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THE FEDERAL SENTENCING GUIDELINES: A MISPLACED TRUST IN MECHANICAL JUSTICE

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In 1984 the Sentencing Reform Act was passed, ending fully discretionary sentencing by judges and allowing for the creation of the Federal Sentencing Guidelines ("FSG" or "Guidelines"). This Note proposes that the Guidelines failed not only because they ran afoul of the Sixth Amendment, as determined by the Supreme Court in 2005, but also because they lacked a clear underlying purpose, had a misplaced trust in uniformity, and were born of political compromise. Moreover, the effect of the FSG was to blindly shunt discretionary decisions from judges, who are supposed to be neutral parties, to prosecutors, who are necessarily partisan. This Note argues that such a shift ignores not only the underpinnings of our adversarial system, but also the prosecutor's role in the executive branch. This Note further argues that a return to indeterminate sentencing coupled with guidelines for parole boards would solve this problem, realigning the power between the branches and creating transparency in the federal sentencing system.

INTRODUCTION

With discretion[1] comes dissent. One of the more divisive topics in modern legal scholarship stems from questioning and analyzing this very issue in the context of the judiciary. Criticism of judicial discretion has led, in part, to the promulgation of legislation like the Sentencing Reform Act of 1984[2] ("SRA"), which, in turn, allowed for the creation of the Federal Sentencing Guidelines[3] ("FSG" or "Guidelines"). This Note argues, however, that the FSG failed not only because they ran afoul of the Sixth Amendment,[4] but also because they were unable to solve a number of the discretion-based criticisms that spurred their passage. Instead of

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1. The term "discretion" itself is loaded and carries various meanings, some of which are discussed in this Note. Here, "discretion" means either the ability to make a choice, or the appearance thereof.

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

3. 18 U.S.C. § 3553 (2006).

4. *See* United States v. Booker, 543 U.S. 220 (2005). Although the Supreme Court's decision in *Booker*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and their progeny rely heavily on this argument, this Note addresses briefly some of the problems with this analysis *infra* in Part III.

increasing transparency in the sentencing process, as intended, the FSG blindly shunted more power to prosecutors and overlooked the importance of designated neutrals, like judges or juries, making sentencing decisions. This Note further argues that one method for solving these problems is a return to indeterminate sentencing coupled with the imposition of guidelines on parole boards, instead of tighter restrictions on the judiciary.

Part I of this Note addresses the SRA and the reasons behind the passage of the Guidelines. Part II contextualizes this legislation through a brief outline of the legal scholarship evaluating judicial discretion. It then sets out and evaluates the respective roles of the judiciary and advocates in an adversarial system. Part III analyzes the problems with the Guidelines, and touches on the difficulties with the Supreme Court decisions declawing them. Part IV suggests an alternative solution to the discretion-related criticism that spawned the FSG, and argues that indeterminate sentencing coupled with parole board guidelines properly realigns the balance of power between the executive and judicial branches while also allowing for transparency.

I. ORIGINS: THE INCEPTION OF THE FSG

During the 1970s and early 1980s, a general dissatisfaction with the standard practice of indeterminate sentencing[5] began to materialize. Some even characterized it as a "near-revolution."[6] Marvin E. Frankel, a United States District Judge for the Southern District of New York, was a particularly vocal leader of this early charge for change.[7] He characterized the United States criminal justice system in the 1970s as "a bizarre 'nonsystem' of extravagant powers confided to variable and essentially unregulated judges, keepers and parole officials," and stated that "the sentencing stage has come to

5. In the 1970s, indeterminate sentencing was used across the country by both the federal and state systems. Mechanically, this meant that the legislature set a maximum term of imprisonment, and judges chose whether the individual was fined or sentenced to probation or jail time. Within this sentence, the judge decided the maximum jail time for the defendant. The parole boards then set the release dates. Michael Tonry, *Reconsidering Indeterminate and Structured Sentencing*, *in* 2 SENT'G & CORRECTIONS ISSUES FOR THE 21ST CENTURY: PAPERS FROM THE EXEC. SESSIONS ON SENT'G & CORRECTIONS (U.S. Dep't of Justice, Washington D.C.), Sept. 1999, at 1 (on file with the University of Michigan Journal of Law Reform), *available at* http://www.ncjrs.gov/pdffiles1/nij/175722.pdf.

6. SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 217 (2d ed. 1998) ("Nearly everyone, it seemed, was unhappy with the indeterminate sentence. Conservatives accused judges of being 'soft' on crime, while liberals argued that the sentences were arbitrary and discriminatory.").

7. *See* Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

strike me as the key focus of disease in our apparatus of punishment."[8] One of the central criticisms leveled against the pre-FSG sentencing system was that it did not set out the goals and principles that were meant to guide sentencing decisions.[9] Judges had no guidance in making sentencing determinations and this, in turn, led to sentencing disparities and a perception of arbitrariness and injustice.[10] Judge Frankel concluded, with more than a trace of frustration, "[t]he process would be totally unruly even if judges were superbly and uniformly trained for the solemn work of sentencing. As everyone knows, however, they are not trained at all."[11]

Another criticism aimed at the prevailing system was that sentences lacked any mechanism for appellate review.[12] This censure was compounded by the fact that judges were not required to explain their reasoning in reaching sentencing decisions, leading—according to some critics—to a "shadow-land of doubt, ignorance, and fragmented responsibility."[13]

Congress set out to correct these problems by passing the Sentencing Reform Act in 1984[14] and eliminating parole in the federal system.[15] The SRA created the United States Sentencing Commission ("Sentencing Commission" or "Commission"), an independent agency that sits in the judicial branch[16] and is

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8. *Id.* at 1–2.

9. *Id.* at 4 ("Even the most basic sentencing principles are not prescribed or stated with persuasive authority. . . . Nothing tells us . . . when or whether any of these several goals [retribution, deterrence, denunciation, incapacitation or rehabilitation] are to be sought, or how to resolve such evident conflicts as that likely to arise in the effort to punish and rehabilitate all at once.").

10. *Id.* at 7–9, 14; *see also* Tonry, *supra* note 5, at 5–6; William W. Wilkins, Jr. et al., *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 CRIM. L.F. 355, 357–62 (1991).

11. Frankel, *supra* note 7, at 6; *see also id.* at 6–9.

12. *See, e.g., id.* at 23–28; Tonry, *supra* note 5, at 1 ("[V]irtually all these decisions [by the judges, corrections officials and parole boards] were immune from review by appellate courts.").

13. Frankel, *supra* note 7, at 10.

14. *See* U.S. SENTENCING COMM'N, GUIDELINES MANUAL 1–15 (2008) (on file with the University of Michigan Journal of Law Reform), *available at* http://www.ussc.gov/2008guid/GL2008.pdf [hereinafter GUIDELINES] (providing the background history of the Guidelines); Wilkins, *supra* note 10, at 362–64. The Guidelines were upheld as constitutional in *Mistretta v. United States*, 488 U.S. 361, 363–67 (1989).

15. Comprehensive Crime Control Act of 1984, 18 U.S.C. § 3624 (2000). The elimination of parole was done in an attempt to make the system more transparent so parties would not be "fooled" by the discrepancy between a judge's sentence and the defendant's release on parole. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988). For a more thorough evaluation of the SRA, and the political motivations behind its passage, see KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING 38–77 (1998) [hereinafter STITH & CABRANES, FEAR OF JUDGING].

16. *But cf.* Kate Stith & José A. Cabranes, *To Fear Judging No More: Recommendations for the Federal Sentencing Guidelines*, 11 FED. SENT'G REP. 187, 187 (1999) [hereinafter Stith &

composed of seven voting and two non-voting ex officio members.[17] The SRA also allowed for the creation of federal sentencing guidelines, required judges to state—specifically and on the record—the reason for the sentence handed down and, among other things, allowed for appellate review of sentences.[18] Congress broadly set forth four basic justifications for punishment to direct the Sentencing Commission in creating the Guidelines: retribution, deterrence, incapacitation and rehabilitation.[19] Congress also set out the following goals for the Sentencing Commission:

> (b) The purposes of the United States Sentencing Commission are to—
>
> (1) establish sentencing policies and practices for the Federal criminal justice system that—
>
> (A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;
>
> (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

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Cabranes, *To Fear Judging No More*] ("While the Sentencing Commission is asserted to be 'within the judicial branch' of the federal government, it has in fact been dominated by non-judges appointed by the President and confirmed by the Senate for a term of six years." (citation omitted)).

17. GUIDELINES, *supra* note 14, at 1.

18. Wilkins, *supra* note 10, at 364–65.

19. 18 U.S.C. § 3553(a)(2) (2006):

> (a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE. . . . The court, in determining the particular sentence to be imposed, shall consider—
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . .

> (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process . . . .[20]

Beyond this, Congress requested that the Sentencing Commission pay "particular attention" to "providing certainty and fairness in sentencing and reducing unwarranted sentence disparities."[21] However, as this Note argues *infra* Part III, the FSG did not provide certainty in the ways that Congress envisioned and, as a result, it is not clear that the current regime ultimately translates equal sentences into fair ones.

A detailed description of how the Guidelines prescribe each sentence is unnecessary as a brief summary still makes clear how they function. The Sentencing Commission developed a rubric for calculating what sentence an individual should receive based on the severity of the crime charged and the individual's prior criminal history, with variations based on the specific circumstances (i.e., if the individual committed the crime within six months of a prior conviction, etc.).[22] This rubric was approved by Congress in 1987.[23] If the judge or jury in the case found that the individual was guilty of the crime, the Commission limited the judge's sentencing discretion so she could only issue a sentence within a range that did not exceed a six month or 25 percent variation.[24] This was intended to minimize sentencing discrepancies when individuals were convicted of the same level of crime.

However, two other factors—operating in conjunction with one another—actually shifted a majority of the discretion in sentencing from judges to prosecutors. First, the Guidelines were initially mandatory.[25] Judges could only break from the FSG if they found very unusual circumstances in the case.[26] Second, the FSG prescribed sentences based on the elements of the crime for which the defendant was *charged and convicted*, regardless of the defendant's

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20. 28 U.S.C. § 991(b).

21. *Id.* § 994(f) ("The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.").

22. GUIDELINES, *supra* note 14, at 11 (describing the sentencing table created to help with calculations).

23. *Id.* at 15; *see also* Wilkins, *supra* note 10, at 374.

24. 28 U.S.C. § 994(b)(2).

25. This changed in 2005 when the Supreme Court made the FSG advisory in *United States v. Booker*, 543 U.S. 220 (2005).

26. Wilkins, *supra* note 10, at 369 ("In other words, under the SRA scheme, the guidelines are *mandatory*, except in cases that are significantly atypical."). *See* GUIDELINES, *supra* note 14, at 6–7 (explaining when departures from the FSG are allowed).

actual conduct.[27] Judges were forced to issue sentences in accordance with the prison terms listed in the FSG, meaning they were confined to the elements of the crime the prosecutor chose to charge.[28] For the purposes of sentencing in this new system, the charging documents carried greater weight than the defendant's actual behavior.

Interestingly, the Sentencing Commission notes that it initially attempted to create a "real offense" system, one in which the guidelines based the defendant's sentence on his actual conduct.[29] However, the Commission found this system, which was more akin to pre-FSG sentencing, to be unworkable in the context of creating a sentencing matrix and resorted instead to what is known as the "charge offense" system.[30] This methodology limits the judge's sentencing evaluation to *only* those charges brought by the prosecutor for which the defendant is convicted.[31]

Although the Commission defends this choice, in the introduction to the Federal Sentencing Guidelines it acknowledges that in the charge offense system "[o]ne of the most important [drawbacks] is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment."[32] In an adversarial system where, as discussed *infra* Part II, each side is supposed to act as a zealous advocate, binding guidelines that give prosecutors so much authority fundamentally change the balance of power in criminal prosecutions.[33]

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27. GUIDELINES, *supra* note 14, at 5–6 (comparing "Real Offense" with "Charge Offense" sentencing).

28. *See, e.g.*, United States v. Alldredge, 551 F.3d 645 (7th Cir. 2008) (reversing and remanding because the lower court considered the actual conduct of the defendant in sentencing, instead of limiting the decision to the elements of the offense charged).

29. GUIDELINES, *supra* note 14, at 5–6.

30. See Breyer, *supra* note 15, at 4, for a more in-depth comparison of these two methodologies.

31. GUIDELINES, *supra* note 14, at 5–6; *see also Alldredge*, 551 F.3d at 645.

32. GUIDELINES, *supra* note 14, at 6. The Commission goes on to hedge, however, by stating that "the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase the defendant's sentence." *Id.*

33. It is arguable that plea bargaining does the same thing. However, plea bargaining leaves a defendant the option of going to trial. Here, the prosecutor can determine the individual's sentence not only at the bargaining phase, but also at trial. *See* Marvin E. Frankel & Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655, 669–70, 675 (1993) (agreeing that there is "a *prima facie* case for the proposition that guidelines enhance the prosecutor's power in plea bargaining"); *cf.* Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 560–65 (1993) (proposing that sentencing guidelines and increased prosecutorial power have a positive effect on plea bargaining). For a more detailed account of the relationship between the plea bargaining and indeterminate sentencing, see George Fisher, *Plea Bargaining's Triumph*, 109

II. CONTEXTUALIZING THE GUIDELINES: JUDICIAL DISCRETION AND THE ADVERSARIAL SYSTEM

A full understanding of the FSG requires contextualizing this legislation. First, to understand why the Guidelines were adopted, one has to appreciate the general conversation and skepticism surrounding judicial discretion.[34] This mistrust of judges played a strong role in shaping the Guidelines.[35]

Second, to understand why the Guidelines failed, one must contextualize them in the adversarial framework of our legal system. When giving more discretion to prosecutors, the Sentencing Commission failed to fully consider the prescribed roles of advocates in our criminal justice system and the need for them to argue zealously. As a result, the Guidelines were unable to deliver the impartial fairness they set out to provide.[36]

A. Discretion and Its Limits

Two prominent perspectives on judicial discretion are articulated by H.L.A. Hart and Ronald Dworkin. Hart sits at one end of the spectrum, arguing that judicial rules can only extend so far[37] and, as a result, judicial "legislation" is a necessary part of the

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YALE L.J. 857, 1044–56 (2000). A full evaluation of plea bargaining and its interaction with the FSG is beyond the scope of this Note.

34. Judicial discretion is a thorny issue that has spawned countless law review articles and books. This Note only touches upon the basics of the debate, which helps illuminate the FSG and their failings. For a more thorough investigation of the topic see, for example, Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975); Jeremy Waldron, Essay, *The Core Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

35. WALKER, *supra* note 6, at 217–20 (discussing the general dissatisfaction with judicial discretion in indeterminate sentencing and the way in which the sentencing guidelines greatly limited that discretion as a result).

36. *See infra* Part III.

37. H.L.A. HART, THE CONCEPT OF LAW 121 (1961) ("[T]he law must predominantly, but by no means exclusively, refer to *classes* of person, and to *classes* of acts, things and circumstances . . . ."). Hart goes on to argue that inflexible terminology and strict application of the law, while predictable, can lead to absurd results, meaning that "[t]he rigidity of our classifications will . . . war with our aims in having or maintaining the rule." *Id.* at 127. For varying points of view on this issue, compare Justice Warren Burger's majority opinion with Justice Lewis Powell's dissent in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). Justice Powell argues that statutory interpretation cannot be so strict as to produce "absurd results." In contrast, Justice Burger argues that the plain meaning of the text should control, regardless of the practical outcome. This could be because, in line with Justice Scalia's formalism, Justice Burger was more interested in establishing the means of reaching the decision, as opposed to strictly considering the real-world results.

decision making process on the bench.[38] The Guidelines sit in opposition to Hart's philosophy, as they limit judicial discretion and prescribe set sentences based on only two or three criteria. Hart stated that "a world fit for 'mechanical' jurisprudence" would be one "characterized only by a finite number of features," and that we would be able to make advance provision for every possibility.[39] The FSG seem premised on the assumption that such a world exists; Hart disagreed.

Dworkin sits at the other end of the spectrum,[40] arguing that no such judicial decision making should exist[41] because each legal question has only one correct answer,[42] which can be found by turning to moral guidelines and legal principles.[43] Dworkin would likely appreciate the Guidelines for the simplicity of their application and their resemblance to clear rules. In his book TAKING RIGHTS SERIOUSLY, Dworkin analogizes the judge to a referee in a game of chess.[44] The rules are straightforward and "[t]he referee is not free to give effect to his background convictions in deciding

38. Hart, *supra* note 37, at 132 ("Here are the margin of rules and in the fields left open by the theory of precedents, the courts perform a rule-producing function which administrative bodies perform centrally in the elaboration of variable standards."); *see also* Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed* 16 (Univ. of Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 77, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=968657#. Hart was not alone in this point of view. *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 115 (1921).

39. Hart, *supra* note 37, at 125.

40. Some scholars have argued that the core of the Hart-Dworkin debate revolves around their differing concepts of the law, and that their discussion of judicial discretion is a derivative one. *See* Shapiro, *supra* note 38, at 4. While this may be true, the motivations for their varying opinions are not relevant at this juncture. Instead, this Part aims only to contextualize the FSG by outlining various views on judicial discretion.

41. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058 (1975) ("[J]udges neither should be nor are deputy legislators, and the familiar assumption, that when they go beyond political decisions already made by someone else they are legislating, is misleading.").

42. Ronald Dworkin, *Judicial Discretion*, 60 J. PHIL. 624, 636 (1963) ("[T]he judge must attempt to reach . . . the 'correct' result."); *see also* RONALD DWORKIN, A MATTER OF PRINCIPAL 119–45 (1985). Toward the end of the chapter he notes that in most cases "[t]here seems to be no room . . . for the ordinary idea of a tie. If there is no right answer in a hard case, this must be in virtue of some more problematic type of indeterminacy or incommensurability in moral theory." *Id.* at 144.

43. Legal principles provide "separate sorts of standards, different from legal rules" that are relied upon throughout the law's history. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 28 (1977) [hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY] (selection from Ch. 2, "Model of Rules I"). Further, once a judge identifies the appropriate legal principle, he is required to follow it. RONALD DWORKIN, LAW'S EMPIRE 217 (1986) ("[O]ur judges [are required], so far as this is possible, to treat our present system of public standards as expressing and respecting a coherent set of principles, and, to that end, to interpret these standards to find implicit standards between and beneath the explicit ones.").

44. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 43, at 102.

[a] hard case."[45] Further, even if the rules' origins are unclear, the referee, like the judge, has a duty to "protect the character of the game" instead of freely interpreting matters in a case-by-case manner.[46]

For the purposes of this discussion, the perspective of Justice Antonin Scalia is equally important, as he interpreted the FSG and ruled numerous times on their legality. Justice Scalia is known for being a stalwart legal formalist,[47] and fits more comfortably at the Dworkin-end of the spectrum—although he offers a different rationale for why judges have (or should have) minimal discretion. He emphasizes the importance of the "appearance of equal treatment" and the need for predictability.[48] As a result, Justice Scalia places great importance on clearly enunciated rules[49] and is uncomfortable with the idea (or perception) of judicial law making.[50] Professor Cass R. Sunstein characterized Justice Scalia as someone who, "[a]bove all . . . seeks to develop rules of interpretation that will limit the policymaking authority and decisional discretion of the judiciary."[51] In short, this brand of decision making minimizes judicial discretion by urging that rules should be extended as far as possible, and balancing tests and analysis that rely on the totality of the circumstances should be avoided at all costs.[52] This logic, it would seem, meshes closely with the FSG and suggests some of the reasons behind the structure of the legislation. This statute provides judges with firm ground to stand on, avoids the "mushiness" of mitigating circumstances in sentencing, and does away with a large portion of judicial discretion. However, the Sentencing Guidelines went too far, even for a formalist like Justice Scalia.

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45. *Id.*

46. *Id.*

47. *See, e.g.*, Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 530 (1997) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997)) ("We might even say that Justice Scalia is the clearest and most self-conscious expositor of democratic formalism in the long history of American law.").

48. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–79 (1989). He argues that these factors are particularly important because they provide judges with stronger ground on which to stand when making decisions in "hard cases." *Id.* at 1180.

49. *Id.* at 1178 ("Much better, even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision.").

50. *Id.* at 1185 ("[W]hen one does not have a solid textual anchor or an established social norm from which to derive the general rule, its pronouncement [by the court] appears uncomfortably like legislation.").

51. Sunstein, *supra* note 47, at 530. Sunstein further notes that Justice Scalia's general attack on common law rule making is "rooted in distrust of particularism—especially judicial particularism . . . ." *Id.* at 531.

52. Scalia, *supra* note 48, at 1187.

In 1989, Justice Scalia was the only justice to find that the powers granted to the Sentencing Commission (including the ability to determine the weight assigned to the various factors in the defendant's history) violated the non-delegation doctrine and the separation of powers principle.[53] And, as discussed *infra* Part III, in 2005 he was in the majority that found the FSG to be unconstitutional.[54] Even Justice Scalia had to admit that sometimes discretion is superior to strict rules, and in his 1989 dissent he noted:

> Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.[55]

In the case of the Guidelines, even a staunch advocate of limiting judicial discretion had to admit that this delegation had gone too far.

B. The Adversarial System's Key Players: Zealous Advocates and Third-Party Neutrals

The FSG, as discussed *supra* Part I, increased the charging power of prosecutors. However, it is important to remember that our legal system is largely an adversarial one and, as a result, it relies on ardent advocacy from both parties in order to function.[56] Trials epitomize the competitive back-and-forth required by this method of justice and, as the Supreme Court pointed out in *Tehan v. United States*, the basic purpose of a trial—and by extension the adversarial system—is "the determination of the truth."[57] This means, as discussed more fully *infra*, prosecutors—unlike judges—are *not* intended to be neutral, disinterested parties and, as a result, they should not be given the power to sentence defendants.[58]

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53. Mistretta v. United States, 488 U.S. 361, 413–26 (1989) (Scalia, J., dissenting).

54. Note, though, that Justice Scalia based his decision on grounds other than those relating to judicial discretion.

55. *Mistretta*, 488 U.S. at 415.

56. Black's Law Dictionary defines the term "adversary system" as follows: "A procedural system, such as the Anglo-American legal system, involving active and *unhindered* parties contesting with each other to put forth a case before an independent decision-maker." BLACK'S LAW DICTIONARY 58 (8th ed. 2004) (emphasis added).

57. 382 U.S. 406, 416 (1966).

58. See the discussion of plea bargaining, *supra* note 33.

The American Bar Association's ("ABA") *Model Rules of Professional Conduct* reiterate the importance of fervent advocacy in our legal system.[59] In the Preamble, the ABA states that "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."[60] The Preamble also states:

> A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.[61]

Such a statement could only be possible if the ABA ascribed to the view that lawyers can divorce themselves ethically from their legal arguments because the adversarial system will succeed in revealing the truth to a third-party neutral, such as a judge or jury, who will make the ultimate determination of fact. Some scholars have characterized this separation as "neutral" or "non-accountable partisanship,"[62] and have noted that without it, our adversarial system would fall apart.[63]

The *Model Rules of Professional Conduct* clearly state, then, that prosecutors can, and should, passionately argue the government's case without ethical concern. This is not to say that prosecutors are without boundaries or are free from an ethical code. The executive branch of our government sets internal guidelines regarding which cases they may pursue[64] and, further, in describing the role of the federal prosecutor, Justice George Sutherland said that "while he may strike hard blows, he is not at liberty to strike foul ones."[65] However, once these cases go forward, a prosecutor not only "may

59. MODEL RULES OF PROF'L CONDUCT ¶ 2 (2009).

60. *Id.*

61. *Id.* ¶ 8.

62. DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 9 (2007). Luban states that such a point of view also holds that "[n]ot only are lawyers their clients' partisans and proxies, but professionalism requires that lawyers remain morally neutral toward lawful client ends." *Id.; see also* Michael D. Zimmerman, *Professional Standards Versus Personal Ethics: The Lawyer's Dilemma*, 1989 UTAH L. REV. 1.

63. Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 674 (1978) ("If advocates could be called personally to account for representing clients fully within established professional restraints . . . [it] would undercut the very assumptions of the adversary system.").

64. *See, e.g.*, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL ch. 9-27.000 (1997) (on file with the University of Michigan Journal of Law Reform), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm [hereinafter MANUAL].

65. Berger v. United States, 295 U.S. 78, 88 (1935).

prosecute with earnestness and vigor—indeed, he *should* do so."[66] In line with these parameters, the law gives prosecutors wide discretion to decide which cases to arraign.[67] This means that even though prosecutors, as advocates, are constrained by guidelines and have wide discretion to select which cases to bring, our adversarial system would not function if U.S. Attorneys could not zealously, and to some degree amorally, argue their cases.[68] As Judge Frankel stated, "[t]he plainest thing about the advocate is that he is indeed partisan, and thus exercises a function sharply divergent from that of the judge."[69] For this reason, prosecutors cannot rationally be expected to act as impartial sentencers.

As Judge Frankel suggests, and other scholars agree, for the adversarial system to function, judges must be set *apart* from the partisan advocacy of the attorneys presenting the case.[70] The ABA *Model Code of Judicial Conduct* reiterates this with the first of its four central canons: "A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[71] The ABA's *Model Rules of Professional Conduct* also emphasize the neutral and impartial nature of judges in Rule 1.12, which analogizes judges with arbitrators, mediators, and "other third-party neutral[s]."[72]

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66. *Id.* (emphasis added). Justice Sutherland also stated:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Id.

67. MANUAL, *supra* note 64, § 9-27.110(B) ("Under the Federal criminal justice system, the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of Federal criminal law. . . . This discretion exists by virtue of his/her status as a member of the Executive Branch, which is charged under the Constitution with ensuring that the laws of the United States be 'faithfully executed.'" (citations omitted)).

68. Again, by "amorally" this Note means free from personal responsibility for the outcome. Although prosecutors can apply their own moral filter when deciding which cases to bring, and should do so, once they have begun proceedings the adversarial system is premised on the assumption that each side will argue its case to the full extent of the law.

69. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1035 (1975).

70. David Luban, *Rediscovering Fuller's Legal Ethics*, 11 GEO. J. LEGAL ETHICS 801, 820 (1998) (citing Lon L. Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW 31 (Harold J. Berman ed., 1961)).

71. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007).

72. MODEL RULES OF PROF'L CONDUCT R. 1.12(a) (2009) ("[A] lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and

This Note's description of judges in the adversarial system is limited to those directly impacted by the FSG. Although much of the commentary set out in Part II addresses the legitimacy of "making" new law, the underlying evaluations and criticisms of judicial discretion still stand in the sentencing context. So although the textualist arguments espoused by Justice Scalia, for example, center around rule-making, the values he esteems—predictability and the appearance of equality—are strongly reflected in the passage of the Guidelines.

The chief function of a judge in an adversarial system—particularly a criminal one—is to act as a third-party neutral.[73] Although some scholars have argued that lawyers should rely on judges' neutrality less because the adversarial system is flawed,[74] such arguments do not refute the role of the judge (or jury) as a neutral decision-maker.

Even those who quibble with the way the current system is structured acknowledge the role judges are meant to play. Judge Frankel, in contrasting judges with advocates, stated that "[w]hether or not the judge generally achieves or maintains neutrality, it is his assigned task to be nonpartisan and to promote through the trial an objective search for the truth."[75] Judge Frankel also noted that "[w]ithin the confines of the adversary framework, the trial judge probably serves best as relatively passive moderator."[76] Even if judges should be "passive moderators" in our current adversarial system, this Note argues *infra* Part IV that they are still better qualified than morally "non-accountable" partisans to make discretionary sentencing decisions.

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substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.").

73. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007); *see also* MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (2007) ("A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."); Frankel, *supra* note 69, at 1035 (asserting that the judge's role to be nonpartisan).

74. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) (arguing that lawyers have a separate ethical obligation to evaluate the cases they take on and, as a result, should not rely wholly on judges). Even if this is true, it does not mitigate the judge's role in the adversarial system. Instead, it simply asks lawyers to add their own moral filter to the proceedings. *See also* Zimmerman, *supra* note 62.

75. Frankel, *supra* note 69, at 1035. Judge Frankel goes on to critique the current manifestation of this role, noting, "[t]he ignorant and unprepared judge is, ideally, the properly bland figurehead in the adversary scheme of things." *Id.* at 1042.

76. *Id.* at 1043.

III. FEARING JUDGES AND TRUSTING COMPROMISE: WHY THE FEDERAL SENTENCING GUIDELINES FAILED

Almost since their inception, the FSG have been under fire.[77] No system enacted by so many, with such varied and competing interests, could be free from compromise.[78] Even Judge Frankel finally came to admit that the Guidelines, as enacted, were not what he had envisioned.[79] Professor Kate Stith and Judge José A. Cabranes, two strident critics of the Guidelines, argue that "[t]he federal Sentencing Guidelines were born of a naive commitment to the ideal of rationality, an enduring faith in bureaucratic administration, and an uneasiness with the very concept of official discretion."[80] They also assert that the FSG are "[g]rounded in a fear of judging" and aim to replace judicial decisions with formulaic sentences.[81] In short, the Guidelines were unsuccessful because they attempted to administer the "mechanical justice" Hart warned against,[82] and instead created penalties that did not align with the seriousness of the crimes charged[83] and sentences that judges did not support.[84]

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77. *See, e.g.*, Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665, 681 (2006) ("[N]ot long after they were enacted, the Guidelines began to attract serious criticism, which became more vehement as years went by . . . ."); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1235–52 (2004) (describing how judges and Congress dislike the Guidelines as currently used).

78. *See generally* STITH & CABRANES, FEAR OF JUDGING, *supra* note 15, at 38–77; Breyer, *supra* note 15, at 2 ("The spirit of compromise that permeates the Guidelines arose out of the practical needs of administration, institutional considerations, and the competing goals of a criminal justice system, all of which combined to bring about a final product quite different from the idealized versions of the Guidelines which were initially envisioned.").

79. Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2045 (1992) ("Five years ago, I would have hesitated to stand up anywhere and say this idea [of sentencing guidelines] was mine, for fear of exposing the immodesty that I keep trying to conceal. Now, however, I would feel obligated to say this as a matter of required disclosure or confession."). *See also* Frankel & Orland, *supra* note 33, at 656 ("I think we can agree that the most serious complaints about the federal guidelines have to do with undue severity, rigidity, and prosecutorial rather than judicial power.").

80. Stith & Cabranes, *To Fear Judging No More*, *supra* note 16, at 187.

81. *Id.*

82. *See* Frankel, *supra* note 79, at 2048 ("[T]he Commission put largely outside the pale a variety of factors that sentencing judges have treated over the years as mitigating circumstances. The results have included some evasion or warping of the guidelines—by judges along with prosecutors and defense counsel.").

83. United States v. Marshall, 908 F.2d 1312, 1335 (7th Cir. 1990) (Posner, J., dissenting) ("The positivist view [of the FSG], applied unflinchingly to this case, commands the affirmance of prison sentences that are exceptionally harsh by the standards of the modern Western world, dictated by an accidental, unintended scheme of punishment nevertheless implied by the words (taken one by one) of the relevant enactments. The natural law or pragmatist view leads to a freer interpretation, one influenced by norms of equal treatment . . . .").

84. Nancy Gertner, Rita *Needs* Gall—*How to Make the Guidelines Advisory*, 85 DENV. U. L. REV. 63, 63 (2007) ("You apply the Sentencing Guidelines, as you have been told you must

The Supreme Court, however, did not make the FSG advisory for any of these reasons. Instead, it based its opinion in *United States v. Booker*[85] on the Sixth Amendment right to a jury trial. This decision, and those that led up to it, are largely accepted as confusing[86] and have created some bewilderment in the legal community regarding the Supreme Court's rationale for invalidating the FSG.[87] Numerous law review articles have been written addressing the nuances and contradictions within these various cases, and this Note does not aim to recreate these detailed assessments of the Supreme Court's decisions.[88] Instead, this Part first addresses specific reasons the Guidelines actually failed and second, by way of comparison, briefly describes the reasons offered by the Supreme Court for nullifying this legislation.

A. A Stillborn Measure: Why the FSG Were Always Doomed

The FSG were crippled from the beginning. Regardless of whether they actually conflicted with the Sixth Amendment, they lacked a clear underlying purpose, had a misplaced trust in uniformity, and were born of compromise. This Note addresses each of these issues in turn, specifically arguing that the FSG failed because (1) they did not ask and answer the central questions that are necessary for any set of regulations to function properly, (2)

. . . and ultimately come up with a result that makes no sense by any measure. It is inconsistent with the purposes of sentencing in the Sentencing Reform Act (SRA); it is out of proportion to the defendant's culpability and to sentences that have been meted out for far worse, even violent offenses; it is not at all what the public—if they knew all the facts—would demand."). Gertner is a judge serving on the United States District Court for the District of Massachusetts. *See also* Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 9 (2006). In discussing the outcome of the three-strikes laws, mandatory minimums, and the sentencing discrepancy between crack and cocaine powder possession convictions in the FSG (discussed *infra* Part III.A), Tonry noted, "[t]hese all resulted in individual sentences that those obliged to apply them often found unjustly severe, and all violated commonsense notions of the relative seriousness of the crimes they affected and other more serious crimes they did not." *Id.*

85. 543 U.S. 220 (2005).

86. McConnell, *supra* note 77, at 677 ("The most striking feature of the *Booker* decision is that the remedy bears no logical relation to the constitutional violation.").

87. *See, e.g.*, *id.* ("The *Booker* opinions, taken in tandem, do not get high marks for consistency or coherence. If that seems a presumptuous thing for an inferior court judge to say about the product of his superiors, I take comfort in the fact that eight of the nine Justices agree with me that either the Sixth Amendment holding or the remedial holding is wrong, and that the two do not fit together."); Susan R. Klein, *The Return of Federal Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 695 (2005) (characterizing the *Booker* decision, among other things, as a "tortured interpretation of the Sentencing Reform Act").

88. *E.g.*, Klein, *supra* note 87; McConnell, *supra* note 77; Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008).

they confused the perception of homogeny with fairness, and (3) they were too closely tied to political interests to meet the SRA goals of transparency and fairness.

1. Why Do We Really Want Sentencing Guidelines?

First, this Note pushes back on the unchallenged assumption (and a basic premise of the SRA) that uniformity should be a primary goal of sentencing reform. A Dworkinite might argue that clear, unambiguous sentencing—like the strict reading of a statute or a set of rules—provides judges with firmer ground on which to stand when making other decisions. However, this argument ignores the reality that federal courts sit *within* states that have their own set of rules[89] and presumes that federal judges need not (and will not) consider how various sentences will be received within their own community.[90] Some sentencing discrepancies from state to state may, in actuality, accurately reflect the circumstances of the crimes committed and be more commensurate with the local populace's understanding of criminal justice. In other words, as is explored *infra* Part III.A.2, varying sentences may be more fair.

Regardless of one's view on the propriety of allowing disparities, the reality must be acknowledged that federal courts sit in individual states. Legislation must understand how a system actually works to be effective. How could the FSG be successful if, when designed, the Sentencing Commission and Congress were unwilling to consider that other approaches, besides the strict view minimizing discretion, might have merit?[91] Perhaps allowing judges to make discretionary sentencing decisions, to "legislate at the margins," gives the system *greater* legitimacy by enhancing the community's perception of its fairness. If federal sentences are far more severe than those administered within the state, it could have a negative

89. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[O]ne of the happy incidents of the federal system [is] that a single courageous State may, if its citizens choose, serve as a laboratory . . . .").

90. *See, e.g.*, McConnell, *supra* note 77, at 675. In describing the various reactions of the courts of appeals to *Booker*, McConnell notes that the Ninth Circuit had the least downward variation after the decision. He goes on to say, "[i]t is as if the district judges in the Ninth Circuit sentence without much regard to whether the law grants them discretion." *Id.* In contrast, the Seventh Circuit, which was one of the most compliant courts of appeals, saw a large downward departure in sentences following *Booker*. *Id.*

91. In evaluating the FSG and the problem of over-emphasizing the importance of uniform sentences, Marc L. Miller notes, "[i]ndeed, sufficiently complex systems, and systems structured around an abstract calculus rather than core (and comprehensible) concepts, can obscure underlying political and policy choices that might otherwise be subject to debate." Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L.J. 271, 278 (2005).

impact on the federal system as well as the general criminal justice goals of deterrence, rehabilitation, and so on. In any event, these queries cannot be answered if they are never considered.[92]

Second, if a sentencing regime is to fully function—especially one of such broad scope and sweeping effect—it needs to be animated by an underlying theory of criminal justice. Our current system is fragmented; no one clear justification for criminal punishment exists.[93] Retributivism was en vogue in the 1970s, deterrence in the 1980s, incapacitation in the 1990s, and "a muddle in the early years of the twenty-first century."[94] In 1984, the Federal Sentencing Commission sewed together a complicated patchwork to mete out sentences, but it never gave the FSG a clear purpose; it never gave it life. As a result, the final legislation was a mutable text from which one could read out that which had already been read in.[95]

Politically, finding one theoretical justification for the FSG may have been too difficult (as discussed *infra* Part III.A.3). Nonetheless, providing all four common—and often conflicting—justifications for punishment (those popular in the '70s, '80s, and '90s) added little. If anything, it made the Guidelines harder to apply by obfuscating the real reasons for their passage.[96] Are the sentences prescribed by the FSG the best means of retribution for the crimes committed, or will fixed sentencing deter criminals since they know exactly what type of sentence they will receive? Is the aim of fixed sentencing to incapacitate as many criminals as possible, or are these sentences the best means of reforming and rehabilitating prisoners? These are basic, fundamental questions that the SRA left unanswered in 1984 and still has yet to address.

Judge Frankel initially criticized indeterminate sentencing for its lack of clear purpose.[97] In 1972 he scathingly wrote, "Nothing tells

92. Perhaps this lack of inquiry was the result of political compromise. Congress may have realized that the appearance of equality was simply easier than asking if the sentences handed down were actually fair. This seems to align with the way in which the Sentencing Commission acquiesced to a charge-based system, instead of an offense-based system. It may not be the more equitable approach, but it is easier to apply *en masse*.

93. Tonry, *supra* note 84, at 1–2.

94. *Id.* at 2.

95. One could argue the Guidelines became much like satiric writer Ambrose Bierce's definition of a "review": "To set your wisdom (holding not a doubt of it, / Although in truth there's neither bone nor skin to it) / At work upon a book, and so read out of it / The qualities that you have first read into it." AMBROSE BIERCE, THE UNABRIDGED DEVIL'S DICTIONARY 154 (David E. Schultz & S.T. Joshi eds., Univ. of Ga. Press 2000) (1881).

96. *See generally* Tonry, *supra* note 84, for a thorough discussion of the latent reasons for some of our sentencing laws, including "the use of sentencing 'reforms' to achieve personal, partisan, and ideological goals." *Id.* at 9.

97. *See supra* Part I.

us . . . when or whether any of these several goals [retribution, deterrence, denunciation, incapacitation or rehabilitation] are to be sought, or how to resolve such evident conflicts as that likely arise in the effort to punish and rehabilitate all at once."[98] However, the Sentencing Commission never solved this problem. In fact, it never even addressed it. Thirty years later, Judge Frankel had to acknowledge that this difficulty remained:

> [T]he Commission had done little or nothing about the hardest problem of all: it has not advanced the education of Congress, or any of us, about what we mean to achieve, and what we in fact achieve, as we continue to mete out long prison sentences.
>
> . . .
>
> . . . We still scarcely know what we're doing or why we're doing it, when we inflict punishment for a crime.[99]

This strongly contributed to the FSG's failure. One cannot ask for uniformity without knowing *why* it is desirable.[100] This leaves judges and prosecutors without any real guidance and opens the FSG to the same opaque application that led to the near-complete eradication of indeterminate sentencing. Michael Tonry, one of the leading scholars on sentencing, discusses this problem in depth in his article, *Purposes and Functions of Sentencing*.[101] He reiterates that fair and just sentencing systems require a basic understanding of "what sentencing is for and what it can do."[102] He concludes that "[u]nless we are clear about [the purposes and functions of sentencing], we will not have much success at designing sensible, effective, and workable systems for the twenty-first century."[103] In applying Tonry's standards to the FSG, one sees clearly that the Guidelines were all form with minimal underlying function.

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98. Frankel, *supra* note 7, at 4.

99. Frankel, *supra* note 79, at 2051. *See also* Tonry, *supra* note 84, at 14 ("[T]he U.S. Sentencing Commission did not make the guidelines' normative purposes clear.").

100. Paul J. De Muniz, the Chief Justice of the Oregon Supreme Court, and Michael A. Wolff, a judge and the former Chief Justice of the Missouri Supreme Court, argue that "[r]ational sentencing requires that we identify our purposes, then intelligently pursue them within means that are available as a matter of law, proportionality, risk, and priority." Michael A. Wolff & Paul J. De Muniz, *Mainstream Sentencing—The Urgent Need for Dramatic Reform*, 92 JUDICATURE 165, 165 (2009).

101. Tonry, *supra* note 84.

102. *Id.* at 6.

103. *Id.*

2. Outcome-Only Focus Misses the Point

When passing the FSG, Congress equated similar sentences for similar crimes with certainty and fairness.[104] However, simply because two individuals receive the same approximate sentence for the same crime charged does not mean that the potential for injustice and discrepancy has been removed.[105] Our current justice system is premised on the idea that fair sentences involve a full consideration of the particular facts in each case.[106] If this was not true, and we strictly equated predictability with justice, Congress would do away with discretion in sentencing altogether and proscribe a set sentence for each offense with no possibility of deviation. That is not how our system works, however. Even the FSG left room for some variation.[107] As some critics have noted, "the fixation on reducing sentencing disparity that results from the exercise of judicial discretion has been a mistake of tragic proportions."[108] A fair sentence is more than its outcome; instead, "[a] *just* sentence must also be a reasoned sentence and a proportional sentence, imposed through procedures that comport with basic understandings of fairness and due process of law in a constitutional scheme of checks and balances."[109] A mechanical sentence, prescribed by a grid that lines up an individual's prior history with the level of the offense charged, blindly assumes that the discretion used to bring those charges—and to set the sentence stipulated—is fair.[110]

Such blind faith demonstrates either a deep naiveté or a willful ignorance of the way our system functions in two central ways. First, large bureaucracies require compromise, flexibility, and inexactitude to operate.[111] As Hart pointed out, statues cannot be

104. Justice Breyer characterizes this decision as one of the many compromises necessitated by the inherent conflict between procedural and substantive fairness in the justice system. Breyer, *supra* note 15, at 9.

105. Miller, *supra* note 91, at 271 ("Equality . . . is not self-defining: It requires context to have meaning.").

106. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT R. 4.1 cmt. para. 1 (2007) ("Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case.").

107. *See* 28 U.S.C. § 3553 (2006) (allowing judges to issue sentences within a range, but one that is limited and cannot exceed a six month or 25 percent variation).

108. STITH & CABRANES, FEAR OF JUDGING, *supra* note 15, at 105.

109. *Id.* The authors also argue that "[u]niform treatment ought to be *one* objective of sentencing, to be sure, but not the sole or overriding objective." *Id.*

110. As Justice Breyer rightly points out, the FSG could not have been created without compromises. *See generally* Breyer, *supra* note 15. However, as this Note argues *infra*, in this particular instance, too much substantive justice was sacrificed for the appearance of procedural certainty.

111. *See supra* text accompanying note 78.

written to cover every possible outcome.[112] A grid dictating sentences cannot account for all variables.[113] Further, Congress is an inherently political body. As discussed *infra* Part III.A.3, one should not—indeed, cannot—assume that the framework used in the Guidelines is free from bias.[114] In crafting the FSG, Congress created the *appearance* of simplicity and, by proxy, fairness. However, just because something is easy to apply does not mean it is even-handed. Even if the framework created by the Sentencing Commission was fair, basing the assessment of success (i.e., a decrease in bias) on the uniformity of the outcome keeps hidden the process involved in bringing the matter to trial.

Second, prosecutors are not only advocates in the adversarial system, they are *executive branch* advocates.[115] Shunting sentencing-related discretion from judges to prosecutors disregards this basic premise of our criminal system.[116] As discussed *supra* Part II.B, judges are designated as neutrals. They are removed from the political process and are meant to evaluate each case with the aim of being impartial.[117] Whether or not one believes this actually happens, it is one of the central mandates of their position.[118] This is not the mandate for federal prosecutors. Internal guidelines for U.S. Attorneys require them to be fair and rationally objective,[119] and general ethics demand nothing less. At the same time, they serve at the pleasure of the President and the U.S. Attorney General.[120] If the Attorney General decides to set an agenda based on political views, the prosecutors must follow it.

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112. *See* HART, *supra* note 37, at 121.

113. Justice Breyer characterizes this as another necessary compromise in the FSG, one that arises from attempting to balance the competing goals of uniformity and proportionality. Breyer, *supra* note 15, at 13.

114. *Id.* at 16 (discussing the "inherent subjectivity" involved in the Commission's creation of the Guidelines); Tonry, *supra* note 5, at 9 (cautioning that "[r]eduction of sentencing standards to simple numerical formulas may provide an irresistible temptation to adopt symbolic policies in pursuit of short-term political goals.").

115. U.S. Attorneys are appointed by the President with the advice of the Senate. 28 U.S.C. § 541(a) (2006).

116. *See supra* discussion of plea bargaining accompanying note 33.

117. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007).

118. *Id. See also* Frankel, *supra* note 69, at 1035 ("Whether or not the judge generally achieves or maintains neutrality, it is his assigned task to be nonpartisan and to promote through the trial an objective search for the truth.").

119. MANUAL, *supra* note 64, at § 9-27.001 ("The availability of this statement of principles to Federal law enforcement officials and to the public serves two important purposes: ensuring the fair and effective exercise of prosecutorial responsibility by attorneys for the government, and promoting confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case.").

120. 28 U.S.C. § 541(c) ("Each United States attorney is subject to removal by the President."); *see also, e.g.*, The United States Attorney's Office of the Southern District of

The clearest example of this took place in 2003. Then-acting Attorney General John Ashcroft issued a memorandum sharply limiting prosecutorial discretion in charging so as to align all the U.S. Attorneys' Offices with the current presidential administration's political views on crime.[121] Specifically, he instructed the attorneys to charge each defendant with the maximum sentence possible in almost all cases and also said they were not to depart downward from the FSG's recommendation without permission from a superior.[122] Prosecutors were no longer tied to their own personal sense of what was fair, and instead were shackled to the political machinations of the executive branch.[123] As Professor Kate Stith wryly, and rightly, noted, "[p]erhaps it is politically inevitable that if called upon to respond in one sentence to the question, 'What should prosecutors charge?', officials at Main Justice must answer 'the most serious charge available.'"[124] The administration of our criminal justice system, and the locking up of criminals, has been a strong political platform for a long time.[125] It seems foolish to assume that federal prosecutors can remain completely immune to these political pressures. Unlike federal judges, they are not appointed to lifetime terms and they are tied to the executive branch, even if they seek to minimize that connection. Moreover, should the executive branch overstep the bounds of its power (by firing attorneys solely for their political views, for example) it will take a while before this overreaching can be effectively curbed.[126]

The FSG failed to fully consider the relationship between prosecutors and the executive branch. Due to the nature of a prosecutor's role in the criminal system, he has a great deal of discretion in charging the defendant, a power which is intended to be a safeguard against improper prosecutions. But, as demonstrated

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California, Office History, http://www.usdoj.gov/usao/cas/history (on file with the University of Michigan Journal of Law Reform) ("By tradition, United States Attorneys serve at the pleasure of the President and the Attorney General.").

121. *Memorandum from Attorney General John Ashcroft Setting Forth Justice Department's Charging and Plea Policies*, 16 FED. SENT'G REP. 129 (2003) [hereinafter *Ashcroft Memorandum*].

122. *Id.* at 130 ("[C]harge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case . . . .").

123. *See, e.g.*, Amie N. Ely, Note, *Prosecutorial Discretion as an Ethical Necessity: The Ashcroft Memorandum's Curtailment of the Prosecutor's Duty to "Seek Justice,"* 90 CORNELL L. REV. 237 (2004).

124. Stith, *supra* note 88, at 1442.

125. *See, e.g.*, WALKER, *supra* note 6, at 211–17.

126. For example, even though a number of U.S. Attorneys were fired improperly by the administration of President George W. Bush in 2006, this decision was not reviewed until two years later, in 2008. U.S. DEP'T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 (2008) (on file with the University of Michigan Journal of Law Reform), *available at* http://www.usdoj.gov/opr/us-att-firings-rpt092308.pdf.

by Ashcroft's memorandum,[127] if the executive branch decides to flex its muscles and curb that discretion, it can. Even with an internal code of ethics, prosecutors can be directly impacted by the will of the executive branch and forced to make charging decisions they may, personally, think are unfair. The FSG provided prosecutors with a great deal of power, tying sentences to the crimes charged instead of those committed, and the Commission acknowledged that this had the potential for abuse by prosecutors.[128] However, it ignored the power it would be giving the executive and neglected to recognize the potential for abuse if an administration decided to strongly intervene in the decisions made by its attorneys.

When sentencing, judges act as gatekeepers, individuals who oversee a wide variety of cases and are explicitly given the instruction to be impartial and fair.[129] For this reason, taking sentencing discretion from judges and giving it to prosecutors, as the FSG did, removes one of the necessary safeguards from the criminal justice system.[130] This is particularly worrisome when one recognizes—as the Commission failed to do—that this also gives the executive branch a power formerly reserved for the judiciary.

3. Politicization Undermines Transparency and Fairness

The Sentencing Commission was intended to be both independent and a part of the judicial branch. In practice, neither really occurred. Justice Scalia characterized the Commission as "a new Branch altogether, a sort of junior-varsity Congress."[131] Some scholars question the Commission members' actual ties to the judiciary,[132] and the Supreme Court has affirmed that the Commission serves a more legislative than judicial function.[133] Judge Frankel acknowledged outright Congress' political power in influencing the Commission, noting that Congress is the "principal villain" for

127. *Ashcroft Memorandum*, *supra* note 121.

128. *See supra* Part I; GUIDELINES, *supra* note 14, at 6.

129. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007).

130. Stith & Cabranes, *To Fear Judging No More*, *supra* note 16, at 188 ("[T]he judge has no effective check on the sentencing consequences of prosecutorial decisions. Because the Guidelines comprehensively and exhaustively specify the weight to be accorded to most factors relevant to sentencing, the judge's power to depart from the calculated sentence range is greatly limited.").

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

132. *See supra* note 16.

133. United States v. Booker, 543 U.S. 220, 243 (2005) ("[A] recognition that the Commission did not exercise judicial authority, but was more properly thought of as exercising some sort of legislative power . . . was essential to our holding [in *Mistretta*].").

the FSG's severity.[134] This cannot have come as a surprise to those familiar with the political climate surrounding the passage of the SRA and the creation of the Commission.

The Sentencing Commission was born out of the increasing crime rate, poor race relations, and growing national drug problem of the 1970s.[135] These circumstances led politicians to run for office on "tough on crime" platforms[136] and, once elected, they then focused on sentencing to fix high crime rates, making prison sentences longer and doing away with judicial discretion.[137] The FSG and accompanying sentencing matrix came out of this political climate and further politicized the sentencing system in a manner that directly challenged the "fairness" that the SRA was meant to produce.[138] The Commission took sentencing from third-party neutrals, let Congress approve the "appropriate" sentencing structure, and then allowed for a charge-based system that gave prosecutors and their charging documents the power to choose a defendant's potential sentence pre-trial. It is a stretch to claim that this is more fair and untainted by outside interests than a judge issuing an indeterminate sentence.

The politicization of the Guidelines, and the resulting obfuscation of just sentences, is clearest in the sentencing disparity found between crack and cocaine powder.[139] Under the FSG, as originally written, every gram of crack cocaine was treated as the equivalent of 100 grams of powder cocaine,[140] commonly known as the 100-to-1 ratio. Judge Frankel argued that the Commission was not entirely at fault for the failures like these.[141] Instead, "[t]he excessiveness of our sentences stems from a recurrent mass hysteria in which American citizens and their representatives are led to act as if savage punishments will 'solve' the 'crime problem.' "[142] He goes on to

134. Frankel, *supra* note 79, at 2047.

135. WALKER, *supra* note 6, at 211.

136. *Id.*

137. *Id.* at 217.

138. *See supra* Part I.

139. Sentencing disparities, and the disparate impact it has on minorities, extend far beyond cocaine-related sentences. *See, e.g.*, Wolff & De Muniz, *supra* note 100, at 165 (discussing the widespread problems with the current sentencing system).

140. 21 U.S.C. § 841(b)(1)(B)(ii), (iii) (2006) (providing for a five-year mandatory minimum for possession of five grams of crack or 500 grams of cocaine powder); *id.* § 841(b)(1)(A)(ii), (iii) (providing for a ten-year mandatory minimum for possession of 50 grams of crack or five kilograms of cocaine powder). This discrepancy stemmed, in part, from Congress' belief that crack cocaine was more addictive and harmful than cocaine powder. Justice Ginsburg details the reasons behind this rule more fully in *Kimbrough v. United States*, 128 S. Ct. 558, 566–67 (2007).

141. Frankel & Orland, *supra* note 33, at 672.

142. *Id.*

argue that the Commission might still be a good idea, and it could creatively get around this problem.[143] This Note disagrees. The Commission *did* try to amend the FSG's lopsided treatment of crack three times, and was rebuffed by Congress each time.[144] Congress is, by its very nature, a political body that is meant to represent the general public—regardless of its make-up or its fear of criminals. In effect, by putting sentencing in the hands of a Congress-controlled Commission, Judge Frankel turned criminal defendants over to that mob of "mass hysterics."

It was not until 2007, when the Supreme Court stepped in and issued its decision *Kimbrough v. United States*,[145] that judges were explicitly allowed to deviate from the FSG in cases related to the crack/cocaine powder discrepancy. In coming to that decision, the Court explicitly acknowledged that some of the sentences set out under the Guidelines were *not* in line with the purposes of the SRA.[146]

The criminal justice system has been inherently political for a long time. It is folly to assume that a Commission, created by Congress, and whose suggestions must be approved by Congress, can be truly independent. Anyone familiar with politics and crime should know that the FSG could not remain free from strong political influence and compromise. As Justice Stephen Breyer emphasized in *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, written before his appointment to the Supreme Court, "[t]hose individuals disappointed by the compromise[s] [in the FSG] may have failed to adequately consider the way in which governmental processes must inevitably work."[147] This inevitability should have made clear that the FSG could never meet the SRA's goals of clarity and transparency.

B. The Supreme Court's Unclear Approach

The legal beginning of the end for the Guidelines came in 2000 with the Supreme Court's decision in *Apprendi v. New Jersey*.[148] In

143. *Id.*

144. Kimbrough v. United States, 128 S. Ct. 558, 569 (2007) (detailing the Commission's efforts to reduce the crack/cocaine powder sentencing discrepancy from 100-to-1 to 1-to-1).

145. 128 S. Ct. 558 (2007).

146. *Id.* at 575 ("[I]t would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes . . . .").

147. Breyer, *supra* note 15, at 15 (citation omitted).

148. 530 U.S. 466 (2000).

that case, the Court held that any fact which would increase the penalty for the defendant beyond the statutory maximum—besides a prior conviction—must be submitted to a jury and proven beyond a reasonable doubt.[149] A few years later, in 2004, the Supreme Court used this reasoning in deciding *Blakely v. Washington*.[150] Justice Scalia, writing for the majority, found that the state's determinate sentencing laws, which allowed judges to enhance a defendant's sentence on the basis of additional facts, were unconstitutional.[151] Even when the factual enhancement leads to a sentence technically *lower* than the statutory maximum allowed under state law, the Court found that it violated the defendant's Sixth Amendment right to a trial by jury.[152] Justice Scalia emphasized that the *Apprendi* rule was being used to enhance the Sixth Amendment jury right "by ensuring that the judge's authority to sentence derives wholly from the jury's verdict."[153] In other words, the State of Washington's guidelines were flawed because they gave judges too much discretion.

For this reason, the legal community found the Court's decision in *United States v. Booker*[154] all the more perplexing. The *Booker* decision contains two important holdings. First, it held that the FSG are subject to the same jury trial requirements discussed in *Apprendi* and *Blakely*.[155] This means the FSG violate the Sixth Amendment by giving judges the discretion to make factual determinations that could enhance an individual's sentence.[156] Second, to correct this problem, the Court excised the portions of the statute making the Guidelines mandatory.[157] In short, the decision invalidated the FSG for giving judges too much discretion, but then, as a remedy, gave judges more discretion. As former Tenth Circuit Judge Michael W. McConnell observed in frustration, "[i]f there were a right to 'sentence by judicial discretion' in the

149. *Id.* at 490.

150. 542 U.S. 296 (2004).

151. *Id.* Justice Scalia stressed that this holding did not mean that all determinate sentencing structures were unconstitutional. Instead, it only applied to the application used in the present case. *Id.* at 308–09.

152. The court squared this with *Apprendi* by slightly altering the sentencing calculus, holding "the relevant 'statutory maximum' [under *Apprendi*] is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Id.* at 303–04 (emphasis omitted).

153. *Id.* at 306.

154. 543 U.S. 220 (2005).

155. *Id.* at 244.

156. *Id.* at 238 (explaining that the Constitutional right to a jury trial in criminal cases arose because "[t]he Framers of the Constitution understood the threat of 'judicial despotism.'").

157. *Id.* at 258–65.

Constitution, the *Booker* decision would be on the money. How it serves to enforce 'trial by jury' is another matter."[158]

The make-up of the majority for these two holdings adds to the confusion. Only Justice Ginsburg signed on to both portions of the decision.[159] Otherwise, all of those Justices who found that the Guidelines violated the Sixth Amendment dissented from the remedial holding making them advisory, and all of those Justices who found that the Guidelines should be advisory dissented from the majority holding finding them in violation of the Sixth Amendment.[160]

The Supreme Court later bolstered its holding in *Booker*—and finished off the FSG—with three decisions: *Rita v. United States*,[161] which held that appellate courts can apply a presumption of reasonableness to a sentence administered within the Guidelines; *Gall v. United States*,[162] which held that there is no heightened review for judges who sentence outside the Guidelines (i.e., non-Guideline sentences are not presumptively unreasonable); and *Kimbrough v. United States*,[163] which (as discussed *supra*) held that judges may conclude that the Guidelines themselves contain faulty judgments and are inconsistent with the purposes of the SRA.

Various authors have provided different postulations for why *Booker* came out as it did. An author with a particularly strong argument, Professor Kate Stith, suggests this may have been a means of checking Congress and "recharging" the defendant and sentencing judge after the Guidelines shifted power to prosecutors.[164] It is also possible that the Court recognized a firm place for judicial discretion in sentencing. Perhaps Judge McConnell's perturbed assessment of a "right to 'sentence by judicial discretion'" is, in a way, accurate. Not simply because judicial discretion has a long history,[165] but also because it is integral to the balance of power

158. McConnell, *supra* note 77, at 677.

159. *Booker*, 543 U.S. at 225.

160. *Id.*

161. 551 U.S. 338 (2007).

162. 552 U.S. 38 (2007).

163. 552 U.S. 85 (2007).

164. Stith, *supra* note 88, at 248–49. *See also* Klein, *supra* note 87, at 695 (suggesting that the remedial holding was a means of returning more discretionary power to judges).

165. McConnell, *supra* note 77, at 677. *See also* Apprendi v. New Jersey, 530 U.S. 446, 481 (2000) ("Both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by the law." (quoting Williams v. New York, 337 U.S. 241, 246 (1949)). The court also notes, "[w]e should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a

needed for our adversarial system to function. In the alternative, the Court simply may have been aware of many underlying problems with the Guidelines, and its confusing compromise was the only way it could acknowledge and remedy these issues.

IV. REFORM: A RETURN TO THE OLD, WHILE KEEPING THE NEW

The following discussion should be prefaced by the caveat that this Note's proposal is hypothetical in nature. Even strident opponents of the FSG have come to acknowledge that the system, even if advisory, is here to stay.[166] This Note does not argue that the Guidelines will disappear and indeterminate sentencing and federal parole boards will return. Instead, it suggests that in holding with the values espoused by Congress in passing the SRA—fairness, equality and justice—indeterminate sentencing coupled with parole boards and release guidelines would be a better mechanism for enforcing those goals.

First, the SRA focused too much on sentencing and too little on release. This may, at first glance, seem like the same issue. However, there is an important distinction between the two. The FSG strictly proscribed the range of *sentences* that could be handed down, but allowed for factual findings by judges that could enhance the defendant's prison term.[167] In practice, this meant the FSG *only* gave judges the ability to look backwards at the facts of the crime and determine the *desert* of the defendant charged. The individual's sentence was determined entirely by his prior criminal record and the crimes of which he had been convicted.[168] Questions regarding deterrence, rehabilitation, and so on, could not properly be considered.[169]

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judgment within the range proscribed by statute." (emphasis added). *Id.; see also* BENJAMIN RUSH, AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS, AND UPON SOCIETY (1787), *reprinted in* REFORM OF CRIMINAL LAW IN PENNSYLVANIA: SELECTED ENQUIRIES 1787–1819, at 11 (Anno Press 1972) (discussing the norm that judges must vary their sentences in degree "according to the temper of [the] criminals, or the progress of their reformation").

166. José A. Cabranes, *The U.S. Sentencing Guidelines: Where Do We Go From Here?*, 12 FED. SENT'G REP. 208, 208 (2000) ("There is well-nigh universal agreement that the general outlines of the current system are here to stay.... The Guidelines have become deeply entrenched.").

167. 18 U.S.C. § 3553 (2006).

168. *Id.*

169. *See* ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 46 (1976) ("[O]rientation to the past distinguishes desert from other purported aims of punishment—deterrence, incapacitation, rehabilitation—which seek to justify the criminal sanction by its prospective usefulness in preventing crime.").

In contrast, a system that employs indeterminate sentencing and parole boards can make forward-looking evaluations that aim to decrease criminal activity generally and prevent recidivism. In this structure, judges have more flexibility. Not only could they issue sentences that take into account mitigating factors, they could also continue sentencing in the traditional manner by giving a defendant a range of time to serve for the crime committed. Either way, the parole boards would provide a forward-looking backstop to accompany that sentence. Parole boards work closely with prisoners and are in a strong position to evaluate whether the goals of sentencing have been met. If rehabilitation is the most important goal, progress could be factored into the release calculations. If retribution was more important, the severity of the crime could be more clearly considered.

Creating nationwide release guidelines would provide transparency and give our sentencing system purpose. Prisoners would be notified of the parole guidelines when they were sentenced, allowing them to know how long they could reasonably expect to stay in prison. It would also give the prisoners a clear sense of what our system expects from them for their incarceration to end. These guidelines could be created by an independent committee of representatives from various groups within the penological system, including judges, wardens, probationary officers, police and parole board members. These are the individuals who regularly deal with those committing crimes and best understand what works. These guidelines would be propelled by a clear ideological purpose to be determined by the committee and reexamined at set intervals, keeping in mind that the rationale for sentencing might vary depending on the nature and severity of the crime.

In addition to these factors, the central critiques of the indeterminate sentencing policy in the 1970s have been addressed. Appellate review of sentences continues to be available and judges are still required to disclose the reasons for the sentence they have prescribed. Furthermore, limited research has shown that release dates issued by parole boards are more free from racial bias than other facets of the system.[170] In 2000, the Utah Judicial Council's Task Force on Racial and Ethnic Fairness in the Legal System ("Task Force") conducted a comprehensive study of all stages in the State's criminal and juvenile justice system.[171] When examining

170. *See, e.g.*, UTAH JUDICIAL COUNCIL'S TASK FORCE ON RACIAL & ETHNIC FAIRNESS IN THE LEGAL SYS., RACIAL AND ETHNIC FAIRNESS: REPORT ON THE STATE OF THE CRIMINAL AND JUVENILE JUSTICE SYSTEM (2000) (on file with the University of Michigan Journal of Law Reform), *available at* http://www.utcourts.gov/specproj/retaskforce/Reportfinal.pdf.

171. *Id.*

the state parole board and its release dates, the Task Force found no significant difference between the length of prison stay between minorities and whites.[172] This was the only area where the Task Force found whites and minorities being treated equally.[173] Professor Russel K. Van Vleet, the Co-Director of the Utah Criminal Justice Center at the University of Utah and one of the leading researchers who conducted the study, noted the finding was "astonishing."[174] He recalled that the researchers had focused on the finding during the Task Force meetings because it was one of the few examples of equitable treatment they had found.[175]

Second, the Sentencing Commission and the FSG used a top-down approach to reform the criminal justice system. Sentences were prescribed at the most removed level, divorced almost entirely from the individual being punished. It is worth noting that this system failed to decrease crime rates and dramatically increased the prison population in the United States.[176] By shifting the focus from sentencing to release and from judges to parole boards, administrators of the criminal justice system can realign themselves with a more bottom-up approach, which provides more attention to the individual. Parole boards are best suited to evaluate the prisoner's progress and judges can return to considering mitigating factors. Michael Tonry notes that one of the lessons from the past thirty years of sentencing policy is that restorative justice programs,[177] which use a very individualized approach by focusing on meeting the victim's needs, are favored over regular criminal sanctions by victims as well as defendants.[178] Further, these programs have been shown to decrease the chances of recidivism.[179] The current methods are not working. Political interests and a lack of purpose have clouded the sentencing system for too long. It is time for change.

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172. *Id.* at 148.

173. Interview with Russel K. Van Vleet, Co-Director, Utah Crim. Justice Ctr. at the Univ. of Utah, in Salt Lake City, Utah (Jan. 5, 2009).

174. *Id.*

175. *Id.*

176. Frankel, *supra* note 79, at 2047 ("[The Commission] shares with Congress the credit for overfilling the federal prisons to something like 160% of capacity.").

177. Restorative justice is "[a]n alternative delinquency sanction that focuses on repairing the harm done, meeting the victim's needs, and holding the offender responsible for his or her actions. Restorative-justice sanctions use a balanced approach, producing the least restrictive disposition while stressing the offender's accountability and providing relief to the victim." BLACK'S LAW DICTIONARY 1340 (8th ed. 2004).

178. Tonry, *supra* note 84, at 5.

179. *Id.*

CONCLUSION

The Federal Sentencing Guidelines have damaged the adversarial system, dehumanized sentencing, and filled prisons to the breaking point. The Supreme Court made very important progress when it made these Guidelines advisory. However, this is not enough. Judges may be reticent to stray from the forms they have been forced to use for the past twenty years, and using the sentencing matrix is, if nothing else, easier than making tough calls in hard cases. Nevertheless, justice and practicality require something new.

Reviving indeterminate sentencing and parole boards would realign the balance of power in the criminal justice system. Zealous advocates would not have the ability to determine jail time pretrial, and discretion in sentencing would be returned to third-party neutrals where it belongs. But more importantly, release guidelines—even in theory—would encourage prison wardens, judges and others to begin to think carefully about the purpose of sentencing in the criminal justice system. Complete agreement may never be reached on this issue, but promoting discussion is an important start.