

**PRINCIPLES FOR THE
DESIGN AND REFORM OF
SENTENCING SYSTEMS:**

A Background Report

An Initiative of The Constitution Project

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The Constitution Project, based in Washington, D.C., develops bipartisan solutions to contemporary constitutional and governance issues by combining high-level scholarship and public education.

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INTRODUCTION

The Constitution Project's Sentencing Initiative was created in response to two stimuli. The first was a sense widely shared among informed observers that the federal sentencing regime of guidelines and mandatory minimum sentences instituted in the mid-1980s has only partially achieved its laudable objectives and suffers from serious substantive defects, thus requiring careful study and, perhaps, significant reform. Second, the Supreme Court's decisions in *Blakely v. Washington*¹ and *United States v. Booker*² have redefined the constitutional landscape of sentencing and focused the country's attention on criminal punishment to a degree not seen since the mid-1980s. This attention presents an opportunity for federal and state policymakers to consider whether their sentencing systems should be revised and, if so, how.

The Constitution Project, based in Washington, D.C., specializes in developing bipartisan policy solutions to controversial legal and governance issues. In addition to its Sentencing Initiative, the Project has active initiatives on the death penalty, indigent defense, judicial independence, the constitutional amendment process, liberty and security after September 11th, and war powers. As with all of the Project's initiatives, the Sentencing Initiative is guided by a bipartisan blue-ribbon committee of experts. The Sentencing Initiative's Committee (hereinafter Committee) is co-chaired by Edwin Meese III, Attorney General under President Reagan and currently the Ronald Reagan Distinguished Fellow in Public Policy at the Heritage Foundation, and Philip Heymann, Deputy Attorney General under President Clinton and currently James Barr Ames Professor at Harvard Law School. Its other members include current and former judges, prosecutors, defense attorneys, scholars, and other sentencing experts.

The Committee has approached its work in two phases. First, the Committee studied the history and present situation of American criminal sentencing, with particular emphasis on federal sentencing, and agreed upon a set of principles for the design and reform of sentencing systems. This Report enumerates these principles and summarizes the thinking that led to their adoption. The first ten principles are applicable to both state and federal sentencing systems, while the final two focus on the federal structure built around the Federal Sentencing Guidelines. In the second, ongoing, phase of its work, the Committee is attempting to craft recommendations aimed at making the federal sentencing system consistent with the principles. The Committee anticipates issuing a second report detailing these recommendations.

THE SENTENCING INITIATIVE'S BLUE-RIBBON COMMITTEE

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*** Justice Alito participated actively in the deliberations that produced and approved the Committee's Principles. However, his nomination to the Supreme Court in Fall 2005 precluded his participation in drafting and approving this Report. His confirmation to the Court has now compelled him to withdraw from the Committee.*

PRINCIPLES FOR THE DESIGN AND REFORM OF SENTENCING SYSTEMS

I. General Principles

1. The principal goals of a sentencing system should be appropriate punishment and crime control.
 - A. Punishment should be proportional to offense severity and individual culpability and circumstances.
 - B. Within the upper and lower bounds of a proportional sanction, crime control considerations such as incapacitation, deterrence, and rehabilitation should inform the sentencing decision.
2. A sentencing system should treat similarly situated defendants similarly while retaining the flexibility to account for relevant differences among particular offenses and offenders.
3. Individual sentencing decisions should be guided by legal rules and principles.
4. The prospects for success of any sentencing system are markedly enhanced by the existence of a coherent criminal code structure.

5. Meaningful due process protections at sentencing are essential. Fair notice should be provided and reliable fact-finding mechanisms ensured. Judicial sentencing decisions should be subject to appropriate appellate review.
6. Victims of crime should have the opportunity to make an impact statement at sentencing and should be treated fairly in the sentencing process.
7. Critical to the long-term success of any sentencing system is an appropriate sharing of authority and responsibility among the institutions that create and administer sentencing rules.

II. Sentencing Structures

8. Effective sentencing guidelines with meaningful appellate review are a critical component of a successful sentencing system.
 - A. Sentencing guidelines are best capable of controlling unwarranted disparities while retaining appropriate flexibility.
 - B. Sentencing guidelines enhance public confidence in the sentencing system by being open about the factors upon which sentences are being based.
9. Essential to the successful operation of a sentencing guidelines system is a sentencing commission or similar entity with the expertise and stature to study sentencing issues, gather data, and formulate proposed sentencing rules and amendments. The commission should continually assess the performance of sentencing rules and should periodically recommend modifications, which may include either upward or downward adjustments of sentences, based on its assessment. Commission processes should include transparency and fair administrative rulemaking procedures.
10. Experience has shown that mandatory minimum penalties are at odds with a sentencing guidelines structure.

III. Federal Sentencing Guidelines

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.

The Sentencing Initiative's Sentencing Principles

The Committee's principles are strongly influenced by a careful study of the history of the American sentencing reform movement of the late Twentieth Century and of the operation of the federal and state structured sentencing systems that emerged during this period.

The Pre-Guidelines World

The sentencing reform movement that began in the 1970s and led in the federal system to the Sentencing Reform Act of 1984³ (SRA) and the enactment of the Federal Sentencing Guidelines in 1987 was both a rejection of certain prior practices and understandings and an endorsement of a new set of objectives and sentencing structures.

On the one hand, the reformers largely rejected the rehabilitative or medical model of sentencing that held sway through most of the first three-quarters of the Twentieth Century⁴ (although rehabilitation remains an important stated objective of the Sentencing Reform Act⁵). They were skeptical that rehabilitation was possible, or at least that the existing criminal justice institutions knew how to accomplish the rehabilitation of any substantial fraction of offenders.⁶ It seemed unclear that judges and probation officers had any special skill in prescribing at the front end the proper amount and type of punishment most likely to rehabilitate offenders, or that parole boards operating at the back end had any demonstrable insight into when rehabilitation had been accomplished. Some reformers also sought "truth in sentencing" - rules ensuring that defendants serve all or a very substantial portion of the sentence announced by the judge in the first place, rather than the much lower sentence generally produced by the exercise of the parole power.⁷ Indeed, Justice Stephen Breyer, in his influential article about how the Guidelines were written, identified what he called "honesty in sentencing" as one of Congress' two primary purposes in enacting the SRA.⁸

Federal sentencing reformers were also concerned that the nearly unreviewable judicial discretion afforded judges made sentencing a lawless process inasmuch as no law governed a judge's choice of penalty within the broad confines of statutory minimum and maximum sentences.⁹ Unreviewable judicial sentencing discretion was thought to produce unjustifiable sentencing disparities. Liberal critics of the old regime were particularly concerned that a system of effectively unreviewable judicial discretion might be hospitable to hidden racial disparities.¹⁰ Unreviewable judicial discretion also made the sentencing process opaque. That is because judges had no obligation to explain their sentences, it was impossible to determine whether, and if so to what degree, sentencing outcomes were unjustifiably disparate.

There was also concern in some quarters that sentences for some classes of federal offenders were unduly lenient,¹¹ and that judges and prosecutors were colluding through the practice of plea bargaining in producing inappropriately low sentences in individual cases.¹² Many of those expressing these concerns believed that the objective of improved crime control could be achieved through the imposition of more and longer sentences of incarceration providing lengthier periods of incapacitation and, assertedly, greater deterrence.

Lessons from a Quarter Century of Federal and State Sentencing Reform

The Sentencing Reform Act of 1984 sought to address all of these concerns.

Sentencing Purposes

Some have criticized both the SRA and the drafters of the Federal Sentencing Guidelines for failing to be clearer about the theoretical basis of their work and for failing to articulate how particular purposes of punishment were related to the overall structure and to sentences mandated for particular types of crime and offenders.¹³ While this critique has some force, examination of the provisions of the SRA and the Guidelines suggests the philosophy animating them is reasonably clear. While the SRA did not disclaim rehabilitation as a goal of sentencing, it did abandon the rehabilitative or medical model of punishment as the primary organizing principle of federal sentencing. Moreover, perusal of the legislation and the Guidelines suggests that they are actuated by something like Norval Morris' idea of "limiting retributivism,"¹⁴ a theory of justification for criminal punishment that holds that "just deserts is an appropriate general justifying aim of punishment, but that it sets fairly broad bounds within which a range of not-unjust punishments may be chosen according to other principles, both utilitarian and nonutilitarian."¹⁵ Certainly the current federal sentencing system gives more prominence to the ideas of just deserts as a limiting principle and crime control as a utilitarian objective than had previously been the case.¹⁶

The Sentencing Initiative's Committee has not attempted to resolve all the knotty questions about which of the various possible purposes of punishment are legitimate, which should predominate generally or in particular cases, and the degree to which the SRA has achieved any or all of those purposes. However, the members of the Committee agree that criminal defendants should not be punished more severely than they deserve, that there should be rough proportionality between punishment and offense, that crime control is an important and legitimate objective of criminal sentencing, and that rehabilitation

remains an important and legitimate objective of criminal sentencing.¹⁷ These points of agreement are expressed in the first of the Committee’s Principles:

Principle #1:
The principal goals of a sentencing system should be appropriate punishment and crime control.

- A. *Punishment should be proportional to offense severity and individual culpability and circumstances.*
- B. *Within the upper and lower bounds of a proportional sanction, crime control considerations such as incapacitation, deterrence, and rehabilitation should inform the sentencing decision.*

Disparity, Individualization, and Transparency in Sentencing

The potential for unwarranted sentencing disparity was a primary concern about the pre-guidelines federal sentencing system. Nonetheless, had disparity been the only concern of federal sentencing reformers, the problem might in theory have been addressed by a radical simplification of the federal criminal code and the imposition of a limited number of mandatory punishments.¹⁸ However, a long campaign to simplify and rationalize the substantive federal criminal law had failed shortly before the SRA was enacted.¹⁹ In any case, the reformers who wrote the SRA wanted a system that both reduced unwarranted disparity between similarly situated defendants and provided a mechanism to account for material differences among defendants convicted of the same or similar statutory crimes.²⁰ The SRA addressed the interlocking problems of reducing unwarranted disparity and allowing for appropriate individualization of sentences by mandating the creation of sentencing guidelines and a Sentencing Commission to write guidelines, study their implementation, and propose amendments to them.

Implicit in the Sentencing Reform Act are several fundamental judgments about the proper roles of Congress, the judiciary, and the executive in criminal sentencing. First, and most obviously, the SRA rejects unfettered judicial sentencing discretion. At the same time, the SRA impliedly rejects the notion that Congress can or should specify in advance the precise punishment to be meted out to each offender. Congress plays a central role in sentencing by defining crimes, setting the parameters of appropriate punishments for classes of offenders, and exercising democratic oversight over the operation of the criminal justice system.

However, it cannot adjudicate individual cases and is ill-suited for drafting detailed sentencing rules. The SRA's movement to guidelines represented a common-sense judgment by Congress itself that, in the large, substantively complex, geographically dispersed federal sentencing system, the twin goals of reducing disparities among similarly situated offenders and meaningfully individualizing sentences could only be achieved through a system of rules that channel judicial discretion based on the existence of facts identified in advance as relevant to sentence type and severity.

The available evidence suggests that the Federal Sentencing Guidelines have succeeded in reducing judge-to-judge disparity within judicial districts,²¹ but have been less successful in reducing disparities between similarly situated defendants sentenced in different districts.²² Research on the effect of guidelines on disparity in both state and federal systems suggests that guidelines appear to reduce disparity, particularly when first introduced, but that sentencing disparity tends to reappear in guidelines systems over time.²³ The Committee believes that reduction of unwarranted sentencing disparity is a desirable goal, and that guidelines help reduce unwarranted disparity. Those members of the Committee with substantial federal criminal experience believe that the Federal Sentencing Guidelines have reduced inter-judge sentencing disparity. The Committee is less confident that the Guidelines system as it had developed up to the time of the *Booker* decision provided sufficient flexibility to allow appropriate individualization of sentences, a point addressed in greater detail below.

There is ongoing dispute about the effect of the Guidelines and federal mandatory minimum sentences on racial disparity. African-American and Hispanic defendants are significantly over-represented in the federal prison population in comparison with their percentage of the general population.²⁴ The difficult question is whether this over-representation is simply a consequence of the distribution of federally prosecutable criminal behavior among racial and ethnic groups, or whether it results wholly or in part from racial discrimination in the enforcement of federal criminal law or in the design and operation of federal sentencing rules.²⁵ This question is plainly important to both the reality and perception of federal criminal justice, but resolving it was beyond the scope of the Committee's work.

The Committee members agree that a good sentencing system must balance the goals of reducing unwarranted disparity and promoting a desirable degree of individualization in sentencing. Consequently, they concur with the critics of the

pre-Guidelines federal sentencing regime that a structured sentencing system with rules cabinning or guiding judicial discretion is superior to a system of unfettered judicial discretion. The Committee emphasizes that “structured sentencing” should not be a euphemism for the elimination of judicial sentencing discretion. The circumstances of criminal defendants and their offenses are so various that no set of rules can specify in advance the proper sentence for every offender. Properly designed structured sentencing systems help reduce unwarranted disparity while preserving space for individualization of sentences. Consequently, a just system of sentencing should provide both reasonable constraints on, and reasonable scope for the exercise of, judicial discretion.

Structured sentencing has the additional advantage that it promotes transparency in the sentencing process. Transparency is desirable because it makes sentencing outcomes more predictable to the parties in individual cases and more comprehensible to the general public, while at the same time enabling policymakers to understand the behavior of front line sentencing actors and (at least in theory) to craft appropriate responses to that behavior.

The Committee expressed the foregoing conclusions in its second and third Principles:

Principle #2:

A sentencing system should treat similarly situated defendants similarly while retaining the flexibility to account for relevant differences among particular offenses and offenders.

Principle #3

Individual sentencing decisions should be guided by legal rules and principles.

The Experience of the States and the Desirability of a Simple, Coherent Criminal Code

The states, too, have gone through a period of sentencing reform over the last three decades, with many states adopting some variant of structured sentencing. State approaches have been sufficiently diverse that even an adequate summary of their experiments and outcomes is beyond the scope of this Report.²⁶ Nonetheless, most observers who have compared the state and federal experiences would agree that the task of state reformers in trying to apply ideas of structured sentencing

to their existing systems was simpler than that facing the original U.S. Sentencing Commission. States enjoyed an advantage because virtually every state criminal code is far simpler than the sprawling and disorganized federal criminal code and virtually every state ranks the seriousness of the offenses in its code by placing every offense into one of a small number of grades or classes. The simpler and more coherent state codes conferred at least two benefits on state sentencing reformers. First, the relative simplicity of state substantive criminal law allowed state reformers to create presumptive or guidelines sentencing schemes far simpler than the federal system. Second, the fact that state criminal codes are written and passed by legislatures confers immediate democratic legitimacy on the choices embodied in those codes. A structured sentencing system built on a foundation of legislative decisions about the definition and relative seriousness of offenses may be less subject to the kinds of political tensions that have arisen in the federal system, where the rules governing sentencing are written by a sentencing commission obliged to impose order on legislatively-created chaos.

Among the conclusions drawn by the Committee from the experience of states is that expressed in its fourth Principle:

Principle #4

The prospects for success of any sentencing system are markedly enhanced by the existence of a coherent criminal code structure.

The Importance of Due Process in Sentencing to Litigants and Victims of Crime

A central criticism of the pre-Guidelines federal sentencing system was that a regime of largely unfettered judicial discretion provided little due process to the litigants. Neither the defendant nor the government could know in advance what facts beyond the elements of the offense of conviction would be important at sentencing. Nor were the parties afforded an opportunity to litigate the existence of facts the judge thought important to the sentence, employing the tools and protections characteristic of Anglo-American notions of due process - such as fair notice, the right to present evidence, compulsory process for witnesses, rights of confrontation and cross-examination. By contrast, a properly designed structured sentencing system not only specifies in advance the facts that will be most important in determining a criminal sentence, but provides the parties a procedurally fair opportunity to prove or contest the existence of such facts. Conversely, because

the creation of a structured sentencing system necessarily involves identifying facts that bind or at least guide sentencing judges, both ordinary notions of fairness and constitutional due process principles require enhanced procedural protections in connection with the determination of such facts.

A key component of meaningful due process in a system of structured sentencing is a right of appellate review. Not only must there be rules identifying those facts relevant to sentencing and specifying the procedures available to the parties in proving or contesting the existence of such facts, but the litigants must have recourse to some appellate body with authority to ensure that the sentencing court adhered to the rules and procedures.

The Committee expressed its view about the importance due process at sentencing in its fifth Principle:

Principle #5
Meaningful due process protections at sentencing are essential. Fair notice should be provided and reliable fact finding mechanisms ensured. Judicial sentencing decisions should be subject to appropriate appellate review.

In the United States, we tend to think of due process as an exclusive concern of the government and the defendant, who are formally the only litigants in the case. In fact, of course, the persons with the greatest interest in the outcome of a criminal case, other than the defendants themselves, are often the victims of crime and their families and friends. In Anglo-American practice, these persons are not parties and have no right to initiate or control the course of a criminal case.²⁷ Nonetheless, there has been a growing awareness of the need to involve victims in the criminal process, particularly with regard to the imposition of sentence.²⁸ In its sixth Principle, the Committee expressed its view that providing victims a meaningful opportunity to provide input at sentencing is an essential component of criminal due process:

PRINCIPLE #6
Victims of crime should have the opportunity to make an impact statement at sentencing and should be treated fairly in the sentencing process.

The Imperative of Institutional Balance in Sentencing Systems

The imposition of criminal punishments is one of the most central and most daunting functions of government. It necessarily involves all three branches of the national and state governments. Speaking broadly, the legislature defines crimes and designates appropriate punishments or ranges of punishment for those crimes, the executive apprehends and prosecutes criminal suspects, and the judicial branch (defined to include both judges and juries) adjudicates guilt and imposes sentences within legislatively prescribed parameters. However, while this generic description of the division of institutional responsibility for sentencing is accurate so far as it goes, it can be used to describe very different institutional arrangements producing very different allocations of real sentencing power. For example, it accurately describes both a system in which the legislature prescribes only a single mandatory punishment for each crime and a system in which the legislature grants the sentencing judge or the jury unfettered discretion to impose any sentence from probation to life imprisonment upon conviction of a crime.

Moreover, the classic division of responsibility among the three constitutionally mandated branches of government is complicated by the addition of quasi-independent administrative bodies operating under the umbrella of those branches, most particularly parole boards and sentencing commissions. The recent popularity of “truth in sentencing,” with the concomitant elimination or devaluation in many jurisdictions of parole boards, has simplified the picture to some degree by removing one institutional player from the power equation. But the structured sentencing movement has introduced a new sentencing policy actor in the form of sentencing commissions. At the federal level, the SRA largely accomplished its goal of achieving “truth in sentencing” by abolishing parole (and the U.S. Parole Commission) and requiring that federal defendants sentenced to a term of incarceration serve approximately 85 percent of the period imposed by the court before becoming eligible for release.²⁹ On the other hand, the SRA created the U.S. Sentencing Commission and charged it with the task of drafting and monitoring the operation of sentencing guidelines.

There is no constitutional template for the proper allocation of sentencing power between the constitutional and sub-constitutional entities involved in the sentencing process. Nor does the Committee believe that there exists any perfect set of institutional arrangements and relationships guaranteed to produce a sentencing utopia. That said, perhaps the most important conclusion reached by the Sentencing Initiative’s Committee is that a reasonable distribution of

sentencing authority among the institutions responsible for sentencing is critical to the long-term success of any sentencing system. The Committee believes that a sentencing system in which the authority to make sentencing rules and the authority to mandate sentencing outcomes in particular cases is distributed appropriately among the institutional sentencing actors is more likely to prove satisfactory over time. Expressed negatively, the Committee’s conclusion is that a system that concentrates sentencing authority disproportionately in the hands of one or even two institutional sentencing actors may be prone to difficulty. The Committee’s views on institutional balance are expressed in its seventh Principle:

Principle #7
Critical to the long-term success of any sentencing system is an appropriate sharing of authority and responsibility among the institutions that create and administer sentencing rules.

Sentencing Structures

An Endorsement of Sentencing Guidelines

Having concluded that it preferred a structured sentencing system with enhanced due process protections and an appropriate distribution of institutional sentencing authority, the Committee considered the various possible structured sentencing arrangements. Structured sentencing systems have taken a number of forms, from simple variants in which conviction of an offense generates a presumptive, aggravated, and mitigated range of sentences, to complex grid systems like the Federal Sentencing Guidelines in which determination of the appropriate sentencing range may require multiple post-conviction judicial findings of fact and the interpretation of complex rules.³⁰ Such systems also vary widely in the degree to which they constrain judicial discretion. For example, some states have voluntary guidelines systems in which judges need not apply the rules at all.³¹ Other states have guidelines systems that are advisory in the sense that judges are required to perform guidelines calculations, but are not required to sentence in conformity with what the guidelines suggest should be the result of those calculations.³² In neither voluntary nor advisory guidelines systems is the judge’s sentencing decision subject to meaningful appellate review. By contrast, under the Federal Sentencing Guidelines in effect between 1987 and the *Booker* decision in 2005: (1) sentencing judges were required to find facts and apply the Guidelines’ rules to those findings, and (2) the Guidelines were legally binding and enforceable through a process of appellate review.

The Committee agrees with the drafters of the SRA that the best mechanism for providing the desired combination of consistency, individualization, transparency, and enhanced due process is a system of sentencing guidelines. In the federal system, this conclusion is to some degree foreordained by the complexity and logical disarray of the federal criminal code and the improbability of a successful recodification in the foreseeable future. Absent recodification, merely rationalizing federal sentencing law requires that a system of sentencing rules, which is to say guidelines, be overlaid on the existing substantive criminal law.

Nonetheless, the Committee's endorsement of guidelines does not rest purely, or even primarily, on such considerations of realpolitik. The Committee was moved in the direction of guidelines by many of the same considerations that affected the original drafters of the SRA and that have proven persuasive to state lawmakers. The Committee was also influenced by the relative success of state guideline systems, as well as the growing body of scholarship on the advantages of well-designed guidelines exemplified by the work of Kevin Reitz, Reporter for the American Law Institute project on revising the sentencing chapter of the Model Penal Code.³³ However, for reasons detailed below, the Committee concludes that guidelines for federal sentencing should be markedly simpler than those now in place.

The Committee endorsed guideline sentencing in its eighth Principle:

Principle #8

Effective sentencing guidelines with meaningful appellate review are a critical component of a successful sentencing system.

- A. *Sentencing guidelines are best capable of controlling unwarranted disparities while retaining appropriate flexibility.*
- B. *Sentencing guidelines enhance public confidence in the sentencing system by being open about the factors upon which sentences are being based.*

The Importance of Sentencing Commissions

It is possible to have sentencing guidelines without a sentencing commission (as indeed it is possible to have a sentencing commission without sentencing guidelines). Legislatures certainly have the power to enact guidelines into statute, and could assign the work of drafting such statutory guidelines to a legislative committee or to an ad hoc advisory group commissioned to generate guidelines

for the legislature’s approval. However, the best available thinking about the design and maintenance of a guidelines sentencing system suggests the importance of a sentencing commission to such a system. Professor Reitz has enumerated to the American Law Institute the following advantages of a guidelines-sentencing commission system:

- ▶ The consistent application of law, policy, and principle to individual sentencing decisions.
- ▶ The articulation of starting points for sentencing decisions, as opposed to the total absence of such guidance in the cavernous penalty ranges of indeterminate-sentencing codes.
- ▶ New visibility of decision rules for sentencing, giving rise to new opportunities to study and debate those rules.
- ▶ A vastly improved capacity for systemwide policymaking, including an ongoing process of ensuring that penalties for discrete crime classifications make sense when matched against each other.
- ▶ The enlargement of judicial discretion to make effective choices about punishments in cases before them, particularly in prison cases.
- ▶ Improved information about how the sentencing system operates, and the creation of an ethic in legislative and other domains that high-quality information should drive policy.
- ▶ The ability to make accurate predictions of future sentencing patterns, in the aggregate and line-by-line by offense type, enabling the production of credible fiscal impact forecasts when changes in guidelines or laws affecting punishment are proposed. (In most guideline states, this capacity has been used to retard prison growth as compared to that in other states without sentencing commissions or guidelines.)
- ▶ New tools to better understand and attack imbalances in criminal punishments as they affect minorities.
- ▶ The development of a common law of sentencing, through which sentencing judges explain their decisions in selected cases, appellate courts may review

those decisions, and judges are the primary actors in the evolution of sentencing policy.

- ▶ The formation of sentencing commissions composed of representatives from all sectors of the criminal justice system and from the general public, to work toward informed positions of sentencing policy that carry credibility as reflecting the views of all relevant constituencies.
- ▶ The removal of at least some policymaking about criminal punishment from the glare of the political process.
- ▶ A sensible alternative to the proliferation of mandatory-penalty laws; one that can produce predictable sentencing results overall, and can reflect public concern over violent crime, while preserving judicial discretion in individual cases.³⁴

Not every member of the Committee would agree that every one of these asserted advantages of a guideline-sentencing commission system is in fact an advantage or is likely to accrue from adoption of a guidelines-sentencing commission system. The Committee is convinced, however, of the importance of a sentencing commission to a properly functioning guideline sentencing system. The Committee believes it particularly important that a sentencing commission possess both the expertise and the political stature to ensure respectful consideration of its analysis and recommendations by the public and the political branches of government.

The Committee's views on the desirability of a sentencing commission and its necessary attributes are expressed in its ninth Principle:

Principle #9

Essential to the successful operation of a sentencing guidelines system is a sentencing commission or similar entity with the expertise and stature to study sentencing issues, gather data, and formulate proposed sentencing rules and amendments. The commission should continually assess the performance of sentencing rules and should periodically recommend modifications, which may include either upward or downward adjustments of sentences, based on its assessment. Commission processes should include transparency and fair administrative rulemaking procedures.

Mandatory Minimum Sentences

One of the most controversial topics in recent sentencing debates has been the use of mandatory minimum sentences.³⁵ A mandatory minimum sentence is a minimum punishment, usually a term of years, that the legislature requires be imposed on a defendant who is convicted of a specified offense or who engages in some additional statutorily specified conduct in addition to the offense of conviction. An example of the former situation would be a minimum term imposed upon conviction of first degree murder.³⁶ An example of the latter would be an additional term of years imposed for committing a felony with a firearm.³⁷

In one sense, mandatory minimum sentences are an unexceptional component of a legislatively enacted scheme of criminal punishments. Legislatures undoubtedly have the authority to specify the punishments that attach to criminal violations. They are constitutionally entitled to specify a single punishment, which may include a term of incarceration, for every violator of a criminal statute. If the legislature instead specifies a range of possible punishments, that range will necessarily consist of a range with a minimum and maximum term. There is no constitutional rule or immutable principle of sound sentencing policy that requires that the bottom of every sentencing range be set at probation. Moreover, there are indisputably some offenses, such as forcible rape or premeditated murder, for which, by any standard, the minimum legally allowable punishment should include a term of imprisonment.

Nonetheless, many observers of American sentencing have been critical of what they perceive to be the overuse and misuse of mandatory minimum sentences.³⁸ There are three somewhat interlocking critiques of mandatory minimum sentences.

First, some critics object on the ground that, even if the specified minimum sentence is appropriate for the overwhelming majority of those who commit the offense, the mandatory character of the sentence deprives sentencing judges of the power to take appropriate account of exceptional circumstances and the individual characteristics of atypical offenders.

Second, other critics object to the absolute length of many mandatory minimum sentences, particularly those now commonly provided under both state and federal law for drug offenders and recidivists. These critics question not the power of legislatures to impose minimum sentences, but rather the legislative

choice to impose on large classes of offenders punishments that are both severe and mandatory.³⁹

A third critique combines elements of the first two and addresses the effect of mandatory minimum sentences on structured sentencing systems. At the rulemaking level, the routine enactment of statutory mandatory minimum sentences may reflect a legislative disregard for the process of consultation with the sentencing commission and other interested parties. At the case level, the concept of an impermeable minimum sentence runs contrary to the premise that guidelines should meaningfully constrain judicial discretion while permitting the individualization of sentences in appropriate cases. Moreover, if mandatory minimum sentences are perceived with some regularity by judges, prosecutors, and other frontline actors as prescribing punishment inappropriate for the offender or the offense, the mandatory character of the penalty not only prevents the individualization of sentences, but blocks a critical feedback mechanism by precluding the imposition of sentences assessed by frontline actors to be more appropriate to the circumstances. In addition, the existence of mandatory minimum sentences tied to conviction of particular offenses permits manipulation of sentences through differential prosecutorial charging and plea bargaining policies. Such manipulation undercuts the objective of reducing disparity⁴⁰ and, in the federal courts, contributes to the institutional imbalance the Committee perceives to be at the heart of many difficulties with the federal sentencing system.⁴¹

The Committee is cognizant and profoundly respectful of the constitutional role and prerogatives of legislatures generally and Congress in particular. Likewise, it recognizes that there may be offenses for which mandatory minimum sentences are appropriate. However, in the Committee's view, mandatory minimum sentences are generally incompatible with the operation of a guidelines system and thus should be enacted only in the most extraordinary circumstances. The Committee's views in this regard are expressed in its tenth Principle:

Principle #10

Experience has shown that mandatory minimum penalties are at odds with a sentencing guidelines structure.

The Federal Sentencing Guidelines

Thus far, the Committee's conclusions are almost entirely compatible with the premises underlying the Sentencing Reform Act and not inconsistent with perpetuation of the Federal Sentencing Guidelines, even in their pre-*Booker* form. However, the occasion for the formation of the Committee was a sense that, however laudable the objectives of the Sentencing Reform Act, the Guidelines regime only partially achieved them. The major critiques of the pre-*Booker* federal sentencing system include:

Severity

Many critics of the federal sentencing regime focus on the severity of the sentences meted out in federal courts. These critics complain that federal law requires imposition of prison sentences too often and for terms that are often too long.⁴² It is notoriously difficult to determine how much punishment is enough, either in individual cases or across an entire population of offenders, but regardless of whether one approves or disapproves of the trend, the current federal sentencing regime has undeniably increased federal inmate populations and the length of the sentences federal inmates are serving.

From 1980 to 2002, the number of federal prison inmates increased by more than 600 percent, from 24,363⁴³ to 163,528.⁴⁴ The percentage of federal defendants sentenced to a purely probationary sentence declined from roughly 48 percent in 1984,⁴⁵ to 15.5 percent in 1990,⁴⁶ to 9.0 percent in 2003.⁴⁷ From 1984 to 1990, the mean sentence length imposed by judges for all federal crimes in which a prison sentence was imposed nearly doubled from 24 months to 46 months.⁴⁸ By 1992, the mean sentence imposed increased by almost another 50 percent to 66.9 months.⁴⁹ Interestingly, the mean federal sentence leveled off in 1993-94,⁵⁰ and has declined slowly to 56.8 months in 2003.⁵¹ Despite the modest retreat in mean sentence length, in 2003 86.3 percent of federal defendants received prison sentences,⁵² compared to 52 percent in 1984,⁵³ and the mean sentence of imprisonment in 2002 remained more than double what it had been in 1984.

These figures measure the sentences imposed by judges. The SRA's abolition of parole and embrace of "truth in sentencing" also dramatically increased the proportion of imposed sentences actually served. For example, a federal defendant sentenced to ten years in 1986 would, on average, have served slightly less than six years before release on parole. Under the Guidelines, a defendant sentenced to ten

years must serve approximately 85 percent of that term, or slightly more than 8 1/2 years, before release.⁵⁴

The behavior of federal judges and prosecutors also suggests that, as a group, they may see some federal sentences as being unduly stringent, or at least as being longer than necessary to achieve the ends of justice. For example, in state guideline systems, rates of upward and downward departures from guidelines or presumptive ranges are generally comparable.⁵⁵ By contrast, before *Booker*, more than 30 percent of all federal cases received downward departures,⁵⁶ while less than 1 percent received upward departures.⁵⁷ And at least one study has found that judges, prosecutors, and other frontline sentencing actors exercised their discretion from the early 1990s through 2001 to gradually reduce average sentences in drug cases.⁵⁸ It is, of course, misleading to treat all federal sentences as an undifferentiated lump. Not even the harshest critics of the Guidelines view sentences for all classifications of federal crime as being too severe. Those who criticize federal sentencing severity tend to focus particularly on drug sentences. Some have been concerned about immigration sentences, and in the last several years some have become concerned about sentences at the upper end of those meted out for white collar crime.

The response of the Justice Department and some members of Congress to criticisms of the Guidelines on the ground of severity has been that tougher sentencing laws are a rational, necessary, and effective strategy to combat crime. They point to statistics showing a general decrease in rates of violent and property crime during the guidelines era.⁵⁹

The Committee expresses no view about the overall severity of federal criminal sentences. Some members agree with critics who view federal sentencing in the years since the SRA as generally too harsh. Others feel that the move to higher sentences in recent years was generally appropriate, even if they may have reservations about sentences for particular defendants or classes of cases. The Committee is nonetheless in agreement on two points related to severity. First, although the Committee expresses no view on the appropriateness of current federal sentencing levels, it is concerned that the federal rulemaking system is hospitable to increases, but extremely resistant to decreases, in the sentences called for by federal statutes and guidelines, a tendency that devalues the work of the Sentencing Commission and may over time skew the distribution of federal sentences in undesirable ways. This point will be explored in detail below.

Second, irrespective of their views on sentence severity, the Committee members are concerned about the rigidity, complexity, and institutional imbalance of the pre-*Booker* federal sentencing system, as expressed in the following sections.

Complexity

Many critics have contended that the Guidelines are too complex. Some have argued that the Guidelines are too complex to understand or apply.⁶⁰ Others have contended that the Guidelines subdivide offense conduct into too many categories requiring detailed factual findings that have only an attenuated relationship to offense severity.⁶¹ The Committee is skeptical of the assertion that the Guidelines are too complex for ready application by lawyers and judges,⁶² although the Guidelines' complexity might constitute a barrier to their application in the context of jury trials, a point to which we will return below.

The Committee is nonetheless in agreement that, for at least two reasons, excessive complexity is a serious problem for the federal sentencing system. First, the Committee believes that the Guidelines do indeed subdivide offense conduct too finely and require more factual findings than are necessary for a sensible determination of criminal sentences. This conclusion is expressed in Principle 11(A).

Principle #11(A):

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

Second, the Committee believes that complexity has had more subtle, but also more profound, effects on the evolution of federal sentencing policy in the twenty years since the SRA's enactment. In particular, the Guidelines' complexity has contributed to their unreasonable rigidity and been a primary cause of an increasing institutional imbalance at both the rulemaking and individual case levels. This point will be considered in detail below.

Rigidity

Many critics of the pre-*Booker* federal sentencing system complained that it was too rigid in that it provided too little flexibility to the sentencing judge to account for circumstances individual to the defendant or peculiar to the case.⁶³ "Rigidity" is one of the trickiest points to assess about the federal system because what appears to one observer as undue rigidity may appear to another as nothing more than a

necessary incident of bringing law to a sentencing regime formerly characterized by largely unfettered judicial discretion. Nonetheless, several themes customarily emerge in discussions of this issue.

First, one common complaint is directed not at the SRA or the Sentencing Guidelines, but at the framework of statutory mandatory minimum sentences Congress has overlaid onto the Guidelines system for certain classes of offenses, most notably drug and firearm crimes.⁶⁴ For example, the enactment in 1986 of tough statutory quantity-based mandatory minimum drug sentences⁶⁵ influenced the shape and severity of the drug guidelines promulgated by the Commission in 1987.⁶⁶ These mandatory minimums also block the exercise of the otherwise available judicial departure power in cases to which they apply.

Second, some have argued that even without mandatory minimums, the Guidelines were too rigid.⁶⁷ This sort of rigidity arose from a combination of the complexity of the Guidelines and the relatively tight legislative constraints placed on judicial authority to depart from the sentencing range generated by the Guidelines. The complexity of the sentencing grid and the accompanying rules forces judges to make detailed factual and legal determinations that generate a fairly narrow range of possible sentences, within which the judge must impose a sentence, unless he or she “departs” based on yet another set of factual findings.

Some Guidelines critics contended that the rules governing a judge’s power to depart from the range were too restrictive. One common complaint has been that with respect to awarding departures, the Guidelines bar consideration of many of the characteristics of a defendant or circumstances of his background that have traditionally been considered to mitigate punishment.⁶⁸ In addition, Congress and the courts have disagreed about the degree to which appellate courts should police the award of downward departures. In *Koon v United States*,⁶⁹ the Supreme Court tacitly encouraged departures by holding that the applicable standard of appellate review should be abuse of discretion.⁷⁰ In the Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003, Congress took a different and more restrictive view of departures, mandating changes in guidelines rules governing departures, legislatively repealing *Koon*, and mandating *de novo* appellate review of departures.⁷¹

The Committee agrees that the federal sentencing regime that existed before *Booker* was indeed too rigid in several respects. Its conclusions are expressed in Principle 11(B):

Principle #11(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.

Quantifiable Factors and Relevant Conduct

The Committee believes that the existing Guidelines regime places undue weight on quantifiable factors such as loss in economic crime cases or drug quantity in drug cases. The Committee does not suggest that loss, drug weight, and the like should have no influence on the sentencing calculus. Rather, its conclusion rests on two observations: first, that quantifiable measures have too great an effect on sentence length in comparison to other less easily quantifiable factors (such as a defendant’s culpable mental state or role in the offense), and second, that the Guidelines make too many fine distinctions based on quantity. The prime examples of the latter complaint, which is in a sense merely a special case of the complexity problem discussed above, are the sixteen-level loss table in the theft/fraud guideline and the seventeen-level drug quantity table in the drug guideline.⁷²

The Committee has also concluded that the Guidelines often place undue emphasis on facts not centrally related to the offense of conviction and that enter the sentencing calculus through inclusion of “relevant conduct.” The concept of “relevant conduct” is one of the most distinctive features of the Federal Sentencing Guidelines.⁷³ One of the issues facing the designers of the Guidelines was whether, when assessing offense seriousness, the sentencing judge would be allowed to consider only facts directly and intimately related to the particular offense or offenses of which a defendant was convicted by trial or plea, or whether a judge could consider all facts about what a defendant really did in relation to those offenses.⁷⁴ The concern of the drafters was that a pure offense-of-conviction system would allow the parties, and more particularly the prosecutor, to control sentencing outcomes by limiting the scope of a defendant’s sentencing liability through charge manipulation and bargaining.⁷⁵ To take but one simple example, a defendant who engaged in a series of five drug transactions with an undercover

officer, each involving 100 grams of powder cocaine, could be charged with or permitted to plead to possession with intent to distribute 100, 200, 300, 400, or 500 grams. Given the Guidelines' reliance on quantity to set drug sentence lengths, the parties could effectively decide among them what sentence the defendant should receive, and the judge would have no meaningful ability to override that decision, even if she were fully aware of all facts about the defendant's conduct. If outcomes were freely negotiable among the litigants, the objective of reducing unwarranted disparity would be undermined.

Of course, the ability to manipulate the system in this way remains under the Guidelines, but only insofar as the government is willing to conceal evidence from the court (or the court is willing to blink at evidence it knows of, but which the parties exclude from the terms of their plea agreement). There is at least anecdotal evidence that "fact-bargaining" of this sort does occur.⁷⁶

The Guidelines' drafters not only felt that relevant conduct was necessary to limit prosecutorial control over sentencing outcomes, but also argued that judges had always been able to consider all facts about both the crime(s) of conviction and related incidents in setting a sentence within the statutory range.⁷⁷ Indeed, pre-Guidelines judges were at liberty to consider all aspects of a defendant's life and character in determining a sentence. Those concerned about the effect of relevant conduct note that, while pre-Guidelines judges could consider facts not directly within the ambit of the crime(s) of conviction, they were never required to do so.⁷⁸ Moreover, the complexity of the Guidelines plays a role in increasing the effects of relevant conduct. The fact that the Guidelines assign mandatory weight to so many facts increases the opportunities for relevant conduct not directly implicated by the offense of conviction to influence the sentence. The combination of the wider factual net thrown by the relevant concept rule, the complexity of the Guidelines, and the requirement that sentencing facts be proven only to a preponderance in a proceeding with reduced procedural protections, has been thought to give relevant conduct disproportionate weight in the sentencing process.⁷⁹ This argument is captured in the metaphor of "the tail which wags the dog," discussed by the Supreme Court in *Blakely*,⁸⁰ and a number of previous federal sentencing cases.⁸¹

The Committee's conclusions on quantifiable factors and relevant conduct are expressed in its Principle 11(C):

Principle #11(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.

Institutional Balance in Sentencing

As noted above, the Committee's overriding concern about the federal sentencing system is its creation of an undesirable imbalance of power among the institutions responsible for sentencing. The Guidelines system was supposed to remedy the former system's excessive reliance on judicial discretion by distributing sentence authority among the relevant institutional actors. At the rulemaking level, the SRA created the Sentencing Commission, which was to serve as an expert, neutral rulemaker, reasonably insulated from direct political pressure,⁸² and equally importantly, serve as a forum for policy debate among other institutional actors—judges, prosecutors, the defense bar, probation officers, and interested community groups.⁸³ Congress was to have ultimate authority over Commission rules, but would in theory stay out of the details of sentencing policy, or would at least give substantial deference to the Commission's judgment. The Department of Justice would have a seat at the Sentencing Commission table in order to express its position, but would be only one among a number of important voices.⁸⁴

At the individual case level, trial judges lost their former plenary authority of front-end sentencing. But appellate judges gained an unprecedented role in sentencing through the review function. And even trial judges retained significant discretionary power through their unfettered authority to sentence anywhere within the applicable range, through the power to depart from the range upon appropriate grounds, and through the hidden, but very real, de facto discretionary authority to find sentencing facts. Prosecutors gained the authority inherent in being masters of the facts in a fact-driven guidelines system, but were supposed to be constrained from exercising dominant authority by the relevant conduct rules and their obligation as officers of the court to report all potentially relevant sentencing facts to the court.⁸⁵

The hoped-for institutional balance has broken down. The former unwarranted judicial and parole board hegemony over federal sentences has been replaced by an alliance of the Department of Justice and Congress at the rulemaking level, and a marked increase in the power of prosecutors at the individual case level. These trends can be summarized as follows:

Institutional Imbalance in Sentencing Rulemaking: The complexity of the Guidelines and the federal sentencing table tends to encourage continuing congressional intervention in the particulars of federal sentencing law. Indeed, it is only the complexity of the table that makes repeated, detailed congressional intervention politically attractive and therefore likely.

In the pre-Guidelines era, Congress could not readily translate its concern about a class of high-profile crimes into specific sentencing outcomes. Faced with a real or perceived outbreak of criminal activity, Congress had four basic legislative options: (1) it could increase appropriations to law enforcement agencies so that more offenders could be caught and prosecuted, which might prove effective but which is inevitably expensive and thus likely requires raising taxes or the deficit, or reallocating resources dedicated to non-law-enforcement activities; (2) it could create a new crime covering the activity causing concern, but given the breadth of existing federal criminal law, there are few crimes not already covered by the federal code; (3) it could raise the statutory maximum penalty for existing statutory crimes covering the activity, but neither before nor after the Guidelines did an increased statutory maximum have any necessary effect on actual sentences (and in any case one can only raise statutory maximums so many times for any particular offense before running up against limits imposed by the finite span of human life); (4) it could legislate a statutory minimum sentence for the activity, but at least until recently Congress has been relatively reluctant to impose minimums except in drug and gun cases. The reasons for congressional hesitation to impose and repeatedly raise mandatory sentences outside the realm of drug and gun crimes are not entirely clear. It may be that Congress recognized that mandatory minimum sentences are blunt instruments ill-suited to offense types like economic crimes where the relative severity of particular offenses and relative culpability of individual offenders is hard to gauge. In any case, once a mandatory minimum sentence has been enacted for a crime type, repeated increases in the minimum sentence for the same crime are even more problematic than increases in statutory maximum sentences since mandatory sentences necessarily affect all defendants

convicted of an offense, while increases in statutory maximum sentences need have no impact on any particular defendant.

Once the Sentencing Commission created a 258-box sentencing table with detailed instructions for placing defendants in those boxes, the options available to Members of Congress seeking a legislative response to a specific type of crime mushroomed. In short, the proliferation of fact-dependent and legally enforceable decision points created by overlapping guidelines and statutory mandatory minimum sentences has given Congress a mechanism to micro-manage sentencing policy.⁸⁶

Perhaps unsurprisingly, given the perennial salience of crime as an electoral issue, almost all recent congressional intervention in the details of sentencing policy has been in the direction of raising sentences or blocking Sentencing Commission initiatives to lower them.⁸⁷ In this respect, the laudable transparency of the Guidelines system may have proven an impediment to the evolution of a balanced guideline system by allowing interested legislators to identify and reject any change in sentencing rules that would have the effect of reducing penalties. Still, neither the political dynamic favoring tough criminal sentences nor the complexity of the Federal Sentencing Guidelines can entirely explain the behavior of Congress in the sentencing field. The political incentives favoring tough sentences operate in state legislatures as well, and many states have guidelines systems, albeit less complex ones, which their legislatures can amend.⁸⁸ Yet over the last twenty years, states have both raised and lowered sentences and the current trend in the states is toward moderation of penalties.⁸⁹ The difference in federal and state behavior requires some explanation.

The most obvious difference is budgetary. State legislatures operate under two constraints that Congress lacks. First, states are customarily obliged to balance their budgets, usually by command of state law.⁹⁰ Second, the proportion of state budgets devoted to law enforcement and corrections expenditures is far higher than the equivalent proportion of the federal budget.⁹¹ Consequently, state legislators can only pursue a course of ever higher sentences, ever more prisoners, and ever larger corrections costs for so long before the pure economic cost of such a program begins to force unpleasant choices between building more prisons and either cutting budgets for public goods - such as education, health care, and public works - or raising taxes. In part for this reason, state sentencing guidelines systems have increasingly been used “to gain better control over rapidly escalating prison populations and correctional expenses.”⁹²

This is not to say that the state sentencing experience over the past thirty years has been an unqualified success. State prison populations have increased dramatically.⁹³ While the incidence of violent and property crimes has decreased as the number of state prisoners has increased, many observers contend that the size of state prison populations has passed the point of diminishing returns from the point of view of crime control.⁹⁴ Nonetheless, state structured sentencing regimes are generally agreed to be both simpler and more broadly satisfactory to constituent groups than the federal Guidelines. Moreover, unlike their congressional counterparts, state lawmakers have acted to both raise and lower sentences.

By contrast, because the federal government need not balance its budget and federal correctional spending is such a tiny fraction of that budget, Congress does not perceive itself to be faced with the same stark choice between prisons or schools that haunts their colleagues in America's statehouses. Accordingly, because Congress has little incentive to scrutinize Justice Department requests or initiatives by its own members seeking higher sentences, there exist few restraints on the gradual upward ratcheting of tougher penalties made attractive by politics, and made possible by the complexity of the Guidelines-centered federal sentencing structure. This institutional imbalance has blocked the expected feedback from front-line sentencing professionals and prevented the Sentencing Commission from adjusting the guidelines in response to experience.

Institutional Imbalance in the Imposition of Individual Sentences: Since the advent of the Sentencing Guidelines in 1987, local United States Attorneys and their Assistants have exercised an increasing amount of power over sentencing outcomes in individual cases. This development is a direct consequence of a fundamental attribute of guidelines systems: increasing the complexity of a sentencing guidelines system tends to confer power on prosecutors at the same time as it tends to limit the power of judges. This is particularly true if the guidelines are overlaid on a complex criminal code containing an array of fact-dependent statutory minimum sentence provisions. As the number of fact-dependent rules potentially applicable to the sentence of each defendant increases, so too does the number of opportunities for a prosecutor to control each defendant's sentence - by charging or not charging crimes or statutory enhancements, proving or not seeking to prove facts determinative of guideline adjustments, or moving or not moving for various types of departures. Because the Federal Sentencing Guidelines and associated statutory provisions are, taken together, one of the most complex sentencing regimes ever devised, the effect is to confer on prosecutors a very high degree of control over sentencing outcomes. Some added degree of prosecutorial influence

over sentencing is an inevitable, even desirable, consequence of shifting from a regime of unguided to judicial discretion to one of fact-dependent guidelines. However, the Committee believes that the degree of control over sentencing outcomes now exercised by federal prosecutors has reached troublesome levels.

The Committee’s conclusion about the need for greater institutional balance in federal sentencing is expressed in its twelfth and final Principle:

Principle #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.

The Effect of Booker v. United States on the Federal Sentencing Environment

The section of the Committee’s principles specifically addressed to federal sentencing critiques the Federal Sentencing Guidelines system “as applied prior to *United States v. Booker*.” The Supreme Court’s decision in *Booker* found the Federal Sentencing Guidelines as then applied to be unconstitutional, a defect the Court remedied by declaring them “effectively advisory.” One might, therefore, dismiss an analysis of the federal system before *Booker* as of only historical interest. However, *Booker* altered but did not destroy the Guidelines. Indeed, one can fairly argue that *Booker* has preserved the pre-existing federal sentencing regime almost untouched, producing at most a modest increase in the power of judges to impose sentences outside the ranges called for by the Guidelines. Consequently, the Committee believes that its critique of the pre-*Booker* federal sentencing regime is an essential component of the debate about what course federal sentencing policy should now take.

That said, a discussion of *Booker* and its immediate predecessor, *Blakely v. Washington*, is in order.

Blakely v. Washington.⁹⁵ *Blakely* involved a challenge to the Washington State Sentencing Guidelines. In Washington, pre-*Blakely*, a defendant’s conviction of a felony produced two immediate sentencing consequences. First, the conviction rendered the defendant legally subject to a sentence within the upper boundary set by the statutory maximum sentence for the crime of conviction, and second, the

conviction placed the defendant in a presumptive sentencing range set by the state sentencing guidelines within the statutory minimum and maximum sentences.⁹⁶ Under the Washington State Sentencing Guidelines, a judge was empowered to adjust this range upward, but not beyond the statutory maximum, upon a post-conviction judicial finding of additional facts. For example, Blakely was convicted of second degree kidnapping with a firearm, a class B felony that carried a statutory maximum sentence of ten years.⁹⁷ The fact of conviction generated a “standard range” of forty-nine to fifty-three months;⁹⁸ however, the judge found that Blakely had committed the crime with “deliberate cruelty”-a statutorily enumerated factor that permitted imposition of a sentence above the standard range⁹⁹-and imposed a sentence of ninety months.¹⁰⁰ The United States Supreme Court found that imposition of the enhanced sentence violated the defendant’s Sixth Amendment right to a trial by jury.¹⁰¹

In reaching its result, the Court relied on a rule it first announced four years before in *Apprendi v. New Jersey*: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”¹⁰² In the years after *Apprendi*, many observers assumed that *Apprendi*’s rule applied only if a post-conviction judicial finding of fact could raise the defendant’s sentence higher than the maximum sentence allowable by statute for the underlying offense of conviction.¹⁰³ For example, in *Apprendi* itself, the maximum statutory sentence for the crime of which Apprendi was convicted was ten years, but under New Jersey law the judge was allowed to raise that sentence to twenty years if, after the trial or plea, he found that the defendant’s motive in committing the offense was racial animus.¹⁰⁴ The Supreme Court held that increasing Apprendi’s sentence beyond the ten-year statutory maximum based on a post-conviction judicial finding of fact was unconstitutional.¹⁰⁵

In *Blakely*, however, the Court found that the Sixth Amendment can be violated even by a sentence below what had always before been considered the statutory maximum. Henceforward, “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”¹⁰⁶ Any fact that increases a defendant’s “statutory maximum,” as newly defined in *Blakely*, must be found by a jury.

Thus, the *Blakely* model of constitutional sentencing practice seemed to run something like this:

First, any fact, the proof of which exposed a defendant to a higher theoretical maximum sentence than he could have been subject to absent proof of that fact, was an “element” of a crime (or at least is something like an “element”¹⁰⁷) and had to be proven to a jury beyond a reasonable doubt or admitted by the defendant. It did not seem to matter whether the rule correlating the fact with increased possible punishment was enacted by a legislature or an administrative body like a sentencing commission. Most importantly, the concept of a maximum sentence appeared to include the tops of fact-based presumptive sentencing ranges situated below what had previously been understood to be statutory maximum sentences.

Second, the Supreme Court held in *McMillan v. Pennsylvania*,¹⁰⁸ and reaffirmed in *Harris v. United States*,¹⁰⁹ that post-conviction judicial findings of fact can increase minimum sentences, so long as the raised minimum does not increase the statutory maximum. Because *Blakely* did not overrule the holding of *Harris*, a fact, the proof of which subjects a defendant to a minimum sentence and even a real and inescapable mandatory minimum sentence, is not an element. Such a fact can be found by a judge, post-conviction and to a lower standard of proof, so long as the resultant minimum sentence is below the legislatively established maximum sentence for the same crime.

Third, *Blakely* did not deny the power of a legislature to specify a single punishment for a crime. Conversely, *Blakely* confirmed that if a legislature chooses to assign a range of punishments to proof of a crime, it may allow judges to impose a sentence anywhere within that range in the unchecked exercise of their discretion. Thus, *Blakely* apparently permitted legislatures or sentencing commissions to create entirely advisory guidelines suggesting additional non-element facts that judges should take into account in imposing sentences below the statutory maximum. But *Blakely* did not seem to permit a system in which a post-conviction judicial finding of non-element facts could generate even a presumptive sentencing range with a maximum sentence lower than the maximum set by statute.

Fourth, the *Blakely* majority viewed its result as necessary “to give intelligible content to the right of jury trial.”¹¹⁰ Exactly what the Court meant by this was not entirely clear; however, it is fair to surmise that *Blakely* was intended as a partial response to the argument about the tail of relevant conduct wagging the sentencing dog.¹¹¹ That is, at a minimum the Court intended jury fact-finding to set meaningful limits on a defendant’s maximum sentencing exposure.

Accordingly, the Federal Sentencing Guidelines seemed to fall within the *Blakely* rule. In their essentials, the federal Guidelines are indistinguishable from the Washington Guidelines struck down in *Blakely*. In both systems, the fact of conviction generates a guideline sentencing range bounded at the top by a maximum sentence that is below the absolute statutory limit for the crime, but which cannot be legally exceeded in the absence of post-conviction judicial findings of fact.¹¹² And in both systems, post-conviction judicial findings of fact raise both the bottom and top of the guideline range, and by raising the top of the range increase the length of a defendant's possible guideline sentence.

United States v. Booker:¹¹³ In *Booker*, the same five-member majority that had prevailed in *Blakely*¹¹⁴ found that the Guidelines' process of post-conviction judicial fact-finding was unconstitutional under the Sixth Amendment,¹¹⁵ but an almost completely different five-member majority¹¹⁶ wrote the opinion describing the proper remedy for the constitutional violation. Justice Breyer, writing for the remedial majority, did not require juries to find all sentence-enhancing guidelines facts, nor did he invalidate the Guidelines *in toto*. Instead, he merely excised two short sections of the Sentencing Reform Act,¹¹⁷ leaving the remainder of the SRA in place, and thus keeping the Guidelines intact but rendering them "effectively advisory."¹¹⁸ Perhaps even more important, the remedial opinion found that both the government and defendants retained a right to appeal sentences, and that appellate courts should review sentences for "reasonableness."¹¹⁹

The practical implications of *Booker* have yet to be fully understood.¹²⁰ The remedial opinion lends itself to different interpretations. Some have been tempted to read "advisory" to mean that the Guidelines are no longer legally binding on trial judges and that the Guidelines are now merely useful suggestions to sentencing courts.¹²¹ However, a closer reading of the opinion suggests something quite different. First, because the opinion leaves virtually the entire SRA and all of the Guidelines intact, the requirement that judges find facts and make guideline calculations based on those facts survives. Second, because the remedial opinion retains a right of appeal of sentences and imposes a reasonableness standard of review, appellate courts must determine what is reasonable. The remedial opinion left undisturbed 18 U.S.C. § 3553(a), which lists the factors a judge must consider in imposing a sentence and includes on that list the type and length of sentence called for by the Guidelines. Thus, the determination of "reasonableness" under the statute necessarily includes consideration of whether a sentence conforms to the Guidelines. The unresolved question is the weight that will be accorded to the

Guidelines sentence: Will it be considered at least presumptively correct or will it be reduced to the status of only one among many other factors? Although the Supreme Court has yet to opine on this point, the lower federal courts have so far tended to accord the Guidelines considerable weight.¹²²

In short, the federal guidelines system has survived *Booker*. District judges now have somewhat greater latitude to impose sentences outside the guideline range. But the Sentencing Commission, its guidelines and the procedures for promulgating them, and the network of interlocking mandatory minimum sentences all remain. What then are the implications of the Committee’s work for the post-*Booker* world?

On one hand, the “advisory” Guidelines created by *Booker* undoubtedly ameliorate to some degree the Committee’s concern with the excessive rigidity of the former system. Giving sentencing judges some additional measure of sentencing flexibility is a good thing. Even in this area, however, it must be noted that *Booker* did not address mandatory minimum sentences, which, as the Committee observed in Principle 11(b), interact with the Guidelines to render the system rigid. In any event, it remains to be seen how much additional flexibility the post-*Booker* regime will allow sentencing judges.

Regrettably, the remainder of the Committee’s concerns about the pre-*Booker* guidelines system are unaddressed by the Supreme Court’s decision. The Guidelines and associated sentencing statutes remain unduly complex. They continue to divide conduct into too many categories and require too many factual findings. They retain the same undue emphasis on quantifiable factors and continue to undervalue non-quantifiable sentencing considerations. They continue to place excessive emphasis on conduct not centrally related to the offense of conviction. And most critically, the basic design of the guidelines and its supporting structures remains unchanged, suggesting that *Booker* will have relatively little effect on the institutional imbalance at the core of the Committee’s concerns about the federal sentencing process.

Accordingly, if the post-*Booker* advisory Guidelines are to remain the system governing federal sentencing for the foreseeable future, the Committee’s work suggests, at a minimum, that modifications be made to the advisory system. Likewise, if the post-*Booker* advisory system is determined to be generally unsatisfactory, any effort to reconfigure the federal sentencing structure should be undertaken with the principles articulated by the Committee in mind. We hope to provide more particular suggestions in this vein in a future report.

ENDNOTES

1. 542 U.S. 296 (2004) (striking down the Washington state sentencing guideline system as violative of the Sixth Amendment right to trial by jury).
2. 543 U.S. 220 (2005) (finding the Federal Sentencing Guidelines unconstitutional as applied, and invalidating sections of the Sentencing Reform Act of 1984 so that the guidelines became “essentially advisory”).
3. Title II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473 (1984).
4. For discussions of the fall of the rehabilitative model of sentencing and the rise of the Federal Sentencing Guidelines, see Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 685-689 (1996) (hereinafter cited as *The Quality of Mercy*); PAMALA L. GRISET, DETERMINATE SENTENCING: THE PROMISE AND REALITY OF RETRIBUTIVE JUSTICE 25-37 (SUNY Press 1991).
5. 18 U.S.C. § 3553(a)(2)(D) (2004) (stating that the sentencing judge “shall consider . . . the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”).
6. See GRISET, *supra* note 4, at 28-29 (“Penal treatment was said to be empirically invalid, as measured by recidivism rates.”); Steven S. Nemerson, *Coercive Sentencing*, 64 MINN. L. REV. 669, 685-86 (1980) (“In part, the massive professional and academic disillusionment with the therapeutic model stems from the simple practical inability of the criminal justice system to reform serious offenders effectively through incarceration.”); Andrew von Hirsch, *Recent Trends in American Criminal Sentencing Theory*, 42 MD. L. REV. 6, 11 (1983) (“[N]o serious researcher has been able to claim that rehabilitation routinely could be made to work for the bulk of the offenders coming before the courts.”). *But see*, Michael Vitiello, *Reconsidering Rehabilitation*, 65 TULANE L. REV. 1011 (1991) (urging that rehabilitation be revisited as a dominant rationale for criminal sanctions).
7. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4, (1988) (“Congress meant to end the previous system whereby a judge might sentence an offender to twelve years, but the Parole Commission could release him after four. Since release by the Parole Commission in such circumstances was likely, but not inevitable, this system sometimes fooled the judges, sometimes disappointed the offender and often misled the public.”); Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1202 (2005) (hereinafter cited as *State Sentencing Systems*) (describing the place of “truth in sentencing” in state sentencing reform efforts over the last several decades).
8. Breyer, *supra* note 7.

9. Perhaps the most influential critic of pre-Guidelines federal sentencing on the ground of unjustifiable sentencing disparity was Judge Marvin Frankel, who said of federal sentencing that “the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.” MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5 (1973).
10. See William W. Wilkins, Jr., Phyllis J. Newton, and John R. Steer, *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 *CRIM. L. F.* 355, 359-62 (1991) (discussing the public perception of biased sentences and reviewing empirical studies on the disparate treatment of minority defendants and victims).
11. Many conservative members of Congress plainly felt that federal drug sentences were too lenient, a defect they set out to remedy with the Anti-Drug Abuse Act of 1986 (ADAA), Pub. L. No. 99-570, 100 Stat. 3207, codified in 21 U.S.C. § 801 *et seq.* See Frank O. Bowman, III and Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 *IOWA L. REV.* 1043, 1059-64 (2001) (hereinafter cited as *Quiet Rebellion*) (discussing the effects of the ADAA on federal drug sentencing). Similarly, the members of the original Sentencing Commission took to heart the views of critics who viewed pre-Guidelines sentences for many economic crimes as too lenient, a situation they sought to change by requiring at least some prison time for economic crime offenders who might previously have received probation. See Breyer, *supra* note 7, at 20-21; Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 *YALE L. J.* 2043, 2047 (“[T]he Commission produced guidelines that actually increase the overall severity [of federal sentences], taking particular aim at so-called white-collar offenders whom the Commission found (perhaps correctly) to have been treated with undue solicitude.”).
12. See Bowman, *The Quality of Mercy*, *supra* note 4, at 688.
13. See, e.g., Paul H. Robinson and Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 *COLUM. L. REV.* 1124, 1153-54 (2005); Marc Miller, *Purposes At Sentencing*, 66 *SO. CAL. L. REV.* 413 (1992).
14. NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 179-208 (1982).
15. Miller, *supra* note 13, at 432.
16. For a general discussion of the philosophical premises of the Federal Sentencing Guidelines, see Paul H. Hofer and Mark Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 *AM. CRIM. L. REV.* 14 (2003).
17. The Principles adopted by the Committee categorize rehabilitation as a crime control consideration. In doing so, the Committee does not denigrate the view, which is held by a number of its members, that society has an obligation arising from moral, ethical, or religious precepts to attempt the rehabilitation of those convicted of criminal offenses. The Committee did not attempt to decide whether rehabilitation is a societal obligation or merely a desirable outcome of criminal sanctions. Whatever one’s view on this question, it is undeniable that rehabilitating criminal defendants in the sense of inducing them to live without violating the law does promote crime control.
18. For example, one might rewrite the federal criminal code to provide for only five severity levels of economic crime – call them “very minor,” “minor,” “moderate,” “serious,” and “very serious” – each corresponding to a single punishment – say probation, 1 year, 3 years, 5 years, and 10 years respectively. Such a scheme would effectively eliminate judicial sentencing discretion as a potential source of sentencing disparity. Of course, it would also enhance the role of charge and plea bargaining in determining sentences, and would thus increase the degree to which prosecutorial decision-making and the private bargains of the parties could produce sentencing disparities.
19. Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 *BUFF. CRIM. L. REV.* 45, 92-135 (1998) (reviewing historical efforts to revise the federal criminal code).

20. See Breyer, *supra* note 7, at 13-14 (discussing the need to accommodate “two competing goals of a sentencing system: uniformity and proportionality”); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992).
21. See Paul J. Hofer, Kevin R. Blackwell, and R. Barry Ruback, *The Effect of Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOL. 239, 241 (1999) (“[T]he guidelines have significantly reduced overall inter-judge disparity in sentences imposed.”); James M. Anderson, Jeffrey R. Kling, and Kate Stith, *Measuring Interjudge Disparity: Before and After the Federal Sentencing Guidelines*, 42 J. LAW & ECON. 271, 273 (1999) (finding a decrease in sentencing disparity between randomly selected judges during the early years of the guidelines); U.S. SENTENCING COMMISSION, *THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING* (1991) (hereinafter cited as *FEDERAL SENTENCING GUIDELINES*) (finding that the Guidelines reduced disparity); U.S. GENERAL ACCOUNTING OFFICE, *SENTENCING GUIDELINES – CENTRAL QUESTIONS REMAIN UNANSWERED* (1992) (reanalyzing Sentencing Commission disparity data, cautiously concurring with the Commission’s conclusions that disparity appears to have been reduced, but raising important questions about the robustness of the Commission’s conclusions). Cf., G.W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991) (contending that the Guidelines did not reduce sentencing disparity).
22. See Hofer, Blackwell, and Ruback, *supra* note 21, at 241 (finding increases in inter-district disparity since the adoption of the guidelines, particularly in drug cases). See also Frank O. Bowman, III and Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data From the District Level*, 87 IOWA L. REV. 477, 530-534 (2002) (hereinafter cited as *Quiet Rebellion II*) (discussing wide variation in average drug sentences between federal circuits).

Moreover, there is reason to suppose that developments such as the legitimization of “fast-track” programs under the Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003 will increase interdistrict disparity by giving the Justice Department discretion to create geographic zones in which special sentencing rules are adopted to facilitate case management concerns of prosecutors and courts. “Fast-track” programs are created to speed case processing in high-volume types of cases or in high-volume districts by offering extraordinary sentencing discounts in return for early pleas. They require an initiative by the prosecution to create the program and make the plea offers, and the cooperation of judges in accepting the resulting pleas. Such programs were formerly unsanctioned by the Guidelines and were a source of friction between local U.S. Attorney’s Offices and the Department of Justice in D.C. The PROTECT Act confers power on the Attorney General to authorize such programs and mandates a special guidelines provision for them. Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675(2003). See Memorandum from Attorney General John Ashcroft to All Federal Prosecutors 2 (September 22, 2003) (available at <http://news.findlaw.com/hdocs/docs/doj/ashcroft92203.pdf>, and at http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm, at 6-7) (describing circumstances under which Attorney General will authorize fast track programs). In response to this mandate, the Sentencing Commission created an “early disposition” departure. USSG § 5K3.1 (2004). For a discussion of fast-track programs in a number of Mexican border districts, see *Implementing Requirements of the PROTECT Act: Hearing Before the U.S. Sentencing Commission* (September 23, 2003) (available at http://www.ussc.gov/hearings/9_23_03/092303PH.pdf). For a defense of fast-track departures, see Michael M. O’Hear, *Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departure*, 27 HAMLINE L. REV. 357 (2004).

23. U.S. BUREAU OF JUSTICE ASSISTANCE (BJA), *NATIONAL ASSESSMENT OF STRUCTURED SENTENCING* 97 (1996) (available at <http://www.ncjrs.org/pdffiles/strsent.pdf>) (“There is substantial evidence to show that sentencing disparity has been reduced by presumptive guidelines in several jurisdictions. However, there is also evidence to show that some of the early progress achieved in these States may be slowly eroding.”); Casey Bateman, Greg Jones, Kristin Quayle, and Mary Uhlfelder, *Issues in Maryland Sentencing: An Analysis of Unwarranted Sentencing Disparity* (available at http://www.msccsp.org/publications/issues_disparity.html) (“Other states with recent research on sentencing disparity found that the guidelines were immediately effective in disparity reduction; yet the system tended to find ways to return to its original status.”). Some members of the Committee are less concerned about regional disparity than others, viewing some degree of regional sentencing variation as inevitable and, within sensible limits, perhaps desirable.

24. For example, in 2003, 42.9 percent of all defendants sentenced under the Guidelines were Hispanic, while 23.2 percent were black. U.S. SENTENCING COMMISSION, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 16, tbl. 4 (2005). In 2002, sentenced federal defendants were 41 percent Hispanic, and 24.6 percent black. U.S. SENTENCING COMMISSION, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 14, tbl. 4 (2003).

25. Numerous studies have addressed the question of whether the Federal Sentencing Guidelines and other federal sentencing measures, such as mandatory minimum sentences, have had a measurable effect on racial disparity at sentencing. See, e.g., BJA, *supra* note 23, at 86-97 (surveying data and literature). There is no dispute that the proportion of federal inmates who are members of minority groups has increased during the Guidelines era. The two questions that remain the subject of heated dispute are: (1) whether any of the federal sentencing laws (both statutes and guidelines) enacted since the early 1980s are unjustifiably discriminatory in the sense of imposing enhanced punishment for crimes that are more commonly committed by members of minority groups, but are no more heinous than analogous offenses more commonly committed by non-minority groups; and (2) whether, and if so to what degree, the disproportionate representation of minority group members in federal prisons can be attributed to conscious or unconscious bias by front-line sentencing actors such as judges and prosecutors in the application of facially neutral laws. Compare David B. Mustard, *Racial, Ethnic and Gender Disparities in Sentencing: Evidence from U.S. Federal Courts*, 44 J.L. & Econ. 285, 308 (2001) (finding disparities in 1991 to 1995 sentencing data), with Panel 1: *Disparity in Sentencing-Race and Gender*, 15 FED. SENT. REP. 160, 161 (2003) (Kevin Blackwell’s paper, developed with Paul Hofer) (criticizing Mustard and other similar studies for failing to control for effects of minimum mandatory sentences and departures and finding that, while certain racial disparities in federal sentencing data are statistically significant, they are small in comparison to legally relevant considerations).

26. For overviews of the recent history and status of state sentencing reform efforts, see Frase, *State Sentencing Guidelines*, *supra* note 7; Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS UNIV. L.J. 425 (2001) (hereinafter cited as *Guided Discretion*) (surveying the structures and purposes of state sentencing guideline systems). For in-depth treatments of several individual state sentencing reform efforts, see Ronald F. Wright and Susan P. Ellis, *A Progress Report on the North Carolina Sentencing and Policy Advisory Commission*, 28 WAKE FOREST L. REV. 421 (1993); Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980-2000*, 29 CRIME & JUST. 39 (2002); Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN. ST. L. REV. 1087 (2005).

27. In this regard, Anglo-American practice differs from that of many other countries in which victims and/or their families are accorded the status of parties to criminal actions with defined procedural rights in consequence of that status. See, e.g., Renee Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D’Assises*, 2001 U. ILL. L. REV. 791, 819-820 (2001) (describing the “civil party” and the ability to seek civil damages as part of the criminal process in France); Michael K. Browne, *International Victim’s Rights Law: What Can Be Gleaned from the Victims’ Empowerment Procedures in Germany as the United States Prepares to Consider the Adoption of a “Victim’s Rights Amendment” to Its Constitution*, 27 HAMLINE L. REV. 15 (2004) (examining victims’ rights in German criminal proceedings); Criminal Procedure Law of Mongolia, Article 42 (setting out the rights of victims as parties to criminal prosecutions, including the right to counsel and the right to participate in the trial of the case).

28. For arguments in favor of involving victims, see generally Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Amendments in Light of the Crime Victims’ Rights Act*, 2005 B.Y.U. L. REV. 835 (2005); Paul G. Cassell, *Barbarians at the Gates: A Reply to the Critics of the Victims’ Rights Amendment*, 1999 UTAH L. REV. 479 (1999). For a comprehensive review of victim’s current role in criminal process, see DOUGLAS E. BELOOF, PAUL G. CASSELL, AND STEPHEN K. TWIST, *VICTIMS IN CRIMINAL PROCEDURE* (2d ed. Carolina Academic Press 2005).

29. The Committee did not address the question of how important “truth in sentencing” should be in comparison to other objectives of a sentencing system. Nor did the group revisit the question of whether back-end release authority should be revived in any form in the federal system. For a thought-provoking discussion of how the institution of parole release might be reinvigorated within a guidelines system, see Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377 (2005).

30. Frase, *Guided Discretion*, *supra* note 26 (surveying the structures and purposes of state sentencing guideline systems).
31. *See, e.g.*, Va. Code Ann. § 17.1-803 (Lexis 1950 & Supp 2004) (creating a sentencing commission with the power to develop, maintain and modify a system of discretionary sentencing guidelines).
32. *See, e.g.*, Ark. Stat. § 16-90-801 (1987 & Supp 2003) *et seq.* (establishing an Arkansas Sentencing Commission and advisory sentencing guidelines or standards). *See also*, Frase, *Guided Discretion*, *supra* note 26, at 446 (describing the degree to which particular state guideline systems are mandatory).
33. *See* American Law Institute, *Model Penal Code: Sentencing Report* (April 11, 2003).
34. *Id.* at 49-50.
35. For an early critique of the interaction of statutory mandatory minimum sentences with the guidelines sentencing model by several important actors in the process of creating the Federal Sentencing Guidelines, see William W. Wilkins, Jr., Phyllis J. Newton, and John R. Steer, *Competing Sentencing Policies in a "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305 (1993).
36. *See, e.g.*, Rev. Stat. of Missouri § 565.020(2) (2006) (imposing a minimum penalty of life imprisonment, and providing for the possibility of capital punishment, upon conviction of first degree murder).
37. *See, e.g.*, 18 U.S.C. § 924(c) (2004) (imposing mandatory minimum consecutive sentences for the use of a firearm during the commission of certain enumerated offenses).
38. One of the most consistent critics of mandatory minimum sentences has been the U.S. Sentencing Commission. *See, e.g.*, U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUMS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 33 (August 1991) (available at http://www.usc.gov/r_congress/MANMIN.PDF) ("In summary, it would appear that all of the intended purposes of mandatory minimums can be equally or better served by guidelines, without compromising the crime control goals to which Congress has evidenced its commitment."); Statement of John R. Steer, Member and Vice-Chair of U.S. Sentencing Commission, before the House Governmental Reform Subcommittee on Criminal Justice, Drug Policy, and Human Resources, May 11, 2000 (available at <http://www.usc.gov/hearings/steer5110tes.htm>) (commenting critically on the interaction of mandatory minimum sentences and the sentencing guidelines).
39. *See, e.g.*, Ronald F. Wright, *Drug Sentences As a Reform Priority*, 5 FED. SENT. REP. 199 (1993).
40. *See* BJA, *supra* note 23, at 89.
41. *See* the discussion of institutional imbalance in the federal system *infra* at 34.
42. *See, e.g.*, Speech by Anthony M. Kennedy, American Bar Association Annual Meeting (August 9, 2003) (available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html) (observing that because federal sentences are often too long the "Federal Sentencing Guidelines should be revised downward," and that "[i]n too many cases, mandatory minimum sentences are unwise and unjust."); KATE STITH and JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 59–65 (Chicago 1998) (discussing the Guidelines' role in increasing average sentences); Aaron Rappaport, *The State of Severity*, 12 FED. SENT. REP. 3 (1999); MICHAEL TONRY, SENTENCING MATTERS 78-79 (Oxford 1996); Kevin Blackwell, *A Comparison of State and Federal Guidelines: The Resentencing Project* 24 (U.S. Sentencing Commission, no date) (in thirty-six of fifty sentencing comparisons, defendants faced more severe penalties under federal law than in the four state systems compared).

In addition, there is a body of literature noting that American criminal sentences, both federal and state, are substantially higher than is the case in most other Western democracies. *See, e.g.*, JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (OXFORD 2003); U.S. BUREAU OF JUSTICE STATISTICS, *GERMAN AND AMERICAN PROSECUTIONS: AN APPROACH TO STATISTICAL COMPARISON* 27-35

(Government Printing Office 1998); RICHARD S. FRASE, SENTENCING IN GERMANY AND THE UNITED STATES: COMPARING ÄPFEL WITH APPLES 51-52 (Max Planck Inst 2001); Richard S. Frase, *Sentencing Laws & Practices in France*, 7 FED. SENT. REP. 275 (1995); James P. Lynch, *A Comparison of Prison Use in England, Canada, West Germany, and the United States: A Limited Test of the Punitive Hypothesis*, 79 J. CRIM. L. & CRIMINOL. 180, 198 (1988). Consider MICHAEL TONRY AND RICHARD S. FRASE, EDs., SENTENCING AND SANCTIONS IN WESTERN COUNTRIES (Oxford 2001); MICHAEL TONRY AND KATHLEEN HATLESTAD, EDs., SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE (Oxford 1997).

43. U.S. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1994 1 (1995).
44. U.S. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2002 1 (2003).
45. FEDERAL SENTENCING GUIDELINES, *supra* note 21, at 376, fig. 14.
46. U.S. SENTENCING COMMISSION, ANNUAL REPORT: 1990 52, fig. 4 (1991).
47. U.S. SENTENCING COMMISSION, 2003 SOURCEBOOK, *supra* note 24, at 29, fig. D.
48. U.S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES, *supra* note 45, at 378.
49. U.S. SENTENCING COMMISSION, ANNUAL REPORT: 1995 61, fig. F (1996).
50. *Id.*
51. The mean federal sentence declined to 54.9 months in 2001, U.S. SENTENCING COMMISSION, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 30, tbl. 14 (2002), before ticking back up to 55.4 months in 2002, U.S. SENTENCING COMMISSION, 2002 SOURCEBOOK, *supra* note 24, 30, fig. D, and 56.8 months in 2003, U.S. SENTENCING COMMISSION, 2003 SOURCEBOOK, *supra* note 24, at 30, tbl. 14. The causes of the recent upturn in mean sentence length have not yet been studied, though increased emphasis by the Bush Administration's Justice Department on prosecutorial and judicial adherence to the guidelines is one factor that suggests itself.
52. U.S. SENTENCING COMMISSION, 2003 SOURCEBOOK, *supra* note 24, at 29, fig. D. In 2003, 83.3 percent of convicted federal defendants received a prison-only sentence. Three percent received a sentence of prison and community confinement. Of the remainder, 4.7 percent received a sentence consisting of probation and some form of non-prison confinement. *Id.*
53. U.S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES, *supra* note 45, at 378.
54. See Paul J. Hofer and Courtney Semisch, *Examining Changes in Federal Sentencing Severity: 1980-1998*, 12 FED. SENT. REP. 12, 13 (1999).
55. See, e.g., Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978-2003*, 32 CRIME & JUST. 131, 172-74 (2005) (discussing upward and downward departures from Minnesota guidelines ranges).
56. U.S. SENTENCING COMMISSION, 2003 SOURCEBOOK, *supra* note 24, at 53, fig. G. Roughly half of these downward departures are "substantial assistance" departures awarded on motion of the government for cooperation in the investigation or prosecution of others. The other half are downward departures ordered by judges for some other reason. *Id.*
57. *Id.*
58. Bowman and Heise, *Quiet Rebellion*, *supra* note 11; Bowman and Heise, *Quiet Rebellion II*, *supra* note 22. The mean sentence for federal drug offenders trended slightly upward in 2002-03. The causes of this trend have not yet been the subject of any published study.

59. See, e.g., Testimony of Christopher Wray, Assistant Attorney General, Before the U.S. Sentencing Commission (November 17, 2004) (available at http://www.ussc.gov/hearings/11_16_04/Wray-testimony.pdf). See also, Frank O. Bowman, III, *Murder, Meth, Mammon, and Moral Values*, 44 WASHBURN L. J. 495, 500-507 (2005) (summarizing arguments about the effectiveness of increased incarceration as an anti-crime tool).
60. See, e.g., STITH AND CABRANES, *supra* note 42, at 3, 33, 91-93 (contending that the Guidelines are too complex and suggesting that they may usefully be compared to the Internal Revenue Code).
61. R. Barry Ruback and Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCH. PUB. POL. & L. 739 (2001) (arguing that the complexity of the Guidelines undermines the purposes of sentencing reform).
62. See Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 328-29 (2000) (discussing arguments that the Guidelines are too complex to understand or apply); Ronald F. Wright, *Complexity and Distrust in Sentencing Guidelines*, 25 U.C. DAVIS L.R. 617 (1992) (discussing the reasons for and utility of complexity in the design of the federal sentencing guidelines).
63. See, e.g., Robert Weisberg and Marc L. Miller, *Sentencing Lessons*, 58 STAN. L. REV. 1 (2005) (reviewing criticisms of federal sentencing guidelines, and noting that excessive rigidity is a common theme of such criticisms); Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 STAN. L. REV. 37 (2005) (criticizing the pre-Booker Federal Sentencing Guidelines as too rigid); Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 JUDICATURE 173, 178 (1995) (“[S]tate guidelines generally appear to be more balanced than the federal version. Offender characteristics receive more weight in most state systems, departures are more common, sentencing is less severe, and sentencing power, at both the policy-making and individual case level, is shared more broadly.”).
64. See, e.g., Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004); and Kennedy, *supra* note 42 (questioning the wisdom and justice of mandatory minimum sentences). Concern about the effect of mandatory minimum sentences on the federal guidelines structure arose and has persisted since the earliest days of the guidelines regime. See U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (August 1991) (available at http://www.ussc.gov/r_congress/MANMIN.PDF).
65. Anti-Drug Abuse Act of 1986 (ADAA), Pub. L. No. 99-570, 100 Stat. 3207, codified in 21 USC § 801 *et seq.*
66. See Bowman and Heise, *Quiet Rebellion*, *supra* note 11, at 1059-62 (explaining how mandatory minimum sentences for drug crimes affected the structure of drug sentencing guidelines); Michael H. Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 FED. SENT. REP. 355, 358 (1992) (suggesting that the Sentencing Commission could have set guideline sentences without treating the minimum mandatory sentence as the appropriate sentence for the least culpable offenders to which mandatory minimum statutes applied); Kate Stith and Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 283-84 (1993) (expressing sympathy with the view expressed by Professor Tonry and others, but concluding that the structure of the Guidelines is consistent with the intent of Congress in enacting the SRA and related mandatory minimum sentencing statutes).
67. See, e.g., Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentences*, 101 YALE L. J. 1681, 1752-53 (1992) (“[T]he Commission elected the wrong policies for federal sentencing reform. . . . It has opted for rigidity rather than flexibility in its approach”).
68. *Id.* at 1715 (“Perhaps no provisions in the guidelines evoke more dismay from the federal judiciary, the probation service, and the bar than the policy statements assembled in chapter 5H . . .”).
69. 518 U.S. 81 (1996).
70. *Id.* at 99.

71. See PROTECT Act, *supra* note 22, at § 401 (detailing when a judge may impose a sentence below the Guidelines standard).
72. See Jon O. Newman, *Toward Guidelines Simplification*, 13 FED. SENT. REP. 56 (2000) (criticizing complexity of fraud loss table); Jon O. Newman, *Five Guidelines Improvements*, 5 FED. SENT. REP. 190 (1993) (the advocating abandonment of “the current excessive reliance on the drug quantity table as the major determinant of drug sentences”).
73. For discussions of the operation of relevant conduct, see David N. Yellen, *Is “Relevant Conduct” Relevant? Reconsidering the Guidelines’ Approach to Real Offense Sentencing*, 44 ST. LOUIS. U. L.J. 409 (2000); David Yellen, *Just Deserts and Lenient Prosecutors: The Flawed Case for Real Offense Sentencing*, 91 N.W. U. L. REV. 1434 (1997); Julie R. O’Sullivan, *In Defense of the U.S. Sentencing Guidelines’ Modified Real Offense System*, 91 N.W. U. L. REV. 1342 (1997).
74. See William W. Wilkins and John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 497-500 (1990) (discussing the Sentencing Commission’s choice between an offense-of-conviction system and a relevant-conduct system).
75. See Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 U.C.L.A. L. REV. 83, 93-95 (1988) (discussing the problems that plea bargaining presents for application of the Guidelines).
76. See Stephen J. Schulhofer and Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 N.W. U. L. REV. 1284, 1292 (1997) (finding that the Guidelines are circumvented or evaded in roughly 20-35 percent of the cases resolved through guilty pleas).
77. See Breyer, *supra* note 7, at 10-11 (“Typically, courts have found post-trial sentencing facts without a jury and without the use of such rules of evidence as the hearsay or best evidence rules, or the requirement of proof of facts beyond a reasonable doubt.”)
78. FRANKEL, *supra* note 9, at 26-38 (discussing the pre-Guidelines trial judge’s broad discretionary power over pre-sentencing hearings).
79. See *Blakely*, 542 U.S. at 306-07. Some observers have suggested that the difficulties with relevant conduct could at least be ameliorated by according less weight in the Guidelines calculus to relevant conduct not directly involved in the offense or offenses of conviction. See Newman, *supra* note 72.
80. *Blakely*, 542 U.S. at 306-07.
81. See *Apprendi*, 530 U.S. 466 (2000) (Breyer dissenting); *Almendarez-Torres v. United States*, 523 U.S. 224, 243 (1998); *United States v. Watts*, 519 U.S. 148, 157 n 2; *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986).
82. Dale G. Parent, *What Did the United States Sentencing Commission Miss?*, 101 YALE L. J. 1773, 1775 (1992) (noting that the Minnesota Sentencing Commission, in contrast to the United States Sentencing Commission, realized that “[t]he creation of a guidelines commission merely shifted the politics of sentencing reform from the legislature to a commission”).
83. In the late 1990’s, various commentators noted that the Sentencing Commission was intended to serve as a forum for policy debate and suggested improvements in the Commission’s procedures and institutional approach to better achieve that result. See Marc L. Miller and Ronald F. Wright, *Your Cheatin’ Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723 (1999); Frank O. Bowman, III, *Practical Magic: A Few Down-to-Earth Suggestions for the New Sentencing Commission*, 12 FED. SENT. REP. 101, 103-04 (1999).
84. 28 USC § 991(a) (1993 & Supp 2004).
85. See Bowman, *The Quality of Mercy*, *supra* note 4, at 724-32; and Frank O. Bowman, III, *To Tell the Truth: The Problem of Prosecutorial “Manipulation” of Sentencing Facts*, 8 FED. SENT. REP. 324 (1996).

86. For a description of the mechanisms for micromanagement afforded by the current system, see Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315 (2005).
87. See Marc Mauer, *Lessons of the "Get Tough" Movement in the United States 2*, Presented at the 6th Annual Conference of the International Corrections and Prison Association The Sentencing Project (October 25, 2004) (available online at <http://www.sentencingproject.org/pdfs/mauer-icpa.pdf>) ("88% of [the rise in inmate populations from 1980-96] was a result of changes in sentencing policy, and just 12% due to changes in crime.")
88. See Frase, *Guided Discretion*, *supra* note 26 (surveying the structures and purposes of state sentencing guideline systems).
89. See Jon Wool and Don Stemen, *Changing Fortunes or Changing Attitudes? Sentencing and Corrections Reforms in 2003*, Vera Institute of Justice (March 2004) (discussing how state budget shortfalls have translated into reduction of criminal penalties); Daniel F. Wilhelm and Nicholas R. Turner, *Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?*, Vera Institute of Justice (June 2002) (same).
90. See Ronald K. Snell, *State Balanced Budget Requirements: Provisions and Practice* (available at <http://www.nsl.org/programs/fiscal/balbuda.htm>) (outlining the nature of balanced budget requirements in all 50 states and Puerto Rico).
91. In 2001, the federal government spent approximately \$25 billion on direct expenditures for criminal and civil justice, while state governments spent nearly \$59 billion, and local governments spent over \$83 billion. U.S. BUREAU OF JUSTICE STATISTICS, EXPENDITURE AND EMPLOYMENT STATISTICS (available at <http://www.ojp.usdoj.gov/bjs/eande.htm>). In 2001, the federal budget was \$1.8 trillion dollars, and thus federal expenditures for criminal and civil justice constituted approximately 1 percent of the federal budget that year. EXECUTIVE OFFICE OF THE PRESIDENT, A CITIZEN'S GUIDE TO THE FEDERAL BUDGET: BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 2001 iii (available at <http://www.gpoaccess.gov/usbudget/fy01/pdf/guide.pdf>). As for state and local governments, their expenditures in 2001 totaled \$2.048 trillion dollars, and thus state and local expenditures for criminal and civil justice constituted approximately 7 percent of state and local budgets that year. U.S. CENSUS BUREAU, STATE AND LOCAL GOVERNMENT FINANCES BY LEVEL OF GOVERNMENT AND BY STATE: 2001-02, tbl. 1 (available at http://www.census.gov/govs/estimate/0200ussl_1.html).
92. Frase, *supra* note 64, at 175. See also, Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina: 1980-2000*, 29 CRIME & JUSTICE 39 (2002) (discussing North Carolina's efforts to match crime control and penological objectives with available resources); Richard S. Frase, *Sentencing Guidelines in the States: Lessons for State and Federal Reformers*, 10 FED. SENT. REP. 46, 46 (1997) ("[S]tate guideline reforms are increasingly motivated by a desire to gain better control over escalating prison populations; several states (and the ABA Standards) directly link recommended sentences to available correctional resources.")
93. Between 1974 and 2002, the number of federal and state prisoners rose from 216,000 to 1,355,748, a more than five-fold increase. Between 1974 and 2001, the rate of imprisonment rose from 149 inmates to 628 inmates per 100,000 population, a more than four-fold increase. Jail populations have increased markedly. Between 1985 and 2002, the number of persons held in local jails more than doubled, from 256,615 to 665,475. By mid-year 2002, the combined number of inmates in federal and state prisons and jails exceeded two million. Bowman, *supra* note 60, at 496-97.
94. See, e.g., Jenni Gainsborough and Marc Mauer, *Diminishing Returns: Crime and Incarceration in the 1990's*, The Sentencing Project (September 2000) (available at <http://www.sentencingproject.org/pdfs/9039.pdf>); Steve Aos, *The Criminal Justice System in Washington State: Incarceration Rates, Taxpayer Costs, Crime Rates, and Prison Economics*, Washington State Institute for Public Policy (January 2003) (available at <http://www.wsipp.wa.gov>).
95. 542 U.S. 296 (2004).
96. *Id.* at 299.
97. See Wash. Rev. Code Ann. §§ 9A.40.030(3), 9A.20.021(1)(b) (West 2003).

98. *Id.* at § 9.94A.515 (seriousness level V for second-degree kidnapping); *id.* at App. 27 (offender score two based on § 9.94A.525); *id.* at § 9.94A.510(1) box 2-V (standard range of thirteen to seventeen months); *id.* at § 9.94A.510(3)(b) (36 month firearm enhancement).
99. *Id.* at § 9.94A.535(2)(a).
100. *See Blakely*, 542 U.S. at 300.
101. *Id.*
102. *Apprendi*, 530 U.S. at 490.
103. *See* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L. J. 1097, 1102-23 (2001) (discussing Supreme Court cases regarding the distinction between elements of a crime and sentencing factors); Nancy J. King and Susan R. Klein, *Après Apprendi*, 12 FED. SENT. REP. 331 (2000) (discussing the appeals of sentences affected by *Apprendi*).
104. *Apprendi*, 530 U.S. at 468-69.
105. *Id.* at 491-97.
106. *Blakely*, 542 U.S. at 303, citing Wash. Rev. Code. Ann. §9.94A.420 (2000).
107. Whether the facts that before *Blakely* would have been called “sentencing factors” are now “elements” in every sense of the word remains an open question. For example, it is clear that “elements” of a federal crime must be alleged in the indictment, but it is so far unclear whether these new element-like sentencing factors must be alleged in the indictment or whether due process might be satisfied by an information or some other form of pre-trial pleading. Similarly, if a pre-*Blakely* “element” was not proven beyond a reasonable doubt, the trial court would have an obligation under Fed.R.Crim.P. 29 to dismiss the charge containing the unproven element. But failure to prove a post-*Blakely* element-like sentencing factor seems unlikely to require dismissal of the underlying charge. Rather, the failure of proof would probably only bar the sentencing enhancement associated with the unproven element.
108. 477 U.S. 79 (1986).
109. 536 U.S. 545 (2002).
110. *Blakely*, 542 U.S. at 305.
111. Indeed, Justice Scalia expressly invokes the metaphor in his opinion. He says of those who criticize the *Apprendi* decision that they must either grant legislatures the unfettered right to designate elements and sentencing factors, or conclude that “legislatures may establish legally essential sentencing factors within limits – limits crossed when, perhaps, the sentencing factor is a ‘tail which wags the dog of the substantive offense.’ What this means in operation is that the law must not go too far – it must not exceed the judicial estimation of the proper role of the judge. The subjectivity of this standard is obvious.” *Blakely*, 542 U.S. at 307, quoting *McMillan*, 477 U.S. at 88.
112. For example, conviction of bank robbery, 18 U.S.C. § 2113 (2004), exposes the defendant to a statutory maximum sentence of twenty years imprisonment. The fact of conviction generates a base offense level of 20 under U.S.S.G. § 2B3.1(a) (2004). Standing alone, a base offense level of 20 generates a sentencing guideline range of 33-41 months, assuming that the defendant is a first-time offender. U.S.S.G. §5A (2004) (Sentencing Table). However, if the sentencing judge finds, post-conviction, that the defendant used a firearm in the commission of the robbery or injured a victim, the offense level can be increased by up to eleven levels, U.S.S.G. §§ 3B3.1(b)(2), (3) (2004) pushing the defendant’s guideline range up to 108-135 months. U.S.S.G. § 5A (Sentencing Table). Further increases are possible for judicial findings of amount of loss, U.S.S.G. § 3B3.1(b)(7), and other factors.

113. 543 U.S. 220 (2005).
114. Justices Scalia, Stevens, Thomas, Souter, and Ginsburg.
115. 543 U.S. at 648-51.
116. Only Justice Ginsburg joined both halves of the Court’s opinion.
117. 18 U.S.C. § 3553(b)(1) (2004) and 18 U.S.C. § 3742(e) (2004).
118. 543 U.S. at 651.
119. 543 U.S. at 660-62.
120. A small sample of the many discussions of what *Booker* really means would include: Ronald J. Allen and Ethan A. Hastert, *From Winship to Apprendi to Booker: Constitutional Command or Constitutional Blunder?* 58 STAN. L. REV. 195 (2005); Douglas A. Berman, *Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. LAW & CRIMINOL. 653 (2005); Margareth Etienne, *Into the Briar Patch? Power Shifts Between Prosecution and Defense After United States v. Booker?* 29 VALP. L. REV. 741 (2005); Craig Green, *Booker and Fanfan: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 GEO. L.J. 395 (2005); Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149, 181-86 (2005).
121. Justices Stevens and Scalia adopt this view in their *Booker* dissents. 543 U.S. at 685 (“[J]udges must still *consider* the sentencing range contained in the Guidelines, but that range is now nothing more than a suggestion that may or may not be persuasive to a judge when weighed against the numerous other considerations listed in 18 U.S.C. § 3553(a) (2004) (Stevens dissenting) (emphasis in original); *id.* at 688 (“Thus, logic compels the conclusion that the sentencing judge, after considering the recited factors (including the Guidelines), has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range. If the majority thought otherwise – if it thought the Guidelines not only had to be ‘considered’ (as the amputated statute requires) but had generally to be followed – its opinion would surely say so.”) (Scalia dissenting).
122. Some courts have held that the Guidelines should be accorded “heavy weight.” *See, e.g., United States v. Wilson*, 350 F.Supp.2d 910 (D. Utah 2005), *reaff’d* by 355 F.Supp.2d 1269 (D. Utah 2005). The Seventh and Eighth Circuits have found that a sentence within the guideline range is “presumptively reasonable.” *United States v. MyKytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States v. Cawthorn*, 429 F.3d 793,208 (8th Cir. 2005). Other courts have said only that sentencing judges must “consider” the Guidelines together with other factors listed in 18 U.S.C. § 3553(a). *See, e.g., United States v. Crosby*, 397 F.3d 103, 112 (2d Cir. 2005). *See also* Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 MAINE L. REV. 569 (2005) (discussing status of guidelines post-*Booker*). Whatever verbal formula is employed, the behavior of judges since *Booker* as reflected in statistics collected by the U.S. Sentencing Commission suggests that judges continue to sentence defendants within the bounds of the applicable guideline range at a rate only modestly lower than was the case prior to *Booker*. The Sentencing Commission reports that, as of November 1, 2005, 61.7 percent of the cases sentenced after the decision in *Booker* were sentenced within the applicable guideline range. U.S. SENTENCING COMMISSION, SPECIAL POST-BOOKER CODING PROJECT 1 (November 2005) (available at http://www.uscc.gov/Blakely/PostBooker_111005.pdf). By comparison, in 2003, the most recent pre-*Booker* year for which data are available, the percentage of within-range sentences was 69.4 percent. U.S. SENTENCING COMMISSION, 2003 SOURCEBOOK, *supra* note 24, at tbl. 26. And from 1999-2002, the rate of within range sentences was consistently at or below 65 percent. U.S. SENTENCING COMMISSION, 2002 SOURCEBOOK, *supra* note 24, at 51, fig. G. In short, the current rate of compliance with the Guidelines is only 2-3 percent below the rate that persisted for years while the Guidelines were mandatory, binding, and in full legal effect. One cannot predict with any certainty whether the pattern of high rates of judicial compliance with the now-advisory Guidelines will persist. So long as it does, however, one may fairly conclude that the Guidelines remain the primary determinant of federal sentence lengths despite the Supreme Court’s decision in *Booker*.

