implementing national sentencing policies are very different from the interests of line prosecutors across the country, who face distinct demands from law enforcement agents and judges, and from their own U.S. Attorneys.⁸⁵ It would be consistent with the facts as we know them to conclude that the Sentencing Guidelines presented Main Justice (abetted by Congress and by critics of particular prosecutorial decisions) with an opportunity to indulge a natural impulse to centralize control of all federal prosecution, an impulse that continues to this day.

An early study of the Justice Department's response to the Guidelines presciently recognized that the Department's actions "must . . . be understood in the context of an effort by those at the pinnacle of the criminal justice pyramid . . . to get those on the diffuse lower ranks, who have potentially conflicting interests and agendas, to comply with centrally determined policies."⁸⁶ In the cause of aiding Congress and its Sentencing Commission in their mission, Main Justice was able to assert for the first time not merely its primacy in enunciating the general prosecutorial priorities of the Department, but also its direct control of the exercise of prosecutorial discretion nationwide. The project to achieve nationwide uniformity in sentencing, as represented by the Sentencing Reform Act and the Guidelines, became, from the perspective of Main Justice, a project to achieve nationwide centralization of prosecutorial power, as represented by the Thornburgh Memorandum and its successors.

We would do well to recognize that the Thornburgh Memorandum (and later, those of Attorneys General Reno and Ashcroft) sought to centralize the exercise of prosecutorial power essentially by *delegitimizing the exercise of prosecutorial discretion*. The central command of these policies is that prosecutors must apply the criminal law severely by charging "the most serious, readily provable" offense in nearly every case. The federal criminal law is generally not designed to serve such severe purposes; it has lesser-included and overlapping offenses that are applicable to many sets of facts—and it fairly cries out for the exercise of informed prosecutorial discretion. Perhaps it is politically inevitable that if called upon to respond in one sentence to the question, "What should prosecutors charge?", officials at Main Justice must answer "the most serious charge available." (They can hardly answer, for instance, "about half the most serious charge.")

But until the Feeney Amendment in 2003, no one actually asked the Department this question, much less required it to issue a system-wide policy

85. See Richman, *supra* note 5, at 758-67.

86. Schulhofer & Nagel, *supra* note 47, at 253.

related to charging under the Guidelines.⁸⁷ Main Justice itself chose to issue national policies on charging and sentencing, stimulated by the emergence of the Sentencing Guidelines. If all federal prosecutors had abided by the pronouncements from Main Justice, the result would have been a rigidity in law enforcement wholly incompatible with the flexible and variable substantive criminal law that Congress has enacted. Moreover, defendants in principle would have been denied the opportunity to urge anyone—court or prosecutor—to judge how the laws should be applied to the particular facts of their case.⁸⁸ Finally, had prosecutors actually refused to exercise discretion in charging and plea bargaining, it is quite possible that discretion would have simply devolved to a lower (or earlier) stage in prosecution—law enforcement agents.⁸⁹

II. TAKING MEASURE OF THE GUIDELINES REGIME

Many interested observers of federal sentencing—including members of the Sentencing Commission, officials in Main Justice, and, importantly, members of Congress—have proceeded on the assumption that it is possible to measure the extent to which the Guidelines have achieved nationwide uniformity by looking at sentencing data from the federal courts; this data will tell observers the extent to which judges have “complied” with the Guidelines and thereby reduced sentencing disparity. The sentencing data compiled annually by the Sentencing Commission appear to yield answers to a host of questions: Are most sentences within the Guidelines range? Have sentencing judges properly calculated that range? Where there is a departure from the Guidelines, is this for a reason expressly sanctioned by the Guidelines themselves (for example, pursuant to a motion from the government when a defendant has cooperated)? How often are sentencing judges claiming there are grounds to depart? What proportion of those cases is reversed on appeal? Do the decisions and case law of the appellate courts demonstrate that they are living up to their obligation to ensure that the Guidelines, as “law,” are being followed by sentencing judges?

87. See *infra* Part III.

88. See Lynch, *supra* note 6, at 2124-27, 2148-49. For an example of how prosecutors in plea bargains adjust the “facts” to the prosecutor’s judgment of the culpability of the particular defendant, see *United States v. Palladino*, 347 F.3d 29 (2d Cir. 2003). *Palladino* is further discussed in *infra* note 108.

89. See, e.g., *United States v. Gomez*, 103 F.3d 249, 256 (2d Cir. 1997) (raising the issue of “sentencing manipulation” by law enforcement agents who control the extent and facts of investigation).

For most of its first decade, the federal Guidelines system seemed, by these metrics, to be working as well as Congress and the Sentencing Commission could realistically have expected. True, it was recognized on all fronts that despite the proclamations of the Commission and Main Justice, federal prosecutors exercised significant new powers to compel defendants to plead guilty. Prosecutors were the gatekeepers for downward departures on the basis of “substantial assistance” in the prosecution of others; cases with departures on this basis accounted for between 15% and 20% of all sentencings each year.⁹⁰ And even beyond inducing “cooperation,” it was widely understood that the Guidelines were powerful bargaining chips for prosecutors. The percentage of convictions by trial, as opposed to by guilty plea, fell from approximately 13% in 1987 to just over 8% in 1996.⁹¹

Yet the case law and data from the lower federal courts seemed to reassure that the reduction in criminal trials did not undermine the primary purpose of the Sentencing Reform Act: to achieve sentencing uniformity and reduce inter-judge disparity by applying the sentencing rules contained in Guidelines. The data assiduously collected by the Sentencing Commission showed that within-range Guidelines sentences were given in most cases (indeed, the great majority of cases, setting aside sentences for cooperators), and that downward departures from the Guidelines were only affirmed by the courts of appeals when they were permitted by the Guidelines and the Sentencing Reform Act.

A. *Sentencing Cases in the Courts of Appeals*

Given the asymmetry in the structure of the Guidelines (which contain dozens of grounds requiring sentencing enhancement but provide for only two

90. See U.S. SENT’G COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING 103 (2004) [hereinafter U.S. SENT’G COMM’N, FIFTEEN YEAR REPORT], available at http://www.ussc.gov/15_year/15year.htm. Both Congress and the Sentencing Commission accepted the propriety of below-Guidelines sentences for cooperators and accepted the propriety of making the prosecutor the gatekeeper of 5K1 motions; as noted in the text, defense attorneys could not make such a motion, and judges could not do so sua sponte.

91. See U.S. SENT’G COMM’N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 16 tbl.10 (1997) [hereinafter U.S. SENT’G COMM’N, 1996 SENTENCING STATISTICS SOURCEBOOK], available at <http://www.ussc.gov/annrpt/1996/sourcbk.htm> (91.7% of convictions obtained by plea; 8.3% by trial). In 1987, approximately 87% of convictions were obtained by plea of guilty. See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, 1988 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 556 tbl.5.28 (1989). Guilty plea rates after 1996 are discussed in the text accompanying notes 132-133 *infra*.

general mitigating adjustments),⁹² as well as the severity of resulting Guidelines sentences, it is not surprising that most departures have been downward from the Guidelines sentencing range.⁹³ Judging from the appellate case law and data, most of these downward departures appeared to be in compliance with the rules of the Sentencing Reform Act and of the Guidelines themselves governing departures. The courts of appeals appeared to be doing their duty to keep sentencing judges from deviating from the severity called for by the Guidelines. The government appealed very few sentences, and when it did appeal, it usually prevailed—for example, in 1996 winning remand in 85% of its appeals of downward departures.⁹⁴ Courts of appeals also remanded for resentencing in a large majority of cases in which the government claimed the sentencing judge had failed to apply an applicable Guidelines enhancement or had erroneously applied a Guidelines mitigating factor.⁹⁵ Defendants, on the other hand, seldom succeeded in appeals alleging that the sentence was higher than that mandated by the Guidelines.⁹⁶ Although some circuits were surely more deferential than others to district judges who departed,⁹⁷ every court of

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92. Compare U.S. SENT'G COMM'N, GUIDELINES MANUAL, *supra* note 20, §§ 3A1.1-4, 3B1.1, 3B1.3-4, 3C1.1-2 (providing for upward adjustments), *with id.* § 3B1.2 (providing for a downward adjustment for minor or minimal role in offense), *and id.* § 3E1.1 (providing for a downward adjustment for acceptance of responsibility).
93. For instance, in 1996, there were 41,000 offenders sentenced in federal court; in only 388 cases were there upward departures, while there were 7845 downward departures on the basis of cooperation with authorities in the prosecution of others, and 4201 other downward departures. See U.S. SENT'G COMM'N, 1996 SENTENCING STATISTICS SOURCEBOOK, *supra* note 91, at 41 tbl.26.
94. See U.S. SENT'G COMM'N, 1996 SENTENCING STATISTICS SOURCEBOOK, *supra* note 91, at 79 tbl.51. The government's appellate success rate remained high throughout the mandatory Guidelines era. In fiscal year 2001, for instance, the government prevailed in 80% of the cases in which it appealed downward departures. See U.S. SENT'G COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 109 tbl.58 (2002) [hereinafter U.S. SENT'G COMM'N, 2001 SENTENCING STATISTICS SOURCEBOOK], *available at* <http://www.usc.gov/ANNRPT/2001/SBTOC01.htm>.
95. In 1996, the government prevailed in more than 60% of all sentencing appeals that it took. See U.S. SENT'G COMM'N, 1996 SENTENCING STATISTICS SOURCEBOOK, *supra* note 91, at 79 tbl.51. In other years, the government's win percentage was even higher. See, e.g., U.S. SENT'G COMM'N, 2001 SENTENCING STATISTICS SOURCEBOOK, *supra* note 94, at 109 tbl.58 (showing that the government prevailed in over 80% of its sentencing appeals).
96. In 1996, only 8% of defense sentencing appeals were successful. See U.S. SENT'G COMM'N, 1996 SENTENCING STATISTICS SOURCEBOOK, *supra* note 91, at 78 tbl.50 (1997).
97. For instance, in 1996 the Court of Appeals for the Eighth Circuit affirmed 87.2% of sentencing appeals, while the Court of Appeals for the Ninth Circuit affirmed less than 70%. See U.S. SENT'G COMM'N, 1996 SENTENCING STATISTICS SOURCEBOOK, *supra* note 91, at 75-77 tbl.49.

appeals seemed to take seriously its obligation to ensure that the Guidelines sentence was properly calculated and that downward departures were limited to those circumstances that the Sentencing Reform Act and the Commission itself had specified as proper bases for below-Guidelines sentences.

As it turns out, however, appellate case law is a misleading marker of the true state of the law on the ground. It is true that appellate courts have affirmed most within-Guidelines sentences (and the relatively few instances of above-Guidelines sentences), while vacating most below-Guidelines sentences. But appellate decisions suffer from significant selection bias. The great majority of criminal sentences are not appealed by either side. While most federal defendants are indigent, and in this sense their appeals are “free,” it has often been a condition of plea agreements that defendants waive their right to appeal, at least if the government does not breach its promises in the plea agreement.⁹⁸ Even where there is not a waiver of appeal, a defendant who has been the beneficiary of a less-than-strict application of the Guidelines has little incentive to appeal, for doing so could induce a counter-productive cross-appeal by the government. In both situations, the sentencing judge knows that an appeal by the defendant is unlikely, and the absence of an appeal does not necessarily mean that the judge “complied” with the Guidelines. In 1996, more than 42,000 defendants were convicted in federal court, but fewer than 7000 appealed their sentences.⁹⁹

Still more intriguing is that the Government appealed even fewer sentences, including where the sentencing judge explicitly departed downward from the Guidelines for reasons *other than* cooperation with the government. In 1996, for instance, the government appealed a total of only 176 sentences. Moreover, even though there were over 4000 downward departures that year *not* on the basis of cooperation, the government appealed only thirty-two of these.¹⁰⁰ Until implementation of the Feeney Amendment (discussed in Part

98. See Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 212 (2005) (finding that defendants waive appeal in nearly two-thirds of plea agreements nationwide).

99. U.S. SENT’G COMM’N, 1996 SENTENCING STATISTICS SOURCEBOOK, *supra* note 91, at 78 tbl.50, 40 tbl.24 n.1.

100. *Id.* at 40 tbls.24-25, 79 tbl.51. The paucity of government appeals of departures has persisted throughout the Guidelines era. In 2000, for instance, judges departed downward in nearly 10,000 cases (excluding departures for cooperators), but the government appealed only 13 of these and appealed only a total of 77 sentences on any basis, including incorrect application of the Guidelines to the facts. See U.S. SENT’G COMM’N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 53 tbl.26, 109 tbl.58 (2001) [hereinafter U.S. SENT’G COMM’N, 2000 SENTENCING STATISTICS SOURCEBOOK], available at <http://www.ussc.gov/annrpt/2000/SBTOCoo.htm>.

III),¹⁰¹ each local U.S. Attorney's office was the initial gatekeeper in deciding which sentencing cases to appeal. Moreover, this was only the beginning of the appeals process. Every request for a sentencing appeal, like all other appeals, must be approved by the Office of the Solicitor General in Main Justice. The Department thus has the centralized capacity to shape sentencing law in the courts of appeals by strategic exercise of its discretion to appeal.¹⁰² That almost all government sentencing appeals have been successful is consistent with the strategy of appealing only those cases in which the government is most likely to prevail.

The result throughout the Guidelines era (including after *Booker*)¹⁰³ has been a body of circuit case law that on its face signals to district judges to sentence as prescribed by the Guidelines. But this appellate doctrine overstates the extent to which the Guidelines are, in fact, applied fully in sentencing courts. Indeed, the real signal from the courts of appeals, as many sentencing judges surely have realized from the beginning, is this: to avoid reversal, impose a Guidelines sentence *if a non-Guidelines sentence is likely to be appealed*. Where the government and the defense counsel have stipulated to the relevant Guidelines factors, or it is otherwise apparent to the sentencing judge that neither side is disposed to appeal, the extent to which the sentence departs from the Sentencing Guidelines cannot be observed by the appellate courts or measured by outsiders.

B. Sentencing Data from the District Courts

Data related to actual sentencings likewise fail to provide a good measure of Guidelines implementation and compliance. The data compiled by the Sentencing Commission seemed to confirm (at least in the early years of the Guidelines) that sentencing judges, under the watchful eyes of their court of appeals colleagues, were complying with the rules the Sentencing Commission had promulgated. In the great majority of cases, the sentences reported to the Commission were consistent with the Guidelines calculation that the judge, with the help of the probation officer, reported as applicable to the case at hand. Moreover, most departures from the Guidelines were sponsored by the government on the basis that the defendant had cooperated in the prosecution of others—a departure basis explicitly grounded in both statutory law and the

101. See *infra* text accompanying notes 198-201.

102. The Office of the Solicitor General must approve all government appeals, including sentence appeals. See U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL, *supra* note 36, § 9-2.170.

103. See *infra* text accompanying notes 287-291 and note 287.

Guidelines themselves. Even most noncooperation downward departures were identified in judicial case reports as conforming to one of the Guidelines-authorized bases for departure.¹⁰⁴ While the percentage of sentences departing from the Guidelines varied greatly from district to district,¹⁰⁵ downward departures not sponsored by the government for cooperators constituted less than 10% of all sentences during the early years of the Guidelines.¹⁰⁶ If there was growing variance from the Guidelines, most of this was due to prosecutors, not judges: the frequency of downward departures for cooperators grew from less than 6% of all defendants sentenced in 1991 (the first year the Guidelines were applied to a substantial number of cases) to over 19% by 1994.¹⁰⁷

But these data do *not* actually show that judges gave a below-Guidelines sentence in fewer than 10% of cases. First, there is the awkward fact, noted above, that in another 20% of cases, the judge gave a below-Guidelines sentence on the basis of the defendant's cooperation with authorities in the prosecution of others. The Commission and other supporters of the Guidelines regime have always considered these departures, which constitute the great

104. In 1996, for instance, nearly 20% of all sentences included departures downward from the Guidelines on the basis of the defendant's cooperation with authorities, while only 10.3% of sentences included downward departures on some other basis. See U.S. SENT'G COMM'N, 1996 SENTENCING STATISTICS SOURCEBOOK, *supra* note 91, at 41 tbl.26. (showing a 19.2% rate of departures for cooperation with authorities in the prosecution of others; a 10.3% rate of other downward departures; and a less than 1% rate of upward departures). The case reports of noncooperation departures listed a variety of bases for giving a below-Guidelines sentence, but "[p]ursuant to plea agreement" was listed in fewer than one-fifth of the cases. *Id.* at 40 tbl.25.

105. See, e.g., U.S. SENT'G COMM'N, 1995 ANNUAL REPORT 89 tbl.31 (1995), available at <http://www.uscc.gov/annrpt/1995/intro95.pdf> (noting that the downward departure rate on the basis of cooperation in the Southern District of New York was 18%, in the Eastern District of Pennsylvania, 42%, and in the Central District of California, less than 7%; noncooperation downward departure rates for these districts were, respectively, 10%, 6%, and 4%).

106. U.S. SENT'G COMM'N, DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 32 fig.1 (2003) [hereinafter U.S. SENT'G COMM'N, DOWNWARD DEPARTURES] (showing noncooperation downward departures growing from 5.8% of all cases in 1991 to 8.4% in 1995). In 1996, the percentage of cases with noncooperation downward departures grew to 10.3%, see *id.*; U.S. SENT'G COMM'N, 1996 SENTENCING STATISTICS SOURCEBOOK, *supra* note 91, at 41 tbl.26. The continual growth in noncooperation downward departures during the decade of the 1990s is discussed *infra* text accompanying notes 135-151, 164-168.

107. See U.S. SENT'G COMM'N, DOWNWARD DEPARTURES, *supra* note 106, at 32 fig.1; see also U.S. SENT'G COMM'N, 1996 SENTENCING STATISTICS SOURCEBOOK, *supra* note 91, at 39 fig.G. (showing that over 19% of all sentences in 1994, 1995, and 1996 included a downward departure for cooperation).

majority of below-Guidelines sentences, to be as good as within-Guidelines sentences for purposes of measuring “compliance”; in point of fact, however, in nearly one-fifth of cases, the judge was released (at the behest of the prosecutor) of any obligation to give a Guidelines sentence. There is a second and more subtle reason to doubt that the Guidelines were ever implemented to the extent reported by the Commission in its annual publication of sentencing data: the Commission’s data on departures only reveal the sentences judges acknowledge, or even know, vary from the sentence that full application of the Guidelines would require. If judges are not advised of all the aggravating factors arguably present in a case – because the parties have agreed implicitly or explicitly not to advise the court of certain matters – then, unbeknownst to the judge herself, her report that she imposed a “Guidelines sentence” is not entirely accurate. Similarly, even if the judge is aware that there may be additional aggravating facts beyond those alleged by the prosecutor or those stated in the plea agreement, the judge may have little incentive to press an issue that neither party has raised and that ultimately could lead the defendant to seek to withdraw his plea of guilty.¹⁰⁸

The insertion of the probation officer into the Guidelines calculation and application process at first appeared to be a procedure that would genuinely confound the natural instinct of prosecutors and defense attorneys to settle their cases somewhere below the sentence called for by full and rigorous application of the Guidelines. Within several years, however, it became clear that in most cases where the government and the defense agreed on the Guidelines calculation – or agreed to most of the calculation, leaving open perhaps one or two issues on which there might be the need for judicial fact-finding after an adversary hearing – neither the probation officer nor the judge had any incentive or evidence to upset the agreement that the litigants presented. Especially because Guidelines sentences are severe – as compared to state sentences for similar conduct, pre-Guidelines federal sentences, and sentences in most other countries for similar crimes – few judges had a reason or desire to inquire behind the “fact bargain” underlying a plea.¹⁰⁹ Judges may

^{108.} Indeed, where the government fact-bargains to a sentence below what the Guidelines require, it may be held to the bargain even when additional facts become known to the court. *See, e.g., United States v. Palladino*, 347 F.3d 29 (2d Cir. 2003). In this case, the plea agreement did not mention that there was an arguable basis under the Guidelines for six-level enhancement of the offense level; however, when the probation officer asked about the matter, the government presented information confirming its factual basis, and the sentencing judge applied the enhancement. The court of appeals vacated the sentence because the government had indicated in the plea agreement that it would not present facts warranting sentence enhancement beyond that specified in the agreement.

^{109.} *See Garoppolo, supra* note 78, at 405-07.

have decided that the bargain reflected, or did not reflect, a perfect application of the Guidelines, or they may have simply not considered that question important.

To be sure, the Thornburgh Memorandum and Reno Memorandum from Main Justice did implicitly prohibit “fact bargaining” without using the term.¹¹⁰ But this departmental policy was not enforceable for two reasons, one practical and the other conceptual. The practical problem was that there was no mechanism to monitor the exercise of discretion by individual line prosecutors.¹¹¹ Only with respect to one set of cases—those that are death-eligible—has Main Justice been able to expend the resources necessary to enforce its requirement that the discretionary charging decision (whether to seek a death sentence) be made centrally in accordance with Department-wide criteria.¹¹² Apart from capital cases, there was and is no way to review every charging decision and every plea agreement by every Assistant U.S. Attorney in the nation. There may well come a day when Main Justice fully takes control of all charging discretion, but that day has not yet come.

An early study, based on in-depth interviews with prosecutors, concluded that the Guidelines application urged by prosecutors did not fully apply Guidelines enhancement factors in approximately one-third of cases.¹¹³ As explored elsewhere,¹¹⁴ this number in all likelihood underestimates the true extent of “fact bargaining” over sentencing. As one experienced probation officer noted over a decade ago, “The widespread use of fact bargaining, and

110. See *supra* notes 80, 82. After the Feeney Amendment, Main Justice explicitly forbade “fact bargaining.” See Memorandum from Att’y Gen. John Ashcroft 3 (July 28, 2003), reprinted in 15 FED. SENT’G REP. 375, 376 (2003). The memo is discussed in the text accompanying notes 194-195 *infra*.

111. See Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 227-31 (2003); Mark Osler, *This Changes Everything: A Call for a Directive, Goal-Oriented Principle To Guide the Exercise of Discretion by Federal Prosecutors*, 39 VAL. U. L. REV. 625, 633-40 (2005).

112. Under Attorney General Janet Reno, the death penalty could not be sought unless the U.S. Attorney requested and obtained approval from Main Justice in a statutorily death-eligible case. Under Attorney General Ashcroft, the entire process was centralized. See U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL, *supra* note 36, §§ 9-10.010 to 10.190; *id.* § 9-10.080 (“The United States Attorney must submit to the Assistant Attorney General for the Criminal Division every case in which an indictment has been or will be obtained that charges an offense punishable by death or alleges conduct that could be charged as an offense punishable by death.” (emphasis added)).

113. Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992).

114. STITH & CABRANES, *supra* note 1, at 140. See generally *id.* at 116-40.

the lying to the court that is inevitable with the frequent use of such bargaining, is the dirty little secret” of the Guidelines era.¹¹⁵ Another long-time probation officer conducted a nationwide survey that found that in two-thirds of the ninety-four federal districts, the prosecutor and defense counsel included Guidelines stipulations in their plea agreements, and that only 20% of the surveyed officers believed the stipulations were accurate more than 80% of the time.¹¹⁶

The deeper, conceptual problem with attempting to measure Guidelines “compliance” is that the whole enterprise of prohibiting “fact bargaining” – and, relatedly, of insisting that the judge sentence on the basis of the “actual facts” of the case – is largely incoherent. *In litigation, there are no “facts” except those that can be demonstrated in court to the relevant standard of proof.*

Who is to say that the facts marshaled by the probation officer, the prosecutor, or the investigating agent are the “actual” facts – to use the terminology of the Guidelines’ mandate to sentencing judges?¹¹⁷ The whole notion that there *are* “actual” facts that can be found by a judge apart from litigation is based on a naive or incomplete understanding of the adjudicatory process.¹¹⁸ Even in the case of most cooperating defendants who receive 5K1 motions allowing the judge to depart below the Guidelines, all we really can conclude is that the parties have agreed to this disposition; we cannot conclude that the measure of “cooperation” has been consistently applied by particular prosecutors or U.S. Attorneys’ offices, much less that application has been uniform across the nation.¹¹⁹

The most sophisticated studies of Guidelines sentences suggest that they have not had much success in achieving their primary purpose, which was to reduce inter-judge disparity. These same studies therefore leave uncertain the

115. Garoppolo, *supra* note 78, at 405.

116. Letter from Francesca D. Bowman, Chair, Prob. Officers Advisory Group to the U.S. Sentencing Comm’n, to Richard P. Conaboy, Chairman, U.S. Sentencing Comm’n (Jan. 30, 1996), *reprinted in* 8 FED. SENT’G REP. 1, 303-04 (1996).

117. *See supra* text accompanying notes 58-61.

118. In some cases, the participants at the sentencing hearing do dispute the existence of “actual facts,” and the judge holds a hearing or otherwise undertakes a process to determine the facts under the applicable standard of proof (preponderance of the evidence, in the case of a sentencing hearing). In these circumstances, the Commission’s mandate that the judge apply the Guidelines rules to “the facts” has some meaning, for observers can at least judge whether the sentence, given the facts found by the judge, complies with the Guidelines, though even in these cases judges of course have some discretionary leeway in both fact-finding and rule-application.

119. In fact, the incidence of 5K1 motions for prosecutors varies greatly among districts. *See supra* note 90.

extent to which it can be concluded that sentences have “complied” with the Guidelines. We do well to recall that reexamination of the *pre*-Guidelines empirical studies that purported to show significant (and race-based) disparity in federal sentencing revealed the inadequacy of data on which these claims were based.¹²⁰ Similarly, the best post-Guidelines empirical studies do not support the claim that the Guidelines (or even the Guidelines in conjunction with the contemporaneous phenomena of mandatory minimum sentences for drug crimes) have significantly reduced judicial disparity in sentencing. One study published in 1999 was based on the “natural experiment” of random distribution of cases within districts and showed that inter-judge disparity fell only from an average of approximately five months pre-Guidelines to an average of approximately four months post-Guidelines. The study warned that even this reduction in inter-judge disparity might be attributable not to the Guidelines themselves, but to statutory mandatory minimum (and thus more uniform) sentences in drug cases, which account for some 40% of the federal docket nationwide.¹²¹ A similar study conducted by statisticians at the Sentencing Commission yielded a similar result.¹²² Another study, hypothesizing that the identity of the sentencing judge should matter less post-Guidelines than pre-Guidelines, found that judge-specific effects actually increased under the Guidelines.¹²³

Did judges apply the Guidelines uniformly and accurately to “the facts”? We have very little empirical basis for an answer to that question, and in an important sense do not even know what the question means. But the Sentencing Commission apparently continues to believe that the question is meaningful, and that the answer, for at least the first years of the Guidelines regime, was “Yes.”¹²⁴

120. See STITH & CABRANES, *supra* note 1, at 105-12.

121. James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 299 (1999).

122. Paul J. Hofer, Kevin R. Blackwell & R. Barry Ruback, *Criminology: The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239 (1999).

123. Chantale Lacasse & Abigail A. Payne, *Federal Sentencing Guidelines and Mandatory Minimum Sentences: Do Defendants Bargain in the Shadow of the Judge?*, 42 J.L. & ECON. 245, 267 (1999) (arguing that the identity of the judge explained more sentencing variance post-Guidelines than pre-Guidelines).

124. In addition to the Commission’s annual reports on federal sentencing statistics, see, for example, the Commission’s “five-year” report, which concludes that the Guidelines had achieved “significant reductions in disparity and the desired increases in uniformity.” U.S. SENT’G COMM’N, *THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF*

C. Measuring Other Consequences of the Guidelines

The extent to which the Guidelines succeeded in their primary goal—reducing sentencing disparity among judges—is difficult if not impossible to measure, but it is clear enough that they succeeded in their secondary goal: increasing sentences in most crime categories.¹²⁵ The percentage of defendants sentenced to probation fell from 50% pre-Guidelines to less than 15% post-Guidelines.¹²⁶ Despite this overall increase in imprisonment, the average prison sentence also increased, from twenty-eight months in 1986, pre-Guidelines, to an average of fifty months between 1989 and 1996.¹²⁷ The increased severity of federal criminal sentences is too great to be explained only by changes in the nature of criminal caseloads (from less serious to more serious crimes). Moreover, the increase in sentence severity took effect as soon as the Guidelines were widely implemented, with no indication of a parallel sudden change in the nature of federal prosecutions.¹²⁸

The Guidelines and the concomitant enactment of mandatory minimum sentences had other significant effects. One that has been widely noted is the reduction in the frequency of federal criminal trials.¹²⁹ Before the Guidelines, more than 12% of federal offenders were convicted by trial;¹³⁰ by 1996, the

THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA-BARGAINING 85 (1991).

125. See *supra* note 42; see also STITH & CABRANES, *supra* note 1, at 42, 59–63 (noting that increasing sentencing severity for violent and white-collar crimes was a secondary goal of the Sentencing Reform Act and a deliberate Commission policy choice, despite the Commission’s claim that the Guidelines were based on average “past practice”).
126. Compare U.S. SENT’G COMM’N, 1996 SENTENCING STATISTICS SOURCEBOOK, *supra* note 91, at 21 tbl.12 (11.5% of offenders sentenced to probation only), with U.S. SENT’G COMM’N, 1989 ANNUAL REPORT app. B, tbl.B-7 (1989) (showing approximately 50% of offenders sentenced to probation in the years 1984–1988).
127. Because of parole, the time actually served in the pre-Guidelines period was even lower than the twenty-eight month average sentence. For data and analysis, see STITH & CABRANES, *supra* note 1, at 62–65.
128. See U.S. SENT’G COMM’N, 1991 ANNUAL REPORT 68–9 tbl.24 (1991). By 1991, the first year in which the Guidelines were applicable to a large majority of cases, the mean sentence had grown to sixty-five months. *Id.*
129. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005). But see Daniel Richman, *Judging Untried Cases*, 156 U. PA. L. REV. 219, 219 (2007) (questioning whether the reduced incidence of trials is as problematic as suggested by Wright).
130. See U.S. DEP’T OF JUSTICE, 1987 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 442 tbl.5.22 (1988).

percentage was just over 8%;¹³¹ and since 2000 it has been less than 5%.¹³² Indeed, throughout the period of “mandatory” Guidelines, guilty pleas steadily displaced trials in the federal system. Those who have studied this phenomenon quite reasonably attribute it to “the adoption of new sentencing laws that have greatly enhanced the plea-bargaining leverage enjoyed by prosecutors.”¹³³

The result is, as Judge Gerard E. Lynch famously observed a decade ago, that at least in the federal courts we have not an “adversary” system of justice, but an “administrative” system.¹³⁴ Since prosecutorial discretion and plea bargains control most outcomes, the system as it actually operates relies on both the priorities and the judgments of prosecutors. The default is the plea bargain (or sentence bargain), with the adversarial jury trial serving as a kind of judicial review for defendants who are not content with administrative adjudication by the prosecutor.

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131. U.S. SENT’G COMM’N, 1996 SENTENCING STATISTICS SOURCEBOOK, *supra* note 91, at 15 fig.C.
132. See U.S. SENT’G COMM’N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 20 fig.C (2003) [hereinafter U.S. SENT’G COMM’N, 2002 SENTENCING STATISTICS SOURCEBOOK], available at <http://www.ussc.gov/ANNRPT/2002/SBTOC02.htm> (showing that rates of conviction by trial fell from 6.4% in 1998 to 2.9% in 2002); U.S. SENT’G COMM’N, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 22 fig.C (2008) [hereinafter U.S. SENT’G COMM’N, 2007 SENTENCING STATISTICS SOURCEBOOK], available at <http://www.ussc.gov/ANNRPT/2007/SBTOC07.htm> (showing that the rate of convictions by trial was 4.2% in 2007, and averaged below 5% for the years 2003 through 2006).
133. Michael M. O’Hear, *What’s Good About Trials?*, 156 U. PA. L. REV. PENNUMBRA 209, 211 (2007), <http://www.pennumbra.com/responses/11-2007/OHear.pdf>; see also Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 78 (1993) (explaining that the threat of filing a charge with a mandatory minimum sentence “pressure[s] defendants, who otherwise might test the state’s evidence, into accepting guilty pleas”); Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137, 137 (1995) (contending that the Guidelines give prosecutors “greater leverage to virtually compel plea bargaining, force cooperation, and in essence determine the length of sentences”); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2551-54 (2004) (discussing how the costs of going to trial affect plea bargaining); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 132 (2004); Mary Pat Flaherty & Joan Biskupic, *Prosecutors Can Stack the Deck*, WASH. POST, Oct. 7, 1996, at A1 (describing cases in which the maximum sentence imposed by the Federal Sentencing Guidelines influenced a defendant’s decision to plea bargain); Ronald F. Wright & Marc L. Miller, Editorial, *Prosecutor Rex*, PHILA. INQUIRER, Dec. 19, 2003, at A39 (suggesting that wide margins between sentences after trials and sentences after plea bargains can unduly sway defendants toward plea bargains).
134. Lynch, *supra* note 6, at 2218; see also Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005); Richman, *supra* note 76.

III. THE CHALLENGE OF THE FEENEY AMENDMENT

While one cannot know the “true” extent to which the Guidelines are applied, or even what “true” might mean in this context, it may still be worthwhile to undertake a longitudinal analysis of changes in the frequency of Guidelines departures and the severity of Guidelines sentences. For instance, if one makes the (admittedly unrealistic) assumption that the types of cases and the state of the governing criminal law, including the content of the Guidelines, remain constant, then changes in raw numbers of departures and in average sentence over time may offer at least a window on changes in actual judicial sentencing practice. Moreover, such data might provide a rough measure of the effects of exogenous changes in the law, such as the Supreme Court’s *Koon* decision in 1996, the Feeney Amendment enacted by Congress in 2003, and, of course, the *Booker* decision in 2005.

The raw data, set forth in Figure 1, are startling. The frequency of noncooperation downward departures grew throughout the 1990s, from under 7% in the early 1990s to nearly 20% in 2001—the last year for which Congress had data when it enacted the Feeney Amendment.¹³⁵ This growth was particularly pronounced after the Supreme Court handed down the *Koon* decision (enunciating an “abuse-of-discretion” standard for appellate review of departures) in 1996.¹³⁶ Even as the rate of government-sponsored downward departures for cooperators decreased slightly (from nearly 20% in 1995 to just over 17% in 2001), the rate of other downward departures more than doubled, from 8.5% in 1995 to over 18% in 2001.¹³⁷ Then, in the wake of both the 2003 Feeney Amendment and the threat of the Chairman of the Judiciary Committee of the House of Representatives, F. James Sensenbrenner, to investigate all the

135. U.S. SENT’G COMM’N, DOWNWARD DEPARTURES, *supra* note 106, at 32; *see also* U.S. SENT’G COMM’N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 51 fig.1 (2006) [hereinafter U.S. SENT’G COMM’N, BOOKER FINAL REPORT] (showing that total noncooperation departures grew from 10% in 1991 to close to 20% in 2001). The data reported by the Commission are by fiscal year, with the fiscal year beginning three months prior to the calendar year (i.e., fiscal year 2001 began on October 1, 2000, and ended on September 30, 2001).

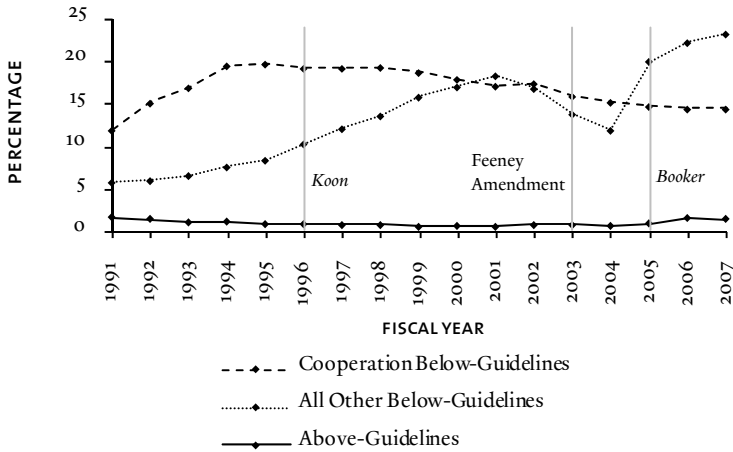
136. *Koon v. United States*, 518 U.S. 81, 99-100 (1996). *Koon* was decided on June 13, 1996; hence the percentages shown for FY1996 in Figure 1 include both pre- and post-*Koon* sentencings.

137. U.S. SENT’G COMM’N, DOWNWARD DEPARTURES, *supra* note 106, at 32. It turns out that the rate of noncooperation downward departures actually peaked in FY2001, though Congress did not have FY2002 data available when it promulgated the Feeney Amendment. *See* U.S. SENT’G COMM’N, BOOKER FINAL REPORT, *supra* note 135, at D-10 (showing that noncooperation downward departures fell from 18.3% in 2001 to 16.8% in FY2002).

sentences of a judge who had testified that Guidelines sentences were too severe,¹³⁸ the percentage of noncooperation downward departures fell to approximately 13% in 2003 and 2004.¹³⁹ Since *Booker* (in 2005), the percentage of below-Guidelines sentences for reasons other than noncooperation has risen to over 23%.¹⁴⁰ Figure 1 illustrates these trends.

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138. On May 14, 2002, Judge James Rosenbaum of the District of Minnesota testified concerning his experience with Guidelines sentences for narcotics offenses; for months thereafter Chairman Sensenbrenner and members of his staff heaped harsh criticism on the judge and issued repeated threats of further investigation. See Tresa Baldas, *Congress Comes After a Federal Judge: Sentencing at Issue in Subpoena Uproar*, NAT'L L.J., at A1 (Mar. 24, 2003) ("In an unprecedented and controversial move that has judges nationwide expressing concern, the House Judiciary Committee threatened to issue subpoenas for records relating to Rosenbaum's sentencing decisions, and has requested a federal review of the entire Minnesota federal bench as part of a broader inquiry . . ."). The Chairman's actions were widely understood to be an attempt to ensure that judges would hew closely to the Guidelines. See Robert Moilana, Op-Ed., *Judge Rosenbaum's Trial by Intimidation*, MINNEAPOLIS/ST. PAUL BUS. J., June 11, 2004, available at <http://www.bizjournals.com/twincities/stories/2004/06/14/editorial2.html>; Todd David Peterson, *Oh, Behave: Congressman's Recent Efforts To Punish Federal Judges Flout the Constitution; It Says So in the Good Behavior Clause*, LEGAL AFF., Nov./Dec. 2005, at 16, available at http://www.legalaffairs.org/issues/November-December-2005/toa_novdeco5.msp; David Rubenstein, *Rosenbaum's Inquisition*, NATION, Dec. 11, 2003, at 6, available at <http://www.thenation.com/doc/20031229/rubenstein>.
139. U.S. SENT'G COMM'N, 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 79-yellow pages tbl.26A, 79-blue pages tbl.27A (2005) [hereinafter U.S. SENT'G COMM'N, 2004 SENTENCING STATISTICS SOURCEBOOK], available at <http://www.ussc.gov/ANNRPT/2004/SBTOC04.htm> (showing that the downward departure rate, other than for cooperators, was under 12% in first part of FY2003, and that the rate grew slightly after *Blakely v. Washington* was handed down in June 2004).
140. U.S. SENT'G COMM'N, BOOKER FINAL REPORT, *supra* note 135, at D-10 (showing that in the first year after *Booker* was handed down, cooperation departures were given in 14.4% of cases, below-Guidelines sentences on other bases were given in 21.8% of all cases, and above-Guidelines sentences doubled to a total of 1.5% of all cases). In FY2007, 23.2% of sentences were below the Guidelines for reasons other than cooperation with authorities. U.S. SENT'G COMM'N, 2007 SENTENCING STATISTICS SOURCEBOOK, *supra* note 132, at 70-71 tbl.26.

Figure 1.
 RATE OF NON-GUIDELINE SENTENCES (1991-2007)¹⁴¹



The trendlines in Figure 1 are misleading, however, because many of the noncooperation downward departures were in fact sponsored by the

141. The data from which Figure 1 was constructed are from the Commission’s annual reports on sentencing: U.S. SENT’G COMM’N, 1991 ANNUAL REPORT 139 tbl.55 (1991); U.S. SENT’G COMM’N, 1992 ANNUAL REPORT 127 tbl.50 (1992); U.S. SENT’G COMM’N, 1993 ANNUAL REPORT 161 tbl.66 (1993); U.S. SENT’G COMM’N, 1994 ANNUAL REPORT 83 tbl.33 (1994); U.S. SENT’G COMM’N, 1995 ANNUAL REPORT, *supra* note 105, at 89 tbl.31; U.S. SENT’G COMM’N, 1996 SENTENCING STATISTICS SOURCEBOOK, *supra* note 91, at 41 tbl.26; U.S. SENT’G COMM’N, 1997 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 53 tbl.26 (1998), available at <http://www.usc.gov/annrpt/1997/sbtoc97.htm>; U.S. SENT’G COMM’N, 1998 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 53 tbl.26 (1999), available at <http://www.usc.gov/ANNRPT/1998/Sbtoc98.htm>; U.S. SENT’G COMM’N, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 53 tbl.26 (2000), available at <http://www.usc.gov/ANNRPT/1999/Sbtoc99.htm>; U.S. SENT’G COMM’N, 2000 SENTENCING STATISTICS SOURCEBOOK, *supra* note 100, at 53 tbl.26; U.S. SENT’G COMM’N, 2001 SENTENCING STATISTICS SOURCEBOOK, *supra* note 94, 53 tbl.26; U.S. SENT’G COMM’N, 2002 SENTENCING STATISTICS SOURCEBOOK, *supra* note 132, at 53 tbl.26; U.S. SENT’G COMM’N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 57 tbl.26 (2004), available at <http://www.usc.gov/ANNRPT/2003/SBTOC03.htm>; U.S. SENT’G COMM’N, 2004 SENTENCING STATISTICS SOURCEBOOK, *supra* note 139, at 72 tbl.26, 75 tbl.26A, 278 tbl.26, 281 tbl.26A; U.S. SENT’G COMM’N, 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 74 tbl.26, 77 tbl.26A, 286 tbl.26 (2006), available at <http://www.usc.gov/ANNRPT/2005/SBTOC05.htm>; U.S. SENT’G COMM’N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 74-75 tbl.26 (2007), available at <http://www.usc.gov/ANNRPT/2006/SBTOC06.htm>; U.S. SENT’G COMM’N, 2007 SENTENCING STATISTICS SOURCEBOOK, *supra* note 132, at 70-71 tbl.26. A Fiscal Year begins on October 1 of the preceding year. *United States v. Koon* was decided at the end of Q3 of FY1996. The Feeney Amendment was enacted in Q3 of FY2003. *United States v. Booker* was decided at the beginning of Q2 of FY2005.

government. As the Sentencing Commission concluded in a report that it issued after Feeney was enacted,¹⁴² and as Max Schanzenbach has demonstrated in a subsequent empirical analysis,¹⁴³ the increase in departures throughout the 1990s is due in part to the increasing proportion of immigration cases in the federal criminal caseload in border districts, in which *the government* moved for downward departures (apparently because of the large and growing number of such cases, and in order to hasten deportation).¹⁴⁴ Main Justice had approved this so-called fast-track treatment of immigration cases prior to Feeney—and the Feeney Amendment itself transformed this policy into a statutory mandate requiring “fast-track” treatment of immigration offenders where proposed by the government.¹⁴⁵

Prior to 2003, the Sentencing Commission did not keep data on the extent to which noncooperation downward departures were in fact initiated or sponsored by the government for reasons other than cooperation. In 2003, however, the Commission undertook a reexamination of 2001 data and concluded that, while slightly more than 18% of cases had a downward departure for reasons other than the defendant’s cooperation, approximately 40% of these were explicitly agreed to by the government, primarily in plea agreements or pursuant to a “fast-track” program in districts with a high incidence of immigration offenses.¹⁴⁶ The Commission’s analysis thus concluded that the rate of true (nongovernment-initiated) judicial departures in 2001 was just under 11%,¹⁴⁷ as shown in Figure 2. Drawing also upon data

142. U.S. SENT’G COMM’N, DOWNWARD DEPARTURES, *supra* note 106. The Feeney Amendment had required the Commission to issue a comprehensive report on departures and its efforts to reduce the frequency of noncooperation downward departures. See *id.* at i (“The United States Sentencing Commission submits this report in direct response to section 401(m) of . . . [the ‘PROTECT Act’], and as part of its overall fifteen year review of the federal sentencing guidelines.”).

143. Max Schanzenbach, *Have Federal Judges Changed Their Sentencing Practices? The Shaky Empirical Foundations of the Feeney Amendment*, 2 J. EMP. L. STUD. 1, 17–38 (2005).

144. See U.S. SENT’G COMM’N, DOWNWARD DEPARTURES, *supra* note 106, at 51–61; Schanzenbach, *supra* note 143, at 22–28.

145. See Pub. L. No. 108–21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003) (to be codified at 28 U.S.C. § 994 note); see also *infra* note 186.

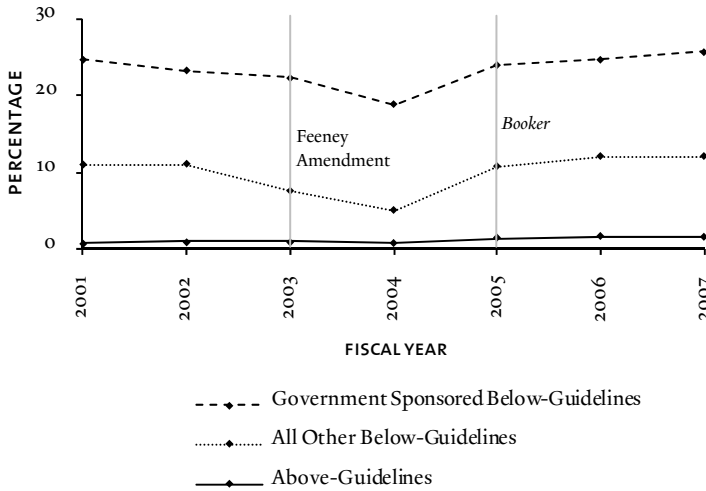
146. U.S. SENT’G COMM’N, DOWNWARD DEPARTURES, *supra* note 106, at 59–60; 60 fig.15. Following the Commission’s methodology, Figure 2’s “Government-sponsored below-Guidelines” sentences include not only departures for cooperation, but also downward departures based on plea bargains, the government’s “fast-track” program for immigration cases in border districts, and cases where the offender was deported.

147. See *id.* at v (“If all the government initiated departures are excluded, the remaining downward departure rate [for 2001] is estimated to be about 10.9 percent.”); U.S. SENT’G COMM’N, FIFTEEN YEAR REPORT, *supra* note 90, at 111 (“The rate of downward departures

from the Commission's subsequent annual data reports, Figure 2 shows the rates of different types of non-Guidelines sentences through 2007.

for reasons other than substantial assistance that were *not* initiated by the government [as part of early disposition program or plea agreement] appeared to be approximately 10.9 percent in 2001.”).

Figure 2.
REVISED RATE OF NON-GUIDELINE SENTENCES (2001-2007)¹⁴⁸



148. The sources for the percentages shown for FY2003 to FY2007 are listed in note 141, *supra*; for these years, the Commission disaggregated downward departures, providing data for both cooperation departures and “other government-sponsored” departures. The FY2001 percentage of “Government-sponsored below-Guidelines” sentences is from U.S. SENT’G COMM’N, DOWNWARD DEPARTURES, *supra* note 106, at 32 fig.1, and 60 fig.15; U.S. SENT’G COMM’N, BOOKER FINAL REPORT, *supra* note 135, at 53 n.265; *id.* at 55, fig.2 (adding the “substantial assistance departures” and “government-initiated departures” data from the Downward Departures Report to obtain government-sponsored downward departure figures for FY2001 and FY2002). I calculated the 2002 percentage by applying the assumptions of the Downward Departures Report—namely, that one-quarter of “general mitigating circumstances” departures and all plea bargained, fast-tracked, and deportation-related sentences are “government-sponsored”—to the Commission’s annual report data pertaining to FY2002. See U.S. SENT’G COMM’N, DOWNWARD DEPARTURES, *supra* note 106, at 59-60; U.S. SENT’G COMM’N, 2002 SENTENCING STATISTICS SOURCEBOOK, *supra* note 132, at 51, fig.G; *id.* at 52, tbl.25. Fiscal Year begins on October 1 of the preceding year. The Feeney Amendment was enacted in Q3 of FY2003. *United States v. Booker* was decided at the beginning of Q2 of FY2005.

The percentages shown for FY2001 and FY2002 should be treated with caution. Perhaps most importantly, the Commission sometimes ascribed more than one reason for a downward departure. See U.S. SENT’G COMM’N, DOWNWARD DEPARTURES, *supra* note 106, at 42 fig.11; U.S. SENT’G COMM’N, 2002 SENTENCING STATISTICS SOURCEBOOK, *supra* note 132, at 52 tbl.25 n.2. As a result, certain numbers in the Commission’s reports—such as the number of cases involving fast-track and deportation departures—may be inflated due to double counting. Moreover, the Commission’s finding that one-quarter of “general mitigating circumstances” departures in FY2001 were government-sponsored is based on a potentially nonrepresentative sample and, in any case, does not necessarily carry over to FY2002.

Schanzenbach's analysis similarly concluded¹⁴⁹ that controlling for changes in the nature of prosecutions (using the calculated Guidelines sentencing range as a proxy) and controlling for district effects (especially pronounced in border districts with a high proportion of immigration cases) results in a less startling trend line: true judicial downward departures rose by less than one-third between 1996 and 2001.¹⁵⁰ When he also excluded from his analysis all cases with plea bargains, Schanzenbach estimated that the rate of noncooperation downward departures grew only slightly between 1996 and 2001.¹⁵¹

In the single legislative hearing held on the Feeney Amendment, Main Justice argued¹⁵² that the increase in downward departures throughout the 1990s was due in large part to the failure of the courts of appeals to enforce the Guidelines, and that this failure had been exacerbated by the standard of

149. Schanzenbach's methodology is econometric, while the Commission examined the details of a sample of past downward departures to determine the percentage that were initiated by the government. Because the methodologies used by the Commission and by Schanzenbach are different, their analyses yield slightly different percentages of non-Guidelines sentences. The data set used by Schanzenbach ended in 2001 and hence he did not address the effect of Feeney in 2003 or *Booker* in 2005.
150. Schanzenbach, *supra* note 143, at 24 fig.1. After controlling for these factors, the noncooperation downward departure rate was approximately 13% in FY1996, and grew to 17% in FY2001. Schanzenbach concluded, "there is no doubt that downward departures increased [after *Koon*], but they did not do so to the extent suggested by proponents of the Feeney Amendment." *Id.* at 26. In his narrative analysis, Schanzenbach uses the data from FY1996 as the benchmark to measure the effect of *Koon*, *see id.* at 22-38. However, *Koon* was decided in June 1996, during the 1996 fiscal year used by the Commission in its data reports, *see supra* note 135; hence the data reported for FY1996 include cases decided after *Koon*. Schanzenbach's analysis reveals a greater increase in judicial downward departures if the benchmark year is FY1995. *See id.* at 24 fig.1 (showing, after controlling for caseload and district effects, noncooperation departures grew from under 12% in FY1995 to approximately 17% in FY2001).
151. *See id.* at 25 fig.3 (excluding plea bargains, as well as controlling for caseload and district, the noncooperation departure rate was just under 13% in FY1996, and grew to approximately 15% in FY2001). Using Schanzenbach's own methodology, the impact of *Koon* would appear greater if FY1995 data are treated as the benchmark, as is arguably more appropriate. *See* Schanzenbach, *supra* note 143, at 25 fig.3 (eliminating all cases with plea bargains and removing caseload and district effects, Schanzenbach's methodology yields a noncooperation departure rate of 9% in FY1995, rising to nearly 13% in FY1996); *supra* note 150.
152. *See Child Abduction Prevention Act and the Child Obscenity and Pornography Prevention Act of 2003: Hearing on H.R. 1104 and H.R. 1161 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 15-18 (2003) (statement of Daniel P. Collins, Assistant Deputy Att'y Gen.) [hereinafter Statement of Daniel P. Collins]; *see also* William W. Mercer, *Assessing Compliance with the U.S. Sentencing Guidelines: The Significance of Improved Data Collection and Reporting*, 16 FED. SENT'G. REP. 43 (2003).

review for departures set forth in *Koon*—review for “abuse of discretion.”¹⁵³ The Department supported adding language to the Sentencing Reform Act that “would effectively overrule *Koon*,”¹⁵⁴ which was a unanimous decision authored by Justice Anthony Kennedy.¹⁵⁵ As I have previously suggested, and as the implementation of that standard in the *Koon* case itself made clear,¹⁵⁶

153. *Koon v. United States*, 518 U.S. 81, 99-100 (1996).

154. Statement of Daniel P. Collins, *supra* note 152, at 18.

155. In addition to announcing that departures should be reviewed under an “abuse-of-discretion” standard, *Koon* also spoke approvingly of the “heartland” approach to departures that the Court of Appeals for the First Circuit had adopted when Stephen Breyer served on that court, *see* *United States v. Diaz-Villafane*, 874 F.2d 43, 49 (1st Cir. 1989), although this aspect of *Koon* apparently was of lesser concern to Representative Feeney, Main Justice, and other supporters of the Feeney Amendment. While a generous understanding of the “heartland” approach might allow departure in any atypical case, the case law of the courts of appeals, even those that ostensibly accepted the “heartland” approach to departures, did not, for the most part, signal a more lenient standard for departures, upward or downward, after *Koon*. *See, e.g.*, *United States v. Hemmingson*, 157 F.3d 347, 359 (5th Cir. 1998); *United States v. Hoffer*, 129 F.3d 1196, 1206 (11th Cir. 1997); *United States v. Weaver*, 126 F.3d 789, 790 (6th Cir. 1997) (rejecting harsh treatment of minor white-collar offenders as a basis for departure since all white-collar offenders are included in the heartland); *United States v. Wong*, 127 F.3d 725, 728 (8th Cir. 1997) (reversing a departure and rejecting a host of factors including disparity among co-defendants, cost of imprisonment, lack of judicial sentencing discretion, crack-versus-powder-cocaine sentencing disparities, low recidivism risk, and the absence of a weapon during a violent crime); *see also* *United States v. Bonnet-Grullon*, 53 F. Supp. 2d 430, 433 (S.D.N.Y. 1999) (rejecting interdistrict sentencing disparity as the basis for downward departure), *aff’d* 212 F.3d 692 (2d Cir. 2000); *United States v. Snyder*, 954 F. Supp. 19 (D. Mass. 1997), *rev’d and remanded*, 136 F.3d 65 (1st Cir. 1998) (rejecting federal/state sentencing disparity as a basis for a downward departure); *United States v. Brennick*, 949 F. Supp. 32 (D. Mass. 1996), *vacated and remanded*, 134 F.3d 10 (1st Cir. 1998); Francesca D. Bowman, *Has Koon Undermined the Guidelines?*, 9 FED. SENT’G REP. 32, 32 (1996) (reviewing statistics from the District of Massachusetts, and concluding that *Koon* is not “undermining the guidelines at this point”); Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1277-82 (1997). A few circuits did, at least on occasion, more aggressively implement the heartland concept. *See, e.g.*, *United States v. Leahy*, 169 F.3d 433, 440 (7th Cir. 1999) (relying heavily on *Koon* and the heartland concept to hold that “most, but not all, of the conduct regulated by those statutory provisions explicitly referenced would be considered ‘typical’ and within the ‘heartland’ of cases covered by that guideline. By implication, cases embodying conduct regulated by statutory provisions that are not referenced by a particular guideline logically cannot be found to fall within the ‘heartland’ of that particular guideline.”); *United States v. Sanchez-Rodriguez*, 161 F.3d 556 (9th Cir. 1998); *United States v. Woods*, 159 F.3d 1132, 1134 (8th Cir. 1998) (holding that “because the underlying offense was bankruptcy fraud, and not drug trafficking or some other offense typical of organized crime, the facts of her money laundering did not fall into the ‘heartland’ of cases involving that offense”).

156. *See* Stith, *supra* note 25, at 15 (noting that despite using the “abuse of discretion” standard, the Court in *Koon* had vacated the sentence and held that certain bases the sentencing judge had relied on for departure were unlawful).

review of departures for “abuse of discretion” in fact does not liberate sentencing judges to depart in a regime that by law limits departures.¹⁵⁷ Since the Guidelines limited the allowable bases for departure,¹⁵⁸ the “abuse of discretion” standard amounted to something close to the usual judicial review for legal error. Although the Department of Justice complained at the hearing on the Feeney Amendment that the reason it had appealed only twenty-five downward departure decisions in 2001 was *Koon’s* lenient review standard,¹⁵⁹ the Department had consistently appealed only a tiny percentage of downward departures even prior to *Koon*.¹⁶⁰ Moreover, in 2001, the government appealed very few sentences (with or without departures) on *any* basis,¹⁶¹ as had been its practice throughout the Guidelines era.

Still, as noted in Part II, the appellate legal regime is only one factor among many affecting the behavior of sentencing judges. Schanzenbach’s analysis, even after controlling for caseload and district effects, shows that the percentage of cases with downward departures for reasons other than cooperation with the government grew significantly – by nearly one-third or by one-half, depending on whether 1995 or 1996 is used as the benchmark year.¹⁶² This increase in the frequency of judicial downward departures may have been a response to the norm-setting signal to *district courts and to prosecutors* that the

157. See *Zervos v. Verizon*, 252 F.3d 163, 168-69 (2d Cir. 2001) (explaining the relationship between “abuse of discretion” and “legal error”); cf. Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right To Appeal*, 57 U. CHI. L. REV. 1 (1990) (discussing the abuse of discretion standard). For an extended appraisal of the meaning and impact of *Koon*, see Marc L. Miller & Ronald F. Wright, *Your Cheatin’ Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723 (1999).

158. See *supra* note 23.

159. U.S. SENT’G COMM’N, DOWNWARD DEPARTURES, *supra* note 106, at 54-56 (summarizing the Department’s position); see *id.* at 56 (noting that the government appealed downward departures in a total of twenty-five cases, prevailing in more than three-fourths of these).

160. See *supra* Section II.A; see also U.S. SENT’G COMM’N, DOWNWARD DEPARTURES, *supra* note 106, at 56 n.117 (noting that the government appealed an average of thirty-eight downward departures per year in the four years prior to *Koon*).

161. See U.S. SENT’G COMM’N, 2001 SENTENCING STATISTICS SOURCEBOOK, *supra* note 94, at 109 tbl.58 (noting that the government appealed on a sentencing issue in only 94 cases, prevailing in 70% of these); see also Paul Hofer, Willie Martin & Pamela Montgomery, *Departure Rates and Reasons After Koon v. United States*, 9 FED. SENT’G REP. 284 (1997).

162. Schanzenbach, *supra* note 143, at 24 fig.1. After controlling for changes in offense characteristics and district effects, noncooperation downward departures grew from just over 11% of cases in FY1995, to approximately 13% of cases in FY1996, to over 17% of cases in FY2001. As to whether FY1995 or FY1996 data ought to be used as the benchmark to measure the increase in departures after *Koon*, see *supra* note 150.

Supreme Court enunciated in *Koon*. That is, the *Koon* decision may have had an impact on sentencings in various locales not by altering post-*Koon* appellate case law, but by causing some sentencing judges and some advocates to understand that the Supreme Court sought in *Koon* to make departures more readily available.¹⁶³

More generally, we do well to recall that the year-by-year increase in below-Guidelines sentences began well before *Koon*; that the continued increase in noncooperation departures after *Koon* was accompanied by a decrease in departures for cooperators;¹⁶⁴ and that throughout the 1990s there was an increase in the frequency of plea bargaining and guilty pleas.¹⁶⁵ Moreover, average sentences fell throughout the 1990s.¹⁶⁶ It is clear, then, that a host of norms and practices, involving both line prosecutors and judges, were evolving throughout the decade and into the new century.¹⁶⁷ In light of the complexity and the particularized nature of both charging and sentencing, neither the raw data, nor the analyses of this data by the Commission in 2003 and Schanzenbach in 2005, allow us to infer the extent to which *Koon* was responsible for the increase in noncooperation departures after that decision was handed down. As Paul Hofer has observed: “[I]t appears that departure rates were influenced . . . more by cultural and institutional factors operating

163. Cf. Miller & Wright, *supra* note 157, at 793-800 (arguing that *Koon* changed the law on departures).

164. See Figure 1. It is possible that government-sponsored departures below the Guidelines and judicial departures are in some circumstances a substitute for one another. For instance, judges may be more disposed to find a ground for a below-Guidelines sentence in cases where the Government does not initiate a basis for leniency from a severe Guidelines sentence. See also Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569 (1998) (discussing why the District of Connecticut consistently had a high rate of judicial departures and a low rate of departures for cooperation, while the District of Massachusetts had a low rate of judicial departures and a high rate of cooperation departures).

165. See *supra* notes 130-132 and accompanying text.

166. See U.S. SENT’G COMM., FIFTEEN YEAR REPORT, *supra* note 90, at 46 (showing that average sentences for felonies peaked in 1992 and fell slightly in every subsequent year of the decade).

167. After examining factors that could explain the persistent decline in narcotics sentences between 1991 and 1999, Bowman and Heise conclude that “at virtually every point in the Guidelines sentencing process where prosecutors and judges can exercise discretionary authority to reduce drug sentences, they have done so.” Bowman & Heise, *supra* note 76, at 1126; see also Frank O. Bowman, III and Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 558 (2002) (finding significant variation in drug sentence severity by circuit and district, and concluding that “the decline in drug sentences has been largely a product of discretionary choices by judges, prosecutors, defense attorneys and probation officers”).

incrementally over the long term than by particular guideline amendments or judicial decisions.”¹⁶⁸

Yet whatever their deficiencies as evidence of *Koon*’s impact or evidence of actual judicial sentencing behavior,¹⁶⁹ the numbers before Congress in 2003 were powerful. They showed persistent increases in the rate of noncooperation downward departures during the 1990s—especially after the *Koon* decision was handed down in 1996. This presented an opportunity for Congress, aided and abetted by willing officials at Main Justice,¹⁷⁰ to demand an even greater reduction in judicial discretion than had been achieved by the Sentencing Guidelines. By 2001, the last year for which Congress had complete data, the percentage of cases with noncooperation downward departures was greater than that with departures for cooperators, 18% to 17%.¹⁷¹ As one commentator noted, “Prosecutors who don’t like the increase [in departures] blame it on activist judges emboldened by the 1996 Supreme Court decision *United States v. Koon*.”¹⁷² The Feeney Amendment would put a stop to this.

The Feeney Amendment was enacted into law on April 30, 2003, as part of the PROTECT Act of 2003, the major provisions of which concerned child pornography and other sexual exploitation of children.¹⁷³ Although the Amendment was introduced by (and named after) Representative Tom Feeney, a member of the House Judiciary Committee, which was at the time headed by Representative Sensenbrenner, it reportedly was drafted by officials at the Department of Justice.¹⁷⁴ In late 2002 and early 2003, the Department had collected a set of seventy-eight white-collar cases from forty-nine districts

168. Paul J. Hofer, *Immediate and Long-Term Effects of United States v. Booker: More Discretion, More Disparity, or Better Reasoned Sentences?*, 38 ARIZ. ST. L.J. 425, 427 (2006).

169. See *supra* Section II.B.

170. Or perhaps it was Main Justice aided and abetted by a willing Congress. As discussed, it is difficult to determine who was the “principal” and who was the “accomplice” in the enactment of the Feeney Amendment. Cf. 18 U.S.C. § 2 (2000) (providing that all accomplices are also principals).

171. See U.S. SENT’G COMM’N, DOWNWARD DEPARTURES, *supra* note 106, at 32; U.S. SENT’G COMM’N, 2001 SENTENCING STATISTICS SOURCEBOOK, *supra* note 94, at 51 fig.G.

172. Michael S. Gerber, *Down with Discretion*, LEGAL AFF., Mar./Apr. 2004, at 72, 72, available at http://www.legalaffairs.org/issues/March-April-2004/story_gerber_marparo4.msp.

173. Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18 U.S.C.). See generally Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power To Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295 (2004).

174. See Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn’t*, 117 YALE L.J. 1388 (2008).

around the country in which sentencing judges had departed downward.¹⁷⁵ According to spokesmen for Main Justice, these cases were egregious and “troubling” examples of sentencing judges “using downward departures frequently, in some cases nearly routinely, as a way of avoiding imposing the prescribed guideline sentence.”¹⁷⁶ In testimony in March 2003 before the Sentencing Commission, the Department announced it would “seek legislation . . . to address the unacceptably high levels of non-[cooperation] downward departures.”¹⁷⁷ Subsequent analysis showed that the Department’s description of the bases for departure in at least some of these seventy-eight cases was incomplete or misleading, and that the government had not even sought to appeal many of them.¹⁷⁸ Inasmuch as local prosecutors’ offices were the first gatekeepers of appeals during these years (the Solicitor General’s Office did not even see cases that local prosecutors did not wish to appeal),¹⁷⁹ the showcasing of this selected set of cases as evidence of judges abusing their limited departure authority is consistent with the understanding that concern over downward departures emanated not from line prosecutors in the field, but from Main Justice and closely allied U.S. Attorneys.

Adopted as an amendment to the House version of the PROTECT Act, the measure introduced by Representative Feeney would have prohibited all downward judicial departures on grounds other than those specifically provided in the Guidelines, as well as eliminated most remaining grounds relating to the personal history or characteristics of the defendant, the very

175. A copy of the summaries of these seventy-eight cases, each on a separate page, has been obtained by the author. The binder is entitled “Examples of Non-Substantial Assistance Downward Departures in Economic Crimes,” but does not list an author or a date.

176. *Hearing on Commission’s Response to Directives Contained in Sarbanes-Oxley Act Before the U.S. Sent’g Comm’n* 7, 9 (2003) (statements of W. Mercer, U.S. Attorney, District of Montana, and Paul K. Charlton, U.S. Attorney, District of Arizona). Mercer was subsequently brought to Washington to serve concurrently as Principal Associate Deputy Attorney General. See Press Release, Dep’t of Justice, Deputy Attorney General James B. Comey Announces Appointment of Principal Associate Deputy Attorney General (May 9, 2005), available at http://www.usdoj.gov/opa/pr/2005/May/05_dag_250.htm. Interestingly, several years after testifying before the Commission, Charlton was one of the seven U.S. Attorneys dismissed on December 7, 2006. See Allegra Hartley, *Timeline: How the U.S. Attorneys Were Fired*, U.S. NEWS & WORLD REP., Mar. 21, 2007, <http://www.usnews.com/usnews/news/articles/070321/21attorneys-timeline.htm>.

177. *Hearing on Commission’s Response to Directives Contained in Sarbanes-Oxley Act Before the U.S. Sent’g Comm’n*, *supra* note 176, at 10.

178. See Letter from Julie Stewart, President, and Mary Price, Gen. Counsel, Families Against Mandatory Minimums to Hon. Diana E. Murphy, Chair, U.S. Sentencing Comm’n 4-9 (Aug. 1, 2003) (on file with author).

179. See *supra* note 102.

grounds that Department officials had objected to in the set of seventy-eight white-collar cases it had compiled and publicized.¹⁸⁰ The bill that ultimately emerged from the House-Senate conference committee was less radical than Feeney's original measure, in large part because both Senator Kennedy and Senator Hatch (then the Chairman of the Senate Judiciary Committee) vigorously opposed the original proposal.¹⁸¹ Moreover, the Chief Justice of the United States sent an extraordinary—if not unprecedented—letter, objecting that the proposal would “seriously impair the ability of courts to impose just and reasonable sentences.”¹⁸² In the final bill, the nearly absolute prohibition on judicial downward departures was limited to crimes involving child pornography, sexual abuse, and child trafficking.¹⁸³ But the legislation nonetheless contained a series of challenges to the then-extant regime of federal sentencing. The Feeney legislation contained provisions that:

- (1) Overturned the Supreme Court's holding in *Koon*, replacing the existing standard for appellate review of departures of “abuse of discretion” with “de novo” review by the court of appeals.¹⁸⁴
- (2) Increased direct prosecutorial control over departures in two respects: first, by requiring the prosecutor's approval before a sentencing judge could give the maximum available adjustment for the defendant's acceptance of responsibility;¹⁸⁵ and, second, by

180. Compare 149 CONG. REC. H2405 (daily ed. Mar. 27, 2003) (providing the text of an amendment to H.R. 1104 offered by Rep. Feeney, prohibiting downward sentencing departures on the grounds of criminal history, family ties, diminished capacity, “aberrant” behavior, vocational or educational skills, past good works, employment history, or mental capacity), with *Hearing on Commission's Response to Directives Contained in Sarbanes-Oxley Act Before the U.S. Sent'g Comm'n* 9 (2003) (statements of W. Mercer, U.S. Attorney, District of Montana, and Paul K. Charlton, U.S. Attorney, District of Arizona) (decrying departures for aberrant behavior, charitable or civic work, employment record, family ties, and mental condition).

181. Gerber, *supra* note 172, at 74.

182. See Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENT'G REP. 310 (2003) (quoting Letter from Chief Justice William H. Rehnquist to Senator Patrick Leahy). Others also objected, including the Judicial Conference of the United States, certain former U.S. Attorneys, and a group of seventy law professors. See *id.* The author was a primary signatory of the letter from law professors. See Letter from Professor Frank O. Bowman et al. to Senators Orrin Hatch and Patrick Leahy (Apr. 2, 2003) (on file with author).

183. Pub. L. No. 108-21, § 401(b), 117 Stat. 650 (2003) (directly amending the Sentencing Guidelines to prohibit or greatly limit departures in such cases).

184. *Id.* § 401(d), 117 Stat. at 670; see Bibas, *supra* note 173, at 296. As to the meaning of de novo review of fact-particularized sentencing departures, see *infra* note 202.

185. Pub. L. No. 108-21, § 401(j)(2), 117 Stat. at 671.

- prohibiting “fast-track” immigration-offense departures except on motion of the prosecutor.¹⁸⁶
- (3) Prohibited the Sentencing Commission, for a period of two years, from providing new grounds for downward departures; directed the Commission to amend the Guidelines so as to reduce the bases and scope of currently available departures;¹⁸⁷ and reduced the number of federal judges on the seven-member Commission from “at least three” to “no more than three.”¹⁸⁸
 - (4) Directed the Department of Justice to monitor and collect data on all downward departures, and to issue guidance to prosecutors to reduce the number of judicial departures and to ensure appeals therefrom.¹⁸⁹

Most portentously, the legislation as enacted required the Justice Department to report all departures (including the name of the sentencing judge) *to Congress itself within fifteen days of the sentencing* (that is, before time had run on the Department’s right to seek appeal). There was, however, an important escape clause to this reporting requirement: it would not take effect if, within ninety days of enactment of the Feeney Amendment, the Department submitted a report to Congress setting forth procedures to ensure that prosecutors would abide by the Guidelines and that the Department would undertake the “vigorous pursuit of appropriate and meritorious appeals.”¹⁹⁰

Feeney, in other words, directly confronted and sought to reduce the discretion of every institution involved in federal criminal sentencing—the Supreme Court, the courts of appeals, sentencing judges, the Sentencing Commission, and even the Department of Justice. Both the Judicial Conference of the United States, in September 2003, and Chief Justice William H. Rehnquist, in his year-end report on the state of the judiciary, urged repeal of

186. *Id.* § 401(m)(2)(B), 117 Stat. at 675.

187. *Id.* §§ 401(m), 401(j)(2), 117 Stat. at 673, 675. Pursuant to this demand, the Commission prohibited or restricted departures relating to overrepresentation of the defendant’s criminal history in the calculated criminal history score, aberrant behavior in drug trafficking offenses or for repeat offenders, family ties, coercion and duress, diminished capacity, addiction to gambling, restitution, role in the offense and acceptance of responsibility (the latter two already calculated, to some extent, in the Guidelines). See U.S. SENT’G COMM’N, DOWNWARD DEPARTURES, *supra* note 106, at 18-20 (summarizing and collecting Guidelines citations). For a thorough analysis of the Commission’s restrictions on departures in response to Feeney, see 16 FED. SENT’G REP. 93-153 (2003).

188. Pub. L. No. 108-21, § 401(n)(1), 117 Stat. at 676.

189. *Id.* § 401(l)(1), 117 Stat. at 674.

190. *Id.* §§ 401(l)(2)(A), (l)(3), 117 Stat. at 675.

portions of the legislation.¹⁹¹ To its credit, the Department had opposed the direct reporting of sentences to Congress as “counter to longstanding and important traditions that counsel against legislative interjection into individual criminal cases.”¹⁹² As noted above, however, the compromise that was then reached—namely, that the Department take steps to ensure prosecutorial compliance with the Guidelines and appeals from noncompliant judicial decisions—conferred additional authority on the Department itself (that is, Main Justice) at the expense of prosecutors in the field.

As required by the escape clause on reporting departures to Congress, Attorney General Ashcroft issued a new Memorandum in July 2003 that, like the Thornburgh Memorandum and Reno Memorandum before it,¹⁹³ sought to alter the behavior of individual prosecutors primarily by means of strict charging policies that were mandatory on their face. In order to reduce the incidence of fact bargaining, the July 2003 Ashcroft Memorandum not only expressly employed that term—“federal prosecutors may not ‘fact bargain’”¹⁹⁴—but went on to explain the meaning of this requirement in practice: “[I]f readily provable facts are relevant to calculations under the Sentencing Guidelines, the prosecutor must disclose them to the court, including the Probation Office.”¹⁹⁵ In a September 2003 follow-up memorandum, which explicitly superseded the Reno Memorandum, Attorney General Ashcroft repeated the central requirement of both the earlier directives—that “federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case”¹⁹⁶—but listed fewer circumstances in which local offices would have authority to deviate from this general rule absent the express approval of Justice Department officials in Washington. The September 2003

191. See U.S. Judicial Conference Statement on the Feeney Amendment (Sept. 23, 2003), reprinted in 16 FED. SENT’G REP. 136 (supporting legislation that would repeal portions of the Feeney Amendment); Chief Justice William Rehnquist, 2003 Year-End Report on the Federal Judiciary (Jan. 1, 2004), reprinted in 16 FED. SENT’G REP. 143 (complaining, inter alia, that “the PROTECT Act was enacted without any consideration of the views of the Judiciary”).

192. See Statement of Daniel P. Collins, *supra* note 152, at 331, 333.

193. See *supra* text accompanying notes 80-82.

194. Memorandum from Att’y Gen. John Ashcroft 3 (July 28, 2003), reprinted in 15 FED. SENT’G REP. 375, 376 (2003).

195. *Id.*

196. Memorandum from Att’y Gen. John Ashcroft 2 (Sept. 22, 2003), available at http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm.

Memorandum of Attorney General Ashcroft repeated the strictures of his July memorandum on “fact bargaining” and sentencing advocacy.¹⁹⁷

The immediate effectiveness of these statements of policy, no matter how mandatory on their face and how few the expressly authorized exceptions, depended on the incentives and attitudes of U.S. Attorneys and their line prosecutors. No enforcement mechanism having been provided, and language being what it is—for example, what is “readily provable”?—there was operational and interpretive space in implementing these mandates. In any event, as previously noted, there were not enough people in Main Justice to monitor and enforce “mandatory” charging policies in every U.S. Attorney’s office. The mandatory-policy approach to controlling dispersed prosecutorial discretion can work (if it can work at all) only by altering the practice and norms of U.S. Attorneys’ offices over time.

But in addition to these measures, the Ashcroft Memorandum of July 2003 introduced a new procedural device that might be enforceable by Main Justice and that portended significant further centralization of authority in Washington. That device was a new requirement that prosecutors report “adverse” sentencing decisions to the Department in Washington.¹⁹⁸ That is, much as they had been required by Attorney General Ashcroft to report all “death-eligible” cases to Main Justice (even when they did not wish to seek the death penalty),¹⁹⁹ every U.S. Attorney’s office would now be required to report all sentencings in which the judge made a Guidelines adjustment or downward departure that “is not supported by the facts and the law.”²⁰⁰ Under the terms of the new July 2003 directive, the Criminal Division of Main Justice, not the local U.S. Attorney’s offices, would have authority to decide whether to seek approval from the Solicitor General’s Office to appeal the case.²⁰¹

In sum, Feeny directly limited the discretion of federal district judges, ordered the Sentencing Commission to amend the Guidelines to reduce this discretion further, increased the burdens on the federal courts of appeals

197. *Id.*

198. Ashcroft, *supra* note 195, at 4 (“Department attorneys must promptly notify the appropriate division at the Department of Justice . . . concerning any adverse sentencing decision that meets the objective criteria set forth in § 9-2.170(B) [of the U.S. Attorneys Manual as] amended . . . in the attached Appendix to this memorandum.”).

199. *See supra* note 112.

200. *See Ashcroft, supra* note 195, at 3, 4.

201. *See id.* at 3 (“[U]pon notification of an adverse decision described in [U.S. Attorneys’ Manual] § 9-2.170(B), the appropriate division at Main Justice should carefully review the decision to determine whether an appeal would be appropriate and meritorious.”).

(which now had to review all sentencings “de novo”²⁰²), overturned a unanimous Supreme Court decision, and impinged on the exercise of discretion by line prosecutors. But it resulted, not coincidentally, in enhancing the authority of the Department of Justice in Washington. Main Justice was able to parlay congressional concerns about leniency in sentencing into further centralization of the exercise of prosecutorial discretion, thereby expanding its own authority at the expense of that of the ninety-four U.S. Attorneys and their line assistants. In the wake of Feeney (and in the wake of the threatened investigation by Congressman Sensenbrenner of a judge who had expressed concern over the severity of the Guidelines²⁰³), the number of true judicial downward departures (those not initiated or otherwise sponsored by the government) plunged to 5% of all cases,²⁰⁴ as shown in Figure 2 above.

This was the state of affairs when the Supreme Court handed down *Booker*, a decision that would fundamentally change federal sentencing. In restoring the opportunity for judges in each of the nation’s judicial districts to exercise sentencing discretion, *Booker* struck back against the efforts of Congress and the Justice Department to centralize both sentencing policy and the exercise of prosecutorial power.

202. It is not clear exactly what was contemplated by Feeney’s requirement that appellate courts review all departures “de novo.” Judge Jack B. Weinstein of the Eastern District of New York issued an order announcing that inasmuch as the “mandate of de novo review of downward departures dictates that the Court of Appeals act in effect as a sentencing court,” he would thereafter *videotape* all sentencing hearings, in order to aid the appellate court in making credibility and other determinations. *In re Sentencing*, 219 F.R.D. 262, 264-65 (E.D.N.Y. 2004), *reprinted in* 16 FED. SENT’G REP. 282, 283-84 (2004).

203. *See supra* note 138. The consistent trending upward of the rate of noncooperation downward departures reached its zenith in 2001. *See supra* note 137. Hence the reduction in the rate of departures actually began shortly after Judge James Rosenbaum of the District of Minnesota was targeted by Representative Sensenbrenner, and it is possible that this action had at least as great an impact on sentencing judges as did Feeney itself. *See also supra* text accompanying notes 164-168.

204. *See* U.S. SENT’G COMM’N, 2004 SENTENCING STATISTICS SOURCEBOOK, *supra* note 139, at 75 tbl.26A (showing that, pre-*Blakely*, the true judicial departure rate was 5.2%); *id.* at 281 tbl.26A (showing that, after *Blakely* was handed down on June 25, the true judicial departure rate was 4.6%). Using the raw numbers provided in these tables, I calculated the overall true judicial departure rate for FY2004, which began on October 1, 2003, to have been 5%. In the three months of FY2005 preceding the *Booker* decision, the true judicial departure rate was even lower, 4.3%. *See* U.S. SENT’G COMM’N, 2007 SENTENCING STATISTICS SOURCEBOOK, *supra* note 132, at 63 fig.G.

IV. THE SUPREME COURT'S POWERS TO LIMIT PROSECUTORIAL DISCRETION

Throughout the years of the “mandatory” Guidelines, Congress had shown no interest in addressing the phenomenon of greatly enhanced prosecutorial influence over sentencing—which, I have argued,²⁰⁵ is in part a consequence of Congress’s own legislative actions, and specifically its disposition to write broad, overlapping criminal prohibitions and to provide for severe maximum penalties. While a few interested persons banded together to lobby against the new regime—for instance, “Families Against Mandatory Minimums”²⁰⁶—and decried the severe penalties imposed on those who found themselves charged by federal prosecutors, opposition to the Guidelines regime did not have much public salience, except in one area. The statutorily based requirement that sentences for distribution of crack cocaine be significantly higher than those for distribution of powdered cocaine had a pronounced and alarming disparity based on race.²⁰⁷ By the mid-1990s, the Sentencing Commission had called for adjustments to reduce these disparities, while no scholar or judge defended the disparate sentencing.²⁰⁸ Yet every federal court of appeals upheld the constitutionality of the crack-powder disparity²⁰⁹ because the Supreme Court

205. See *supra* text accompanying notes 4-6.

206. See Jim Newton, *Long LCD Prison Terms—It’s All in the Packaging*, L.A. TIMES, July 27, 1992, at A1.

207. See MARC MAUER, RACE TO INCARCERATE 182-87 (1999) (describing the effect of disproportionate incarcerations of African American communities); SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE 21-48 (Michael Tonry & Kathleen Hatlestad eds., 1997) (describing racial disparities); MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA (1995).

208. See U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 1 (1995); see also *United States v. Pruitt*, 502 F.3d 1154, 1171 n.2 (10th Cir. 2007) (McConnell, J., concurring) (“[T]he 100:1 crack/powder [weight] distinction [is] virtually indefensible.”).

209. *United States v. Moore*, 54 F.3d 92 (2d Cir. 1995) (rejecting a challenge to provisions that base sentences on the weight of drugs, with one gram of crack cocaine equivalent to 100 grams of powdered cocaine); *United States v. Clary*, 34 F.3d 709 (8th Cir. 1994) (same); *United States v. Smith*, 34 F.3d 514 (7th Cir. 1994) (same); *United States v. Singleterry*, 29 F.3d 733 (1st Cir. 1994) (same); *United States v. Thompson*, 27 F.3d 671 (D.C. Cir. 1994) (same); *United States v. Thurmond*, 7 F.3d 947 (10th Cir. 1993) (same); *United States v. Reece*, 994 F.2d 277 (6th Cir. 1993) (same); *United States v. Frazier*, 981 F.2d 92 (3d Cir. 1992) (same); *United States v. King*, 972 F.2d 1259 (11th Cir. 1992) (same); *United States v. Harding*, 971 F.2d 410 (9th Cir. 1992) (same); *United States v. Simmons*, 964 F.2d 763 (8th Cir. 1992) (same); *United States v. Watson*, 953 F.2d 895 (5th Cir. 1992) (same); *United States v. Lawrence*, 951 F.2d 751 (7th Cir. 1991) (same); *United States v. Thomas*, 900 F.2d 37 (4th Cir. 1990) (same).

had made it abundantly clear that Congress has near-plenary authority to fix criminal punishments.²¹⁰

Indeed, the Supreme Court has taken a limited and “subconstitutional” role in reviewing not just criminal penalties but nearly all of substantive criminal law.²¹¹ It would be a mistake, however, to conclude that the Supreme Court has therefore played no role in checking legislative or prosecutorial overreaching. It has done so primarily through two distinct approaches: first, and most prominently, by creating or enlarging the constitutional procedural rights of defendants; second, and less controversially, through its power to interpret substantive federal criminal law and related common-law doctrines such as the attorney-client privilege.

The criminal procedure “revolution” of the 1960s is of course the most sustained example of the former approach. Granting defendants additional procedural rights (in either criminal investigations or trials) generally has the effect of limiting or reducing the power of the prosecutor. Sometimes the restraint on prosecutorial power is direct. The *Batson* case,²¹² for instance, at once provided the defendant a new right (the right not to have individual members of the jury venire peremptorily struck on the basis of race) and placed an explicit limitation on the exercise of peremptory challenges by prosecutors. The limitation on the prosecutor is the flip-side of the right of the defendant. In many situations, however, the limitation on the prosecutor’s power is indirect. For instance, *Gideon*²¹³ held that defendants who face imprisonment have the right to counsel at trial. While this new entitlement did not directly reduce prosecutorial authority, it did reduce the prosecutor’s power relative to that of indigent defendants. To use a metaphor, *Gideon* gave the defendant a higher card in the poker game of plea bargaining with the prosecutor – and, all other factors being equal, the expected result would be a more advantageous outcome for the defendant, whether at trial or when plea bargaining in the

210. See, e.g., *Chapman v. United States*, 500 U.S. 453, 467 (1991) (“Congress has the power to define criminal punishments without giving the courts any sentencing discretion.”); cf. *Ewing v. California*, 538 U.S. 11 (2003) (upholding the constitutionality of a “three strikes” law providing for up to life in prison, where the third “strike” was the theft of three golf clubs).

211. See Kate Stith-Cabranes, *Criminal Law and the Supreme Court: An Essay on the Jurisprudence of Byron White*, 74 U. COLO. L. REV. 1523, 1548 (2003) (“[T]he Constitution places very few limits on what a state may criminalize.”).

212. *Batson v. Kentucky*, 476 U.S. 79 (1986).

213. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

“shadow” of the trial.²¹⁴ There is no doubt that the process of plea negotiations is complex and that the rationality of both defendants and prosecutors is incomplete and bounded.²¹⁵ But as a general rule, it is reasonable to expect that the recognition of additional defendant rights—the right to counsel, the right to proof of every element beyond a reasonable doubt, the right to confront witnesses, and so on—will redound, at least in the immediate aftermath, to the benefit of defendants.²¹⁶ This is why, after all, defense counsel urge the Supreme Court to interpret Fourth, Fifth, Sixth, and Eighth Amendment rights expansively, while prosecutors generally resist such interpretations.²¹⁷

The Court initially declined the invitation to apply most of these rights in the context of the Sentencing Guidelines. In the first decade of the Guidelines, the Court deferred entirely to Congress and to the Sentencing Commission. In 1989, in *Mistretta*, it upheld the delegation of power to the Commission to (in

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214. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 31-32 (1966); Thomas W. Church, Jr., *In Defense of “Bargain Justice,”* 13 *LAW & SOC’Y REV.* 509, 512-14, 523 (1979); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 *J. LEGAL STUD.* 289, 309-17 (1983); William M. Landes, *An Economic Analysis of the Courts*, 14 *J.L. & ECON.* 61, 66-69 (1971); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979); Edward A. Rittenburg, *Plea Bargaining Analytically—The Nash Solution to the Landes Model*, 7 *AM. J. CRIM. L.* 323, 353 (1979); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909 (1992); Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 *YALE L.J.* 2011 (1992). In the civil context, also see Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 *J. LEGAL STUD.* 225 (1982); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. LEGAL STUD.* 1 (1984); and Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 *J. LEGAL STUD.* 55 (1982).
215. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *HARV. L. REV.* 2464 (2004); Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 *N.Y.U. J.L. & LIBERTY* 512 (2007); Geoffrey R. McKee, *Competency To Stand Trial in Preadjudicatory Juveniles and Adults*, 26 *J. AM. ACAD. PSYCHIATRY & L.* 89, 96-97 (1998) (observing that teenage defendants may lack the capacity to understand plea bargaining).
216. See Nancy J. King & Susan R. Klein, Comment, *Apprendi and Plea Bargaining*, 54 *STAN. L. REV.* 295 (2001). Over time, changes in prosecutorial charging and other practices may blunt the impact of the new procedural right. Moreover, the legislature usually has the power to “undo” the leverage obtained by defendants by redefining crimes or punishments. See *infra* note 329. See generally Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 *TEX. L. REV.* 2055 (2006); Richman & Stuntz, *supra* note 4; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1 (1997).
217. See *Blakely v. Washington*, 542 U.S. 296, 312 (2004) (Scalia, J.) (“The implausibility of Justice Breyer’s contention that *Apprendi* is unfair to criminal defendants is exposed by the lineup of *amici* in this case. It is hard to believe that the National Association of Criminal Defense Lawyers was somehow duped into arguing for the wrong side.”).

effect) create “Guideline crimes” and rejected the claim that this power was inappropriate for an agency purportedly in the judicial branch of the federal government.²¹⁸ Over the course of the next decade, the Court in four cases rejected arguments that the Guidelines regime violated defendants’ constitutional procedural rights by (1) enhancing punishment on the basis of criminal behavior of which the defendant was not convicted,²¹⁹ (2) allowing double punishment of behavior that both is the basis for a Guidelines enhancement and is separately prosecuted,²²⁰ (3) requiring enhancement of punishment on the basis of conduct of which the jury had acquitted the defendant,²²¹ and (4) requiring that punishment be based on “relevant conduct” (the core of the Guidelines’ “real offense” approach) of which the defendant was not convicted.²²² Only Justice Stevens, who a decade earlier had raised constitutional objections to the enhancement of penalties on the basis of unconvicted conduct,²²³ dissented in most of these cases.²²⁴

In addition, the Court did not use its power to interpret federal law, including application of the rule of lenity, to limit the reach of Guidelines crimes. Although the Court had been willing to read mens rea requirements into federal statutes that in fact had no mens rea language at all,²²⁵ it declined to do so with respect to the Guidelines, which have a weak mens rea requirement in vicariously attributing to the defendant the conduct of others involved in the defendant’s crime of conviction.²²⁶ Indeed, in the early 1990s, the Court absolved itself of any responsibility to decide whether the Commission had properly interpreted its various statutory mandates and authorities,²²⁷ granting the Commission a sort of super-*Chevron* deference

218. *Mistretta v. United States*, 488 U.S. 361 (1989).

219. *United States v. Dunnigan*, 507 U.S. 87 (1993).

220. *Witte v. United States*, 515 U.S. 389 (1995).

221. *United States v. Watts*, 519 U.S. 148 (1997) (per curiam).

222. *Edwards v. United States*, 523 U.S. 511 (1998).

223. *McMillan v. Pennsylvania*, 477 U.S. 79, 95 (1986) (Stevens, J., dissenting).

224. See *supra* note 74.

225. See, e.g., *Staples v. United States*, 511 U.S. 600 (1994).

226. See, e.g., U.S. SENT’G COMM’N, GUIDELINES MANUAL, *supra* note 20, § 1B1.3 (“Relevant Conduct” Guideline). For discussion of the Guidelines and mens rea, see *United States v. Richardson*, 238 F.3d 837, 840-41 (7th Cir. 2001); and Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 FED. SENT’G REP. 121 (1994).

227. See *Stinson v. United States*, 508 U.S. 36 (1993); *Williams v. United States*, 503 U.S. 193 (1992).

despite the inapplicability to the Commission of the judicial review provisions of the Administrative Procedure Act.²²⁸

A. Booker: *Recharging Judges and Prosecutors*

The Supreme Court—without any change in its make-up—began to turn the tide on the Guidelines in the late 1990s.²²⁹ We cannot know at a subjective level why first three²³⁰ and then four Justices²³¹ joined Justice Stevens in perceiving constitutional problems with a regime they had previously found impervious to constitutional attack. Perhaps the continuing controversy over crack-cocaine sentencing²³²—and the emerging controversy over the harsh penalties imposed on corporations and their employees²³³—played a part. Guidelines sentences for both drug crimes and financial crimes depend heavily on the quantity of harm found by the sentencing judge—specifically, the quantity of drugs²³⁴ or the amount of financial “loss.”²³⁵ Both of these

228. See Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217, 231 (2005).

229. For an examination of the Court’s sentencing jurisprudence primarily from the “internal” perspective of the decisions themselves, see Stith, *supra* note 70, which analyzes *Blakely*; and Stith, *supra* note 30, which analyzes *Mistretta* and the Court’s subsequent Guidelines cases.

230. *Almendarez-Torres v. United States*, 523 U.S. 224, 251 (1998) (Scalia, J., dissenting, joined by Stevens, Souter, Ginsburg, JJ.) (expressing “genuine[] doubt[]” that the “Constitution permits a judge” to find facts that increase the maximum penalty).

231. *Jones v. United States*, 526 U.S. 227, 251 (1999) (expressing “serious constitutional” concern if the statute is interpreted to permit sentence enhancement on the basis of judicial fact-finding) (Souter, J., joined by Stevens, Scalia, Thomas, and Ginsburg, JJ.).

232. See U.S. SENT’G COMM’N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002); U.S. SENT’G COMM’N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1997); see also *supra* text accompanying notes 207–209.

233. See, e.g., Bryan Gruley & Keith Perine, *Even Before Judge’s Decision, Calls Build To Penalize Microsoft*, WALL ST. J., Mar. 5, 1999, at A1; Deborah Lohse, *Stratton Penalized in Crackdown on Repeat Offenses*, WALL ST. J., Apr. 29, 1996, at B7F; see also Editorial, *Enron Overstretch*, WALL ST. J., Apr. 20, 2005, at A16 (criticizing the Sentencing Guidelines for white-collar crimes); Holman W. Jenkins, Jr., *Should the Stock Market Be the Sentencing Judge?*, WALL ST. J., Mar. 31, 2004, at A15 (criticizing the Sentencing Guidelines’ “loss” calculations in corporate fraud cases); George Melloan, *The Supremes Touch the Brakes on CEO Bashing*, WALL ST. J., June 7, 2005, at A15 (lauding the Supreme Court’s decision that overturned the conviction of the Arthur Andersen accounting firm).

234. U.S. SENT’G COMM’N, GUIDELINES MANUAL, *supra* note 20, § 2D1.1(c) (drug quantity table).

235. See, e.g., *id.* § 2B1.1(b)(1) (detailing the offense level increase for financial crimes involving varying quantities of loss). Moreover, whereas the drug quantity-penalty tables in the Guidelines are at least extrapolated from corresponding amounts in federal statutes, the Guidelines’ “loss”-penalty tables appear to have been created out of whole cloth, without

quantities are calculated on the basis of the “real offense,” and thus take into account the actions of others for which the defendant is “accountable” through operation of the Guidelines’ “relevant conduct” provision.²³⁶ Their only mens rea requirement is that the conduct be “foreseeable,”²³⁷ a low standard generally frowned upon in the criminal law.²³⁸ But addressing this narrow issue would have required the Court to overrule its previous assertion of deference to the Commission in interpretation of its authority,²³⁹ and would have embroiled the Court in an endless set of disputes over the meaning and basis for the specific Guidelines crimes the Commission had chosen to create.

Instead of using its authority to interpret federal statutes, including the Sentencing Reform Act, the Court ultimately reset the balance of authority in federal sentencing through its power to enunciate the constitutional rights of defendants. In a series of cases that culminated in *United States v. Booker* in 2005—from *Jones* (1999)²⁴⁰ and *Apprendi* (2000)²⁴¹ to *Blakely* (2004)²⁴²—the Court made it clear that a legislature or its delegate agency cannot evade the rights that the Constitution guarantees—in the words of the Sixth Amendment, “[i]n all criminal prosecutions”²⁴³—by moving part of the “prosecution” to the post-conviction sentencing phase.

The *Booker* merits decision holding the mandatory Sentencing Guidelines unconstitutional has been understood as a decision dealing with the Sixth Amendment’s right to jury trial. That is accurate but incomplete. It is true that in *Booker*, the Court held that judicial fact-finding under the Guidelines resulting in the enhancement of the maximum lawful sentence violates the rights to jury trial and proof beyond a reasonable doubt guaranteed by the

either statutory or empirical basis. The great weight that the Guidelines attached to quantity had been devastatingly criticized, *see, e.g.*, *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2004) (Lynch, J.), and nowhere explained, *see* STITH & CABRANES, *supra* note 1, at 68–70.

236. *See supra* note 68.

237. U.S. SENT’G COMM’N, GUIDELINES MANUAL, *supra* note 20, § 1B1.3 (a)(1)(B).

238. *See* WAYNE R. LAFAVE, CRIMINAL LAW 270–72 (4th ed. 2003); *see also id.* at 688 (criticizing the “‘natural and probable consequence’ rule of accomplice liability” as incompatible with “fundamental principles of our system of criminal law”).

239. *See supra* note 227.

240. *Jones v. United States*, 526 U.S. 227 (1999).

241. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

242. *Blakely v. Washington*, 542 U.S. 296 (2004).

243. U.S. CONST. amend. VI.

Fifth and Sixth Amendments.²⁴⁴ It is also true that in *Blakely v. Washington*, the decision that presaged the *Booker* merits holding, Justice Scalia proclaimed that the trial jury “function[s] as circuitbreaker in the State’s machinery of justice.”²⁴⁵ In extolling the constitutional value of the jury, however, Justice Scalia did not mean that the *Blakely* rule would actually result in more jury trials. Indeed, the Justice recognized that the holding in *Blakely* would not necessarily result in more trials at all. He went to great lengths to explain that the structure of plea bargaining would not be altered: “[N]othing prevents a defendant from waiving his *Apprendi* rights. . . . States may continue to offer judicial fact-finding as a matter of course to all defendants who plead guilty.”²⁴⁶ He accepted that “[b]argaining already exists with regard to sentencing factors because defendants can either stipulate or contest the facts that make them applicable.”²⁴⁷ Thus the debate between Justice Scalia and Justice Breyer in *Blakely* was not *really* about whether there should be greater reliance on jury trials.²⁴⁸

Rather than being about “recharging the jury,”²⁴⁹ the debate in *Booker* and previous cases was about recharging the *defendant* by providing her with additional rights that would, to some extent, counterbalance the power that the prosecutor had gained under the Guidelines regime. This debate was framed by widespread knowledge of the hegemony of federal prosecutors, and increasingly Main Justice, over federal sentencing. In dissents in *Blakely* and *Booker*, Justices Breyer and Sandra Day O’Connor insisted that sentencing guidelines could ensure that prosecutorial power was not abused.²⁵⁰ Justice Scalia, on the other hand, showed no confidence in either the “juniorvarsity”²⁵¹ Sentencing Commission or, for that matter, in sentencing judges.²⁵² Similarly, in the *Booker* merits opinion, Justice Stevens for the majority stressed that his

244. *United States v. Booker*, 543 U.S. 220, 232 (Stevens, J.); *see also id.* at 319 n.6 (2005) (Thomas, J., dissenting in part).

245. *Blakely*, 542 U.S. at 306.

246. *Id.* at 310.

247. *Id.* at 311.

248. Indeed, as Dan Richman notes, “the jury—in whose name this line of cases started, has pretty much dropped out of the picture” in the 2007 trilogy of cases. Richman, *supra* note 174, at 1374.

249. Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33 (2003).

250. *United States v. Booker*, 543 U.S. 220, 331 (Breyer, J., dissenting in part); *Blakely*, 542 U.S. at 315-18 (O’Connor, J., dissenting).

251. *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

252. *Blakely*, 542 U.S. at 311-13.

constitutional objection was not to the lack of jury trials under the Guidelines, but to a system in which the defendant could not, in bargaining with the prosecutor, have the power to insist on jury determination of sentencing enhancement facts. The Justice was hardly seeking to “recharge” the jury when he stressed that defendants could continue to plead guilty by “waiv[ing] [their] *Blakely* rights.”²⁵³ Indeed, Justice Stevens noted in his dissent on the remedy in *Booker*, “[M]y proposed remedy . . . would potentially affect only a fraction of plea bargains”²⁵⁴

Had the Court in *Booker* adopted the remedy proposed by Justice Stevens, as several states have done,²⁵⁵ the Guidelines would have been left in place as “law,” but Guidelines factors that result in enhancement of punishment would have been charged alongside the statutory charges in the indictment. “Fact bargaining” would have continued; indeed, more than a year *after* the Ashcroft Memoranda had purported to outlaw it,²⁵⁶ Justice Stevens noted that “fact bargaining [is] quite common under the current system.”²⁵⁷ The difference would have been that the prosecutor would have less bargaining power because he could be “required to prove [sentencing facts] beyond a reasonable doubt.”²⁵⁸ In other words, the power of the prosecutor would have been checked by the additional rights of the defendant, thereby providing additional incentive to exercise her prosecutorial discretion by agreeing to a plea and sentence bargain more favorable to the defendant.²⁵⁹

Instead, the *Booker* Court unexpectedly adopted, in an opinion written by Justice Breyer, a very different remedy to undo the unconstitutionality of mandatory sentencing rules dependent on judicial fact-finding. This remedy was to render the Guidelines “advisory” by “severing and excising” two

253. *Booker*, 543 U.S. at 285 (Stevens, J., dissenting).

254. *Id.* at 289.

255. See *Cunningham v. California*, 127 S. Ct. 856, 871 n.17 (2007) (noting that eight states had responded to *Blakely* by treating sentencing enhancement factors as elements of the crime, subject to jury determination beyond a reasonable doubt should the defendant choose jury trial).

256. See Memorandum from Att’y Gen. John Ashcroft 3 (July 28, 2003), reprinted in 15 FED. SENT’G REP. 375, 376 (2003); Memorandum from Att’y Gen. John Ashcroft 5 (Sept. 22, 2003), available at http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm; *supra* text accompanying note 194.

257. *Booker*, 543 U.S. at 290 (Stevens, J., dissenting).

258. *Id.* at 291.

259. I have elsewhere noted that under the Stevens resolution, “[n]o longer could the prosecutor hold over the defendant’s head the possibility of conviction at trial for some relatively easy-to-prove crime, and then punishment under the Guidelines for additional or more serious criminal conduct.” Stith, *supra* note 30, at 489.

provisions of the Sentencing Reform Act.²⁶⁰ One of these was the provision, added by floor amendment to Senator Kennedy's reform legislation in 1978, which made the Guidelines mandatory in all but factually extraordinary cases.²⁶¹ The second was the provision stating the standard of appellate review, including the key provision of the Feeney Amendment that required "de novo" review of sentencing departures by the courts of appeals.²⁶² Removing these portions of the Sentencing Reform Act left as instructions to the sentencing judge the general statutory criteria of the Sentencing Reform Act, as stated in 18 U.S.C. § 3553(a). This provision requires the sentencing judge to "consider" a variety of factors, including the nature of the offense, the purposes of sentencing, and, importantly, the Guidelines' sentencing range and the Guidelines' policy statements that discourage all but a few grounds of departure.²⁶³

It is a testament to Justice Breyer's inventiveness and his political skills that the regime created by the *Booker* remedy decision in many respects resembles the regime that the *Booker* merits decision held unconstitutional: factors that enhance sentences under the Guidelines are not treated for constitutional purposes as "Guidelines crimes" (with attendant rights of grand jury indictment, jury trial, and proof beyond a reasonable doubt), and judges must still calculate the Guidelines sentencing range as the starting point for every sentence.

But it would misapprehend the achievements and significance of the *Booker* remedy to view it simply as the last-ditch effort of Guidelines proponents to save what they could of the old regime. While the Guidelines remain extant,

260. *Booker*, 543 U.S. at 265.

261. 18 U.S.C. § 3553(b)(1) (2000) (requiring sentencing judges to adhere to the Guidelines unless they identify an "aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described [by the Guidelines, including departure policy statements]"); see *supra* text accompanying note 23.

262. See 18 U.S.C.A. § 3742(e) (West Supp. 2007). The Breyer majority's stated rationale for this unusual feat of severance was to abide by congressional intent, which was said to prefer an "advisory" Guidelines scheme over the Stevens approach of retaining mandatory Guidelines with engrafted constitutional requirements.

263. See 18 U.S.C. § 3553(a) (2000). Curiously, and with uncertain effect, the excised portion of § 3553(b)(1) remains, after *Booker*, in the Commission's policy statement on grounds for departure. See U.S. SENT'G COMM'N, GUIDELINES MANUAL, *supra* note 20, § 5K2.0. In place of the excised appellate review provision, the Court decided (and effectively amended the Sentencing Reform Act to provide) that all sentences, whether or not departures, should be reviewed by the courts of appeals using the standard of "reasonableness." See *Booker*, 543 U.S. at 260-62. "Reasonableness" review is discussed in the text accompanying note 282 *infra*.

the remedy in *Booker* alters the status of the Guidelines significantly and opens the possibility of an evolving sentencing law that draws on the judgment and experience of sentencing judges themselves. Justice Breyer claimed in his *Booker* remedy decision²⁶⁴ (as he had previously in dissenting opinions in the *Apprendi* line)²⁶⁵ that the Guidelines regime itself held this very promise. The truth is that if the Guidelines did hold such a promise, it was never fulfilled. Perhaps because the Sentencing Commission had to spend most of its time responding to Congress's repeated demands for new and higher Guidelines sentences, it did not attend in a sustained manner to the discontent expressed by judges about particular Guidelines and Guidelines factors. While all but one of the Justices²⁶⁶ who supported the remedy in *Booker* apparently would have preferred that the *Apprendi/Blakely/Booker* revolution had never taken place, the creation of the *Booker* remedy is at least as revolutionary as the Stevens *merits* decision—and in several ways more revolutionary than the Stevens *remedy* would have been.

We do well to recall that the Stevens remedy, too, would have left the Guidelines in place—and would have left them with the status of law. On this issue, the Breyer remedy went a step further than any of *Booker*'s advocates before the Court had even dreamed or urged,²⁶⁷ for it transformed the Guidelines into something less than law. In so doing, it has the promise of addressing and reducing the prosecutor's power over sentencing in every case. It does so not by granting new rights to defendants, but by reviving the approach that our legal system has relied upon throughout most of our nation's history to check Congress's own nearly plenary authority to criminalize and the prosecutor's nearly plenary discretion to charge—that is, by reviving judicial discretion in sentencing. In other words, the Breyer approach

264. *Booker*, 543 U.S. at 250–52 (Breyer, J.).

265. See *supra* note 54.

266. Justice Ginsburg is the only Justice who joined both the *Booker* merits majority opinion (by Justice Stevens), 543 U.S. at 226, and the remedy majority opinion (by Justice Breyer), 543 U.S. at 244.

267. Neither *Booker*'s brief nor those of amici National Association of Criminal Defense Lawyers (NACDL) and the Federal Public Defenders urged the Court to transform the Guidelines from mandatory to advisory. Nor did the brief for the United States even mention the possibility of such a remedy in the event the Court held the Guidelines unconstitutional under *Apprendi* and *Blakely* rules. Cf. Kate Stith & William Stuntz, *Sense and Sentencing*, N.Y. TIMES, June 29, 2004, at A27 (urging, during the pendency of *Booker* in the Supreme Court, that Congress could make the Federal Sentencing Guidelines constitutional under the *Apprendi* and *Blakely* rules simply by making them advisory rather than mandatory).

“recharged” *the sentencing judge*.²⁶⁸ The reinvigoration of the sentencing judge was not itself a constitutional decision. None of the Justices in *Booker* was prepared to deny Congress’s constitutional authority to eliminate judicial discretion by statutorily imposing the Stevens remedy, or by statutorily altering the Guidelines to provide only for mandatory minimum (and not maximum) sentences, or by statutorily imposing fixed sentences for all crimes.²⁶⁹ Thus, the remedy in *Booker* was not constitutional but “subconstitutional.” This was the most the Court could do; the Rehnquist Court was not likely to find in the Constitution itself a requirement of judicial discretion in sentencing.

In addition to reducing the leverage of federal prosecutors by recharging the sentencing judge, the Breyer remedy accomplishes several other important recalibrations of the structure of federal sentencing that the Stevens remedy would have left untouched. *Booker* did not just recharge the sentencing judge; it also recharged local prosecutors, reined in Main Justice, and reduced the role of the courts of appeals in sentencing by adopting a new standard for appellate review – not just of departures from the Guidelines (as it had in *Koon*) but for all sentences. In sum, Justice Breyer in *Booker* was able to undo every significant provision of the Feeney Amendment.²⁷⁰ While Feeney overturned *Koon*, *Booker* overturned Feeney, not only as to the *Koon* issue but as to each of Feeney’s most radical innovations. *Booker* explicitly excised from the Sentencing Reform Act Feeney’s “de novo” standard of review for departures and adopted a new standard of “reasonableness” review for all sentences. It also transmuted from “law” to “advice” all of the departure-reducing Guidelines

268. I use the term “recharge” here in contradistinction to the idea that these cases are about “recharging” the jury. See *supra* note 249; cf. Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 410 (2006) (arguing that *Booker* is “not really about vindicating the role of juries and the meaning of the Sixth Amendment’s jury trial right, but rather about vindicating the role of judges” (emphasis added)).

269. The Court was unanimous in recognizing Congress’s power over the content of the criminal law, including by providing for mandatory sentences. *Booker*, 543 U.S. at 226, 244; see also *infra* note 329.

270. Feeney directly amended the departure Guidelines to prohibit certain grounds of departure in child sex offenses, see PROTECT Act, Pub. L. No. 108-21, § 401(b), 117 Stat. 650, 668 (2003) (amending Guidelines 5H1.6 and 5K2.13 and inserting new Guideline 5K2.22). But as a result of *Booker*, these Feeney-added Guidelines now have only the “advisory” character of all the Guidelines. In addition, Feeney added language to the Sentencing Reform Act itself to greatly limit the availability of downward departures for child sex offenses. These provisions remain in effect, since *Booker* did not excise or otherwise address them. 18 U.S.C.A. § 3553(b)(2) (West Supp. 2007). It is unclear whether *Booker*’s excision of language previously appearing in 18 U.S.C.A. § 3742(e) (West Supp. 2007), governing appellate review, effectively renders even these Feeney provisions advisory.

amendments that the Sentencing Commission had promulgated pursuant to the Feeney Amendment.²⁷¹ The post-Feeney Guidelines amendments promulgated by the Commission, like the Guidelines as a whole, still exist, but their legal status has been highly degraded.²⁷²

Breyer's *Booker* remedy has also had the effect of altering the significance of the 2003 Ashcroft Memoranda. Those directives, issued at the behest of and in the wake of Feeney, placed strict limits on prosecutorial charge bargaining and on sentencing fact bargaining, and sought to deny local prosecutors the power to act as gatekeepers over which sentencing decisions would be appealed.²⁷³ It may well be that even after *Booker*, Main Justice is busy attempting to review every sentencing decision that does not comport with the Guidelines.²⁷⁴ But no longer are such sentences ipso facto, in the words of the Ashcroft Memorandum, "not supported by the facts and the law."²⁷⁵

This change in the status of the Guidelines should give great pause to efforts of Main Justice to control the local exercise of prosecutorial discretion. When the Guidelines were fully "law," a requirement that the representative of the government "oppose"²⁷⁶ every downward adjustment and departure unless clearly "supported by the facts and law" required the prosecutor to be a staunch

271. In response to Feeney, the Sentencing Commission amended the Guidelines to add a variety of prohibitions and restrictions on departures. *See supra* note 187.

272. Many judges may still treat the Guidelines as "presumptive," in the sense that unless given good reasons for doing otherwise, the judge will give a sentence that comports with the Guidelines. But prior to *Booker*, the Guidelines were presumptive as a matter of law. Moreover, if (following the usual convention, *see supra* note 26) one uses the term "the Guidelines" to include the Commission's regulation of departures (which incorporated the standard in 18 U.S.C. § 3553(b) that *Booker* excised), the Guidelines were, by law, mandatory. *Cf.* Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 156 (2005) (arguing that the change in label from "mandatory" to "advisory" is "jargon" with little legal meaning).

273. *See supra* text accompanying notes 195-201.

274. Within a week of the decision in *Booker*, Main Justice issued a memorandum to all federal prosecutors reiterating that "Federal prosecutors must actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases . . . involving circumstances that were not contemplated by the Sentencing Commission." Memorandum from Deputy Attorney Gen. James B. Comey to All Federal Prosecutors 2 (Jan. 28, 2005). The memorandum also required prosecutors to seek approval for any appeal of below-Guidelines sentence that "fails to reflect the purposes of sentencing." *Id.* at 2-3.

275. *See Ashcroft, supra* note 195, at 2 ("The Department's actions with respect to sentencings must in all respects be supported by the facts and the law.").

276. *See id.* at 3 ("Department attorneys must oppose sentencing adjustments . . . that are not supported by the facts and the law"); *id.* ("Prosecutors must affirmatively oppose downward departures that are not supported by the facts and the law . . .").

advocate of the law itself. To abide by the Ashcroft Memorandum after *Booker* puts the prosecutor in the position not of upholding the law, but of opposing in all circumstances the exercise of *lawful* discretionary decisions of the sentencing judge. The policies of the Ashcroft 2003 directives, if followed, would require prosecutors to oppose, willy-nilly, below-Guidelines sentences even when Guidelines sentences would clearly disserve the statutory purposes invoked by *Booker*. The result would be a loss of credibility not only in the proceeding at hand but also in cases where the prosecutors do have a winning argument that the Guidelines sentence best serves the statutory purposes.²⁷⁷ After *Booker*, what savvy or experienced prosecutors have always known should be clear to every prosecutor: they must be responsive, formally and overtly, to the judges before whom they stand—not simply to the Department in which they are employed.²⁷⁸

B. *Booker Is for Real*

It is understandable that *Booker's* remedial holding, recharging the sentencing judge, was not clearly understood by most federal courts of appeals until the trio of decisions in *Rita*, *Kimbrough*, and *Gall*. The precise legal weight that the Court intended to give the Guidelines under the *Booker* regime was described incompletely in that decision. If *Booker's* import was only to make the Guidelines calculation “advisory,” then as a formal matter the discretion of sentencing judges would have been almost entirely restored to its pre-Guidelines scope. While sentencing judges might be disposed to impose Guidelines sentences, they would be under no legal obligation to do so.²⁷⁹ A

277. Cf. *United States v. Herndon*, No. 3:01CR00063, 2008 U.S. Dist. Lexis 22277 (W.D. Va., Mar. 19, 2008). The sentencing judge noted:

This district is reported to have the fourth largest number of defendants who qualify for a reduction in sentence under the U.S. Sentencing Commission's policy on retroactivity of the amended crack cocaine guidelines. Unfortunately, it appears that the United States Attorney for this district is objecting to reduction in *every case* [A] per se objection to reduction does not serve the public interest. . . . [T]he court is required to consider the public safety in determining whether to reduce a particular sentence . . . and the government's blanket objection in all cases does not assist the court in making that decision, and, in fact, hinders it.

Id. at *1-*2 & n.1.

278. See also Richman, *supra* note 76, at 798.

279. Cf. *United States v. Booker*, 543 U.S. 220, 304-05 (2005) (Scalia, J., dissenting) (“[T]he plain effect of the remedial majority's decision” to make the Guidelines advisory “is to say,

truly “advisory” system would give the Guidelines no more formal weight than, say, the recommendations to judges made by the editorial writers of the *New York Times* or the *Wall Street Journal*.²⁸⁰

But the *Booker* remedy did more than make the Guidelines “advisory.” It left in place one of the hallmarks (and worthy achievements)²⁸¹ of the Sentencing Reform Act: appellate review of sentencing. The duty of the courts of appeals under the pre-*Booker* regime was to ensure that the sentencing judge had complied with the Guidelines, including their limitations on judicial departures from the calculated Guidelines sentencing range. After Feeney, the appellate courts were also obliged to review departures “de novo,” rather than under *Koon*’s abuse-of-discretion standard. *Booker* excised these statutory provisions and created (essentially out of whole cloth) a new standard of appellate review for all cases: appellate courts would be expected to determine whether the sentence under review is “reasonable” given the statutory criteria in 18 U.S.C. § 3553(a), one of these criteria being the Guidelines themselves. Appellate review for reasonableness does not make the Guidelines *binding*, but it does make them – as opposed to, for instance, newspaper editorials – legally meaningful.²⁸²

How legally meaningful the Guidelines would be after *Booker* was not clarified in that decision, perhaps because there was not agreement among the five members of the Court who joined the remedial opinion. For the courts of appeals, accustomed to their previous role as Guidelines enforcer,²⁸³ the answer was “very” meaningful. As one student of the Guidelines has noted, “In the wake of *Booker*, federal courts of appeal did not rethink the goals of sentencing from scratch. Instead, they continued to take the [G]uidelines seriously, much

district courts have discretion to sentence anywhere within the ranges authorized by statute – much as they were generally able to do before the Guidelines came into being.”)

280. Cf. Editorial, *The Limits of the Death Penalty*, N.Y. TIMES, April 16, 2008, at A24 (urging that that capital punishment for rape of a child is unconstitutional; the case was being argued that day in the U.S. Supreme Court); Editorial, *Supreme Liability*, WALL ST. J., June 9, 2007, at A8 (expressing disappointment that in an amicus brief about to be filed in the Supreme Court, the Solicitor General would probably support the concept of “secondary liability,” characterized as being “all about . . . expanding the financial targets available for tort lawyers to sue”); Editorial, *‘Three Strikes’ Strikes Out*, N.Y. TIMES, Nov. 5, 2002, at A26 (expressing agreement with the Ninth Circuit that the application of California’s “three strikes” sentencing law constituted “cruel and unusual” punishment of a defendant whose third “strike” was a theft of videos worth \$150; the case was being argued that day in the U.S. Supreme Court).

281. See STITH & CABRANES, *supra* note 1, at 2, 170-71.

282. See also Stith, *supra* note 30, at 491.

283. See *supra* text accompanying notes 24-25.

as they had for over twenty years.”²⁸⁴ Indeed, seven of the twelve circuit courts adopted a “presumption” of reasonableness for Guidelines sentences, while four denied they applied such a presumption.²⁸⁵

Whether it is proper for a court of appeals to apply a rebuttable presumption that Guidelines sentences are reasonable was the issue in *Rita v. United States*,²⁸⁶ the first case that the Court heard to clarify *Booker*. The briefs submitted on behalf of the defendant highlighted the apparent gross disparity between presumption-circuits and nonpresumption-circuits in the likelihood of a defendant prevailing on appeal. Amici in *Rita* urged the Court not to allow the Guidelines to be considered presumptively reasonable because courts of appeals that had adopted a presumption *never* reversed a within-Guidelines decision nor upheld a below-Guidelines decision appealed by the government.²⁸⁷ Amici argued, and Justice Souter ultimately agreed,²⁸⁸ that applying a reasonableness presumption to Guidelines decisions revives the

284. Richard M. Re, *Re-Conceptualizing Booker: How To Prevent Legislatures from Circumventing the Right to Jury Trial* 52 (Mar. 7, 2008) (unpublished manuscript, on file with The Yale Law Journal), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1106543; see also Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665, 676, 681-82 (2007).

285. Courts of appeals explicitly adopted a presumption of reasonableness for Guidelines sentences in *United States v. Dorcelly*, 454 F.3d 366, 376 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 691 (2006); *United States v. Kristl*, 437 F.3d 1050, 1053-1054 (10th Cir. 2006); *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006), *cert. denied*, 547 U.S. 1156 (2006); *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 3043 (2007); *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005), *cert. denied*, 546 U.S. 1081 (2005). Four courts of appeals declined to adopt a presumption of reasonableness but nonetheless indicated that a within-Guidelines sentence would seldom be unreasonable. See *United States v. Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc), *cert. denied*, 127 S. Ct. 928 (2007); *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 192 (2006); *United States v. Cooper*, 437 F.3d 324, 331 (3d Cir. 2006); *United States v. Talley*, 431 F.3d 784, 788 (11th Cir. 2005).

286. 127 S. Ct. 2456 (2007).

287. Brief for the New York Council of Defense Lawyers as Amicus Curiae Supporting Petitioners, at 3-5, *Rita v. United States*, 127 S. Ct. 2456 (2007) (No. 06-5754). Prior to the Court's grant of certiorari in *Rita*, there was no appellate decision reversing a within-Guidelines sentence. During the pendency of *Rita*, one such decision was handed down. See *United States v. Lazenby*, 439 F.3d 928 (8th Cir. 2006). The author is aware of only one other decision holding a within-Guidelines sentence unreasonable. See *United States v. Paul*, 239 Fed. App'x 353 (9th Cir. 2007).

288. *Rita v. United States*, 127 S. Ct. 2456, 2487 (2007) (Souter, J., dissenting).

Guidelines to such an extent that the system would threaten once again to violate the Constitution.²⁸⁹

Yet as noted above,²⁹⁰ appellate sentencing case law is a poor indicator of how the law is actually applied in the district courts. This is not surprising in view of the Justice Department's ability strategically to decline to appeal most below-Guidelines sentences. (Indeed, the Government's brief in *Rita* ever-so-nimblely conceded as much.²⁹¹) As a subsequent empirical analysis demonstrated, the appellate adoption of a presumption of reasonableness after *Booker* reduced the national frequency of a below-Guidelines sentence by only 1%—and that result was solely attributable to the Second Circuit (comprising the judicial districts of New York, Connecticut, and Vermont), which had long been the most departure-friendly of all circuits.²⁹² The inconsequential impact of an appellate presumption of Guidelines reasonableness was dwarfed by the apparent impact of *Booker* itself. The raw sentencing data, not controlled for caseload or other factors, show a marked increase in non-government sponsored below-Guidelines sentences (from 5% of all sentences to approximately 12% of all sentences).²⁹³ The practical insignificance of the appellate presumption was matched by the doctrinal ambiguity of the holding

289. See Brief for New York Council of Defense Lawyers, *supra* note 287, at 5a-6a; Brief for the Federal Public and Community Defenders and the National Association of Federal Defenders in Amicus Curiae Supporting Petitioners at A11-A17, *Rita*, 127 S. Ct. 2456 (No. 06-5754).

290. See *supra* Section II.A.

291. See Brief for the United States at 36, *Rita*, 127 S. Ct. 2456 (No. 06-5754) (stating “the reality [is] that . . . the government does not reflexively appeal whenever there is a below-Guidelines sentence,” and noting that the government had appealed only 2% of below-Guidelines sentences since *Booker*).

292. Alexander P. Robbins & Lynda Lao, *The Effect of Presumptions: An Empirical Examination of Inter-Circuit Sentencing Disparities After United States v. Booker* (Nov. 4, 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=1027541>. Taking out the Second Circuit, the presence of a circuit presumption of Guidelines reasonableness actually *increased* the frequency of below-Guidelines sentences. See also Paul J. Hofer, *Empirical Questions and Evidence in Rita v. United States*, 85 DENV. U. L. REV. 27 (2007) (discussing the ambiguity of post-*Booker* sentencing data).

293. See U.S. SENT'G COMM'N, BOOKER FINAL REPORT, *supra* note 135, at 55, fig.2, D-10 (showing that the percentage of cases with non-government sponsored below-Guidelines sentences increased from 5.2% in the first half of FY2004 to 12.5% in the first year after *Booker* was handed down); U.S. SENT'G COMM'N, 2007 SENTENCING STATISTICS SOURCEBOOK, *supra* note 132, at 50 tbl.N, 63 fig.G (showing that the percentage of cases with non-government sponsored below-Guidelines sentences grew from approximately 5% in FY2004 to 12.1% in both FY2006 and FY2007); see also *supra* note 204 (calculating the percentage of such sentences in FY2004 to have been exactly 5%, and noting that the percentage in FY2005, pre-*Booker*, was even lower).

in *Rita*: that courts of appeals are permitted, but not required, to apply a rebuttable presumption of reasonableness to within-Guidelines sentences.²⁹⁴ The most important institutional message of *Rita* was that it signaled the Supreme Court's willingness to continue to tolerate significant variances in the rate of below-Guidelines sentences in the various circuits,²⁹⁵ despite *Booker*'s extended discussion of Congress's desire for national uniformity.²⁹⁶

In addition, Justice Breyer's opinion in *Rita*, joined in full by five other Justices (including Justices Ginsburg and Stevens), gave a special nod to sentencing judges, which had not appeared in *Booker*. According to *Rita*, the reason a court of appeals is allowed to decide that within-Guidelines sentences warrant a reasonableness presumption is that such sentences represent a *dual* judgment: the Sentencing Commission's considered judgment *and* that of the sentencing judge that such a sentence is appropriate given the facts of the case.²⁹⁷ Before *Booker*, the Sentencing Commission was the body that formally enunciated sentencing policy; the views of judges on sentencing policy would be heard, if at all, only as filtered through the Commission, which might (or might not) consider their views and amend the Guidelines as appropriate in an "evolutionary" process.²⁹⁸ *Booker* as elaborated in *Rita* clearly shifts power away from the Commission, according the judgments of sentencing judges direct significance in each criminal sentencing proceeding.

294. *Rita*, 127 S. Ct. at 2459.

295. See U.S. SENT'G COMM'N, BOOKER FINAL REPORT, *supra* note 135, at 98-104 (showing marked variance in rates of Guidelines sentences and various types of non-Guidelines sentences among the eleven circuits and among the ninety-four districts, as had been true pre-*Booker*).

296. *United States v. Booker*, 543 U.S. 220, 255-56 (2005).

297. 127 S. Ct. at 2463 ("[T]he presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one."). One sentencing scholar has astutely noted that "*Rita*'s 'double determination' logic necessitates that the sentencing court's determination be truly independent of the commission's determination as expressed in the [G]uidelines. Otherwise, there would be no double determination, but only one determination followed by an echo." Re, *supra* note 284, at 58-59.

298. See U.S. SENT'G COMM'N, GUIDELINES MANUAL, *supra* note 20, at 2 (providing the original introduction for the Guidelines Manual as an editorial note to commentary to § 1A1.1) ("The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines . . ."). This original introduction to the Guidelines Manual, said to be written by Judge Breyer, *see* text accompanying *supra* note 49, was moved to an "application principle" in 2000.

Moreover, in a series of dicta, *Rita* seemed to invite sentencing judges to consider whether the Sentencing Commission had in fact made a “professional judgment”²⁹⁹ with respect to the factors at hand. In language that perhaps was necessary to win the concurring votes of the Justices who most strongly adhere to the proposition that only truly “advisory” Guidelines are constitutionally permissible,³⁰⁰ Justice Breyer noted the possibility that the Guidelines themselves could “reflect an unsound judgment, or . . . they do not generally treat certain defendant characteristics in the proper way.”³⁰¹ *Rita* thus implicitly suggested that the Sentencing Commission, which at one time was worthy of super-*Chevron* deference,³⁰² now merits only the lesser deference of *Skidmore*.³⁰³

The Court’s two Guidelines decisions handed down early in the October Term 2007, *Gall v. United States*³⁰⁴ and *Kimbrough v. United States*,³⁰⁵ take these suggestions further. Going beyond *Booker*, they explicitly affirm the important role of the sentencing judge, not simply in finding facts that the Guidelines provide are relevant to punishment, but in judging the statutory purposes of sentencing, including the justness of punishment in the case at hand. The majority opinion in *Gall* by Justice Stevens expressly rejects the circuit case law that the greater the magnitude of departure from the Guidelines, the more “extraordinary” must be the circumstances justifying departure.³⁰⁶ The opinion likewise rejects any application of “a presumption of unreasonableness” to non-Guidelines sentences.³⁰⁷ The decision exhorts sentencing courts to judge for

299. *Rita*, 127 S. Ct. at 2468.

300. This language would appear to be especially important to Justice Ginsburg, see *Cunningham v. California*, 127 S. Ct. 856 (2007) (Ginsburg, J.), and to Justice Scalia, see *Gall v. United States*, 128 S. Ct. 586, 602 (Scalia, J., concurring) (2007); *United States v. Booker*, 543 U.S. 220, 303 (2005) (Scalia, J., dissenting).

301. 127 S. Ct. at 2468.

302. See *supra* text accompanying notes 227–228.

303. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”); cf. *Stith & Dunn*, *supra* note 228, at 231–33 (arguing in favor of establishing a new sentencing agency not accorded *Chevron* deference).

304. 128 S. Ct. 586 (2007).

305. 128 S. Ct. 558 (2007).

306. 128 S. Ct. at 595.

307. *Id.* *Rita*, while allowing the courts of appeals to apply a presumption of reasonableness to Guidelines sentences, had strongly hinted that it would be impermissible to apply a

themselves the statutory factors set forth in 18 U.S.C. § 3553(a); the district court “may not presume that the Guidelines range is reasonable” and “must make an individualized assessment based on the facts presented.”³⁰⁸

To be sure, these two opinions do not on their face allow sentencing judges anything close to the full range of discretion they could exercise in the pre-Guidelines era. Most significantly, the Court in *Kimbrough* continued to stress, as the Court often has done since *Mistretta*, the Sentencing Commission’s asserted expertise and reasoned policy judgments—judgments that in most cases sentencing judges apparently should award significant deference. Justice Ginsburg’s majority opinion in *Kimbrough* made clear that the particular issue presented in that case—the disparity in sentencing rules governing crack cocaine and powdered cocaine—is an example of a situation in which a sentencing judge could reasonably conclude that the Guidelines themselves “reflect an unsound judgment,” in the words of *Rita*,³⁰⁹ and “fail[] properly to reflect the § 3553(a) considerations,” in the words of *Kimbrough*.³¹⁰ At the same time, however, Justice Ginsburg’s opinion, perhaps to ensure Justice Breyer’s full concurrence, repeats the bromide of the “empirical basis” of the Guidelines—except, apparently, for drug offenses. In constructing its Guidelines for offenses involving the distribution of cocaine and other narcotics, the Commission had accepted and built upon the differential mandatory minimums and maximums in statutory law.³¹¹ As portrayed in *Kimbrough*, the Commission’s acquiescence to the will of Congress was an exception to its normal, scientific mode of operation. In the words of the opinion, the Guidelines on crack cocaine “do not exemplify the Commission’s exercise of its characteristic institutional role,” which is to take account of “empirical data and national experience.”³¹²

This paean to the Sentencing Commission echoes the repeated claims of Justice Breyer. Most recently in *Rita*, he asserted that the Guidelines were based on an “empirical approach” and reflected, on average, past sentencing

presumption of unreasonableness to sentences outside the Guidelines. See *Rita v. United States*, 127 S. Ct. 2456, 2467 (2007).

308. *Id.* at 596–97.

309. *Rita v. United States*, 127 S. Ct. 2456, 2468 (2007).

310. 128 S. Ct. at 570.

311. *Id.* at 575; see *supra* note 209. See generally Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1046 (2004) (“[T]he Guidelines themselves often reflect . . . mandatory minimum sentences. The Guidelines for drug trafficking, for example, are pegged to the mandatory minimum drug quantities.”).

312. *Kimbrough*, 128 S. Ct. at 575.

practice as revealed by a statistical analysis of 10,000 pre-Guidelines presentence reports.³¹³ This has always been a puzzling claim. When the original Guidelines were constructed, there were no available data in most presentence reports with respect to many of the factors that the Sentencing Commission decided were most relevant to a sentence; nor did the Commission seek to determine what factors the sentencing judges in the sample of 10,000 cases actually considered in imposing sentence. Moreover, largely pursuant to broad statutory directives in the Sentencing Reform Act itself, the Commission provided for significant increases in sentences for major categories of crime, including white-collar offenses.³¹⁴ Most importantly, as the insightful Paul Hofer recently noted, “A lot has happened since Justice Breyer left the Sentencing Commission.”³¹⁵ The most important thing that “happened” are hundreds of amendments to the original Guidelines, most of which increase penalties at the express direction of Congress, including Feeney and, in the white-collar area, the Sarbanes-Oxley Act.³¹⁶

The doctrinal and practical implications of *Kimbrough* are thus uncertain and, frankly, baffling. Most curiously, the opinion suggests that implementing the will of Congress is the exception for the Commission, and that where the Commission is merely responding to the requests or mandates of Congress, sentencing judges have freedom to disagree with the policy judgments

313. 127 S. Ct. at 2464.

314. For accounts of the limitations of the empirical analyses undertaken by the Sentencing Commission, see STITH & CABRANES, *supra* note 1, at 60-61; Amy Baron-Evans, *The Continuing Struggle for Just, Effective, and Constitutional Sentences After United States v. Booker: Why and How the Guidelines Do Not Comply with § 3553(a)*, 30 CHAMPION 32 (2006); Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT'G. REP. 180, 182 (1999); and Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; Or, Confessions of Two Reformed Reformers*, 9 GEO. MASON L. REV. 1001 (2001).

315. Hofer, *supra* note 292, at 47.

316. The Feeney Amendment directly amended the Guidelines, *see* Pub. L. No. 108-21, § 401(b), (g), (i), 117 Stat. 668, 671-72 (2003), and directed the Commission to amend them further, *see supra* text accompanying note 187. The Sarbanes-Oxley Act, Pub. L. No. 107-204, § 805, 116 Stat. 745, 802 (2002) (to be codified at 28 U.S.C. § 994 note), also directed the Commission to amend the guidelines, *see* Scott L. Fenstermaker, *Amendments to the United States Sentencing Guidelines After Sarbanes-Oxley*, 21 J. TAX'N INVEST. 17 (2003). But these are only among the most recent and prominent instances of Congress directing the Commission's work. Since the original Guidelines were promulgated in 1987, the Commission has amended them on more than 700 occasions, usually directly in response to legislation that added new crimes or altered the punishments of existing crimes, and that often explicitly mandated amendment of the Guidelines. *See* U.S. SENT'G COMM'N, FIFTEEN YEAR REPORT, *supra* note 90, at B1-B9 (listing “Congressional Directives to the United States Sentencing Commission Subsequent to Enactment of the Sentencing Reform Act”); Hofer, *supra* note 292, at n.115.

embedded in the Guidelines. Where, on the other hand, the Guidelines represent “empirical analysis,” judges are generally not free to disagree with the policy judgments they embody.³¹⁷ In fact, most Guidelines (including the original Guidelines) cannot be said in any meaningful sense to be based on empirical analysis, but do reflect the will of Congress as clearly stated in the Sentencing Reform Act and in Congress’s hundreds of subsequent instructions to the Commission.³¹⁸ Of course, reflecting the will of Congress is ordinarily a basis for *judicial deference* to administrative regulations.

If fairly described here, *Kimbrough* may, in the final analysis, be far less significant than *Gall*. The crack-cocaine Guidelines present a unique situation in which the Commission itself respectfully questioned the wisdom of Congress, while faithfully adhering to Congress’s judgments until just after the Court granted certiorari in *Kimbrough*. Indeed, as the Court noted, it was during the pendency of *Kimbrough* that the Commission amended its crack-cocaine Guidelines to reduce the Guidelines’ disparate treatment of the two forms of cocaine.³¹⁹ It is possible that as a doctrinal matter, *Kimbrough* will stand merely for the proposition that judges may reject Guidelines based on statutory determinations where the Commission itself has rejected the reasonableness of those determinations—a principle that, so far, is limited to sentences for distribution of crack cocaine. *Kimbrough* has the potential, however, to permit, at last, something akin to administrative judicial review of the Sentencing Guidelines.³²⁰ Given its broadest reading, the decision may stand for the proposition that sentencing judges have discretion to reject Guidelines that the Commission has never explained or justified.³²¹

Still, the resounding overall message of *Rita*, *Kimbrough*, and *Gall* is clear: *Booker* did indeed transform the Federal Sentencing Guidelines from “law” to a lesser species, a form of quasi-law. Using the Court’s terminology, the Guidelines are “advice” that yield sentences that (per *Rita*) can in most cases be judged “reasonable.” Inasmuch as *Booker* tells the courts of appeals to review sentences under a “reasonableness” standard, a Guidelines sentence is as safe as any harbor can be. But reasonableness has a range and can take more than one form. Most importantly, the courts of appeals may not pronounce a sentence

317. *Kimbrough*, 128 S. Ct. at 575.

318. See *supra* text accompanying notes 314–316.

319. *Kimbrough*, 128 S. Ct. at 566 n.6, 569, 573.

320. See *supra* text accompanying note 228.

321. See Paul J. Hofer & Amy Baron-Evans, New Frameworks for Federal Sentencing 19 (Apr. 22, 2008) (unpublished manuscript, on file with author) (“[M]any guidelines do *not* reflect a reasoned administrative process.”).

unreasonable simply because the reviewing panel would have imposed a different sentence had it been the sentencing court. *Gall* confirms that if a sentencing judge explains the reasons for her judgment that the § 3553(a) factors warrant a non-Guidelines sentence, the reviewing court must adopt a posture of “deference” to the “reasonableness” of her passage outside the safe harbor.³²² Indeed, *Gall* interchangeably uses the term “reasonableness” and “abuse of discretion” as the standard for appellate review of all sentences.³²³ While “abuse of discretion” meant review for legal error when the Guidelines (including their regulation of departures) were law,³²⁴ under the *Booker* regime the standard of abuse of discretion requires deference to the sentencing judge’s decision to give a non-Guidelines sentence.

As suggested above, restoring significant sentencing power (and thus opportunity to exercise informed discretion) to sentencing judges throughout the nation weakens the centralizing role of the Sentencing Commission and Main Justice, the institutions whose objective has been to capture authority over sentencing. Empowering the sentencing judge also empowers the litigants, including the line prosecutor. They must respond to the individual sentencing judge’s understanding of the demands of justice, which deemphasizes, and in many cases may override, whatever hollow directives continue to emanate from the central, bureaucratic authorities in Washington, D.C.

Less than a decade ago, federal district judges occupied a position of weakness and disrespect in the nation’s criminal sentencing system. Now their sentencing judgments must be accorded deference. Indeed, the new discretion handed to federal sentencing judges has already led one distinguished judge in the Southern District of New York consciously to echo a concern that a predecessor on that court, Marvin Frankel, expressed thirty-five years ago³²⁵: “Before the cheering starts among district judges, let me [urge that] . . . [j]ust as ‘sentencing guidelines’ are misnamed when they are treated as narrowly

322. *Gall v. United States*, 128 S. Ct. 586, 597 (2007) (“But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.”).

323. See *id.* at 591, 594, 595, 596, 597, 598, 600, 602. *Kimbrough* also uses the two terms interchangeably. See 128 S. Ct. at 575, 576.

324. See *supra* text accompanying notes 156-158.

325. See FRANKEL, *supra* note 2.

rigid binding rules, so are they misnamed when they cease to guide anyone.”³²⁶ And so the pendulum swings.

CONCLUSION

The “Guidelines” promulgated by the U.S. Sentencing Commission under the Sentencing Reform Act of 1984 were no mere guidelines; from the beginning, they were mandatory rules for sentencing. The most significant consequence of the Sentencing Reform Act was the transfer of power over punishment from judges to line prosecutors and the Department that employs them. In the wake of the 2003 Feeney Amendment, the Guidelines became more rigid as judicial discretion was further squeezed out of the system, and as prosecutorial discretion became more severely constrained under policies of Main Justice that sought to centralize control over prosecutorial charging and plea decisions. While data on Guidelines application and on departures do not reveal the actual workings of the law on the ground, examination of data over time can reveal trends. The trend after Feeney was a free-fall in judicial (non-government sponsored) departure rates, to only 5% of all cases in 2004.³²⁷ This was the lowest level since the earliest years of the Guidelines. However, 2004 was also the year that the Court decided *Blakely*, which foretold the unconstitutionality of the mandatory Sentencing Guidelines, as decreed the next year in *Booker*.

And so, the Supreme Court has for now prevailed—with Justice Breyer both a (reluctant) hero and a “winner.” The *Booker* remedy managed to save the Guidelines (albeit as a still-evolving species of highly degraded law), while simultaneously allowing greater exercise of judicial discretion, as former Sentencing Commissioner Breyer apparently had always preferred. Most importantly, both in holding the Guidelines unconstitutional and in constructing the *Booker* remedy, the Court as a whole asserted the authority of the Judicial Branch in the face of both a Congress and an Executive Branch that had failed to accord it adequate respect.

Booker’s assertion of authority was not just on behalf of district judges; it was for the federal judiciary as a whole—and most saliently for the Supreme Court itself, whose unanimous decision in *Koon* had been undone cavalierly by the Feeney Amendment. *Rita*, *Gall*, and *Kimbrough* also make clear that *Booker* empowers both defendants and line prosecutors—not directly, but by

326 Gerard E. Lynch, Letting Guidelines Be Guidelines (and Judges Be Judges), OSJCL Amici: Views from the Field 1-2 (2008), <http://osjcl.blogspot.com>.

327. See *supra* note 204.

permitting these adversarial parties in a criminal case to present *reasons* to a *judge* for tempering implementation of the Sentencing Commission's policies. At a minimum, the Court has to some extent restored discretion, localized in judges and prosecutors in the ninety-four federal districts of the nation.

There is a nice irony in the fact that the counter-revolution of *Booker* and its progeny, which revives the discretion of district judges and local prosecutors, is a direct result of "real offense" sentencing—the very approach that, at the dawn of the Guidelines era, the Sentencing Commission had adopted to directly reduce the power of judges and indirectly reduce the power of prosecutors over criminal punishment.³²⁸ The *Booker* merits decision held that mandatory "real offense" sentencing is unconstitutional, and *Booker's* remedy restoring significant opportunities for the exercise of judicial discretion indirectly liberates line prosecutors from a regime in which fidelity to the law required that they seek the most severe "real offense" sentence available.

While Congress has the constitutional authority to undo both halves of the *Booker* decision,³²⁹ it appears for the moment to have moved on to other concerns. Crime is down. Issues of executive power, rather than judicial power, are at the fore. After its brief burst of energy in *Feeney*, Congress seems to have become bored with criminal sentencing. That issue has been largely kicked back to the federal district courts, where it resided for two centuries, essentially ignored by Congress, Main Justice, and the people themselves. The abject fear of judging has abated considerably.

328. See *supra* text accompanying notes 32, 44–61.

329. In *Harris v. United States*, 536 U.S. 545 (2002), the Supreme Court declined to apply the *Apprendi* rule to judicial fact-finding that increases the minimum, rather than maximum, sentence. This leaves an opening for Congress to reinstate the *Booker*-excised portions of the Sentencing Reform Act, see *supra* notes 261–262, without violating the Constitution. If *Harris* remains good law, all Congress need do is alter the structure of the Guidelines to provide only mandatory minimum sentences (with the maximum lawful sentence always being the statutory maximum for the crime of conviction). 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, 262–63 (2004).

Apparently only Justice Scalia, who was in the majority in both *Harris* and the *Apprendi* line of cases, is able to reconcile the two; hence, the continued viability of *Harris* remains uncertain. But even if the Court should overturn *Harris*, Congress has the constitutional power to restore a mandatory sentencing guidelines system. It could respond, for instance, by instructing the Sentencing Commission to alter the structure of the Guidelines to provide for high base sentences and to treat the absence of aggravating factors as "mitigating" factors. *Apprendi* and its progeny only prohibit judicial fact-finding that *increases* sentences; there is no constitutional prohibition on judges reducing sentences on the basis of mitigating factors designated by statute or administrative rules.

To be sure, we have not come anywhere near full circle. There are still powerful forces arrayed against the exercise of sentencing discretion by district judges responsive to local concerns, the particular facts of the case at hand, and the advocacy of the parties. As a formal matter, courts of appeals may still second-guess judges whose sentences are found to be an “unreasonable” application of the broad statutory sentencing criteria that are the lodestar of sentencing law after *Booker*. At a more practical level, Main Justice may, through those U.S. Attorneys and line prosecutors who yield with ease to its centralizing directives, meet and parry every move judges make to judge outside the Guidelines.³³⁰ Most importantly, the Guidelines remain the starting point for all sentences, with an anchoring effect³³¹ made all the more powerful by *Rita*’s go-ahead to the courts of appeals to treat Guidelines sentences as presumptively reasonable.³³² The Guidelines are now the frame, in both law and practice, in which sentences are viewed.³³³

If it should come to pass that only the Guidelines, and not local judgments outside of the Guidelines, are hereafter considered “reasonable,” we could not fairly ascribe that result to a decree from on high. *Booker* loosed the weight of law that compelled the whole federal criminal justice system to profess to comply with the arbitrary metrics of the Guidelines. Even without the force of law, however, the gravitational pull of the Guidelines on the pendulum of sentencing practice remains strong. It is possible that as a new generation of

330. See, e.g., *supra* note 277.

331. Cf. Birte English, Thomas Mussweiler & Fritz Strack, *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts’ Judicial Decision Making*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 188, 194 (2006), available at <http://psp.sagepub.com/cgi/content/abstract/32/2/188> (finding that in an experimental setting, the sentence imposed varied with the severity of the initial recommended sentence, even though those pronouncing sentence knew that the initial recommendation was chosen at random).

332. See *Rita v. United States*, 127 S. Ct. 2456, 2487 (2007) (Souter, J., dissenting).

333. Slightly more than 90% of active federal district judges were appointed after the Guidelines became effective; even including senior district judges, more than two-thirds were appointed during the Guidelines regime. See Federal Judicial Center, Federal Judges Biographical Database, www.fjc.gov/history/home.nsf (last visited Mar. 31, 2008) (search for judges confirmed after November 1, 1987, the date on which the Guidelines became effective). See generally Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People*, 30 CARDOZO L. REV. (forthcoming Aug. 2008) (manuscript at 287, on file with author) (“The judiciary’s hesitancy to depart from the Guidelines with any frequency [post-*Booker*] is not surprising when one considers that . . . [m]ost federal trial judges have never sentenced under any other program, . . . such sentencing requires less time in thought and less stress on the judge than fashioning individual sentences [and] . . . judges may also be exercising self-restraint out of apprehension about possible action by Congress that would reinstate a mandatory system.”).

prosecutors and judges enters into service, the pendulum may swing back toward the local exercise of informed discretion, if *Booker* lasts that long. But incumbent sentencing decision makers may be reluctant to regard as unreasonable the sentences they were obliged to seek and impose for two decades under the command and the conceit of law.