

**THE PROMISE OF TRAILING-EDGE SENTENCING GUIDELINES
TO RESOLVE THE CONFLICT
BETWEEN UNIFORMITY AND JUDICIAL DISCRETION**

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Until the mid-1980's, federal judges had broad discretion in sentencing defendants. However, this created disparities in sentencing from one judge to another, and this in turn created a desire for much greater uniformity. The drive for uniformity resulted in a number of strict legislative measures, including mandatory minimum sentences and mandatory sentencing guidelines. Over time, the judiciary branch grabbed back some discretion (largely through the Supreme Court's Booker decision in 2005, which made the sentencing guidelines advisory rather than mandatory), but this has resulted in a return to disparities.

The underlying problem is a view of sentencing that sees a zero-sum equation between judicial discretion and uniformity—that is, the belief that uniformity must be established by curtailing judicial discretion. This Article argues for a different model: sentencing guidelines that use peer effects and modern technology to directly use judicial discretion to create uniformity. Instead of mandated, arbitrary guidelines, a computer-based sentencing information system would require a sentencing judge to review and consider all the other sentences chosen by judges in similar situations, and this body of experience would functionally become the guidelines. A judge who strays too far from the norm would have to justify that choice based on unusual and compelling circumstances. Such a system would harness discretion as the engine towards uniformity, and discard the false dichotomy between the two that has created so much discord.

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I. INTRODUCTION

Choosing between a positive value and a negative one, between good and evil, is easy: It hardly invites controversy to say that individuals should work hard rather than steal things. What is difficult, though, is to elect just one of two positive values that seem to be in opposition. For example, peace and justice are both good things, but sometimes it may feel necessary to breach the peace in order to pursue justice. Which should one choose: peace or justice?

This Article looks at one such societal dilemma—the seemingly necessary choice between judicial discretion and uniformity in criminal sentencing, a choice that is often made (via mandatory minimums and sentencing guidelines) in favor of uniformity at the expense of discretion. As the costs of that choice become increasingly clear, it is time to consider a different resolution that honors both values by using the discretionary choices of judges, in the aggregate, to serve as guideline measures which then create uniformity through peer effects. In other words, judges' collective decisions at sentencing should literally become the guidelines through the use of a computer-based sentencing information system.

The challenge considered here is not unique. Perceived trade-offs between positive attributes are a common problem in many fields. For example, for decades automotive engineers struggled with a fundamental dilemma in developing car engines. There was a strict trade-off between three attributes that those engineers wanted to attain: power, gas mileage, and pollution control. Fast cars got bad mileage and polluted the air. Cleaner cars got good mileage but did not have much pep. Finally, developing technology provided an answer—the hybrid car. By adding an electric motor to run in tandem with a gasoline engine, engineers could design and build a car that was much cleaner and got far better mileage, while providing as much or more power. No longer were mileage, pollution, and performance in opposition, and the only losers were those who did not take advantage of this new ability.

While automotive engineers struggled with the competing

values of mileage, pollution, and performance, those in the field of sentencing have long struggled with the tension between judicial discretion and the uniformity of sentences. In short, it is the use of discretion by judges that is most often blamed for sentencing disparities—judges often use their freedom, it seems, in disparate ways.¹ As with cars, the solution lies in technology: The technologic key proposed here is a computer-driven sentencing information system which would gather and display real-time information about federal sentencing and direct judges in making sentencing decisions.

The modern debate over sentencing generally assumes that discretion is the enemy of uniformity.² This oppositional construct became firm in 1984. With the passage of the Sentencing Reform Act that year,³ Congress made a striking choice to pit these two interests against one another. By imposing mandatory sentencing guidelines, judicial discretion was strikingly reduced to ensure uniformity.⁴ This choice resolved a dilemma discussed for years:

¹ Other factors, such as prosecutorial practices, also act to create disparities, but are not addressed here.

² *See infra* Part III.A. Few would disagree with the claim that both judicial discretion and uniformity are good things, however. The discernment of carefully chosen and experienced judges to distinguish one case from another is a good thing. In fact, it is precisely this type of discretion society looks for in choosing experienced attorneys to become judges, and it is to protect the free and proper use of such discretion that the U.S. Constitution grants those judges a life-long appointment and bars any attempt to lower their pay while in office. U.S. CONST. art. III, § 1. Similarly, most would concur that uniformity in sentencing is also a good thing—that a defendant sentenced by one judge should get about the same sentence that she would receive from the judge in the next courtroom. Yet, the current sentencing debate continually views these two positive values as being in zero-sum opposition; to value one is to take away from the other.

³ 18 U.S.C. §§ 3551–3586 (1985).

⁴ At the same time, discretion was also taken away from the parole board as the institution of parole was extinguished in the federal system. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 235, 98 Stat. 2031 (1984) (codified as amended in scattered sections of 18 U.S.C.). The simultaneous limitation of judges' discretion in sentencing and the elimination of parole had the net effect of shifting power from the judicial and executive branches to the legislative branch and the newly-formed U.S. Sentencing Commission. Erik

how to cabin judicial discretion and get rid of differential sentencing that seemed to be based more on the judge assigned than any other factor.⁵ After all, went the reasoning, it was the judges' very employment of their discretion that caused disparities in sentences.

That choice, to sacrifice the public employment of discretion in the pursuit of uniformity,⁶ led to decades of turmoil in federal sentencing as the values of discretion and uniformity were set in opposition. In today's federal courts, the costs of this turmoil include increasing disparities,⁷ continuing instability in the sentencing system,⁸ and a disconnect between judges' decisions and the evolution of the sentencing guidelines.⁹

In federal sentencing today, even with advisory rather than mandatory guidelines,¹⁰ there remains a strong tension between uniformity (ensuring that similar defendants get similar sentences) and judicial discretion (which allows for judges to come to different results in similar cases). The trade-off exists because the

Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 98–99 (2005) (“[T]he real sentencers in the federal system were the Commission from afar and the prosecutor in the case at bar. The judicial function at sentencing often was nothing more than ceremonial The judge, in other words, had lost the independence and no longer ensured that justice was done in individual cases.”).

⁵ Judges were acutely aware of the fact that their discretion was being limited. Perhaps the best articulation of judges' objections to this is found in Kate Stith and Jose Cabranes' *FEAR OF JUDGING: SENTENCING GUIDELINES IN FEDERAL COURT* (1998).

⁶ Some, including myself, have argued that judges continued to exercise considerable discretion in ways that often were not reflected in the public record. See, e.g., Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2005); Mark Osler, *Seeking Justice Below the Guidelines: Sentencing as an Expression of Natural Law*, 8 GEO. J. L. & PUB. POL'Y 167 (2010).

⁷ See *infra* Part III.B.1.

⁸ See *infra* Part III.B.2.

⁹ See *infra* Part III.B.3.

¹⁰ In 2005, the Supreme Court held that mandatory guidelines violated the Sixth Amendment, and imposed as a remedy the requirement that the federal sentencing guidelines be advisory rather than mandatory. *United States v. Booker*, 543 U.S. 220, 222 (2005).

advisory federal sentencing guidelines try to create uniformity at the direct expense of the sentencing judge's discretion—the U.S. Sentencing Commission (“the Sentencing Commission” or “the Commission”) directs an appropriate sentence, which then shapes an outcome, and a judge risks reversal if she strays from that guideline.¹¹

Like the hybrid car, the solution advanced in this Article relies on newly developed technology. Trailing-edge guidelines are simply this: Before sentencing a defendant, a judge enters aggravating and mitigating factors along with criminal history into a computer program, which then shows her an array of data points representing the sentences that similar defendants have received. Clicking on any one of the data points would open a pop-up window with additional data about that individual case.

This Article calls such guidelines “trailing-edge” because they follow judges' practices, instead of leading them. A trailing-edge system would ensure that guidelines are truly responsive to what judges actually think and do by incorporating their use of discretion directly into the evolution of the guidelines themselves.¹² The guideline ranges would be created dynamically through the Sentencing Commission (which would continue to compile data and identify relevant aggravating and mitigating factors) and the judges (who would essentially create the ranges that relate to a set of factors).

The beauty of trailing-edge guidelines is that they create uniformity through the exercise of discretion by judges, relying on peer efforts between and among sentencing judges. It not only

¹¹ This is true even after the Supreme Court's ruling in *Booker*, which converted the federal guidelines from a mandatory to an advisory system. *Id.* Under advisory guidelines, what is considered a “reasonable” sentence is still pegged to the sentencing guidelines, meaning that judges have strong incentives to stay within the guidelines to avoid the chance of reversal on appeal. *See Rita v. United States*, 551 U.S. 338, 347 (2007).

¹² The unresponsiveness of the guidelines has been a chronic problem, despite the availability of reasonable incremental reforms to partially address this, such as a ban on appeal waivers. *See* Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 177 (2005).

enables the sentencing system to simultaneously serve the goals of uniformity and judicial discretion, but pulls away from a sentencing process that is complex, frustrating, and dehumanizing, yet serves no rational goal very well.¹³ Once again, norms could evolve openly among those who work with criminal law every day, for the first time using peer effects across the broad span of the American continent.

Part II describes the current federal sentencing process, which places uniformity and judicial discretion in opposition, while Part III describes the significant costs of this structure. In turn, Part IV explores how a trailing-edge system could work in federal courtrooms and looks to the example of two jurisdictions (Missouri and Scotland) that have considered using parts of such a system. Finally, Part V outlines the advantages and challenges presented by such an admittedly radical change.

II. CURRENT POLICY: PLACING UNIFORMITY AND DISCRETION IN OPPOSITION

A. The Mechanics of the Guidelines' Suppression of Discretion

The federal sentencing guidelines, whether advisory or mandatory, operate to achieve uniformity through a simple zero-sum mechanism: Greater uniformity is achieved only at a direct cost to judicial discretion. That is, the Sentencing Commission can achieve uniformity around the sentences they recommend only so far as judges forfeit their discretion and actually follow those guidelines. Conversely, when judges ignore the sentencing guidelines and seize discretion (such as when they grant wide variances from the guideline range), sentencing disparities increase.¹⁴

¹³ The problems with the current system will not be chronicled here, as that has been adequately accomplished elsewhere. One excellent set of articles critiquing federal sentencing can be found in the October 2005 (Volume 58, Number 1) issue of the *Stanford Law Review*, which was entirely devoted to these questions.

¹⁴ Of course, it is possible that in some instances uniformity will result when judges ignore the guidelines, as those doing so will end up with similar

While it was left to the Sentencing Commission to implement these guidelines, Congress created the zero-sum equation through the Sentencing Reform Act of 1984.¹⁵ Though there are many complex aspects to that Act, at its heart is a consistent theme—to create uniformity by limiting judicial discretion.¹⁶

The resulting federal law not only expressly directs a sentencing judge to “avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,”¹⁷ but also structures the sentencing process so that it hinges on a presentence report prepared by a probation officer,¹⁸ while requiring that this report identify the “applicable guidelines,”¹⁹ “calculate the defendant’s offense level and criminal history category” under those guidelines,²⁰ and state the resulting guideline range.²¹ Thus, the guidelines become the template for a presumptive sentence regardless of whether guidelines are mandatory (as they were before *United States v. Booker*²²) or advisory (as they are now). Even with the guidelines being advisory, the underlying process is the same and is always centered on the guidelines: The primary purpose of the presentence investigation report, for example, is to give the judge an accurate sentencing range under the guidelines, and there is a power to the existence of that objective-looking calculation sitting before the judge as she hears the sentencing arguments of the parties.

sentences outside of the guideline range. For example, if all the judges in a given district go below guidelines on low-level white-collar crime cases, this will result in more uniformity than if some followed the guidelines while others did not.

¹⁵ Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 218(a)(5), 98 Stat. 2027 (1984) (codified at 18 U.S.C. §§ 3551–3586).

¹⁶ The wholesale removal of parole from the system, of course, also created uniformity in the sentences actually served by not just limiting but dismantling the second-look institution of parole. *See id.*

¹⁷ 18 U.S.C. § 3553(a)(6) (2010).

¹⁸ *See id.* § 3552(a).

¹⁹ FED. R. CRIM. P. 32(d)(1)(A).

²⁰ *Id.* at 32(d)(1)(B).

²¹ *Id.* at 32(d)(1)(C).

²² 543 U.S. 220 (2005).

More important, in terms of the trade-off between discretion and uniformity, is the strong personal incentive within the guideline system for judges to issue sentences within the guideline range.²³ Judges, naturally, do not like to be reversed on appeal. Reversals both create more work (in this case, a resentencing) and express a failure in judgment on the part of the sentencing judge.²⁴ One way to avoid reversal is to sentence a defendant within the guideline range, because the great majority of U.S. Courts of Appeal presume that a within-guideline sentence is reasonable, a presumption that has been approved by the Supreme Court.²⁵

Even in a post-*Booker* world, the federal sentencing guidelines continue to suppress judicial discretion in favor of mandated uniformity, through the structure of the sentencing process and the presumptive reasonableness of within-guideline sentences. Of course, to the degree that judges do vary from the advisory guidelines, they are creating disparities between their practices and those of judges who remain within the guidelines, and thus uniformity is lost and the zero-sum game continues.

B. *The Continuing Value of Both Uniformity and Discretion*

While the guideline regime continues to disfavor discretion and favor uniformity by encouraging conformance to the guidelines, both discretion and uniformity are valuable and even necessary parts of a rational sentencing system. The best outcome would be to create a sentencing system that honors both discretion and uniformity, since both are positive attributes.

1. *Uniformity*

The existing guidelines were created in response to disparate sentences emerging from federal courts, and Congress's concern for uniformity at the time was neither irrational nor wrong. The point of this Article is not to disparage the value of uniformity, but rather to align uniformity with judicial discretion in a way that results in a more stable and honest system of justice through public

²³ Osler, *supra* note 6, at 172.

²⁴ *Id.*

²⁵ *Rita v. United States*, 551 U.S. 338, 341 (2007).

sentencing.

The appeal of uniformity is obvious. Fairness is essential to any principled sentencing scheme,²⁶ and one aspect of fairness is that the primary determinant in a sentence should not be which judge is drawn. Those who commit a crime of a given type, with similar circumstances, should receive similar sentences. Anything less offends common sense notions of fairness.

It is beyond question that critiques of unfair disparities in federal sentencing in the 1970's and 1980's, such as Judge Marvin Frankel's book, *Criminal Sentences: Law Without Order*,²⁷ were a driving force behind the reform movement that culminated in the passage of the Sentencing Reform Act in 1984.²⁸ In *Law Without Order*, Judge Frankel argued passionately that uniformity was good not only for the system, but for defendants, in that the reduction of disparities would limit discrimination,²⁹ provide clear and fair notice of the probable sentence,³⁰ lessen resentment against the criminal justice system,³¹ and result in less harsh sentences.³²

Frankel's book struck a deep chord. As even guideline critic Dan Freed noted in 1992, "[i]n a system without acknowledged starting points, measuring rods, stated reasons, or principled review, unwarranted (or at least unexplained) disparity and disproportionality seemed to flourish."³³

On an important and fundamental level, Frankel was right:

²⁶ Though the idea of "fairness" may seem vague, Congress has twice through statute required that sentencing systems be "fair." See, e.g., 28 U.S.C. §§ 991(b)(1)(B), 994(f) (2008).

²⁷ MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

²⁸ Frankel argued that disparities were expressly a product of judges' biases and divergent views on everything from social class to politics. See *id.* at 11–25.

²⁹ *Id.* at 11.

³⁰ *Id.* at 6.

³¹ See *id.* at 42–44.

³² See *id.* at 58.

³³ Daniel J. Freed, *Federal Sentencing In the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1689 (1992).

Federal sentences were (and are) uneven in ways that are hard to justify. The roots of this disparity are buried deep in the structure of the federal judiciary. District court judges (and the appellate judges who review their decisions) are appointed for life by presidents who serve short terms, relative to the judges. Thus, a period in which a conservative president is followed by a liberal president is likely to produce judges with very different outlooks, who will then serve in adjacent chambers for decades. For example, in the 1980's, the great majority of judges on the bench were appointed by Presidents with widely divergent views: Richard Nixon, Gerald Ford, Jimmy Carter, and Ronald Reagan.³⁴ Protected from election cycles or any form of popular review, these judges would have no apparent reason to moderate their views over time, and those divergent views would (and did)³⁵ result in very different sentences in very similar cases.³⁶

As Michael O'Hear has correctly observed, the press for uniformity in the 1970's and 1980's also had another justification that is little discussed today: to humanize sentencing in a way which takes note of the dignity of defendants.³⁷ Certainly, one part of this is the "fairness" and predictability that comes with being treated similarly to others.³⁸ A second part of the argument from dignity has to do with the method of condemnation inherent in sentencing—without guidelines, the fate of the defendant is merely subjected to the will of another individual, a process which leads to

³⁴ See SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 226 (1999). The next four presidents (George H.W. Bush, Bill Clinton, George W. Bush, and President Obama) similarly present a widely divergent set of viewpoints and appointees.

³⁵ FRANKEL, *supra* note 27, at 17–23.

³⁶ State systems also produce disparities, but usually of different types. For example, in Texas all judges are elected, and thus a certain uniformity is created by the expectations and outlook of the local electorate. TX. CONST. art. V. This will produce uniformity at the local level, but allow disparities between districts in the state. One would expect uniform (and tough) sentences in conservative Lubbock, but very different outcomes in liberal Austin.

³⁷ Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 752 (2006).

³⁸ *Id.* at 805.

a denial of the “intrinsic worth” of the singular defendant who is being punished.³⁹

While the argument from dignity may (sadly) seem almost quaint in the more modern, overheated atmosphere of retributive sentencing, those who created the guidelines were right to care about uniformity. Whether they achieved it is another question. Perhaps most effective in attacking the results of this effort has been Albert Alschuler, who came to the following conclusion in 2005:

When viewed from any coherent normative perspective, the Federal Sentencing Guidelines have failed to reduce disparity and have probably increased it [T]he region of the country in which a defendant is sentenced now makes a greater difference than it did before the Guidelines; and racial and gender disparities have increased.⁴⁰

Alschuler noted that while the guidelines tried to rein in judicial discretion (unsuccessfully, he argued),⁴¹ it left alone or enhanced the creation of disparity⁴² by the other actors in the process—defense attorneys,⁴³ probation officers,⁴⁴ and prosecutors.⁴⁵

Regardless of whether the federal sentencing guidelines have been successful in their attempt to create uniformity, there is little question that uniformity is a positive value, and one that should be a goal of any meaningful attempt to revise or reform federal sentencing.

2. *Discretion*

Article III of the U.S. Constitution provides federal judges with life tenure and ensures that their pay cannot be diminished during

³⁹ *Id.* at 805–06.

⁴⁰ Alschuler, *supra* note 6, at 85.

⁴¹ *Id.* at 96–111.

⁴² It should be remembered that “disparity” is a difficult thing to measure. Results will vary widely depending on how one defines “similar cases,” for example, and it is hard to unmask all the facts relating to prevalent practices such as pleading to lesser charges.

⁴³ Alschuler, *supra* note 6, at 111.

⁴⁴ *Id.* at 111–12.

⁴⁵ *Id.* at 112–16.

that term.⁴⁶ These unusual requirements were intended to preserve the free use of discretion by federal judges, even when the powerful disagree with what they do. As the Supreme Court has described it, “[t]he provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the government.”⁴⁷ This model was rejected by many states in crafting their own judicial branches—only Rhode Island has similar lifetime appointment of judges from the trial level through the Supreme Court.⁴⁸ In fact, the nearly unique freedom granted federal judges to use their wise discernment has even been taken into account by state judges, including one Justice of the Georgia Supreme Court who admitted to overlooking errors in criminal cases on review to his own (elected) court, knowing that federal habeas review might catch them; that Justice explained this view quite simply, noting that federal judges “have lifetime appointments. Let them make the hard decisions.”⁴⁹

At the same time that Article III keeps federal judges out of the political fray once they are confirmed, Article II of the Constitution invites a short, intense period of political scrutiny at the time of appointment, charging the President with appointing those judges with the “Advice and Consent” of the Senate.⁵⁰ In the modern era, the requirement that a president appoints and the Senate approves federal judges has led to many famously contentious hearings,⁵¹ including the confirmation hearings for

⁴⁶ U.S. CONST. art. III.

⁴⁷ *United States ex rel. Toth v. Quarels*, 350 U.S. 11, 16 (1955).

⁴⁸ Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 457 (2010).

⁴⁹ Neal Devins, *How State Supreme Courts Take Consequences Into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1664 (2010) (citing Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 799 n.186 (1995)).

⁵⁰ U.S. CONST. art. II.

⁵¹ The political nature of appointments is at least in part driven by the fact that another presidential election is never more than four years away. As Carl Tobias has described it, “[t]he opposition’s perennial hope that it might capture

Robert Bork,⁵² Clarence Thomas,⁵³ Elena Kagan, and others.⁵⁴ Within the drama and tumult surrounding the confirmation processes of Supreme Court nominees, though, has been a constant focus on the discretion of these candidates. Justice Elena Kagan herself, some fifteen years before her own confirmation hearing, argued that this examination into the process of legal discernment needed to be vigorous, and should include “discussion first, of the nominee’s broad judicial philosophy and, second, of her views on particular constitutional issues.”⁵⁵

Compared to Supreme Court and Court of Appeals appointments, the debates over the confirmation of federal district court judges,⁵⁶ who actually issue sentences, generate less political heat. Still, at the heart of that evaluation of merit is an assessment

the White House—and thus choose judges—provide[s] significant incentives to delay.” Carl W. Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 773 (2010).

⁵² Some scholars have described the Bork nomination as one root of the contentiousness which has overtaken the judicial appointment process. See Sarah Binder & Forrest Maltman, *Advice and Consent During the Bush Years: The Politics of Confirming Federal Judges*, 92 JUDICATURE 320, 326 n.12 (2009).

⁵³ The Thomas hearings were particularly ugly, as members of the Senate Judiciary Committee heard testimony from Professor Anita Hill (who had previously worked for Justice Thomas) regarding sexual harassment issues in the workplace and responded by not only sharply questioning the nominee, but his accuser, Ms. Hill. See Kim A. Taylor, *Invisible Woman: Reflections on the Clarence Thomas Hearing*, 45 STAN. L. REV. 443 (1993). This raised issues many found troubling regarding race, gender, and power. *Id.*

⁵⁴ This contentiousness naturally produces some awkward results. For example, President Obama must work and socialize with Chief Justice John Roberts, even though Obama (as a Senator) voted against the confirmation of Roberts. Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J.L. & PUB. POL’Y 1035, 1041 (2009).

⁵⁵ Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 935 (1995) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1994)). In her review, Justice Kagan rebuts Prof. Carter’s argument against asking nominees how they might come out on particular cases. *Id.* at 932–42.

⁵⁶ There are also many more district court judges than there are appellate judges. Currently, there are about 679 district court judgeships in the federal system, compared to about 179 appellate seats. Tobias, *supra* note 51, at 771.

of a potential judge's ability to employ discretion. This is particularly true now that evaluation of a potential nominee by the American Bar Association has been given a role in the process again.⁵⁷

Federal judges are chosen based on their potential to use discretion appropriately, an evaluation that is directed by the Constitution itself both in granting life tenure and requiring both of the other two branches of government to participate in judicial selections.⁵⁸ Moreover, once these judges are chosen for that quality, it makes sense to allow them some expression of it—that their sense of right and wrong come into play in some meaningful way.

One clear advantage of judicial discretion has to do with the fact that they are federal servants who are tasked to serve a particular community—that is, they are local, and can take into account the wildly varying conditions in different places. For example, drug use is not uniform in the United States. Drug use overall varies from place to place, and there is also great variation in the narcotics used from one city to another.⁵⁹ If a city is plagued by PCP, a federal judge in that district is best positioned to address that scourge through sentencing.⁶⁰

The bare fact is that judges are positioned both literally and

⁵⁷ President George W. Bush discontinued the ABA investigations of judicial candidates, but President Obama has returned to the practice of asking the ABA to vet potential judges before a nomination is made. *Id.* at 777.

⁵⁸ U.S. CONST. art. III.

⁵⁹ An excellent graphical illustration of this can be found in the maps which accompany the U.S. Department of Health and Human Services Office of Applied Statistics 2009 report on State Estimates of Substance Use from the 2006–2007 National Surveys on Drug Use and Health. OFFICE OF APPLIED STUDIES, U.S. DEP'T OF HEALTH AND HUMAN SERVS., REPORT ON STATE ESTIMATES OF SUBSTANCE USE FROM THE 2006–2007 NATIONAL SURVEYS ON DRUG USE AND HEALTH (2009), available at <http://www.samhsa.gov/data/2k7state/2k7state.pdf>.

⁶⁰ Oddly, the federal statutes on sentencing recognize the importance of local conditions, but then give the Sentencing Commission—a body almost singularly unfit to respond to local conditions—the task of calibrating national guidelines to unique local conditions. 28 U.S.C. §§ 994(c)(4), (c)(7) (2006).

figuratively within the process of criminal justice at a point where their discretion is potentially most useful. In the criminal case, others (in particular, prosecutors) have significant discretion, but they of course represent a party to the case: the United States. The judge, however, is unique in that she has a relatively objective view, has been chosen for her discretion, and is able to look at, listen to, and evaluate each defendant on an individual basis (something no legislature or President can do). It is the judge, and the judge alone, who has the privilege, obligation, and responsibility to look the defendant in the eyes as she issues society's judgment and price. Such a perspective deserves to be respected through the allocation of meaningful discretion. At any rate, as examined below, the alternative to discretion has been messy at best.

III. THE COSTS OF PLACING JUDICIAL DISCRETION AND UNIFORMITY IN OPPOSITION

Certainly, the reforms that brought the judicial system into the Guidelines era of federal sentencing were well-intentioned. Like most well-intentioned projects, however, these reforms came with unanticipated costs. One of those costs has been, particularly after the *Booker* decision, a failure to achieve uniformity.⁶¹ Another sad result has been the continuing and destabilizing struggle between judges, the Sentencing Commission, and Congress, which has been fought like a tug of war with the rope being dragged first towards uniformity, then towards judicial discretion, and then back again in a pit of mud.⁶² Finally, and related to the other costs, the sentencing guidelines have failed to respond to what judges actually do as they sentence individuals, and this has been one factor in the striking increase in incarceration rates within the federal system.

⁶¹ Chanenson, *supra* note 12, at 186.

⁶² See, e.g., William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & POL. 305 (2011).

A. *The Pre-Booker Era*

In the period before *United States v. Booker* was decided in 2005, the federal sentencing guidelines were mandatory, and sentencing judges could only evade their mandates if they utilized a highly restricted “departure” process which was directly controlled by the guidelines themselves.⁶³ During the pre-*Booker* period, there was ample evidence that these protocols were actively subverted by judges who were unhappy with the restrictions placed upon them, the results those restrictions mandated, or both.⁶⁴

Recent history has taught that restrictions on discretion invite subversion⁶⁵ by sentencing judges who grab that discretion back where they can.⁶⁶ This seizing of discretion has taken many forms—for example, when a break was granted under guidelines section 5K1.1 for substantial assistance to the government when all involved knew that such a departure was not warranted, and was being used simply to achieve a non-guideline result that the prosecution, defense, and the court desired, guidelines be

⁶³ Despite the switch to advisory guidelines, the language describing “departures” remains a part of the federal system. See U.S. SENTENCING GUIDELINES MANUAL §§ 5K2.0–2.24 (2011). The 2011 guidelines still promote the protocol of defining a guideline range, then considering a departure under the guidelines, and only after that considering variances pursuant to the sentencing purposes articulated in 18 U.S.C. § 3553(a). See U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2011).

⁶⁴ See, e.g., Freed, *supra* note 33, at 1683.

⁶⁵ In this instance, “subversion” refers to those actions in which a sentencing judge subverts the intent of the guidelines without putting her reasons on the record as part of an explicit variance or departure. Notably, the sentencing of crack cocaine cases has fostered both this type of subversion and a number of variances and departure cases which have led to the Supreme Court expanding the use of those tools by district court judges. Those cases have included *United States v. Booker*, 543 U.S. 220 (2005), *Kimbrough v. United States*, 552 U.S. 85 (2007), and *Spears v. United States*, 555 U.S. 261 (2009), all of which were crack cases which expanded the discretion of judges by allowing them to explicitly reject the guidelines.

⁶⁶ Among other devices, district judges use departures, variances, and the finding of aggravating and mitigating elements primarily to achieve a desired outcome, rather than according to the evidence. See Alschuler, *supra* note 6, at 106–11.

damned.⁶⁷ Similarly, a judge might have ignored an aggravating factor that was fairly proven, but created a sentence too high for the judge to swallow.⁶⁸ Yes, that judge could have relied on a downward departure, but those were given closer scrutiny on appeal than factual determinations.

Top-down mandatory guidelines unmistakably and predictably created a hidden realm of sentencing where unspoken understandings and judicial subversion often became primary determinants of a person's fate. Freed described this "level of informal noncompliance" as lying beneath the surface of what can be publicly observed:

Because of these altered interactions, the guidelines system initiated in 1987 simultaneously proceeds on two different levels: (1) the level of formal, visible adherence to, or open departure from, guideline prescriptions in the trial courts, followed by review in the courts of appeals; and (2) the level of informal noncompliance with the new system-practices that are eluding scrutiny by courts of appeals and are in fact reacting to appellate rejections of reasonable departures from unreasonable guidelines. Increasingly, the second, underground level of sentencing seems to be displacing the first, visible level.⁶⁹

One cost of mandatory guidelines, then, was subversion of the guidelines and a striking lack of transparency. This result was predictable, given that judges are chosen for their discretion, and then placed in a position where their discretion is tethered. It is not surprising that they strained against those tethers by the means that were available.

In 2005, though, the rules changed. The Supreme Court held in *United States v. Booker* that mandatory sentencing guidelines stood in violation of the Sixth Amendment, and the Supreme Court

⁶⁷ Nearly twenty years ago, Prof. Dan Freed described this subversion, noting that an "underground level of sentencing seems to be displacing the first, visible level." Freed, *supra* note 33, at 1683.

⁶⁸ Cf. Gerald F. Uelman, *Federal Sentencing Guidelines: A Cure Worse than the Disease*, 29 AM. CRIM. L. REV. 899, 899–902 (1992) (discussing the "irrational" outcomes encouraged by the Federal Sentencing Guidelines and the "squirring [of judges] to find some way to manipulate the Guidelines to achieve a more just result").

⁶⁹ Freed, *supra* note 33, at 1683.

chose to remedy this by stripping the guidelines of their compulsory nature while maintaining a standard of “reasonableness” on appellate review.⁷⁰

B. *The Post-Booker World*

The effects of *Booker* and its progeny mitigated the subversion of the guidelines by judges somewhat by allowing variances from the guidelines that did not have to be tied to specific departure characteristics.⁷¹ In the post-*Booker* world, sentencing judges are given more leeway to diverge from the guideline ranges; in fact, the Supreme Court has held that district court judges may sometimes even vary from the guidelines for the sole reason that they disagree with the policy behind the guideline that applies in a particular case.⁷² As one might expect in a zero-sum construct, the increased discretion of judges since that time has correlated with increasing reports of disparity. At least two other significant costs of the structural tension between discretion and uniformity remain: continued instability in sentencing and a persistent failure to align judicial practice with the guidelines, which results in relatively high terms of incarceration.

1. *New Reports of Disparity*

If *Booker* really did represent a suggestion that more sentences outside the guideline ranges might be warranted,⁷³ it is now beyond

⁷⁰ 543 U.S. 220 (2005).

⁷¹ Nevertheless, a very significant disincentive to variances remains. Judges have a universal and understandable aversion to being reversed on appeal. Reversals mean more work for the judge, because she must redo what she has already done (at least) once. Also, reversals result in opinions from the Court of Appeals that, in a very public way, identify the district judge as being “in error”—an assessment that no one likes to hear. At sentencing, though, there is a fairly predictable way to avoid reversal: Simply sentence within a properly-calculated guideline range. The Supreme Court has approved a presumption on appeal that a within-guidelines sentence is reasonable, making those sentences largely immune to reversal. *Rita v. United States*, 551 U.S. 338, 347–48 (2007).

⁷² *Spears v. United States*, 555 U.S. 261, 843–44 (2009) (allowing courts in crack cocaine cases to categorically reject the relevant guideline based on policy disagreement).

⁷³ The remedial opinion in *Booker* expressly recognized that the new regime

dispute that federal judges have increasingly accepted that invitation to stray from the guidelines. In fiscal year 2010, barely half (55%) of federal sentences were within the guideline range.⁷⁴ Of the 45% of sentences outside of the range, nearly all of them (96%) were downward adjustments to a point below the range,⁷⁵ and only about a quarter of those downward adjustments were pursuant to a government motion under the claim that the defendant had provided “substantial assistance” in other cases.⁷⁶

As disparities have risen in the past seven years, some crimes have seen more of a divergence than others. One area of particular concern is child pornography, where sentences vary widely according to the judge who is assigned the case, a trend exacerbated by the sharp increase in caseload in the decade before *Booker*.⁷⁷ Loren Rigsby, in the course of arguing that in child porn “widely disparate sentences for very similar crimes are an unfortunate, and alarmingly frequent, side effect of judicial uncertainty in imposing sentences,”⁷⁸ described two nearly identical criminals sentenced at about the same time in 2008. Both pled guilty to a single count of possessing child pornography, and

and appellate review for “reasonableness” rather than simply adherence to the guidelines would not “provide the uniformity that Congress originally sought to secure.” *Booker*, 543 U.S. at 263.

⁷⁴ U.S. SENTENCING COMM’N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table N (2010), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/TableN.pdf.

⁷⁵ *Id.*

⁷⁶ *Id.* (referring to U.S. SENTENCING GUIDELINES MANUAL § 5K1.1). About 10% of the cases were resolved using the “Early Disposition Program” described in guideline § 5K3.1, which allows shorter sentences in exchange for waiver of nearly all rights, usually in immigration cases. U.S. SENTENCING GUIDELINES MANUAL § 5K3.1.

⁷⁷ In 1995, there were a total of eighty-five federal child pornography cases filed. Loren Rigsby, *A Call for Judicial Scrutiny: How Increased Judicial Discretion Has Led to Disparity and Unpredictability in Federal Sentencings for Child Pornography*, 33 SEATTLE U. L. REV. 1319, 1331 (2010). By 2007, this number had risen to 1,544, making child pornography the fastest-growing part of the federal criminal docket.

⁷⁸ *Id.* at 1321.

both faced a guideline sentencing range of 97–121 months.⁷⁹ Both were in poor health, and sought a reduced sentence for that reason.⁸⁰ The first of them, despite the fact that thousands of “hard-core” child pornography images were found on his computer, received a sentence of one day from a federal judge in Colorado.⁸¹ The second, in Arkansas, appeared to have equally severe medical issues, but was sentenced to serve ninety-seven months, a term that was affirmed by the Eighth Circuit.⁸² The sole distinction between the two appears to be the judge who issued the sentence.

Such disparities have not gone unnoticed. Many scholars have voiced an alarm over a perceived decay in uniformity in the wake of *Booker*. Looking at data in a single Boston courthouse, Ryan Scott quantified significant inter-judge disparities, and concluded that “a defendant’s odds of receiving a downward departure or variance increasingly depend on which judge happens to draw the case.”⁸³ How important is that effect? According to Scott, since the *Booker* decision, “the effect of the judge on sentence length has more than doubled in strength.”⁸⁴

There is a haunting aspect to this debate: The Sentencing Commission itself has reported that the post-*Booker* developments include widening disparities between white defendants and minorities. The Commission’s March 2010 report, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report’s Multivariable Regression Analysis*,⁸⁵ contained

⁷⁹ *Id.* at 1320–21.

⁸⁰ *Id.* at 1320.

⁸¹ *Id.*

⁸² *Id.* at 1320–21.

⁸³ Ryan W. Scott, *The Effects of Booker on Inter-Judge Sentencing Disparity*, 22 FED. SENT’G REP. 104, 105 (2009).

⁸⁴ Ryan W. Scott, *Inter-Judge Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 40 (2010). In both articles, Scott’s observations were limited to judges in Massachusetts.

⁸⁵ U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT’S MULTIVARIATE REGRESSION ANALYSIS (2010), available at http://www.ussc.gov/Research/Research_Publications/2010/20100311_Multivariate_Regression_Analysis_Report.pdf.

several troubling conclusions. According to the Commission, “[b]lack male offenders received longer sentences than white male offenders. The differences in sentence length have increased steadily since *Booker*.”⁸⁶ Similarly, the Commission found that non-citizens got longer sentences than citizens, and this gap also grew after *Booker*.⁸⁷

Enough time has passed since the 2005 shift to advisory guidelines to draw some conclusions. Sadly, those conclusions are that disparity in sentencing between judges has probably grown under the current guideline system, and that this has exacerbated pre-existing disparities between blacks and whites⁸⁸ and between citizens and non-citizens.⁸⁹ These conclusions argue in favor of considering new and possibly radical solutions.

2. *Instability in Sentencing*

The direct and causal relationship between judicial discretion and inter-judge disparity is no secret. Nor is it just academics who have taken notice—Assistant Attorney General Lanny Breuer publicly decried the trend in November 2011, creating fears that the Department of Justice might urge Congress to restrain judicial discretion more forcefully.⁹⁰ Such a reaction would be consistent

⁸⁶ *Id.* at 2.

⁸⁷ *Id.*

⁸⁸ This perhaps no longer needs to be explained, but it is important to note that differential rates in the commission of crime do not explain the disparity in imprisonment between racial groups. There is something deeper at work that has something to do with “police practices and legislative and executive policy decisions that systematically treat black offenders differently, and more severely, than whites.” Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 *CRIME & JUST.* 273, 274 (2010).

⁸⁹ *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After Booker: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. app. E. (2011) (statement of Judge Patti B. Saris, Chair, United States Sentencing Commission), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Testimony/20111012_Saris_Testimony.pdf.

⁹⁰ Prof. Douglas Berman of Ohio State took note of this speech on his blog.

with the instability which has for too long marked the realm of federal sentencing—where the legislative and judicial branches of government continually battle for power, with sentencing as the rope on which they pull.

The past thirty years has seen a continual back-and-forth in federal sentencing, and a pattern has emerged: Congress limits judicial sentencing discretion, judges (at both the trial and appellate level) seize it back, and Congress responds with further limitations.

The start of this process in the 1980's was centered on the perception that granting judges broad sentencing discretion created too many disparities in sentencing. As already discussed,⁹¹ the Sentencing Reform Act of 1984, which created the mandatory sentencing guidelines, was propelled by the rejection of such disparity. From that period until about 2003, judges tended to reclaim discretion through the subversion described in the preceding section.⁹²

In 2003, Congress reacted to this subversion and the Supreme Court's 1996 decision in *Koon v. United States*,⁹³ which had given sentencing judges more leeway to depart from the guideline ranges,⁹⁴ by passing what become known as the "Feeney Amendment."⁹⁵ That legislation sought to shore up the dike of uniformity by limiting existing bases for departures, prohibiting new grounds for downward departures, and ordering the Sentencing Commission to ensure that the number of departures

Douglas A. Berman, *AAG Breuer Talking Up Federal Sentencing at Lawyer Summit*, SENT'G L. & POL'Y (Nov. 15, 2011, 11:48 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2011/11/aag-breuer-talking-up-federal-sentencing-at-lawyer-summit.html.

⁹¹ See *supra* Part II.B.1.

⁹² See *supra* Part III.A.

⁹³ 518 U.S. 81 (1996).

⁹⁴ *Id.* at 97.

⁹⁵ The Feeney Amendment was formally titled the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21 § 401, 117 Stat. 650 (2003) (codified as amended in scattered sections of 18, 21, 28, and 42 U.S.C.).

was “substantially reduced,” among other measures.⁹⁶

The Feeney Amendment appeared to be ushering in another extended era of enforced uniformity, but it did not take long before the judiciary moved to enlarge the discretion of sentencing judges once again, through the 2005 *Booker* decision that converted the guidelines from a mandatory to an advisory system. While *Booker* was not a direct reaction to the Feeney Amendment, it did continue this destabilizing dialectic between the judiciary and legislative branches.

Now, of course, the sentencing world sits in anxious anticipation of the next move by Congress—a move that Justice Breyer literally invited in *Booker* itself, saying in his majority remedial opinion that the ball was now “in Congress’ court.”⁹⁷ It is time to stop treating federal sentencing like a tennis ball. It is highly ironic that the same Congress which so desires certainty seems content with such instability in sentencing as a system. Trailing-edge guidelines can end this dialectic by allowing a slowly evolving common law of sentencing to develop around the priorities established by Congress. In the interests of certainty, fairness, and deterrence, sentencing should be more like a large ship than a battered tennis ball, and trailing-edge guidelines can enable that transition.

3. *The Failure of the Guidelines to Respond to Judges*

The federal guidelines were originally intended to respond to the actions of judges over time—that is, if judges were rejecting or subverting the guidelines, the Sentencing Commission would consider adjusting the guidelines to adhere more closely to the practice in the field. This is how Justice Stephen Breyer (then a First Circuit judge, and former member of the first Sentencing Commission) described the intended process in 1988:

[T]he Commission remained aware throughout the drafting process that Congress intended it to be a permanent body that would continuously revise the guidelines over the years. Thus, the system is “evolutionary”—the Commission issues Guidelines, gathers data from

⁹⁶ *Id.*

⁹⁷ United States v. Booker, 543 U.S. 220, 265 (2005).

actual practice, analyzes the data, and revises the Guidelines over time.⁹⁸

The process Justice Breyer describes, where the Sentencing Commission continuously “right-sizes” the guideline ranges so as to account for the actual practice of judges, would undercut subversion of the guidelines in the long term and take seriously the discernment abilities of federal district court judges. However, this kind of right-sizing never became an important or consistent part of the guideline revision process. Instead, many if not most significant guideline changes are driven by Congressional mandates or the need to standardize effects of different guidelines.

For example, the guidelines relating to child pornography have seen an important series of revisions, nearly all directed by Congress,⁹⁹ but reflecting harmonization as well. In 1990,¹⁰⁰ Congress made simple possession of child pornography a federal crime for the first time, and the Sentencing Commission proposed a new guideline, section 2G2.4, which set a base offense level of ten for that offense (a level at which some defendants would be eligible for a probationary sentence).¹⁰¹ Almost immediately, Congress reacted (through an amendment to an appropriations bill) by demanding that the base offense level be ratcheted up to thirteen, while creating additional enhancements to other child pornography provisions (taking it out of the area of the guideline grid where probation is usually possible).¹⁰² In 1995, Congress

⁹⁸ Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 7–8 (1988).

⁹⁹ A number of other examples could be cited, of course, including most significantly the sentencing rules for several types of narcotics. As the Supreme Court noted in *Kimbrough v. United States*, 552 U.S. 85 (2007), for example, the crack guidelines (prior to the implementation of the Fair Sentencing Act) were essentially determined by Congress and not within “the Commission’s exercise of its characteristic institutional role.” *Id.*

¹⁰⁰ A worthwhile and complete analysis of this process is found in John Gabriel Woodlee’s student note, *Congressional Manipulation of the Sentencing Guidelines for Child Pornography Possession: An Argument for or Against Deference?*, 60 DUKE L.J. 1015, 1026–34 (2011).

¹⁰¹ Notice of Submission of Amendments to the Federal Sentencing Guidelines to Congress, 56 Fed. Reg. 22770 (May 16, 1991).

¹⁰² Woodlee, *supra* note 100, at 1027. This action accompanied a drive by

required another two-point bump in the base offense level included in section 2G2.4, along with a two-point enhancement for use of a computer, making the offense level seventeen for simple possession of a computer image.¹⁰³ The Sentencing Commission, as it must, complied.¹⁰⁴

However, that was not the end of things. In 2003, as part of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (the “PROTECT Act”),¹⁰⁵ Congress directly created a guideline enhancement based on the number of child pornography images, and a four-point bump up for sadomasochistic or violent images.¹⁰⁶ Trying to tidy things up, the Sentencing Commission then folded guideline section 2G2.4 into section 2G2.2 so that receipt and possession would fall under the same rules.¹⁰⁷ Notably, this period was tumultuous enough that the Sentencing Commission saw the need to publish a fifty-four-page history of these changes.¹⁰⁸ The first page of that report soberly intoned that “Congress has been particularly active over the last decade creating new offenses, increasing penalties, and issuing directives to the Commission regarding child pornography offenses.”¹⁰⁹

After this flurry of upward revisions and the harmonization of sections 2G2.4 and 2G2.2, the child pornography guidelines were much harsher than one might imagine. Under the current guidelines, for an individual without any prior criminal history, the penalty for possession of a single computer image depicting a

Congress to separate “possession” of child pornography from “receipt” of that material, with the latter receiving a higher sentence. *Id.*

¹⁰³ *Id.*

¹⁰⁴ Notice of Submission of Amendments to the Federal Sentencing Guidelines to Congress, 61 Fed. Reg. 20306, 20307 (May 6, 1996).

¹⁰⁵ PROTECT Act, Pub. L. No. 108-21, § 401(i), 117 Stat. 650, 652 (2003) (codified as amended at 28 U.S.C. § 994(a) (2006)).

¹⁰⁶ *Id.*

¹⁰⁷ U.S. SENTENCING COMM’N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES (2009), available at http://www.ussc.gov/Research/Research_Projects/Sex_Offenses/20091030_History_Child_Pornography_Guidelines.pdf.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1.

thirteen-year-old is a term of incarceration of thirty-three to forty-one months, based on an offense level of twenty.¹¹⁰ Intriguingly, and confusingly, the offense level for a single act of actual “criminal sexual abuse of a minor” is only eighteen,¹¹¹ resulting in a penalty of twenty-seven to thirty-three months. In other words, the sentencing range is higher for looking at a picture of a thirteen-year old on a computer than it is for actually sexually assaulting the child.

While Congress has been more active than some might have imagined in micro-managing sentences like the one described above, the influence of judges has been nearly unnoticeable. Part of the problem is that, unlike Congress, judges have no direct way to shape the guidelines.¹¹² Thus, though they are the actors (as between the Sentencing Commission, Congress, and judges) most directly in contact with sentencing at the ground level, judges are the only ones who do not have a direct method through which they can change the guidelines. That was not the intent of those who first imagined the guideline system,¹¹³ and it should not be the model going forward. One goal of any reform must be to create an effective feedback loop between judges and the guidelines that attempt to create uniformity amongst them.

As a result of the lack of any feedback loop, there is no systemic reaction by the guideline system to the bare fact that judges continuously and overwhelmingly have sentenced below the relevant guideline range far more often than they vary or depart to sentence above that range.¹¹⁴ This necessarily acts as a lever which artificially keeps incarceration rates high—a damaging dynamic in an era of budget challenges and increasing doubts

¹¹⁰ U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2011).

¹¹¹ *Id.* § 2A3.2.

¹¹² Of course, the Sentencing Commission itself has always included judges, in their individual capacity, among its members, as is mandated by federal law. *See* 28 U.S.C. § 991(a) (2006).

¹¹³ *Cf.* 28 U.S.C. § 994(o) (2006) (“[T]he Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system.”).

¹¹⁴ Osler, *supra* note 6, at 175–76.

about the value of broad incarceration.

IV. THE TRAILING EDGE IDEA IN ACTION

A. *The Shape of the Trailing Edge*

Congress should not only create a dynamic, real-time feedback loop between and among judges, but this sentencing information system should replace the guideline grid found at the well-worn inside cover of every Sentencing Guidelines manual.

The shape of trailing-edge guidelines would be simple, elegant, and efficient. Many aspects of a trailing-edge system track the system currently in place. The crucial distinction lies not in the general process of sentencing, but with the source of the baseline standards judges would use as a reference point. Rather than being determined by a stolid Washington commission, it would be contoured by the collective hands of the nation's federal district court judges.

As now, there would still be a guideline manual, which would define aggravating and mitigating factors for particular types of crime. These factors would, as is true now, be determined and dictated by Congress and by the Sentencing Commission. Those factors, however, would be stripped of their numerical values. The result would be that each guideline section would list up and down factors only, resulting in a simpler and shorter guideline book.

These aggravating and mitigating factors would still shape sentencing. A judge would find, based on evidence at trial and sentencing, the existence of those factors. If a factor was found to exist, the judge would enter it into a computer program along with the underlying crime and all other relevant factors that are found. The program would then present her with a graph of all the other sentences in the nation that addressed the same crime along with a set of aggravating and mitigating circumstances. She could click on side tabs to change the search, too: For example, one tab might limit the search to her district or circuit, while another revealed the race of the defendants being sentenced.

Other factors could be added in as well. For example, sentences that had been reversed could be included as a red dot,

marking the outer boundaries of what had been found allowable. One important consideration would be whether or not to add pop-up windows that would identify the judge associated with each sentencing, and other factors related to that case.¹¹⁵

The standard at the heart of an advisory system, then, would no longer be too-often arbitrary measures established by the Sentencing Commission. Instead, the guiding reference becomes what judges actually do in similar circumstances. Rather than the opinion of an absent “other,” the advice in this advisory system comes from peers—a force that can be powerful in affecting all types of behavior.

A dynamic, real-time sentencing information system would be at the heart of this new sentencing guideline system—in fact, the sentencing information system would become the guidelines, or at least an essential part.¹¹⁶ Intriguingly, such data collection was a part of the initial project of the first Sentencing Commission, at the time they were crafting the very shape of the guidelines themselves.¹¹⁷ As Justice Breyer, a member of that Commission, has described it, a massive collection of prior sentencing facts was

¹¹⁵ One appealing aspect to such transparency would be that it would encourage dialogue between judges about particular sentences, a discourse that can only further the development of common understanding. In fact, if the system was closed such that it was only accessible to judges, it could even include a link on the pop-up window that would allow the judge considering a case to email the one who had previously ruled on a similar situation—there would be two clicks to consensus.

¹¹⁶ The idea of a sentencing information system is not new. *See generally* Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351 (2005) (giving a wonderful description of the history and potential of these sorts of sentencing information systems). It was Professor Miller’s description of these systems in the context of state sentencing that spurred on consideration of the ideas presented here. Professor Miller, understandably, did not address the federal system—in fact, his article properly criticizes the over-analysis of the federal system relative to the states—because the article appeared in a symposium issue addressing the topic “Sentencing: What’s at Stake for the States?” Symposium, *Sentencing: What’s at Stake for the States?*, 105 COLUM. L. REV. 933 (2005).

¹¹⁷ *See* S. REP. NO. 98-225, at 63–65 (1983).

compiled after initial attempts to come up with guideline ranges failed:

Faced, on the one hand, with those who advocated “just deserts” but could not produce a convincing, objective way to rank criminal behavior in detail, and, on the other hand, with those who advocated “deterrence” but had no convincing empirical data linking detailed and small variations in punishment to prevention of crime, the Commission reached an important compromise. It decided to base the guidelines primarily upon typical, or average, actual past practice. . . . The Commission was able to determine which past factors were important in pre-Guideline sentencing by asking probation officers to analyze 10,500 actual cases in detail, and then compiling this information, along with almost 100,000 less detailed case histories, in its computers.¹¹⁸

The tragedy, then, was not that the Sentencing Commission did not realize the importance of sentencing data—it is that they did not build into the guidelines a way for this data to continue to shape outcomes over time. That mistake can now be reversed. Under trailing-edge guidelines, a judge would have to directly consider the body of work of other judges in similar circumstances, through the sentencing information system. Significant deviation from the norm could, as now, be reviewed for reasonableness.¹¹⁹

The use of trailing-edge guidelines would simultaneously create a judge-guideline feedback loop as described in the previous section, while preserving roles in the process for Congress and the Sentencing Commission. By allowing the sentencing practices of judges to shape the guidelines themselves, there would be much less inherent tension between discretion and uniformity. The principle mechanism for enforcing uniformity would be peer effects between sentencing judges rather than overt control by Congress, the Sentencing Commission, or appellate courts. The corrosive tension between discretion and uniformity would fade, as discretion and uniformity were allowed to work together rather than in opposition.

¹¹⁸ Breyer, *supra* note 98, at, 17–18.

¹¹⁹ See *United States v. Booker*, 543 U.S. 220, 260–64 (2005) (announcing the “reasonableness” standard of review for sentencing under advisory guidelines).

B. *Technology and Trailing-Edge Guidelines*

It is not surprising that in 1984 trailing-edge guidelines based on real-time sentencing data were not considered as an alternative to discretion-limiting directives to judges. Quite simply, the technology to create such a system did not exist. Now, however, the use of real-time data is a familiar part of everyday life. In someone's pocket at this moment is an iPhone with access to several such programs. If she wonders how late her flight will be, she can pull up an App called "FlightTrack" that tells her where the plane is, how fast it is going, its altitude, and the near-exact time of arrival.¹²⁰ If, to kill time, she is looking for a Starbucks coffee shop, another App can tell her where one is, even as she moves through the airport.¹²¹ If instead she gives up and goes home, her car uses real-time information presented graphically through a map to tell her where traffic problems might be. The solution to one of our most vexing sentencing problems lies all around us.

One of the more similar programs already in use helps people understand housing markets. If someone wants to know about the value of real estate, she can simply log onto the Zillow website.¹²² Once there, she can limit her search by specifying discrete factors, such as neighborhood. She will then see an array of data points in the form of houses in that neighborhood. Click on any one of them, and specific data about that house pops up. A trailing-edge guideline system would work very much like the Zillow site—as factors are entered, the data set narrows, and can be depicted graphically in a number of ways.

The raw material for such a system is already in place, as the Sentencing Commission already collects extensive data on every federal sentence: Section 994(w)(1) of Title 28 of the U.S. Code requires that each district submit to the commission not only the

¹²⁰ *FlightTrack*, MOBIATA, <http://www.mobiata.com/apps/flighttrack-iphone> (last visited Nov. 12, 2012).

¹²¹ *Starbucks for iPhone*, STARBUCKS, <http://www.starbucks.com/coffeehouse/mobile-apps/mystarbucks> (last visited Nov. 12, 2012).

¹²² ZILLOW, <http://www.zillow.com> (last visited Nov. 12, 2012).

judgment for every case, but a detailed reporting about the defendant and the sentence itself, including “information regarding factors made relevant by the guidelines” as well as the Presentence Investigation Report.¹²³ From this information, the Commission has everything it needs to create a trailing-edge database.

Once that database was created, a judge could access it and then input the factors present in a case—that is, the same factors now considered as aggravating and mitigating circumstances under the guidelines, along with the criminal history of the defendant. With each additional fact, the set of data points would become smaller. For example, say that a district court judge was considering a bank robbery defendant’s sentence. He would first enter the general guideline for that crime, which is section 2B3.1 (robbery). A large array of data points would appear, because many robbers are sentenced every year in the federal system. The next step, entering the fact that it was a bank that was robbed,¹²⁴ would probably not narrow the data set much because the great majority of robbery cases in federal courts involve bank robbery. Imagine that the robber stole \$23,000¹²⁵ and made a threat of death in a note.¹²⁶ Both of those factors, when entered, would narrow the field. Finally, the sentencing judge would enter the criminal history category of the defendant, which would further refine the set.

The sentencing judge would now be looking at a screen which graphically depicts every sentence for the past two years for defendants with similar criminal histories who robbed a bank, took \$10,000 to \$50,000, and made a death threat. One might expect that there would be a concentration of sentences in one place, with outliers scattered above and below that mass. The judge could then click tabs on the edges of the data field to get additional information. For example, one click could reveal the race of each defendant in the field, starkly depicting any racial disparities

¹²³ 28 U.S.C. § 994(w)(1) (2006).

¹²⁴ See U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(1) (2011).

¹²⁵ See *id.* § 2B3.1(b)(7)(B).

¹²⁶ See *id.* § 2B3.1(b)(2)(F).

relating to those defendants. Another could broaden the time period; for example, to three years of data rather than one or two. It would also be possible to limit the field to cases within that circuit or district. By clicking on any of the data points on the screen, the judge could see a pop-up window displaying the specific details of that case including the sentencing judge, the location, the date, and any particularized details that the judge took into consideration.

Of course, a judge would (as now) be expected to articulate a sentence that would be consistent with 18 U.S.C. § 3553(a), regardless of where that sentence falls. In addition, to maintain uniformity, there could be a requirement that a sentence outside the core eighty percent of the field also be justified in writing through reference to particularized circumstances not included in the limiting factors already entered.¹²⁷ For example, if this imaginary bank robber was particularly menacing in his note, perhaps by making specific reference to a teller by name, that would justify a sentence in the top ten percent of data points.¹²⁸

C. Existing Models

While there are no jurisdictions that currently use the model described here, there are some uses of real-time information in sentencing. Perhaps most relevant is the experience of Missouri. There, after a few failed attempts at sentencing reform, the state courts began using an advisory system that masks prior individual outcomes but does guide judges by providing three possible outcomes based on the decisions of peers in similar cases.¹²⁹

Internationally, the experience of Scotland is intriguing, though cautionary. There, a sentencing information system was framed and ready for use by judges in sentencing, but abandoned due to

¹²⁷ This requirement could be waived where there are not a sufficient number of cases to generate a worthwhile set of data.

¹²⁸ Because this guideline system, like the current one, would be advisory rather than mandatory with appellate review for reasonableness, it would not seem to risk a constitutional jury-rights challenge under *Booker*. See *United States v. Booker*, 543 U.S. 220, 260–64 (2005).

¹²⁹ See *infra* Part IV.C.1.

disagreement about who would have access to that system.¹³⁰

1. *Missouri*

Missouri recovered from a period of sentencing tumult by developing an innovative advisory system that shares some aspects of the proposal here. Though judges are not informed of other judges' practices in a transparent way, they do receive recommendations that are based on the practices of prior sentences within the state for similar offenses, and these serve the function of advisory guidelines.¹³¹

Missouri's current system of sentencing is the product of its third attempt at an effective sentencing commission within the span of fifteen years.¹³² The first commission, empanelled in 1989, simply studied sentencing patterns and identified certain disparities, but stopped at that point.¹³³ A second commission began its work in 1994, and came up with a plan for an advisory system that was disseminated for voluntary compliance, but at that point the commission itself dissolved, leaving no continuing body to promote that system, and a later study found that it had little effect on sentencing.¹³⁴ Finally, in 2003, a standing sentencing commission (the Missouri Sentencing Advisory Commission, or "MOSAC") began to develop a lasting process and database.¹³⁵

MOSAC effectively set up a system to collect information on sentencings and other ongoing events, including parole board practices, then made this information the center of their new sentencing system.¹³⁶ In short, this data collection allows judges, or anyone else, to access a computer database that produces a

¹³⁰ See *infra* Part IV.C.2.

¹³¹ For a good overview of the Missouri system, see Michael A. Wolff, *Missouri's Information-Based Discretionary Sentencing System*, 4 OHIO ST. J. Crim. L. 95 (2006). Mr. Wolff was a member of Missouri's sentencing commission.

¹³² *Id.* at 96.

¹³³ *Id.* at 101–02.

¹³⁴ *Id.* at 102.

¹³⁵ S.B. 0667, 2003 Gen. Assemb., 92nd Sess. (Mo. 2003), MO. REV. STAT. § 559.019 (2011).

¹³⁶ See Wolff, *supra* note 131, at 104.

sentencing recommendation which is largely based on prior sentences issued for similar crimes.¹³⁷

Missouri's system is voluntary, meaning that judges are able to issue any sentence allowed by statute¹³⁸ and such sentences are largely free of appellate review.¹³⁹ The guidance provided by MOSAC is simply a recommendation as to a specific sentence, based on three years of data that reflect the sentencing practices of Missouri judges.¹⁴⁰

The process a Missouri judge uses in getting to that recommendation is publicly available (and fun to play with). Simply log onto www.mosac.mo.gov, and click on the link on the right-hand side of the screen marked "Automated Recommended Sentence Information and Application." From there, the user or a judge will answer a series of questions about the given case which in turn leads to the proper recommendation.¹⁴¹

The initial screen asks for a section from the Missouri penal code used to identify the offense.¹⁴² If the user is not sure of the code section, a link will take her to a handy search engine for the task.¹⁴³ Once the code is entered, the process of entering specific facts about the case can begin, starting at a page that identifies the classification and severity level of that offense.¹⁴⁴ Completing the questions will lead to a recommended sentence.

For example, consider a case involving a non-violent, first-degree burglary by a male defendant with no prior criminal history.

¹³⁷ This system is both described and made available to judges and the public online. MOSAC, <http://www.mosac.mo.gov> (last visited Nov. 12, 2012).

¹³⁸ Wolff, *supra* note 131, at 97.

¹³⁹ *Id.* (citing *State v. Cook*, 440 S.W.2d 461, 463 (Mo. 1969)).

¹⁴⁰ Wolff, *supra* note 131, at 98.

¹⁴¹ *Automated Recommended Sentencing Information*, MOSAC, <http://www.mosac.mo.gov/page.jsp?id=45498> (last visited Nov. 12, 2012). Any interested person can access the system and try their hand at using the system.

¹⁴² *Step 1: MO Charge Code Entry*, MOSAC, <https://www.courts.mo.gov/rs/> (last visited Nov. 12, 2012).

¹⁴³ *Charge Code Search*, MOSAC, <https://www.courts.mo.gov/rs/chargeCodeSearch.do?method=start> (last visited Nov. 12, 2012).

¹⁴⁴ *Step 1*, *supra* note 142.

After entering the statutory section (via a “charge code”),¹⁴⁵ the user learns that such an offense is a class B felony with a “medium” severity level.¹⁴⁶ The next page asks for the defendant’s prior criminal history, which is categorized into one of five levels.¹⁴⁷ (This particular burglar is a level one.) That, in turn, leads to a series of questions about the defendant’s gender, age, education level, employment, and substance abuse history, along with a few additional questions on criminal history.¹⁴⁸ Clicking “next” rewards the user with a plethora of useful information.¹⁴⁹

This payoff page lays out several sets of facts and recommendations. One section, marked “advisory sentence,” lays out a “mitigating sentence,” a “typical sentence,” and an “aggravating sentence,” along with any statutory restrictions.¹⁵⁰ For the burglar with no prior criminal history, the mitigating sentence is simple probation, the presumptive sentence is community-structured sentencing,¹⁵¹ and the aggravating sentence is shock probation or drug treatment.¹⁵² Of course, because the judge has complete discretion to do what she wants within the statute, these tiers are purely advisory. To guide the judge in her exercise of that discretion, this page also describes the expected time served, the costs of various sentencing options,¹⁵³ and

¹⁴⁵ In this case, MO Charge Code 14010. MO. REV. STAT. § 569.160 (2012).

¹⁴⁶ *Step 1, supra* note 142 (enter “14010” as the “MO Charge Code,” select “Committed” in the “Charged As” field, then click “Next”).

¹⁴⁷ *Id.* (follow instructions found *supra* note 146, click “Next,” select “Level I,” then click “Next”).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (follow instructions found *supra*, nn.147–148, fill out all fields under “Offender Risk Variable,” then click “Next”).

¹⁵⁰ *Id.*

¹⁵¹ In Missouri, community-structured sentencing includes alternatives focused on treatment for substance abuse and mental health issues, as well as home detention with electronic monitoring, halfway houses, and enhanced forms of probation. MO. SENTENCING ADVISORY COMM’N, RECOMMENDED SENTENCING USER GUIDE 2009–2010, 24–32, *available at* <http://www.mosac.mo.gov/file.jsp?id=45346>, (last visited Nov. 12, 2012).

¹⁵² *Id.* at 55.

¹⁵³ For this burglar, simple probation would cost the state \$9,180 a year, while a term of shock probation which includes a 120-day period of incarceration costs

recidivism rates.¹⁵⁴

Setting out just three options¹⁵⁵ based on the practices of judges in similar cases is intriguing, but a far cry from what is proposed here. Unfortunately, the Missouri system masks the raw data from similar cases, and it is that data that drives a true trailing-edge process. Society should trust its judges to understand that broader array of information.

2. *Scotland*

Outside of the United States, one jurisdiction that has come close to implementing a system like the one described here is Scotland.¹⁵⁶ In 2002, Scotland was in the early years of a new form of self-governance, having formed its first parliament in 1999.¹⁵⁷ Judges feared having their discretion limited by this new legislature, and were especially wary of the possibility that

almost twice as much—\$17,266. MOSAC, *supra* note 141.

¹⁵⁴ *Id.*

¹⁵⁵ The three-option structure tracks the model developed by California in 1977 as part of that state's Determinate Sentencing Law. However, a key difference is how the penalties at each of the three levels are selected. In Missouri, as set out here, the sentences are based on an analysis of the sentences actually given by other judges. In California, though, the statute defines the "three precise terms of imprisonment" that a judge must choose between in determining a sentence. *Cunningham v. California*, 549 U.S. 270, 277 (2007) (finding mandatory DSL law unconstitutional, in that it allowed the upper choice to be reached based on judicial, not jury, findings). That distinction is significant, in that while the structure may be the same, the Missouri system is much more free of the political issues that plague legislative determination of sentencing, where "tough on crime" is often a good platform when running for re-election, regardless of the effects of that toughness. In California, those effects have been catastrophic, with California's prison population exploding from just 25,000 in 1980 to about 172,000 in 2008, largely, though not wholly, due to the Determinate Sentencing Law. Aaron Rappaport, *Sentencing Reform in California*, 7 HASTINGS RACE & POVERTY L. J. 285, 285 (2010).

¹⁵⁶ Though it has not been well-documented, it appears that the Australian jurisdiction of New South Wales also uses a sentencing information system as a way to shape future sentences. Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1374–75 (2005).

¹⁵⁷ Neil Hutton & Cyrus Tata, *A Sentencing Exception? Changing Sentencing Policy in Scotland*, 22 FED. SENT'G REP. 272, 272 (2010).

mandatory sentencing guidelines might be employed.¹⁵⁸ In an attempt to ward off such legislative intervention,¹⁵⁹ Scotland's senior judiciary, in partnership with faculty at Strathclyde University's Centre for Sentencing Research, created a sentencing information system that would "allow judges to consult a carefully constructed database of previous first-instance and appeal decisions so as to help to inform the difficult task of sentencing."¹⁶⁰ In other words, the system was intended to do exactly what is suggested here: provide information about past practices in lieu of more restrictive guidelines dictated by an external body.

The sentencing information system would permit the following:

A Scottish judge faced with a new case can specify various offense and offender characteristics. . . . For any combination of factors, the system will depict the range of sentences imposed. . . . By adding or removing facts, or making different hypothetical determinations, a judge can compare the outcomes for a set of case scenarios.¹⁶¹

The proposed system in Scotland contained the essential dynamic behind trailing-edge guidelines: uniformity through peer efforts, made possible by the review of real-time data by courtroom judges. Sadly, however, the project appears to have been stillborn. As described by two of the faculty at Strathclyde University's Centre for Sentencing Research, which was involved in the project, after the data collection was complete the endeavor was troubled by the question of who would have access to the data, with judges nervous about public disclosure.¹⁶² As a result, the project was "quietly forgotten" and "has been allowed to atrophy" without updates or much evidence of its use.¹⁶³

By letting a trailing-edge information system fade on the vine, Scotland returned to a system with broad judicial discretion, a

¹⁵⁸ Miller, *supra* note 116, at 1372–73.

¹⁵⁹ *Id.*

¹⁶⁰ Hutton & Tata, *supra* note 157, at 274.

¹⁶¹ Miller, *supra* note 116, at 1373.

¹⁶² The University-based group argued for public access, while judges preferred that it be kept private. Hutton & Tata, *supra* note 160, at 272.

¹⁶³ *Id.*

history of avoiding over-incarceration, and little appetite for reform.¹⁶⁴ That is a very different environment than the American federal sentencing swamp, which is now being attacked from nearly all sides, as the post-*Booker* structure appears to be creating as many problems as it solves, and the cost of over-incarceration becomes a bipartisan talking point.

V. THE ADVANTAGES OF TRAILING EDGE GUIDELINES

A. *Discretion and Uniformity*

The crucial feature of trailing-edge guidelines is that a judge's sentence in a given case serves two functions simultaneously. First, it stands alone as a discrete decision within that case. Second, it then becomes a part of the guidelines themselves—a data point to consider by the next judge who faces a similar set of facts. In this way, the use of trailing-edge guidelines can break through the false dichotomy between judicial discretion and uniformity that underlies the current system. Maintaining that tension has produced a series of plagues: mistrust between Congress and judges, over-sentencing, and the utter failure of the system at serving either goal.

At its base, the present federal sentencing system places the expression of one key value (individualized consideration of cases) within the realm of judges and a second key value (uniformity) primarily with two distinct and separate bodies—Congress and the Sentencing Commission. Because the role of creating uniformity was yanked from judges by cabining discretion and in part returned to judges (via *Booker*) without corresponding limits to ensure uniformity,¹⁶⁵ it is no wonder that a core sense of respect between these groups was lost. At its extreme, this failed relationship resulted in experienced judges quitting the bench in disgust.¹⁶⁶

¹⁶⁴ *Id.*

¹⁶⁵ *United States v. Booker*, 543 U.S. 220, 245 (2005).

¹⁶⁶ Those federal district court judges who stepped down while blaming the guidelines included Hon. J. Lawrence Irving of the Southern District of California. Alan Abrahamson, *Judge Quits S.D. Bench Over Sentencing Rules*, L.A. TIMES, Sept. 27, 1990, available at <http://articles.latimes.com/print/1990->

Similarly, Congress's distrust of judges seemed to grow during the guideline period, perhaps reaching its high point in 2003 with the passage of the Feeney Amendment to the PROTECT Act of 2003.¹⁶⁷ The sponsor of that Amendment, which limited the ability of federal judges to depart downward from the sentencing guidelines, condemned the judiciary for basing sentencing on their "personal biases and prejudices, resulting in wide disparity in sentencing."¹⁶⁸ Members of Congress apparently agreed, voting 357-58 in favor of the legislation.¹⁶⁹

Trailing-edge guidelines (or any other system) will not be able to heal the rift between judges and Congress entirely. However, a trailing-edge system could break the damaging dialectic of judicial variance from the guidelines followed by sharp reaction from Congress as was embodied in the Feeney Amendment. By creating more uniformity, it will alleviate at least some of the Congressional pressure that otherwise might be visited on the sentencing system.

B. *Proper Roles for Judges, the Sentencing Commission, and Congress*

As described in the Part above, the current system seems to keep judges, Congress, and the Sentencing Commission in a state of constant agitation, because their interests are set in opposition to one another. With a trailing-edge system, more settled roles will emerge while still retaining adequate checks and balances.

09-27/news/mn-1443_1_sentencing-guidelines, and Hon. John S. Martin of New York, *Judge Quits, Calls Judicial System Unjust*, ASSOCIATED PRESS, July 3, 2003, available at <http://www.corrections.com/articles/8857-judge-quits-calls-judicial-system-unjust>.

¹⁶⁷ The PROTECT Act of 2003 was originally intended to give prosecutors tougher laws to use in cases involving the sexual exploitation of minors. Jared I. Heller, *Do Judges Need Protection? Legislative and Judicial Responses to the PROTECT Act's Feeney Amendment*, 68 ALB. L. REV. 755, 762 (2005).

¹⁶⁸ 149 CONG. REC. H2423 (daily ed. Mar. 27, 2003) (statement of Rep. Patrick Feeney).

¹⁶⁹ *Id.* (Roll Call Vote).

1. *The Role of Judges*

The ones with the most to gain from a trailing-edge system, in terms of influence, are sentencing judges. Their decisions, collectively, will directly shape the guidelines, and the system as a whole will honor the talents that brought them to the bench in the first place. It is hard to imagine that they would prefer the current system to one which would better respond to their practices and provide such a wealth of relevant information.

A trailing-edge system would also give judges a broader and deeper ability to take seriously the traditional goals of sentencing.¹⁷⁰ Section 3553(a) of Title 18 of the U.S. Code has (for the length of the guideline era) directed judges to justify a sentence in light of the four traditional goals of sentencing: retribution,¹⁷¹ deterrence,¹⁷² incapacitation,¹⁷³ and rehabilitation.¹⁷⁴ However, the formulaic and often overly harsh guidelines have too often redirected attention from this duty.¹⁷⁵ With a trailing-edge system, judges will be freer to give real play to these historically important elements.

It should not be assumed, though, that judges would jump at the chance to employ trailing-edge guidelines, even if it was fully advisory rather than mandatory. Resistance to a trailing-edge system among judges could easily arise if the information in the sentencing information system were made available to the public. Indeed, it appears that this problem was a significant part of the denouement of the sentencing information plan in Scotland,¹⁷⁶ where “senior judicial nervousness” about the proposed system’s

¹⁷⁰ One of the core drawbacks of the sentencing guideline era has been the impossibility of building these goals systemically into the process, as they are necessarily relatable to discrete defendants who can be subjected to individualized analysis.

¹⁷¹ 18 U.S.C. § 3553(a)(2)(A) (2012).

¹⁷² *Id.* § 3553(a)(2)(B).

¹⁷³ *Id.* § 3553(a)(2)(C).

¹⁷⁴ *Id.* § 3553(a)(2)(D).

¹⁷⁵ Mark Osler, *Policy, Uniformity, Discretion, and Congress’s Sentencing Acid Trip*, 2009 BYU L. REV. 293, 312–13.

¹⁷⁶ *See supra* Part IV.C.2.

use by the media and others led to it being “quietly forgotten.”¹⁷⁷

The value of making the full sentencing information system publicly available is obvious: It would allow citizens to see plainly the contours of criminal justice as it operates at ground level. Racial disparities, for example, would be as easily accessible (and understandable) as real estate information. However, the primary use of the sentencing information system is for judges themselves,¹⁷⁸ and the breadth of public availability should be left to them.¹⁷⁹

2. *The Role of the Sentencing Commission*

Under a trailing-edge system, the Sentencing Commission would retain two functions, lose a key task, and gain another. While its role in determining outcomes via guideline ranges would be diminished, it would be at the center of a trailing-edge system as keeper and conveyer of information. While this might be seen as a threat to the Commission’s power because the Commissioners no longer get to choose recommended sentences, it really does nothing to lessen the Commission’s overall importance to federal sentencing.

The core functions of the Sentencing Commission would remain the same in two crucial respects: It would formulate an annual guideline manual, which would contain specific guidelines which address a crime or group of crimes (only without numerical values and a sentencing matrix),¹⁸⁰ and it would gather and analyze

¹⁷⁷ Hutton & Tata, *supra* note 157, at 272.

¹⁷⁸ It would be possible, of course, to create a similar system that would track the decisions of prosecutors. This would create a fascinating data set that could reveal, finally, the disparities created by prosecutor’s use of discretion independent of judge’s decisions.

¹⁷⁹ If the system is not made publicly available, there will remain the question of whether or not to make it fully available to prosecutors, defense attorneys, and probation officers. It would be entirely possible to make different versions available to different groups. For example, probation officers and attorneys might have access to the full judicial version, while the public has access to a version that limits some functions.

¹⁸⁰ The Commission is directed to do so by 28 U.S.C. § 994(a) (2012).

data about sentencing.¹⁸¹

The task the Sentencing Commission would gain is crucial: the creation and maintenance of the sentencing information system that would lie at the heart of trailing-edge guidelines. This role would build on the Commission staff's proven ability to gather and analyze masses of data, a skill that was well showcased in its game-changing 2007 report to Congress, *Cocaine and Federal Sentencing Policy*.¹⁸² Importantly, though, information technology resources would have to be beefed up to produce the computer models required to create a real-time trailing-edge system.

Would the Sentencing Commission happily give over its ability to determine sentencing ranges? While power is rarely relinquished gladly, the Commissioners themselves have other jobs and no one would relish the uncomfortable role (perceived or real) of sentence dictators.¹⁸³ Presiding over a Commission that remained at the center of federal sentencing, worked closely with sentencing judges, and required a knowledgeable and engaged staff seems like a task that would remain appealing to the types of people who care deeply about criminal justice.¹⁸⁴

3. *The Role of Congress*

While trailing-edge guidelines would certainly alter Congress's historical practice of demanding certain sentences for hot-button crimes through directing specific score increases, it would still allow for Congressional input through the identification of factors which would be entered prior to viewing the data set relevant to a sentencing—much the same way that Congress can mandate

¹⁸¹ It currently has both jobs. *Id.* § 994(w).

¹⁸² U.S. SENTENCING COMM'N, COCAINE AND FEDERAL SENTENCING POLICY (2007), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf.

¹⁸³ In one instance of particularly sharp name-calling, Supreme Court Justice Antonin Scalia referred to the Commission as a "Junior-Varsity Congress." *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (Scalia, J., dissenting).

¹⁸⁴ Whatever other criticisms have been thrown at the Sentencing Commission over the years, few have doubted their concerned engagement with sentencing issues.

guideline factors now.

All that would be different under a trailing-edge system is that Congress would lose the ability to directly say what the effect (in terms of an offense level score) of a given enhancement would be. Rather, that would develop over time as judges utilize that factor. Simply adding an aggravating factor for consideration, though, will likely result in higher sentences for crimes that include that factor because the judge's attention will be drawn to that aspect of the defendant's actions.

One fear raised by trailing-edge guidelines is that Congress would attempt to maintain its control over sentencing through the increased use of mandatory minimum sentences that are required directly by a statute.¹⁸⁵ Ideally, mandatory minimums would be eliminated or significantly reduced when a plan for trailing-edge guidelines is introduced, but that may be an unrealistic political goal. Or perhaps not so unrealistic—significant new mandatory minimums have not been created in years, and in 2010 Congress actually (and overwhelmingly) reduced a mandatory minimum for crack cocaine through the Fair Sentencing Act.¹⁸⁶

Regardless of the sentencing guidelines in place, the risk of unwise mandatory minimums will remain, as it is within Congress's power to enact such legislation, and political moments sometimes occur in which the pressure to pass such legislation is great. It would be foolish to pass up the chance to enact serious reform simply out of fear of an extreme reaction by legislators. In truth, mandatory minimums arise largely out of purely political forces, not in reaction to developments within criminal law and procedure.¹⁸⁷

¹⁸⁵ See, e.g., 21 U.S.C. § 841(b)(1) (2007) (requiring sentencing to minimum lengths of incarceration for certain drug crimes).

¹⁸⁶ Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified as amended in 21 and 28 U.S.C.).

¹⁸⁷ Carissa Hessick has argued convincingly that these political forces are driven in large part by "public information deficits." Carissa Byrne Hessick, *Mandatory Minimums and Popular Punitiveness*, 2011 CARDOZO L. REV. DE NOVO 23.

C. *Efficiency and Simplicity*

There is a value in simplicity. One concrete advantage of simplicity in sentencing is that it creates a fairer playing field for both sides. The hopelessly complex guidelines that exist now give a strong advantage to those who use them more often—the prosecutors.¹⁸⁸ Trailing-edge guidelines will allow the process to be more easily seen and understood, though it will still require the correct identification and application of aggravation and mitigation factors.

Appeals will likely be simpler as well. Building on parts of the current jurisprudence of sentencing, trailing-edge guidelines would likely allow appeals based on proper consideration of mitigating and aggravating factors and reasonableness relative to the guidelines. However, because the guidelines will move to reflect judges' actions over time, there would likely be fewer sentences that are far out of the "heartland," resulting in fewer appeals.

D. *Options for Implementation*

Wholesale implementation of a trailing-edge system would require Congressional action—specifically, removal of those statutory provisions that require the Sentencing Commission to create guideline ranges,¹⁸⁹ and creation of statutory provisions which direct the commission to construct and maintain the sentencing information system.

It is not necessary, however, that this all happen at once. There is an in-between option that would allow for a test drive of the sentencing information system while Congress considers broad changes. Both systems could easily coexist, with the sentencing advisory system argued for here (that is, the screens of comparable sentences) available to judges at the time they sentence under the current advisory guideline system. Probation officers could

¹⁸⁸ Because many defense attorneys in federal court (both retained and appointed off a panel) have the majority of their caseload in state court, while prosecutors have a one hundred percent federal caseload, prosecutors gain much more experience at using the guidelines.

¹⁸⁹ These provisions are found primarily in 28 U.S.C. § 994 (2006).

incorporate both input from the sentencing information system and the traditional system into Presentence Investigation Reports that are prepared in nearly all federal felony cases. Such a test drive would require no one to give up real power until the utility of this system was established.

VI. CONCLUSION

The current federal sentencing system is a clunker held together with duct tape and Bondo. It is time to upgrade to a system that makes full use of modern technology. Trailing-edge sentencing would eliminate some of the worst aspects of the artificial uniformity-discretion duality, while maintaining a baseline for federal sentencing. If it goes unchanged, it will likely be because society is merely comfortable with the broken-down clunker it has. The harm in that complacency, though, is not only to defendants, but to judges, budgets, and the bedrock American ideal that taking away freedom is something done only with great care.

