

INTRODUCTION

SENTENCING LESSONS

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INTRODUCTION

In 1984 the Sentencing Reform Act (SRA) was adopted after years of proposed legislation and hearings in both houses.¹ The SRA established

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** Professor of Law, Emory Law School; Ralph W. Bilby Visiting Professor of Law, University of Arizona Rogers College of Law. We would like to thank all of the authors in this Issue for reworking their scholarly plans on very short notice and delivering superb and timely chapters. We would like to thank Kari Rosenthal Annand, Joshua Kaul, Rachel Kovner, and Christopher Walker for their thoughtful commitment to this Issue. We would like to thank Ronald Wright for advice on this Introduction.

1. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative*

Congress as a national leader in modern sentencing reform—one of the great criminal justice reform movements of the past century. At a time when both liberals and conservatives believed the classic American indeterminate sentencing model had failed, Congress constructively undertook, and, after a long and dogged effort, made great progress in meeting, the challenge of developing a new model of more principled sentencing.

Such a statement of praise will, of course, sound surprising to many criminal justice leaders, since the years have not been kind to the Federal Sentencing Guidelines. They have been the subject of sustained criticism from judges, lawyers, scholars, and members of Congress, and a wide consensus has emerged that the Federal Guidelines have in many ways failed. But some historical perspective reminds us that the new system created by the SRA was a dramatic step toward achieving the goals that both liberals and conservatives continue to invoke: proportionality between crime and sanction, a reasonable balance between uniformity and individualization, due process protections and appellate review, attention to the informed wisdom of sentencing experts, and balanced allocation of power and responsibility among the branches and agencies of government.

Two decades later we are much wiser about the nature and operation of sentencing guidelines systems than we could have been in 1984, especially now that about half of the states have themselves developed modern sentencing systems.² And from that historical perspective, we can see the dramatic decisions in *Blakely v. Washington*³ and *Booker v. United States*⁴ neither as damaging blows to the system nor even as confirmations of egregious flaws in the system. Rather, they are stages in an inevitable fit-and-start evolution of the system, and they offer a rare opportunity for reassessing and recommitting to the good principles and bipartisan spirit that shaped the SRA. Congress can learn from years of experience and commentary on the Federal Guidelines system and from guidelines systems in many states that have been much more successful.

Blakely and *Booker* have required legal changes and induced new reflection and reform in sentencing for many states. But the nature of the structured systems in most states has eased the burden of adjusting these systems to the new constitutional mandates.⁵ By contrast, the challenge to the

History of the Federal Sentencing Guidelines, 28 WAKE FOREST L. REV. 223 (1993); see also Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723 (1999) [hereinafter Miller & Wright, *Your Cheatin' Heart(land)*].

2. Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005). In 1984, only Minnesota, Pennsylvania, and Washington had modern structured-sentencing systems, and there was limited information available on how well those systems were working. *Id.* at 1199.

3. 124 S. Ct. 2531 (2004).

4. 125 S. Ct. 738 (2005).

5. Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at*

Federal Guidelines system is far more foundational and one that the judiciary probably cannot meet by itself. Of course, if we see *Blakely* as the shock to the federal system, then *Booker* itself is the Supreme Court's remedy for that shock. But the judiciary as a whole has far less power and discretion to shape the best remedies, and the most thoughtful response to the continuing problems and critiques will require, at some point, the remedial hand of Congress itself.

While Congress has regularly modified the Federal Guidelines system in small ways, it has not before faced an occasion for systematic review. As Congress turned its attention to a legislative response to *Booker*, the editors of the *Stanford Law Review* recognized the value of assembling the insights of the nation's leading scholars in the field of sentencing into a current, synthetic statement about the state of sentencing knowledge after twenty-five years of federal and state guidelines reforms.⁶

Sentencing has become a complex and varied field, and the world of sentencing law—indeed much of legal world—looks very different in 2005 than it did thirty years ago before the first modern structured-sentencing system was created. The *Stanford Law Review* editors believed that leading sentencing scholars could articulate the key lessons from all modern sentencing reforms and offer their knowledge in the form of collective and structured scholarly testimony to Congress. While Congress and the federal system are the principal audience for this Issue, we believe the insights in these chapters have much to offer judges, scholars, policymakers, and lawyers at both the state and federal levels.

Produced in conjunction with the new Stanford Criminal Justice Center,⁷ this Issue reflects such an effort to restate the major lessons about sentencing reform from the past twenty-five years, and to do so in a manner that will assist further efforts at reform.⁸ Authors were invited to address specific topics so that the entire Issue would encompass the core philosophical, structural, policy,

Cross-Purposes, 105 COLUM. L. REV. 1082 (2005); Jon Wool, *Aggravated Sentencing: Blakely v. Washington: Legal Considerations for State Sentencing Systems*, 17 FED. SENT'G REP. 134 (2004); Jon Wool, *Beyond Blakely: Implications of the Booker Decision for State Sentencing Systems*, 17 FED. SENT'G REP. 285 (2005).

6. There is a model for organized sentencing commentary addressed to Congress. In 1977, three recent Yale Law School graduates published such a volume. See PIERCE O'DONNELL, MICHAEL J. CHURGIN & DENNIS E. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM (1977). That volume was spurred by Judge Marvin Frankel's famous 1973 indictment of indeterminate sentencing, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

7. See Website of the Stanford Criminal Justice Center, <http://crimlaw.stanford.edu> (last visited Oct. 1, 2005).

8. The idea for this Issue was conceived by participants, several of whom are authors in this Issue, at a Stanford conference on *Blakely* held in October 2004, proceedings of which are published in the *Federal Sentencing Reporter* and the *Ohio State Criminal Law Journal*. See *The Future of American Sentencing: A National Roundtable on Blakely*, 17 FED. SENT'G REP. 115 (2004); Robert Weisberg, *Excerpts from "The Future of American Sentencing: A National Roundtable on Blakely,"* 2 OHIO ST. J. CRIM. L. 619 (2005).

and practical lessons and challenges in designing a successful sentencing system. The chapters in this Issue address the various purposes of sentencing, the special role of federal criminal justice in our federal system, the institutions and actors at the rulemaking and adjudicative stages (including Congress, the Commission, trial and appellate judges, and advocates), and the basic substantive and structural elements of sentencing systems.

In conceiving this Issue, our goal was to provide an overview of knowledge about all essential aspects of the federal system. Each author was invited to summarize learning on a specific topic and to express his or her own views about the implications of that knowledge for further reform. Our goal was not to *create* consensus among all authors on any one topic or on any general theme. But we did cautiously expect, and now have seen, a substantial (if rough) consensus about the principles and operational goals Congress ought to bear in mind. In this Introduction, we try to capture that consensus, but with a substantial caveat: all the authors speak in their own voices, and the rough collective views we report here are those we derive from the articles themselves, not a formal reflection of any group vote or process. The insights in this Issue are both fresh and accessible, and we believe anyone interested in modern sentencing reform, and especially federal sentencing reform, must read each piece in its own light.

We offer this Issue in the hope that Congress will look seriously at revising the federal system in light of *Blakely* and *Booker* and that, in the spirit of the SRA, Congress will want to draw on contemporary expertise and the evolving “intellectual history” of sentencing knowledge in further reforming the federal sentencing system.

I. MODESTY

The first lesson of sentencing reform is about a necessary dual cast of mind that we might call “substantive modesty moderated by institutional realism.” Sentencing is a necessary component of criminal justice; it is a crucial means by which governments implement their criminal laws. But sentencing is not itself criminal law, nor should lawmakers be addressing the larger foundational goals of the criminal law when they devise or reform sentencing systems. To move a level down, Congress (and other actors) should also avoid the mistake of trying to deploy or change sentencing law to solve all the problems or correct all the distortions that plague substantive criminal codes or criminal justice systems. Efforts to do so more often lead to dislocation and distrust than to any real remedy of the problem targeted. More subtly, lawmakers must acknowledge the very limited extent to which the full range of sentencing purposes can be achieved through sentencing, including traditional desert and utilitarian justifications for punishment, the goal of reducing disparity, and communicative and social-norming functions.

In the years leading up to the SRA, Congress contemplated wholesale

revision of the federal criminal code.⁹ Indeed, Congress probably realized that bringing coherence to more than 200 years' worth of new and amended crimes—typically without removing older offenses—would, in effect, make the vast collection of federal criminal offenses into a “code” for the first time. But Congress ultimately substituted sentencing reform for code reform, and other actors have followed suit, relying on sentencing rules and individualized sentences to respond to the problems of our substantive federal criminal law, including overlapping and conflicting offenses, perceived disproportionate crimes and sanctions, and perceived excessive severity.

A. Multiple Purposes

Sometimes the risk of asking too much from a sentencing system arises from the otherwise valuable notion that sentencing reformers should be steeped in and remain critically mindful of the classical purposes of punishment. In this Issue, Professor Richard Frase offers an elegantly comprehensive and thorough reappraisal of the basic utilitarian and retributivist justifications and goals of criminal punishment.¹⁰ But as Professor Frase implicitly reminds us, the relevant lesson of such a review and reappraisal is not that the sentencing reformer should first attempt to resolve any abstract philosophical debates about the relative priority of these principles. No sentencing reformer can or should revisit the implicit choices inherent in the modern American criminal justice system to blend, compromise, and finesse the conflicts among these purposes. Indeed, the sentencing reformer should not even think too abstractly about the proper synthesis of these purposes because that is the task of criminal codemakers.¹¹

Rather, the lesson is that the sentencing reformer should be admonished to acknowledge, as Professor Frase shows, that our criminal justice system acts on a consensus principle of “limiting retributivism.” As Professor Frase defines it, limiting retributivism recognizes that any working system must find compromises between utilitarian and nonutilitarian goals and among the

9. NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE (1971) [hereinafter BROWN COMMISSION REPORT]; Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 92-135 (1998); Robert H. Joost, *Federal Criminal Code Reform: Is It Possible?*, 1 BUFF. CRIM. L. REV. 195 (1997).

10. Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67 (2005) (in this Issue).

11. Teachers of substantive criminal law often begin their courses by asking students to suggest how various purposes of punishment would justify a particular sanction of a particular hypothetical defendant. See, e.g., JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS (5th ed. 2004). This is a useful opening exercise, but of course the point of the exercise is to see how unrealistically abstract such an exercise is and, in particular, that the key premise of our system is that the relationship between abstract principles and individual sentences is mediated by the necessarily categorical mid-level definitions of crimes that constitute our codes.

utilitarian goals themselves; it must also recognize that the political economy of criminal justice will call for situation-specific adjustments and departures from general rules to elicit defendant cooperation.¹²

This admonition that sentence reformers avoid engaging in grand philosophical reorientations of the criminal law or de facto code reform does not, however, preclude some very sensible concerns about broad institutional goals. As Professor Michael Tonry notes, we must draw two important distinctions. First, we must distinguish those big philosophical questions about the purposes of punishment from the large functional goals of sentencing—he enumerates “distributive,” “preventive,” “management,” and “communicative” functions—that fully respect the limited role of sentencing as a tool for the varied legislative goals.¹³

While the scholarly, legislative, and policy debate over the “ultimate” social purposes of a guidelines system has been one of the most arid and dismaying aspects of modern guidelines reform,¹⁴ extensive discussions of these mid-level functional goals have been a high point of reform movements in both the state and federal systems. But second, Professor Tonry reminds us to distinguish those legitimate “overt” functions from the “latent” ones—e.g., matters of personal political ambition or ideology or partisanship, which no sentencing reformer could comfortably declare in public to be a guiding concern in reform efforts, and which, when allowed to drive sentencing rules, can seriously skew the systems away from fair or effective outcomes.¹⁵

B. Institutional Realism

Neither legal scholars nor judges question the centrality of Congress and other legislatures in determining what behavior may be punished criminally or what those punishments will be.¹⁶ Nor does any scholar or judge question the authority of Congress to delegate some substantial part of that authority to a commission, such as the U.S. Sentencing Commission.¹⁷ The limits on

12. See Frase, *supra* note 10, at 76-79 (in this Issue).

13. Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 STAN. L. REV. 37, 43-45 (2005) (in this Issue).

14. Frase, *supra* note 10, at 67 (in this Issue). Scholars have had relatively little to say about classical purposes in the federal system. See Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003); Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413 (1992); Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557 (2003); Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence About the Purposes of Punishment*, 6 BUFF. CRIM. L. REV. 1043 (2003).

15. Tonry, *supra* note 13, at 38-39 (in this Issue).

16. See Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235 (2005) (in this Issue).

17. *Id.*

legislative authority to define and sanction crimes are few indeed.

Nevertheless, scholars warn that the dissonance between troubled codes and sanctions perceived as excessively severe by actors in the system can lead to distortions as rules are sidestepped and decisions are hidden. Scholars reference the long history and sustained scholarship supporting the very basic idea that punishment systems that are significantly out of step with collective morality or the moral judgments of prosecutors, judges, and juries will lead to avoidance and distortion. Legislative primacy in a democratic system is an important and celebrated reality, but then we have to accommodate simple human nature as well. Professor Michael Tonry notes:

At the individual case level, judges and prosecutors see themselves as in the business of doing justice. When laws or guidelines prescribe sentences that are much harsher than practitioners think reasonable or just, there is a problem. When laws require that sentences be calculated by means of mechanical scoring systems, as the Federal Guidelines did, rather than by looking closely at the circumstances of individual cases, there is a problem. The Federal Guidelines placed judges in a situation where oaths they swore—to enforce the law and to do justice—pulled in different directions, and different judges reconciled the tension in different ways.¹⁸

In that regard, Professor Tonry laments that the Federal Guidelines come up short because, in the view of many actors in the system (especially judges), the Commission exhibited a certain hubris in trying to force the wide range of human characters and actions into an overly engineered structure. Professor Tonry notes that the Guidelines'

rigidity and severity produced a system that was often circumvented. Shorter sentences consistently applied would have offered better deterrent potential than long sentences inconsistently applied. . . . [T]he Guidelines undermined moral education functions by breaking commonsense links between crime and punishment.¹⁹

Professor Tonry, like other authors in this Issue, is a realist. An illustration of tough realism comes in Professor Frank Zimring's exploration of the causes of the dramatic increase in the use of imprisonment in the United States over the past thirty years—a pattern inconsistent with the use of imprisonment for the seventy-five years that came before.²⁰ Politics will continue to shape sentencing reform, but Professor Tonry hopes “we can be more self-aware, intellectually honest, and transparent.”²¹ Twenty-five years of experience suggests that legislatures, and indeed all actors, should be modest in their expectations of what sentencing law can do—as a matter of social policy and as a matter of legal reform.

18. Tonry, *supra* note 13, at 46 (in this Issue) (internal citations omitted).

19. *Id.* at 56.

20. Franklin E. Zimring, *Penal Policy and Penal Legislation in Recent American Experience*, 58 STAN. L. REV. 323 (2005) (in this Issue).

21. Tonry, *supra* note 13, at 65 (in this Issue).

Professor Kate Stith and Karen Dunn draw similar lessons from repeated failures at wholesale reform of both the federal criminal code and federal sentencing. The error they find is one of “too much ambition—especially, as evidenced by the Sentencing Reform Act and the Sentencing Guidelines, when such ambition is suffused with a utopian impulse.”²² The Commission implemented its statutory mandate by issuing a somewhat imperial scheme of legislative rules of great complexity and rigidity.

Booker undermines the constitutional legitimacy of rigid, judicially determined Guidelines, but it may have the unintended positive consequence of encouraging Congress to reconceive the Commission. Stith and Dunn believe Congress should mandate that a new Commission play the more useful and modest role of providing guidance and information to judges to implement legislative sanctioning rules and ranges. Indeed, they propose to give it a new name, the “Judicial Sentencing Agency,” and then to have that agency “start slowly and proceed incrementally, both in advising judges how to exercise sentencing discretion and in advising Congress which factors addressed in the Sentencing Guidelines should be recodified as statutory elements.”²³ Moreover, as an insurance policy against having a new Commission repeat the same errors, any rules issued by the new Commission should be treated as if they were the products of a conventional administrative agency, subject to conventional judicial review for reasonableness, fair procedure, and faithfulness to the statutory mandate.²⁴

The need for modesty in pursuit of the many contested and complex goals of sentencing reform is strikingly illustrated in Professor Albert Alschuler’s article concerning the distributive goal of sentencing equality so central to the SRA. In light of the lessons about sentencing jurisprudence provided by Professors Frase and Tonry, the good news revealed in Professor Alschuler’s contribution is that Congress did focus on the legitimate, overt distributive function of reducing sentencing disparity. The bad news is that the designers of the Guidelines had an unrealistically narrow and rigid notion of what disparity meant. As a result, the Guidelines lack “any coherent normative perspective” and, far from reducing disparity, have probably ended up increasing it.²⁵

As Professor Alschuler shows, Congress understood, in the SRA, that disparity and equality were not self-defining concepts²⁶ and, at least implicitly in seeking reduction in “unwarranted” disparity, recognized that such concepts as disparity and equality require some normative framework. But the

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

23. *Id.*

24. *Id.* at 229-33.

25. Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 85 (2005) (in this Issue).

26. *Id.* at 87-89; see also Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L.J. 271, 275 (2005).

Guidelines themselves never settled even such questions as whether judges should sentence offenders convicted of the same crime with the same record in similar ways.²⁷ After reviewing available Commission and external studies, Alschuler finds reason to despair over the distributional failures of the Guidelines, including unwarranted geographic and racially suspect sentencing variations. Most importantly, he notes, any complete and honest assessment of disparity in guidelines systems must account for disparity that “flies beneath the radar,” including actions by judges, prosecutors, and criminal justice agencies.

Thus, the Commission declared a grand goal of distributional equality but overlooked the complexities and nuances required of a thoughtful normative framework for distribution and also never recognized that low-level actors in the system would always try to correct, and would often end up overcorrecting or miscorrecting, the inequalities the Guidelines created. The goal of reducing unjustified disparity is real, but thinking that more rules governing only one actor in one part of a complex, multi-actor system will produce real reductions in unwarranted disparity is a chimera. Reduction in unwarranted disparity is a proper goal, and one Congress and the Commission should keep in mind, but it is a meaningless guide for *fine-tuning* the Guidelines.

Judges and prosecutors have some role in reducing disparity. But much of their success depends on the fundamental but often overlooked matter of *information*. Judges could do a far better job at assessing the sentence in each case if they had better information. As Professors Marc Miller and Ronald Wright note, all actors in the system could make similar judgments about consistency and variation if better information were available, and improved information could allow wiser policy judgments by Congress and the Commission as well.²⁸ Prosecutors and defense lawyers could look to see what sentences judges actually have imposed for similar offenders and make that information part of their sentencing argument.²⁹

Less certain is what role the goal of reasonable uniformity (or avoiding unwarranted disparity) should play in judicial decisions in individual cases. As Professor Alschuler notes, under the SRA appellate courts have refused to allow courts to even align sentences of defendants in the same exact case, much less offenders in other identical situations. If reasonable consistency and

27. Alschuler, *supra* note 25, at 95-105 (in this Issue).

28. Marc L. Miller & Ronald F. Wright, “*The Wisdom We Have Lost*”: *Sentencing Information and Its Uses*, 58 STAN. L. REV. 361, 362-63 (2005) (in this Issue).

29. Conversely, there is little judicial oversight of disparity or bias introduced by prosecutors, a position emphatically clear in federal law. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) (“The Attorney General and United States Attorneys retain ‘broad discretion’ to enforce the Nation’s criminal laws. . . . In the ordinary case, ‘so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.’”) (internal citations omitted).

justified differences are not the aim in an individual case with two or more defendants, how can we hope for greater consistency and principle across many cases? At the same time, if judges seek to fix disparities on a case-by-case basis, individual normative frameworks will more completely shape sentencing decisions, and we risk returning to a world of unstructured, individualized sentencing—a world that no scholar in this Issue praises or desires.

Yet again, modesty is in order. Congress's goal in future reforms should be a reasonably fair and consistent system. Congress should expect assessments of disparity that include decisions by prosecutors and investigative agencies, a sorting between state and federal criminal justice systems in areas of substantial overlap (especially drug cases),³⁰ and a more open recognition of the legitimate and illegitimate reasons for geographic and other variation. Gentle consistency and minimization of extreme inequality, not hard equalities, should be the goal. And Congress, well advised by a new Commission or other research agency, should be the body to assess and respond to identified systematic inequalities.

C. Our Federal System

The federal criminal justice system has, for most of United States history, been limited in scope. As Professor Rachel Barkow notes, “[t]he federal system of the United States is based on the bedrock premise that the states bear the primary responsibility for criminal justice policy.”³¹ Given this premise, Professor Barkow advises Congress to “stay within its appropriate sphere not only because it is constitutionally mandated to do so, but also because it is wise policy.”³² And this premise itself helps federal lawmakers put into perspective the special cautions they should have in mind as they approach federal sentencing reform. Scholars have long expressed concern about the excessive federalization during recent decades of what previously were state matters.³³

30. Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783 (2004); Michael M. O'Hear, *Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departure*, 27 HAMLINE L. REV. 357 (2004); Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures To Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721 (2002).

31. Rachel E. Barkow, *Our Federal System of Sentencing*, 58 STAN. L. REV. 119, 119 (2005) (in this Issue).

32. *Id.* at 121.

33. *Id. passim*; AM. BAR ASS'N, REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW (1998); Chief Justice William H. Rehnquist, Remarks at the 75th Annual American Law Institute Meeting (May 11, 1998), *excerpted in Chief Justice Raises Concerns on Federalization*, THIRD BRANCH, June 1998, at 1, <http://www.uscourts.gov/ttb/jun98ttb/index.html> (last visited Sept. 25, 2005). Scholars have also criticized the more general trend towards “criminalization”—the tendency to criminalize a wider range of behavior in federal and state systems, to undermine the moral clarity and force of the criminal law, and to blur the line between the civil and criminal law, perhaps at some cost to the ultimate social goals of society. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508, 576 (2001).

Professor Barkow explains,

The arguments for limited federal jurisdiction over crimes are as strong today as they were at the framing. . . . First and foremost, state authority to define and prosecute crimes respects the heterogeneity of the American population and increases social utility by responding to local preferences.³⁴

This concern about the scope of the federal role requires a bit of quantitative context. On the one hand, even after decades of dramatic increases in the number of federal criminal statutes and the increasing overlap of federal criminal law with that of the states in major areas such as drug enforcement, only six percent of all felonies are handled in the federal system.³⁵ On the other hand, the federal system is one of the largest criminal justice systems in the country.

More critical than the size of the criminal system is its focus, which has changed radically over the same era in which modern guidelines sentencing has emerged. The conception of a distinct federal role and limits on federal jurisdiction have been blurred in some areas and obliterated in others over the past twenty-five years. As Professor Barkow notes, “[m]uch of the growth in the federal prison population can be attributed to the ‘war on drugs’ and the ever longer sentences handed down to drug offenders.”³⁶ In the 1970s, drug prosecutions played a significant but modest role in the federal system, accounting for 22% of all federal criminal cases in 1973 and only 10% of federal criminal cases in 1979.³⁷ In 2003, drug prosecutions accounted for more than 37% of all federal criminal cases—down from 40% in 1998, 1999, and 2001.³⁸ (In 2000, drug offenders accounted for 57% of the federal prison population.³⁹) In this regard, lawmakers must recognize that excessive ambition and rigidity in the federal sentencing structure may exacerbate the problem of the federal law undermining and distorting state criminal jurisdiction because of exaggerated legal and practical notions of the effects on interstate commerce from drug markets.

If federal criminal enforcement was uniform because of centralized U.S. Department of Justice mandates or just similarities of prosecutorial judgment by the many U.S. Attorneys, national policy enforcement might conflict with state policy, but at least it would be predictable. But as Professor Stephanos Bibas shows, the reality is quite different. There may not really be a “national

34. Barkow, *supra* note 31, at 121, 123 (in this Issue).

35. Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1353 n.4 (2005) [hereinafter Miller, *Map of Sentencing*] (evaluating BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS (2003) (reporting 2000 data)).

36. Barkow, *supra* note 31, at 134 (in this Issue).

37. William W. Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 STETSON L. REV. 651, 679 n.90 (1994).

38. U.S. SENTENCING COMM’N, 2003 ANNUAL REPORT 38 (2005).

39. *Id.*

policy,” given the significant variations in sentences and processes for otherwise similar offenses and offenders throughout the federal system. Bibas notes:

[I]n practice, federal criminal charges and sentences vary greatly from state to state and from district to district. For example, some districts regularly prosecute low-level drug offenders. Others set high drug-quantity thresholds for charging and refer less significant cases to state authorities. In some districts, defendants must go to great lengths to earn cooperation discounts at sentencing. In others, much less cooperation will suffice.⁴⁰

Professor Bibas recognizes—indeed Congress in the SRA recognized⁴¹—that some amount of “local variation” would be important.⁴² But Professor Bibas criticizes the lack of principle supporting these variations, observing that some variations are good—for example when they reflect “particular localized crime patterns, knowledge, and concerns”—while others are bad—when they reflect “local hostility to national policy choices,” arbitrariness, bias, or “implementation strategies at odds with national strategy.”⁴³ He sharply criticizes the best known authorized systematic variation: the use of “fast-track” programs for immigration offenders mostly, but not solely, in border districts. Professor Bibas finds that the fast-track programs illustrate bad variation since they “introduce large and blatant inequalities, undercut national policy, cloak the need to reallocate enforcement priorities, and truncate procedural protections.”⁴⁴ A more mixed case for Professor Bibas arises in the varied use of substantial assistance motions. More generally, he recommends that the Department of Justice and Congress use greater procedural regulation and oversight to develop more consistent national policies.

Together Professors Barkow and Bibas encourage Congress and the Department of Justice to be more explicit about the goals of federal criminal justice and federal prosecution. The general justification goals must be *national*, lest the very idea of having a federal system comes into question. Yet a national policy can be coherent without being uniform, since it can and should respond in some thoughtful way to truly salient variations in local circumstances. National goals can respond to local, state, or district needs and resources. Variation is acceptable if it is principled and within reasonable

40. Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 137 (2005) (in this Issue).

41. 28 U.S.C. § 994(c)(4), (7) (2005) (directing the U.S. Sentencing Commission to consider “the community view of the gravity of the offense” and “the current incidence of the offense in the community and the Nation as a whole”).

42. Charles P. Sifton, *Theme and Variations: The Relationship Between National Sentencing Standards and Local Conditions*, 5 FED. SENT’G REP. 303, 303 (1993); see also Vincent L. Broderick, *Local Factors in Sentencing*, 5 FED. SENT’G REP. 314 (1993); Reena Raggi, *Local Concerns, Local Insights: Further Reasons for More Flexibility in Guideline Sentencing*, 5 FED. SENT’G REP. 306 (1993).

43. Bibas, *supra* note 40, at 138 (in this Issue).

44. *Id.*

limits.

One surprising question that seems absent from the debate over a proper federal criminal justice role—and, for that matter, absent from most discussions of sentencing policy—concerns the wise use of federal dollars. Scholars in this Issue question the costs and benefits of many aspects of federal sentencing policy, but all agree that expenditures have not been a central part of federal sentencing policy debates, perhaps because criminal justice expenditures occupy such a modest portion of the total federal budget.⁴⁵ New bipartisan attention to budget priorities in light of the war on terror and the domestic demands of hurricanes Katrina and Rita ought to bring new attention to the costs and benefits of current federal criminal justice policies.

Criminal justice expenditures in general and punishment expenditures in particular have made the issue of resources central to state sentencing reform. Professor Barkow flags the greater attention to both monetary and social costs at the state level. She connects this greater attention to the widely celebrated idea of states as “laboratories.”⁴⁶ Scholars in this Issue suggest that the attention given to resource constraints provides part of the explanation for why state guidelines systems have, for the most part, been far more successful than the Federal Guidelines. More generally, scholars suggest that the federal system has much to learn from the states.⁴⁷

** Note on states as the source of lessons*

If a greater sensitivity to federalism argues for a more coherent and carefully circumscribed national criminal policy, it also counsels that where national criminal enforcement does prove necessary, its designers should attend to the sensible lessons that our state “legal laboratories” can offer.⁴⁸ Since enactment of the SRA, many states have undertaken thoughtful reconceptions of their sentencing schemes and elaborated varied and creative balances between new determinate-sentencing principles and wise judicial and administrative discretion. And well before *Blakely* and *Booker* forced fundamental reconsideration at the federal level, the sheer cost of increased prison populations, especially in the wake of mandatory drug laws, led many states to undertake bipartisan efforts, drawing on nonpartisan expertise, to

45. Barkow, *supra* note 31, at 124-26 (in this Issue); Marc L. Miller, *Cells vs. Cops vs. Classrooms*, in *THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE* 127 (Lawrence M. Friedman & George Fisher eds., 1997).

46. Barkow, *supra* note 31, at 121, 128-29 (in this Issue); Miller, *Map of Sentencing*, *supra* note 35, at 1393-94 (exploring implications of the laboratory metaphor); Miller & Wright, *supra* note 28, at 379 (in this Issue).

47. Barkow, *supra* note 31, at 130-31 (in this Issue) (“[T]he federal government should pay attention to the states and learn from their experiences in setting sentencing policies.”).

48. Gerard E. Lynch, *Sentencing: Learning from, and Worrying About, the States*, 105 *COLUM. L. REV.* 933 (2005) (introducing the 2005 *Columbia Law Review* symposium “Sentencing: What’s at Stake for the States”).

reconsider the rules by which the prisons get filled.

One of the most striking lessons the federal system can draw from the states is about “relevant conduct.” As Professor (and Dean) David Yellen shows, this is the component of the Federal Guidelines which puts the federal system most strikingly at odds with the states.⁴⁹ The states have recognized that basing the ultimate sentencing judgment on prosecutor-proven facts that are associated with the crime of conviction (in addition, of course, to relevant facts about the defendant’s background) is essential to ensuring fair and predictable sentencing. By contrast, the widely expansive and manipulable rules of relevant conduct by which federal prosecutors and judges operate have been a major source of the problems perceived by the Court in *Blakely* and remain a major obstacle to ensuring that new Guidelines rules comply with *Booker*. The need to reform or eliminate the relevant conduct rules is one useful piece of wisdom the federal reformers can borrow from the states.

Another key lesson is that federal reformers should rely more on nonprison sanctions. As Professor Nora Demleitner shows, many states have fought the rising costs of prisons by deploying a wide variety of nonprison sanctions, such as home confinement, intermediate-facility confinement (e.g., drug rehabilitation residences), community service, safety-focused occupational restrictions, and mandatory restitution orders.⁵⁰ By contrast, as Professor Demleitner illustrates through detailed analysis of the Guidelines, the federal system allows for these alternative sanctions only in very limited categories of offenses and offenders, often requiring at least a split probation/confinement punishment.⁵¹

As Professor Demleitner underscores with refreshing realism, these alternative sanctions are not “a magic bullet.” On the whole they do not demonstrably reduce recidivism any more than prison does. But the point is that they do not do any *worse* a job in addressing recidivism than prison does, and thus, given the huge cost savings in implementing alternative sanctions, either in the currency of social utility (i.e., including the cost to the prisoners themselves) or the measurable costs of running prisons, such alternatives would be well worth folding into any new Guidelines structure.⁵² For this to happen, as Professor Demleitner admonishes, such sanctions must be used correctly. First, they only work for some crimes and offenders because sanctions must “be sufficiently, but not excessively, retributive so as to be roughly proportionate to the offense committed and must function as an effective

49. David Yellen, *Reforming the Federal Sentencing Guidelines’ Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267, 270-72 (2005) (in this Issue); see also Barkow, *supra* note 31, at 134 (in this Issue).

50. See Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 STAN. L. REV. 339, 340-41 (2005) (in this Issue).

51. *Id.* at 342-45.

52. *Id.* at 346.

deterrent.”⁵³ Second, they must be tailored to protect public safety, relying on the kind of sophisticated risk-assessment protocols that many states have fruitfully employed. Third, they must be effectively enforced. Law enforcement only encourages the false but common view that alternative sanctions are too lenient when the enforcers do not even enforce them. For example, even where the federal system allows for mandatory restitution, it has woefully failed to ensure a high rate of collection, even among white-collar offenders who have the resources to make large financial recompense.

States continue to wrestle with the goals of sentencing in ways not visible in the federal debates. And in a great historical irony, as Professor Steven Chanenson notes, the states have taken a fresh new look at the two concepts the perceived failure of which had been a major impetus of the move toward modern structured sentencing in the first place: rehabilitation and parole.⁵⁴ Parole, Professor Chanenson shows, can be achieved in line with the goals of predictability and uniformity so central to modern sentencing reforms, and the judicial discretion necessary to permit parole could be a useful part of a *Booker*-compliant new Guidelines system. What Professor Chanenson has called “indeterminate structured sentencing,”⁵⁵ if worked out in a cooperative effort between Congress, the Commission, and the appellate courts, can strike a useful balance between predictability and individualization. In addition, a scheme he calls “extended sentence review” can permit the system to make cost-efficient and humane remissions from incarceration in light of administrators’ evolving experience with various sentencing measures and risk-assessment tools.⁵⁶

There are stronger conceptions still of the ways in which federal policymakers might learn from the states. Professor Barkow suggests that Congress and other federal authorities try “to treat federal offenses as part of a larger criminal justice framework that includes the states.”⁵⁷ For example, federal sentences might be pegged to the level of state sentences for similar crimes. More broadly, argues Professor Kevin Reitz, lawmakers must avoid relying on a simple binary distinction between binding rules of sentencing and the specter of boundless judicial discretion.⁵⁸ They can do so by attending to the complex continuum between these fictional poles exhibited by a variety of

53. *Id.* at 347.

54. Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 176-77, 187 (2005) (in this Issue).

55. *Id.* at 187.

56. *Id.* at 189-94.

57. Barkow, *supra* note 31, at 127 (in this Issue). Professor William Stuntz has made a similar proposal. See William J. Stuntz, *The Political Constitution of Criminal Justice* (Aug. 14, 2005) (unpublished manuscript, <http://ssrn.com/abstract=783565> (last visited Sept. 25, 2005)).

58. Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 156-57 & fig.1 (2005) (in this Issue).

state systems.⁵⁹ Perhaps because the federal system has been at the most extremely controlled end of this continuum, discussion after *Booker* has fallen prey to this binary view. Observing the creative ways in which states have mixed such components as advisory guidelines, presumptive guidelines, reasons requirements, restrictive departure rules, and varying standards for appellate review could ensure a more methodical discussion of what sort of system should emerge from *Booker*.

II. SIMPLICITY

The Federal Guidelines are far and away the most complex sentencing guidelines system in the United States. The degree of complexity is famously depicted by the 258-box sentencing grid. Professor Alschuler notes that to even describe the complex and multi-layered Federal Guidelines requires “a 629-page guidelines manual with 1100 pages of appendices and more legalisms than *Jarndyce v. Jarndyce*.”⁶⁰

The complexity of the Federal Guidelines was neither mandated by the SRA nor required by any aspect of the federal system.⁶¹ Scholars have expressed concern about the effects of complexity since the early days of the Guidelines,⁶² as did judges testifying about the drafts before the Guidelines’ implementation. The complexity of the system carries great costs and is inconsistent with twenty-five years of experience in the states. Indeed, perhaps the strongest shared theme among the scholars in this Issue is that much simpler Guidelines will produce a wiser, fairer, and more efficient system.

The costs of hyper-complexity have been well documented. In lamenting the Guidelines’ failure to achieve their stated goal of reducing disparity, Professor Alschuler notes that complexity can itself generate disparity when the complex rules suggest outcomes that are irrational or inconsistent with principles such as proportionality.⁶³ Another cost from unnecessary complexity comes in fairness between the parties. Professor Margareth Etienne observes

the high error rate flowing from such a highly mechanical and complicated system. This error rate problem can be viewed as one of parity. Although studies have shown that judges, probation officers, and other so-called Guidelines experts arrive at very different results when given similar facts, the

59. *Id.* at 161-63 & fig.2.

60. Alschuler, *supra* note 25, at 117 (in this Issue).

61. As Professor Margareth Etienne notes, “[T]he Federal Guidelines are far more complicated than most state guidelines systems. For instance, Minnesota’s guidelines have ten severity levels, while Pennsylvania and Washington have thirteen and fourteen, respectively.” Margareth Etienne, *Parity, Disparity, and Adversariality: First Principles of Sentencing*, 58 STAN. L. REV. 309, 320 (2005) (in this Issue).

62. Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587, 605 (1992); Ronald F. Wright, *Complexity and Distrust in Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 617 (1992).

63. Alschuler, *supra* note 25, at 92-93 (in this Issue).

party most harmed by any complex sentencing scheme will be the defendant and her lawyer.⁶⁴

Complexity takes many forms. Obviously, one kind of complexity arises from the sheer number of rules the court must consult to sentence offenders in many cases. Any lawyer or clerk trying to get a basic sense of how federal sentencing now works encounters a bewildering array of offense and offender characteristics and grounds for departure, and almost every potentially vague or ambiguous term in any of those rules has now become the subject of frequent and often conflicting judicial interpretations. Another kind of complexity comes from the variety of judgments that judges are asked to make. That is, even where the doctrine underlying the rules is clear, judges must count and measure facts within these doctrines (How much financial loss was caused? When did the conspiracy end?). They must also make a number of other judgment calls at the intersection of fact and law (Was the gun brandished? Was the defendant a major or minor player? Was the assistance substantial?). A third kind of disparity is generated through institutional roles and the effect of complex rules, as prosecutors and judges respond to and seek to avoid what they perceive to be unjust and unintended outcomes. In this regard, Professor Nancy King suggests that one of the consequences of complexity is that it allows parties and lawyers to keep information from judges (and no doubt from others who would like to review sentencing judgments throughout the system).⁶⁵

But one very distinct cause of hyper-complexity is the component of the Guidelines that Professor Yellen has forcefully denounced—the current “relevant conduct” or “real-offense” rules. As Professor Douglas Berman observes:

The bulk of the Guidelines’ intricate sentencing instructions to judges focuses on various aspects of offense conduct [F]or drug crimes, the severity of the punishment is determined by the type and quantity of the drugs involved; for financial crimes, the severity of the punishment is determined by the amount of monetary loss.⁶⁶

Thus, it is in the voluminous areas of drug and financial cases that the measurement of harm does not focus on the harms associated with the offense of conviction. Professor Yellen explains:

The United States Sentencing Commission adopted a radical policy that requires judges to consider, in a mechanistic way, a great deal of real-offense sentencing information. . . .

. . . .

64. Etienne, *supra* note 61, at 320 (internal citations omitted) (in this Issue).

65. Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 296-300 (2005) (in this Issue).

66. Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277, 282 (2005) (in this Issue) (internal citations omitted).

The Commission termed this structure a “compromise,” but that characterization is highly misleading. It is a compromise weighted heavily toward real-offense sentencing.⁶⁷

The calculation of relevant conduct includes information regarding offenses that were never charged, were dismissed, or were the basis for an acquittal. This approach is radical in that it requires judges to assess such information and to “consider alleged related offenses just as much as charges that have resulted in conviction.”⁶⁸ Such a system is radical as well in the extent to which it is out of step with every state system:

State sentencing guidelines emphasize simplicity and do not attempt to incorporate much real-offense sentencing into their structures. Every state sentencing guidelines system, whether presumptive or advisory, determines the applicable guidelines range largely based on the offense of conviction.⁶⁹

Whatever the other virtues or vices of the recent dramatic trio of Supreme Court judgments in *Apprendi*,⁷⁰ *Blakely*,⁷¹ and *Booker I*,⁷² perhaps they answer the widespread criticism of the federal relevant conduct rules by requiring that findings about many real-offense elements be made by a jury or, in light of *Booker II*,⁷³ be considered by federal judges as nominally advisory rather than binding factors. For those critics who viewed the relevant conduct rules as a critical flaw in the Federal Guidelines, Professor Yellen cautions against assuming that *Blakely* and now *Booker* have fixed that flaw:

[T]he Federal Guidelines are now advisory, at least formally. The real-offense components of the Guidelines remain highly influential, though, since judges are required to continue to calculate the Guidelines range as they had done so before and “consider” the resulting range. . . .

Clearly, the Supreme Court has not abolished real-offense sentencing.⁷⁴

We believe that most citizens would be shocked by the idea that a defendant could be punished for conduct for which he was acquitted or that Congress intended for sanctions to be increased based on such information. With regard to dismissed or uncharged conduct, Professor Yellen recommends that the “Guidelines ranges not be enhanced for conduct that could be the basis

67. Yellen, *supra* note 49, at 268, 271 (in this Issue).

68. *Id.* at 272.

69. *Id.* at 270-71.

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

71. *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

72. *United States v. Booker*, 125 S. Ct. 738, 747 (2005) (Stevens, J.) (substantive opinion).

73. *Id.* at 764 (Breyer, J.) (remedial opinion).

74. Yellen, *supra* note 49, at 273-74 (in this Issue). Also, as Yellen and others have widely observed, the *Blakely* and *Booker* rules, at least for now, do not apply to facts that produce minimum sentences (including mandatory minimums) or to the important factor of prior criminal record, though in both cases scholars have questioned whether the doctrine will soon change.

for a separate criminal charge.”⁷⁵ Such a rule would be consistent with *Blakely* and *Booker*, but it would go well beyond the requirements of proof and address what substantive limits on real-offense conduct are appropriate for consideration at sentencing and what effect such conduct should have.

Simpler relevant conduct rules would only be a start toward a much simpler system. Scholars consistently commend the virtue of simplicity. Professor Bowman emphasizes the central value of simplicity in further reforms: “[T]he combination of excessive complexity and rigidity is the besetting sin of the current system; . . . proper institutional balance cannot be achieved without a marked simplification of federal sentencing rules and structures.”⁷⁶ Professor Tonry agrees:

If the Guidelines system is reconstituted, the implications of experience to date are clear: overly rigid, overly detailed guidelines do not work well. Experience with state guidelines shows that guidelines can at the same time provide meaningful guidance on appropriate sentences for typical cases while allowing judges and counsel sufficient flexibility to adjust sentences to take account of particular ethically relevant circumstances in individual cases.⁷⁷

As Professor Yellen says:

The various state guidelines systems have all opted for simplicity. Only a few of the many factors that might be relevant to sentencing are included in the guidelines calculation. The rest is left to the sound exercise of judicial discretion. . . . The more modest goals of state sentencing guidelines result in a workable system that achieves considerable consistency but allows appropriate individualization of sentences based on real-offense factors.⁷⁸

Scholars in this Issue are not alone in shaping a current consensus that greater simplicity and less rigidity are important goals for any further reforms. The Constitution Project, a nonprofit organization based in Washington, D.C., has developed a “Sentencing Initiative” co-chaired by former Attorney General Edwin Meese and former Deputy Attorney General Philip Heymann. Project members include federal judges Samuel Alito (Third Circuit), Paul Cassell (District of Utah), Nancy Gertner (District of Massachusetts), and Jon Newman (Second Circuit), along with several public defenders, state judges, prosecutors, and three scholars.⁷⁹ The Sentencing Initiative was created in a spirit akin to this Issue. In light of *Blakely* and *Booker*, the participants in the Sentencing Initiative seek to find a bipartisan direction for further reforms and to embrace “the opportunity to address broader concerns about this country’s sentencing

75. *Id.* at 275.

76. Bowman, *supra* note 16, at 258-59 (2005) (in this Issue). Professor Daniel Freed offered an early and important critique of the rigidity of the Guidelines. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992).

77. Tonry, *supra* note 13, at 51 (in this Issue).

78. Yellen, *supra* note 49, at 274 (in this Issue) (internal citations omitted).

79. The three scholars involved in the Sentencing Initiative—Frank Bowman, Ronald Wright, and David Yellen—are each authors in this Issue.

laws that many experts have long expressed.”⁸⁰

The Sentencing Initiative issued its first statement of general principles for the design and reform of sentencing systems. The reporters for the Sentencing Initiative explained that “[t]he Committee’s primary objective was to seek consensus on some of the fundamental elements of a sentencing system that achieves both appropriate punishment and crime control.”⁸¹ The general principles apply to all sentencing systems, not just the Federal Guidelines. They support the idea of structured sentencing and the role of sentencing commissions. The Sentencing Initiative’s general principles also offer the following observations on the federal system:

11. The federal sentencing guidelines, as applied prior to *United States v. Booker*, have several serious deficiencies:

A. The guidelines are overly complex. They subdivide offense conduct into too many categories and require too many detailed factual findings.

B. The guidelines are overly rigid. This rigidity results from the combination of a complex set of guidelines rules and significant legal strictures on judicial departures. It is exacerbated by the interaction of the guidelines with mandatory minimum sentences for some offenses.

C. The guidelines place excessive emphasis on quantifiable factors such as monetary loss and drug quantity, and not enough emphasis on other considerations such as the defendant’s role in the criminal conduct. They also place excessive emphasis on conduct not centrally related to the offense of conviction.

12. The basic design of the guidelines, particularly their complexity and rigidity, has contributed to a growing imbalance among the institutions that create and enforce federal sentencing law and has inhibited the development of a more just, effective, and efficient federal sentencing system.⁸²

Simpler is better. As Albert Einstein said, “Everything should be made as simple as possible, but not simpler.”⁸³ Wide consensus among judges, policymakers in state systems, and scholars confirms that the Federal Guidelines are not nearly as simple as possible.

III. RESPECT

Scholars and policymakers have long recognized that sentencing law and

80. Website of the Constitution Project: Sentencing Initiative, <http://www.constitutionproject.org/si/index.html> (last visited Sept. 25, 2005).

81. CONSTITUTION PROJECT, *Introduction to PRINCIPLES FOR THE DESIGN AND REFORM OF SENTENCING SYSTEMS* (2005), <http://www.constitutionproject.org/si/Preface.doc> (last visited Sept. 25, 2005).

82. CONSTITUTION PROJECT, *PRINCIPLES FOR THE DESIGN AND REFORM OF SENTENCING SYSTEMS* (2005), <http://www.constitutionproject.org/si/Principles.doc> (last visited Sept. 25, 2005).

83. *THE NEW INTERNATIONAL DICTIONARY OF QUOTATIONS* 281 (Margaret Miner & Hugh Rawson eds., 1986).

policy reflect the decisions of many actors—legislatures, sentencing and appellate judges, prosecutors, sentencing commissions, and (in jurisdictions where they exist) parole commissions. Professor Frank Zimring memorably highlighted this insight in 1977, in the pre-Guidelines indeterminate sentencing era, as part of the early discussions of modern sentencing reform.⁸⁴ The fact remains equally true in 2005 and is a major theme of the commentary in this Issue.

The involvement of multiple actors in sentencing systems means that changes in rules, procedures, or decisions by one actor can have a hydraulic impact on other actors and that responses by those actors are not always predictable. It also means that concerns about perceived or actual injustice or inequality may provoke responses, formal or informal, by different actors at different points. The effects of plural authority may pose admonitory lessons for reformers, but they hardly preclude serious reform.

Substantial research suggests that the federal and state sentencing guidelines and other sentencing policy developments (including mandatory minimum penalties and prosecutorial policies) can have enormous shaping force on sentencing systems.⁸⁵ The lessons of the past twenty-five years from the federal and state systems are that the role of each actor should be carefully articulated and that each actor should recognize the role of other actors and treat those roles and others' decisions with appropriate respect.

A. A Commission

It is hard to imagine that the U.S. Sentencing Commission we see today is the expert agency envisioned by Congress in the SRA. It is even harder to imagine it as the agency envisioned by Judge Marvin Frankel, whose critique of indeterminate sentencing and proposals for an administrative structure were critical to the modern reform movement. As Professor Kate Stith and Karen Dunn note in this Issue, Judge Frankel wrote that there should be a “highly prestigious commission or none at all.”⁸⁶ At best, the scholars in this Issue give the actual Commission mixed marks, and “prestigious” is hardly the adjective most observers of federal criminal justice system would choose to capture the intellectual and political status of the current Commission.

Professor Barkow describes the Commission as “a relatively weak agency”

84. Franklin E. Zimring, *Making the Punishment Fit the Crime: A Consumer's Guide to Sentencing Reform*, 12 OCCASIONAL PAPERS FROM U. CHI. L. SCH. 1 (1977); see also Zimring, *supra* note 20 (in this Issue).

85. See Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT'G REP. 69 (1999). See generally MICHAEL H. TONRY, *SENTENCING REFORM IMPACTS* (1987).

86. Stith & Dunn, *supra* note 22, at 224 (in this Issue) (quoting Marvin Frankel, *Lawless in Sentencing*, in *PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY* 226 (Andrew von Hirsch & Andrew Ashworth eds., 1998)).

and notes that “Congress has rejected the Commission’s major policy proposals.”⁸⁷ Similarly, Professor Bowman observes that “the Commission’s power has waned”⁸⁸ over the years and attributes that impotence to the fact that the Commission’s “founding vision of neutral independence from the winds of politics was an unsustainable illusion.”⁸⁹ Stith and Dunn observe that “[f]rom its inception, the United States Sentencing Commission has provided neither guidance nor advice”⁹⁰ and suggest that the Commission “bears the taint of longstanding and widespread disrespect for its own Guidelines.”⁹¹ They conclude that the present “Commission itself has been rendered largely insignificant.”⁹²

Several scholars address recommendations directly to the Commission. Professor Bowman encourages the Commission to recognize that “the complexity and rigidity of the structure it created have led to the dominance of sentencing policy by the Justice Department and Congress and concomitantly to the Commission’s own increasing marginalization.”⁹³ He encourages the Commission to “recognize[] that a simpler and more flexible system would not only be substantively better than the existing Guidelines, but would also in the long run help restore the influence and stature of the Commission itself by reducing the incentives and occasions for external micromanagement”⁹⁴

Other scholars in this Issue propose structural alterations to the Commission. One modest change would be to apply the Administrative Procedure Act to Commission rulemaking.⁹⁵ Professor Stith and Ms. Dunn would take the most dramatic step and reestablish a new sentencing agency in the judicial branch with judges at the core and with a clear mandate to provide sentencing guidance to judges and policy advice to Congress. Stith and Dunn argue that this new agency will be able to respond to the political dynamics of sentencing noted by Professors Zimring⁹⁶ and Bowman,⁹⁷ among others:

We hope that Congress continues to believe, as it did in 1984, that a truly independent and expert body in the judicial branch of government will produce better sentencing policy. . . . [Congress] does not have the time, the resources, or the expertise to produce integrated and reasoned policy across all

87. Barkow, *supra* note 31, at 131 (in this Issue).

88. Bowman, *supra* note 16, at 255 (in this Issue).

89. *Id.* at 263.

90. Stith & Dunn, *supra* note 22, at 218 (in this Issue).

91. *Id.* at 220.

92. *Id.* at 221.

93. Bowman, *supra* note 16, at 263 (in this Issue).

94. *Id.*

95. Miller & Wright, *Your Cheatin’ Heart(land)*, *supra* note 1, at 807; Stith & Dunn, *supra* note 22, at 229 (in this Issue); Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 1 (1991).

96. Zimring, *supra* note 20 (in this Issue).

97. Bowman, *supra* note 16 (in this Issue).

types of offenses and offenders. . . . Properly structured, an administrative sentencing agency in the judicial branch could provide honest and constructive guidance not only to judges but also to Congress, even serving as a buffer much as the Base Realignment and Closure Commission serves in making complex and politically difficult decisions about the closure of military bases.⁹⁸

Professor Barkow picks up the theme that “Congress should also consider . . . adopting some of the best institutional design features of the state commissions.”⁹⁹ She points to the state commissions’ diverse membership and attention to cost and prison capacity. In particular, she recommends that Congress “should require every proposed sentencing bill to include a resource-impact statement”¹⁰⁰ She would have the report examine alternatives, specify the source of funding, and “include an explanation of why the states do not currently address the problem adequately.”¹⁰¹

B. Judges

1. *The risks of global judicial repairs*

Scholars have noted for some time that guidelines serve as a kind of clarifying overlay to otherwise incoherent and bloated criminal codes.¹⁰² But when judges and scholars try to fix substantive criminal law problems to correct (or at least help rationalize) the disparities and dissonances of many modern criminal codes, they demand too much of sentencing law.

Those of us in the legal academy frequently commit or abet this offense. Criminal law teachers have told their students for years that more refined questions of culpability and responsibility will be assessed at sentencing rather than at the guilt/innocence stage of criminal proceedings. Criminal procedure professors have long observed that the actors in the detailed and highly regulated U.S. criminal justice process often have the ultimate sentence in mind as they investigate, charge, and plead or try cases. It makes sense to think in these terms when we are trying to explain or determine how the criminal justice

98. Stith & Dunn, *supra* note 22, at 225 (in this Issue).

99. Barkow, *supra* note 31, at 131 (in this Issue).

100. *Id.* at 132.

101. *Id.* In theory, a series of Executive Orders since 1982 has required federal agencies to identify the federalism impact of proposed legislation. See Exec. Order No. 13,083, 63 Fed. Reg. 27,651 (May 14, 1998) (Clinton); Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (Oct. 26, 1987) (Reagan); Exec. Order No. 12,372, 47 Fed. Reg. 30,959 (July 14, 1982) (Reagan). *But see* GEN. ACCOUNTING OFFICE, FEDERALISM: IMPLEMENTATION OF EXECUTIVE ORDER 12612 IN THE RULEMAKING PROCESS (1999) (discussing the limited preparation of federalism impact statements), <http://www.gao.gov/archive/1999/gg99093t.pdf> (last visited Sept. 25, 2005).

102. Gerard E. Lynch, *The Sentencing Guidelines as a Not-So-Model Penal Code*, 7 FED. SENT’G REP. 112 (1994); Robert Weisberg, *Guideline Sentencing, Traditional Defenses, and the Evolution of Substantive Criminal Law Doctrine*, 7 FED. SENT’G REP. 168 (1995).

system actually operates.¹⁰³ When actors in the criminal justice system confront very concrete threats of injustice in a specific case, it may also make sense to act in these terms. But describing a system in these terms is very different from engaging in de facto criminal code reform when we undertake to normatively evaluate and systematically change an entire sentencing system to fix perceived general and pervasive problems with the substantive criminal law.

It is an understandable impulse but a bad idea for lawmakers or courts to conceive global sentencing rules as a way to correct the perceived ills of the substantive criminal law. A sobering lesson in institutional hubris—or naiveté—in this regard is a line of cases in which the Supreme Court tried to resolve apparent dissonances in substantive criminal law through the levers of constitutional law. Appraising *Blakely* and *Booker* and worrying over what may follow the new Sixth Amendment doctrine, Professor Ronald Allen and Ethan Hastert illustrate this impulse. From due process decisions about the nature and consequences of crime definitions to Eighth Amendment restrictions on the nature of punishable conduct, these cases involve rather grand declamations of constitutional rights to a fairer and more rational substantive criminal law.¹⁰⁴ But as Allen and Hastert show, these decisions cycle into retreats when the Court realizes that legislatures can simply draft their way around these apparently grand due process mandates.¹⁰⁵

This chastening review of Supreme Court incursions into substantive criminal law and punishment has several important lessons for the current sentencing debate. First, it alerts us not to overreact to *Blakely* and *Booker*. Dramatic as these decisions may seem, in some ways they simply culminate the latest phase in the cycle that *Apprendi* began by adding the Sixth Amendment to the list of constitutional triggers that started with the Due Process Clause and the Eighth Amendment. From this perspective, Congress itself should be wary of responding too quickly to the *Blakely* and *Booker* decisions. To the extent they suggest a revolution that places the Court as the arbiter of minimally adequate process through the tool of the Sixth Amendment jury right, the case history indicates that the Court is likely soon to retreat from any central role and will at most produce “statutory drafting lessons” for further congressional reforms.¹⁰⁶ More specifically, Allen and Hastert suggest that Congress might choose to act simply by “giv[ing] teeth to the meaning of ‘reasonableness review,’” and then, should Congress desire, the Guidelines would function largely unchanged.¹⁰⁷

But a larger lesson is that if the Supreme Court’s efforts to reengineer the

103. See Lynch, *supra* note 102; Weisberg, *supra* note 102.

104. Ronald J. Allen & Ethan A. Hastert, *From Winship to Apprendi to Booker: Constitutional Command or Constitutional Blunder?*, 58 STAN. L. REV. 195 (2005) (in this Issue).

105. *Id.* at 195-99.

106. *Id.* at 199.

107. *Id.* at 200.

criminal codes from the top down to enhance fairness later in the process have proved an ineffective blunderbuss, Congress should now avoid the mirror-image error of trying to solve potential inequities and inconsistencies in the federal criminal code by globally reengineering the sentencing system. Whether judicial or legislative, such global fixes are unlikely to respond in any coherent fashion to those failures of structure or operation of substantive law that motivated the efforts to fix the problem in the first place. Thus, judges can now see legislatures as mutual educators in the virtues of incremental reform.

But, happily, that somewhat negative lesson leads Allen and Hastert to another observation that offers us some positive assurance about the value of incremental change that respects preexisting institutional realities. The authors review what courts and legislatures often overlook—that many different actors in the system play significant, if subtle, roles in the “inferential process” that translates facts into punishment-setting conclusions.¹⁰⁸ Both legislators and judges who appreciate these highly embedded checks and balances in the sentencing decisionmaking process will realize that macro-redesign of the system is not only unwise, but unnecessary.

2. *The role of sentencing judges*

Here is a proposition that few observers of federal sentencing would dispute: the Federal Sentencing Guidelines constrain sentencing judges more than any other guidelines system does. Professor Kevin Reitz explains:

[U]nder pre-*Booker* federal law, judicial sentencing discretion was hemmed in—by a combination of statutory and administrative rules—to a much greater extent than under the laws of any state. As compared with eighteen state guidelines systems in operation in early 2005, the federal system was a stark outlier in its emphasis on rule over discretion.¹⁰⁹

Booker has loosened the legal reins over sentencing judges somewhat, but Professor Reitz suggests that “the degree of change should not be overstated”¹¹⁰ and that the federal system remains at the stricter end in terms of control of judicial discretion. The Supreme Court’s use of the word “advisory,” Professor Reitz counsels, is just “legal jargon” that fails to capture the real question about the extent to which rules are binding or judgment is allowed in different sentencing regimes.¹¹¹ Indeed, this is one of the major lessons about structured sentencing of the last twenty-five years.

When Congress enacted the SRA, it debated the extent to which new federal sentencing rules should be “mandatory” or “voluntary.” The years that

108. *Id.* at 208-15 (evaluating the role of various actors in all three branches of government).

109. Reitz, *supra* note 58, at 155-56 (in this Issue) (internal citations omitted).

110. *Id.* at 156.

111. *Id.*

have passed since the enactment of the SRA have taught us that systems can have varying degrees of constraint and discretion. This experience has also shown that the location of any given system on a rule-discretion spectrum turns on several factors, including the trial court's departure powers, the breadth of sentencing ranges, the number and kind of factors explicitly considered or precluded, and the extent and nature of appellate review. In the words of Professor Reitz, "The idea that some Guidelines have 'presumptive' or provisional legal force tells us little about how many teeth the Guidelines have, how sharp the teeth are, and what issues they engage."¹¹²

Professor Reitz's insight about the limits of *Booker*'s impact on sentencing discretion finds some reinforcement in case law acknowledging district judges' continuing obligation to defer to the Guidelines, though the extent of deference is still being debated in the courts.¹¹³ Professor Steven Chanenson, though noting that only initial trends can be determined so early after a major decision, observes that, after *Booker*, "it seems as though district court judges must still calculate and consider the applicable Guidelines range."¹¹⁴

Statistics from federal cases following *Booker* and anecdotes from the federal legal trenches paint a more mixed picture. It is important to separate out the huge logistical impact of *Blakely* and *Booker*, which involves claims being raised in quite literally tens of thousands of current and past federal cases, from the impact on sentencing outcomes. The United States Sentencing Commission reports that in more than 36,000 cases sentenced after *Booker* and up to September 1, 2005, there has been a nationwide decrease of well over seven percentage points in the overall proportion of cases sentenced within the Guidelines, from 69.4% in 2003 to 61.8% in 2005.¹¹⁵ *Booker* has introduced more variation and instability throughout the federal system. It does seem that *Booker* has relieved some of the "pressure" across cases suggested by the high use of substantial assistance departures: the proportion of cases with a departure for substantive assistance has decreased by three percentage points.¹¹⁶ Within circuits and districts, the patterns of sentencing have changed in ways roughly consistent with prior patterns: circuits and districts that had more or fewer departures before *Booker* continue to have relatively more or

112. *Id.* at 157.

113. *Id.* at 172; *see also* United States v. Crosby, 397 F.3d 103, 113 (2d Cir. 2005) ("[I]t would be a mistake to think that, after *Booker/Fanfan*, district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum.").

114. Chanenson, *supra* note 54, at 179 (in this Issue).

115. U.S. SENTENCING COMM'N, SPECIAL POST-*BOOKER* CODING PROJECT: CASES SENTENCED SUBSEQUENT TO *UNITED STATES V. BOOKER* (DATA EXTRACTION AS OF SEPTEMBER 1, 2005) 1 (2005), <http://www.ussc.gov/Blakely/PostBooker091505.pdf> (last visited Oct. 2, 2005). Two circuits, the Second Circuit and the Ninth Circuit, have less than fifty percent of all cases sentenced within the Guidelines range after *Booker*. *Id.* at 8, 10.

116. *Id.* at 7.

fewer departures after *Booker*.¹¹⁷ Anecdotes from around the federal system suggest even greater turbulence than the data alone. While some voices such as the U.S. Sentencing Commission maintain that little has changed, other participants—including trial judges, prosecutors, and defenders—explore the bounds of the new flexibility in individual cases.

When *Blakely* and then *Booker* were decided, some scholars urged that Congress wait and assess the effect of these cases before enacting further significant sentencing legislation. Some contributors to this Issue offer similar suggestions as they observe the ability of federal courts and the Sentencing Commission to adjust to the individual cases. Given the widespread concern among courts and scholars that the federal system was too rigid before *Booker*, perhaps the modest loosening of the reins generated by *Booker* will lead to a system that more actors can accept and a system less rife with the evasion and distortion that hyper-complexity can wreak.¹¹⁸

But letting the federal system continue to run for a long time without further congressional guidance would, as Professor Stith and Ms. Dunn suggest, be like treating Rube Goldberg as a long-range planner.¹¹⁹ *No one* would design the system we now have. That system is, after all, a set of overly complex and rigid rules now rendered advisory by a great judicial shock, and it is a “system” whose future coherence and identity depend on how trial judges choose to adhere to this “advice” and how appellate courts choose to police them. Moreover, even if the federal system continued to operate in a plausible fashion post-*Booker*, fundamental issues such as proportionality and the lack of regulation of prosecutorial decisionmaking would remain unaddressed. The goal of Congress and all who care about sentencing reform should be a more rational, reasoned, and transparent system than events have produced.

A system with much less complexity and somewhat less rigidity would leave room for judges to *judge*—to exercise discretion, within bounds, that responds to offense and offender characteristics and the larger legal and social setting of each case. As Professor Bowman notes, there is almost certainly no substantial constitutional argument that judges have a necessary or inherent role in sentencing.¹²⁰ Scholars and courts widely acknowledge that it is in the power and right of the legislature, with only the narrowest limits, to decide not only what behavior will be criminal, but also what the available sanctions for criminal behavior should be. What judges *can* legitimately urge Congress to respect is the necessity of judgment and the value of judicial discretion in sentencing—that is, wise decisionmaking in individual cases. A revised federal

117. *Id.* at 4-6.

118. James G. Carr, *Some Thoughts on Sentencing Post-Booker*, 17 FED. SENT’G REP. 295, 295 (2005) (“*Booker* neither repeals nor repudiates the Guidelines; it restores, rather, substantial but not unlimited judicial discretion, while restraining that discretion within the Guideline framework.”).

119. Stith & Dunn, *supra* note 22, at 226 (in this Issue).

120. Bowman, *supra* note 16, at 239 (in this Issue).

sentencing system should respect substantial but guided sentencing authority, and that guidance should come from a combination of statutes, guidelines, and appellate review.

3. *Appellate judges and sentencing review*

The Supreme Court has placed the federal appellate courts front and center with its decision in *Booker* to change the standard of appellate review of federal sentences to one of reasonableness. Reasonableness review provides only the most general framework and leaves much of the real impact of appellate review on sentencing discretion and outcomes to evolve over time.

Scholars in this Issue highlight the role of appellate review in shaping the character and consistency of any guidelines system. Professor Chanenson, who also serves on the Pennsylvania Commission on Sentencing, observes:

Appellate courts should be key players in the consultative and interactive process of sentencing guidance and communication. Appellate review ought to be the fulcrum around which guided sentencing systems revolve. With their dual focus on establishing broad principles of sentencing law and evaluating individual cases, appellate courts can bring a distinctive voice to the sentencing discussion.¹²¹

While federal appellate courts could be left to review sentencing decisions and develop law within the abstract reasonableness standard, Professor Chanenson believes that Congress in future legislation could create a more responsive and better system. For example, he recommends that Congress abolish sentence appeal waivers because they “create frequently hidden pockets of disparity or even lawlessness.”¹²²

More dramatically, Professor Chanenson recommends that Congress create a new Court of Appeals for Sentencing.¹²³ The Guidelines have generated steady conflicts among the circuits. Neither the Sentencing Commission, which has none of the judicial authority nor the habits of appellate decisionmaking, nor the Supreme Court, with its limited docket and resources, is well situated to resolve these conflicts. A strong version of Professor Chanenson’s proposal would put subject matter jurisdiction in such a court over specified aspects of sentencing law, much like the Court of Appeals for the Federal Circuit handles patent appeals. A weaker version of the proposal would allow issues to be certified to the new Court of Appeals for Sentencing either at the request of a litigant or through the discretion of the traditional appellate courts. A Court of Appeals for Sentencing might respond to concerns about uniformity and consistency in the post-*Booker* world of advisory Guidelines.

121. Chanenson, *supra* note 54, at 177 (internal citation omitted) (in this Issue).

122. *Id.* at 182.

123. *See id.* at 184-86 (discussing in more detail Professor Chanenson’s proposal for a Court of Appeals for Sentencing).

Other scholars focus on the role of courts in reviewing the rules and rulemaking of the Sentencing Commission. In most administrative systems, courts review both the basis for the administrative rulemaking and the application and fairness of administration adjudication. That has not generally been the case for sentencing, where Congress exempted the Commission from some traditional aspects of “notice and comment” rulemaking. Professor Stith and Ms. Dunn find that exemption unwise and recommend the simple reform of treating the Federal Sentencing Guidelines process like other administrative processes.¹²⁴

However the proposals may differ, they agree that thoughtfully designed appellate review will retain an important and salutary role in generating a fair and effective post-*Booker* sentencing scheme.

C. Lawyers

It has been a virtual mantra for observers of federal sentencing, both before and after *Booker*, that the Guidelines produced a great “transfer of power” to prosecutors. This is because prosecutors have free rein over which charges to bring, and judges are considerably circumscribed in their choice of sentences under fairly rigid Guidelines rules. Scholars widely perceive the power of prosecutors to have increased compared to the pre-Guidelines world, in part because the complexity and rigidity of the system can be used like a control panel by experienced prosecutors to produce the outcomes they desire. Prosecutorial power produces results: the plea rate under the Guidelines has grown from 81% in 1980 to 86% in 1984 to 96% of all federal defendants in 2004.¹²⁵

Professor Bibas reminds us that prosecutorial discretion in the face of complex rules does not just produce power, it also produces variation. He illustrates the problem in the context of substantial assistance motions:

First, districts vary greatly in the raw percentages of defendants who earn substantial assistance departures. In some districts, fewer than four percent receive them, while in others the rate is forty percent or more.

Second, prosecutors’ offices vary in defining what conduct qualifies for a substantial assistance departure. . . .

Third, districts vary greatly in the size or extent of departures that they award. . . .

. . . .

Fourth, districts vary in reviewing line assistants’ substantial assistance

124. Miller & Wright, *Your Cheatin’ Heart(land)*, *supra* note 1, at 807; Stith & Dunn, *supra* note 22, at 229 (in this Issue).

125. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS & FIGURES tbl.3.5 (2004), <http://www.uscourts.gov/judicialfactsfigures/table3.05.pdf> (last visited Sept. 25, 2005); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252-53 & n.150 (2004).

recommendations. . . .

Fifth, districts vary in their reasons for offering cooperation discounts.¹²⁶

Given the strong traditions of executive branch discretion over criminal prosecution, much of the regulation of disparities or other problems created by the exercise of prosecutorial power must come from within the executive branch. Professor Bibas suggests that internal guidance and procedures for substantial assistance must come from the U.S. Department of Justice, but he notes that both the U.S. Sentencing Commission and Congress could play an important role. The Commission can illuminate inconsistencies in practice, while Congress can “direct the Commission to reduce, regulate, and harmonize substantial assistance departures.”¹²⁷ Congress can also direct the Department of Justice to develop policies and collect, release, and analyze data on their implementation.¹²⁸

Professor King discusses the mechanisms that allow parties to sidestep sentencing rules that shape a judge’s discretion within Guidelines ranges. Professor King makes a modest and sensible suggestion aimed at improving the judge’s ability at the margins to supervise the underlying basis for pleas. She suggests that presentence reports be completed *before*, not *after*, pleas are entered.¹²⁹ She also proposes that Congress ensure steady and adequate funding for officials preparing presentence reports and mandate clear professional standards for the kind of investigation and analysis that these reports should reflect.¹³⁰

The problem of prosecutorial oversight is difficult and longstanding, and it is one area in which the states themselves have not offered salutary lessons to the federal government.¹³¹ But unless the power of federal prosecutors to shape outcomes in individual cases is addressed in future reforms, any efforts by Congress or the Commission to reduce unwarranted disparities will necessarily take on a narrow and unrealistically formalistic cast.

IV. TRANSPARENCY

One core virtue of sentencing stands out for its absence in the last round of federal sentencing reform: the virtue of transparency. This principle captures the idea that the critical decisions of the Commission, prosecutors, and judges should be publicly accessible and open to review. The modern federal sentencing system that has evolved—whether we focus on the one mandated by

126. Bibas, *supra* note 40, at 149-50 (internal citations omitted) (in this Issue).

127. *Id.* at 153-54.

128. Miller & Wright, *supra* note 28, at 363 (in this Issue).

129. King, *supra* note 65, at 304-06 (in this Issue).

130. *Id.* at 304-05.

131. See Frase, *supra* note 85, at 77 (“[N]o guidelines system has come up with an effective way of structuring prosecutorial sentencing power, and its potential for disparity and unpredictability.”).

Congress, the one implemented by the Commission, or the one reworked by *Booker*—is opaque to those seeking to understand how many of the critical decisions of both policy and application get made. Any additional reform by Congress should make transparency a core goal.

At the case level, Professor David Yellen explains that one of the vices of complex sentencing systems is that they obscure the basis for and meaning of individual sentences.¹³² Thus, one dimension of the virtue of transparency is predictability: defendants and lawyers should have a reasonable sense of what rules and facts apply in each case and what the implications of those rules and facts will be. The Constitution Project's Sentencing Initiative recommends as one of its guiding principles that "[f]air notice should be provided and reliable fact finding mechanisms ensured."¹³³

Another dimension of the virtue of transparency connected to individual cases is the honest exposure in public light of the reasoning that produced a particular sentence. In a legal world of detailed rules and multiple judgment calls, judges are obliged to carefully explain the basis for each sentence. Professor Yellen explains:

Regardless of the sentencing mechanism, judges should be required to explain their sentences. This will further due process at sentencing, enable appellate courts to develop appropriate common law sentencing principles, and provide feedback to commissions that will be useful in refining guidelines.¹³⁴

Judge Marvin Frankel, in his famous 1973 sentencing reform book that spawned the Commission and Guidelines movement, wrote:

[The] parties . . . are, on deep principles, not merely entitled to a decision; they are entitled to an explanation. . . . The duty to give an account of the decision is to promote thought by the decider, to compel him to cover the relevant points, to help him eschew irrelevancies—and, finally, to make his show that these necessities have been served.¹³⁵

Congress in the SRA required judges to provide reasons for every sentence and "specific reasons" for departures.¹³⁶ Merely announcing a sentence and enumerating the Guidelines sections that mandated it—the all-too-common practice generated by the Guidelines—falls way short of Judge Frankel's salutary ideals.

Professor King's critique of prosecutorial behavior under the Guidelines can also be construed in terms of transparency. In recommending that judges have more information in presentence reports before accepting pleas, she is calling for public exposure of the basis for those agreements—not just for the general health of the system but also as a way of enabling at least modest

132. Yellen, *supra* note 49, at 275 (in this Issue).

133. See CONSTITUTION PROJECT, *supra* note 82 (citing General Principle No. 5).

134. Yellen, *supra* note 49, at 275 (in this Issue).

135. FRANKEL, *supra* note 6, at 40-41.

136. 18 U.S.C. § 3553(b) (2005).

judicial review. As Professor King observes, “Transparency makes sentencing policy better, not worse.”¹³⁷

Professors Miller and Wright extend the idea of transparency to the kind of statistical information available to judges about similar cases. They recommend that Congress reconsider which officials use sentencing data and when and how they use it.¹³⁸ They recommend that the Government adopt information systems to record and make accessible information about each case, so that judges and attorneys can ask and answer the most basic of questions: How have similar offenders been sentenced in similar cases, over time, and across different districts and circuits?¹³⁹

In recent years, the quality and accessibility of federal sentencing data have suffered from the tension and conflict of interest that come from one agency both writing rules and evaluating their effects. Miller and Wright recommend that the federal data and research functions be separated from the rulemaking functions.¹⁴⁰ More generally, they would extend the principle of transparency to allow comparisons across sentencing systems.

In the past twenty-five years, much of our evolved and accumulated wisdom about sentencing has come from state sentencing systems, but in many ways, less is known about the state reforms than about the Federal Guidelines. Miller and Wright decry the lack of a true national sentencing reform discourse:

Despite the similarity in the challenges all jurisdictions face in constructing a criminal justice system (including criminal sanctions), the habit thus far has been for a system in one place to develop with only the most general awareness of systems elsewhere.¹⁴¹

Hence they propose the creation of a “National Sentencing Institute,” perhaps placing it as an office in the Office of Justice Programs at the U.S. Department of Justice.¹⁴²

There are other ways in which the federal system has been less transparent than Congress may have intended in the SRA and certainly less transparent than is ideal. The Commission has issued hundreds of amendments without any steady or adequate habit of explanation. The recommendations by Professor Stith and Ms. Dunn that the Administrative Procedure Act be applied to rulemaking by the Commission would be likely to encourage far better habits of justification, even with the great deference that administrative law provides to the expertise and decisions of rulemakers.¹⁴³

137. King, *supra* note 65, at 300 (in this Issue) (emphasis omitted).

138. Miller & Wright, *supra* note 28, at 363 (in this Issue).

139. *Id.* at 370-72.

140. *Id.* at 363.

141. *Id.* at 375.

142. *See id.* at 378-79 (discussing in more detail Professors Miller and Wright’s proposal for the creation of a “National Sentencing Institute”).

143. *See* Stith & Dunn, *supra* note 22, at 229 (in this Issue); *see also* Miller & Wright, *Your Cheatin’ Heart(land)*, *supra* note 1, at 807; Wright, *supra* note 95, at 1.

* *Note on transparency and mandatory sentences*

Our focus on transparency leads us to note a very strong, if implicit, consensus among our contributors about one major post-*Booker* issue. None of the contributors recommends the “nuclear option” of mandatory minimum sentences. Indeed, using mandatory minimums as the solution to the perceived problems with the Guidelines, pre- or post-*Booker*, would be an illusory way to achieve, and in fact would undermine, the key sentencing virtues we have outlined in this Introduction. Mandatory minimums would be the sort of top-down global fix that might superficially supply clarity to the Guidelines and might enable Congress to finesse the Sixth Amendment constraints imposed by the *Apprendi-Booker* line of cases. But mandatory minimums are the wrong solution, or at least would be aimed at the wrongly perceived problem. Most obviously, they would exacerbate the key imbalances of power that Professor Bowman identifies in the current Guidelines, and they would ensure that most “sentencing decisions” would really be charging decisions made by individual prosecutors well below the public radar.

At core, the nontransparency of the Guidelines has resulted from serious, if originally unintended, imbalances of power. Professor Bowman notes that

the institutional balance that the Sentencing Reform Act was supposed to create broke down. The power that was concentrated unduly in the hands of trial judges and parole boards before the introduction of the Guidelines has migrated to an equally unbalanced concentration of power in the hands of prosecutors at the case level and an alliance between the Justice Department and Congress at the policy level.¹⁴⁴

This means, given relatively rigid Guidelines, that prosecutors effectively control sentences by determining what charges to file, while the Justice Department ensures that the Commission issues Guidelines of a rigidity and severity that the executive and legislative branches find politically attractive.¹⁴⁵ All the problems of interdistrict disparity so well documented by Professor Bibas,¹⁴⁶ of course, are also problems of transparency, since they derive from unmonitored prosecutorial discretion within districts and without Department of Justice or Commission oversight. Thus, the solutions he offers to the disparity problem would well serve the cause of transparency.

The first President Bush, when he served in Congress, made this point in debating the 1970 federal drug law. Though he spoke in favor of severe mandatory sentences for the most egregious “kingpins,” Bush recognized that such sentences were flatly unjust for the great run of cases. Providing the

144. Bowman, *supra* note 16, at 246 (in this Issue).

145. Moreover, Professor Bowman argues, the current post-*Booker* status quo, while it enables judges to make fairer decisions in some individual cases, in no way reduces, and arguably even slightly exacerbates, the problem of opacity. *See id.* at 250-52.

146. *See* Bibas, *supra* note 40, at 139-45 (in this Issue) (discussing the sources of justified and unjustified types of interdistrict disparity).

critical arguments in support of a successful bill that eliminated most mandatory penalties from the federal system, he argued as follows:

The bill eliminates mandatory minimum penalties, except for professional criminals. Contrary to what one might imagine, however, this will result in better justice and more appropriate sentences. For one thing, Federal judges are almost unanimously opposed to mandatory minimums, because they remove a great deal of the court's discretion. . . .

. . . [P]racticality requires a sentence structure which is generally acceptable to the courts, to prosecutors, and to the general public. H.R. 13583 does this in several ways. Elimination of the mandatory minimums is one and, at the other end of the scale, severe maximums with mandatory minimums for the true professional is another. In between, penalties are graduated and flexible to cover the type of offense and the type of offender.

. . . .
. . . . As a result, we will undoubtedly have more equitable action by the courts, with actually more convictions where they are called for, and fewer disproportionate sentences.¹⁴⁷

Two decades later, again in the context of federal drug laws, the Commission itself offered one of the most cogent critiques of mandatory minimums—a reminder of the undeniable value of an expert Commission-like body in synthesizing wisdom and experience in federal sentencing. Reviewing the long federal and state history of such laws, the Commission observed that such sentences have

been rejected historically primarily because there were too many defendants whose important distinctions were obscured by this single, flat approach to sentencing. A more sophisticated, calibrated approach that takes into account gradations of offense seriousness, criminal record, and level of culpability has long since been recognized as a more appropriate and equitable method of sentencing.¹⁴⁸

Commenting on the federal drug laws, the Commission said:

For those convicted of drug trafficking under this section, one offense-related factor, and only one, is determinative of whether the mandatory minimum applies: the weight of the drug or drug mixture. Any other sentence-individualizing factors that might pertain in a case are irrelevant as far as the statute is concerned. Thus, for example, whether the defendant was a peripheral participant or the drug ring's kingpin, whether the defendant used a weapon, whether the defendant accepted responsibility or, on the other hand, obstructed justice, have no bearing on the mandatory minimum to which each defendant is exposed.¹⁴⁹

147. 116 CONG. REC. H33,314 (Sept. 23, 1970) (statement of Rep. Bush), reprinted in *Footnote to History: The 1970 Views of Congressman George Bush on the Wisdom of Mandatory Minimum Sentences*, 3 FED. SENT'G REP. 108 (1990).

148. U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 26 (1991), http://www.ussc.gov/r_congress/MANMIN.PDF (last visited Sept. 25, 2005).

149. *Id.* (discussing the mandatory minimum sentences for drug trafficking set forth in 21 U.S.C. § 841(b) (1991)).

The Commission also noted the arbitrary “cliff effect” in these sentences, whereby large differences in sentencing outcomes turned on whether a defendant’s conduct fell just above or just below a mandatory minimum sentence measure. Thus, “[j]ust as mandatory minimums fail to distinguish among defendants whose conduct and prior records in fact differ markedly, they distinguish far too greatly among defendants who have committed offense conduct of highly comparable seriousness.”¹⁵⁰

But most pertinent to the transparency question, the Commission observed that a mandatory minimum law “allows a shifting of discretion and control over the implementation of sentencing policies from courts to prosecutors.”¹⁵¹ Yet again, restoring a mutually respectful balance of powers among the agencies of government will serve as a salutary “sunshine act” for the solemn act of administering punishment.

CONCLUSION

Twenty-five years have produced a strong and informed consensus that the first bold and hopeful round of federal sentencing reform has largely failed. *Blakely* and *Booker* may create the political moment to act on this consensus, but they do not sharply constrain Congress in its choices about a new system. The scholars in this Issue suggest that there are many possible roads for further reform that might be followed and that some roads are more appealing than others. What Congress faces after *Blakely* and *Booker* is not a challenge to overcome the constitutional bridges that the Court has erected, but rather a challenge to overcome the practical potholes and barriers revealed by the federal system over the past several decades.

The creation of a sentencing commission reflected a set of beliefs not only about the nature of sentencing, but about the politics of sentencing as well. Judge Frankel believed that an expert body might provide both expert advice to legislatures and judges and some insulation against the politics of punishment. It is worth remembering that Judge Frankel made his proposal before the modern “war on drugs” and before crack cocaine. But even in the face of the highly charged politics of crime in the 1980s and 1990s, the capacity of sentencing commissions to encourage principled punishment policymaking has shown some vitality, especially in the states.

Observers who look at the disarray in the federal system and despair of further reform have forgotten the leading role that Congress took in 1984, which helped to spark structured sentencing reform throughout the United States. The authors in this Issue have, for the most part, taken a more optimistic view. The articles contained herein assume that when Congress focuses on sentencing reform, it will not simply respect the technical challenges of *Blakely*

150. *Id.* at 29.

151. *Id.* at 31.

and *Booker*, but will again seek “a more perfect” system. We hope Congress will look to its history and regain the perspective reflected in the SRA— informed (now with much more knowledge), principled (as many of the principles and goals of the SRA remain vital), and bipartisan. This Issue of scholarly testimony is offered in respectful pursuit of that goal.