1-1-2006

The Under-Appreciated Value of Advisory Guidelines

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I. INTRODUCTION

The Sentencing Reform Act of 1984 provided that the trial court "*shall* impose a sentence of the kind, and within the range" set forth in the United States Sentencing Guidelines ("Guidelines") issued by the Sentencing Commission.[1] With that one phrase, the Act created a system of guidelines that was binding upon judges, rather than simply advisory. Concerns about excessive disparity and undue leniency in sentencing unquestionably drove the political coalition that passed the Act.[2] It is not clear, however, why Congress believed that mandatory—as opposed to advisory—guidelines were necessary to address those concerns. With the benefit of hindsight, it is apparent that mandatory guidelines were unnecessary in 1984. Indeed, more than a year of experience under a regime of advisory guidelines, put in place by the Supreme Court in *United States v. Booker*,[3] reveals that advisory guidelines effectively prevent both disparity and leniency-related problems.[4] Unfortunately, just as Congress failed to give meaningful consideration to the adequacy of advisory guidelines some twenty years ago, it now seems determined to make the same mistake.[5]

II. MANDATORY GUIDELINES AND THE SENTENCING REFORM ACT OF 1984

The Sentencing Reform Act of 1984 had a decade-long, rather tortuous history.[6] Despite that extensive history, however, the provision that made the Guidelines mandatory, and ultimately rendered them unconstitutional,[7] slipped into the Act almost unnoticed.[8] Not only did that provision cause the Supreme Court to declare the Guidelines unconstitutional in 2005, but even in 1984, it almost sounded the death knell of the Sentencing Reform Act in the House of

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1. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1837 (codified prior to amendment at 18 U.S.C.A. § 3553(b)(1) (West 1995)) (emphasis added).

2. *See infra* Part II.

3. 543 U.S. 220, 245-46.

4. *See infra* Part III.

5. As this goes to press, Congress is debating a bill that would make the Guidelines more binding upon judges. *See* H.R. 1528, 109th Cong. (2005).

6. The legislative history of the Sentencing Reform Act has been chronicled in detail. *See* Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723 (1999); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

7. *See* United States v. Booker, 543 U.S. 220, 233 (2005) (concluding that United States Sentencing Guidelines are unconstitutional because of their binding nature).

8. *See infra* notes 18-33 and accompanying text.

Representatives.[9] Because the mandatory nature of the Guidelines now has taken on such significance, it is important to understand the forces that converged to pass the Sentencing Reform Act of 1984 and the reasons those forces ultimately embraced mandatory, rather than advisory, guidelines.

A bipartisan coalition in the Senate produced the Sentencing Reform Act of 1984.[10] Although the two parties united in the belief that action was needed to curb the sentencing discretion of federal district court judges, their reasons behind that belief differed somewhat.[11] A group of liberal senators, led initially by Senator Edward Kennedy, became concerned in the 1970s about a perceived disparity in sentencing among federal judges.[12] Senator Kennedy's concern reportedly stemmed from United States District Court Judge Marvin Frankel's analysis in *Criminal Sentences: Law Without Order*.[13] Criticizing the scheme of judicial discretion and the "almost wholly unchecked and sweeping" power of the federal judiciary, Judge Frankel proposed the creation of a commission to formulate binding guidelines.[14] After reading Judge Frankel's book and meeting with him, Senator Kennedy reportedly was shocked at the "hopeless inconsistency" in federal court sentencing and decided to introduce legislation creating a sentencing commission, as recommended by Judge Frankel, to curb the discretion exercised by federal judges.[15]

In 1977, Senator Kennedy introduced Senate Bill 1437 in the Senate Judiciary Committee.[16] As originally introduced, the bill created a sentencing commission that would be charged with promulgating sentencing guidelines to guide the discretion of federal district court judges.[17] It did not, however, make

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9. *See* Stith & Koh, *supra* note 6, at 263-64.

10. *Id.* at 261.

11. *Id.* at 258-61.

12. *See* United States v. Koon, 518 U.S. 81, 92 (1996) ("[The broad discretion afforded to federal judges prior to the passage of the Sentencing Reform Act] led to perceptions that 'federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.'") (quoting S. REP. NO. 98-225, at 38 (1983)); KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING 104 (1998); Stith & Koh, *supra* note 6, at 230-31.

13. *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973).

14. *Id.*; STITH & CABRANES, *supra* note 12, at 35-36. To illustrate the problem of indeterminate sentencing, Judge Frankel recounted a story about a "casual anecdote" over cocktails among judges:

> Judge X . . . told of a defendant for whom the judge, after reading the presentence report, had decided tentatively upon a sentence of four years' imprisonment. At the sentencing hearing . . . Judge X invited the defendant to exercise his right to address the court in his own behalf. The defendant . . . excoriate[ed] the judge, the "kangaroo court" in which he'd been tried, and the legal establishment in general. Completing the story, Judge X said, "I listened without interrupting. Finally, when he said he was through, I simply gave the son of a bitch five years instead of the four."

FRANKEL, *supra* at 18. Judge Frankel went on to criticize a system in which the defendant not only would be given additional punishment for criticizing the court, but also was "never told...how the fifth year of his term came to be added." *Id.* at 18-19.

15. *See* STITH & CABRANES, *supra* note 12, at 38.

16. *See* Stith & Koh, *supra* note 6, at 233.

17. S. 1437, 95th Cong. (1977).

those guidelines binding or mandatory.[18] In 1978, the bill reached the floor of the Senate where Senator Gary Hart of Colorado introduced an amendment which, for the first time, required judges to impose sentences within the applicable Guidelines range.[19] The amended bill, after only the briefest of debate, passed the Senate by a vote of seventy-two to fifteen.[20] Although Senate Bill 1437 died after the House of Representatives refused to take action, Senate Bill 1762, which ultimately became the Sentencing Reform Act of 1984, retained many of the features of Senate Bill 1437, including the creation of a sentencing commission to promulgate sentencing guidelines and the language from Senator Hart's amendment that made the Guidelines mandatory.[21]

By the time Senate Bill 1762 was debated in the Senate Judiciary Committee and ultimately presented to the Senate, however, the political dynamics of the Senate had changed. Most notably, the Republicans had assumed control of the Senate in 1981, and Senator Strom Thurmond had become chairman of the Senate Judiciary Committee.[22] In addition to Senator Kennedy's concerns about disparity in sentencing, conservative senators believed that federal judges were using their discretion to be overly-lenient in sentencing.[23] For those senators, the value of mandatory guidelines apparently was obvious and beyond debate. Indeed, the only debate in the Senate regarding whether the Guidelines should be mandatory or advisory arose after Senator Mathias introduced an amendment to give federal judges more discretion to depart from the Guidelines.[24] The Committee quickly rejected that proposal, concluding that voluntary guidelines would not promote sentencing uniformity because judges would not follow

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18. *See* Miller & Wright, *supra* note 6, at 736-37 (noting that, as introduced, "Senate Bill 1437 said only that the judge should consider a range of factors" including, the guideline sentence, but noting that the judge would have to state his reasons for his sentence, including the reasons for any departure from the guidelines).

19. *See* 124 CONG. REC. 371, 382-83 (1978) ("[T]he court shall impose a sentence within the range [of the sentencing Guidelines] unless the court finds that there exists an aggravating or mitigating circumstance that was not adequately taken into consideration by the Sentencing Commission. . . ."). That language from Senate Bill 1437 survived through to the Sentencing Reform Act of 1984. Stith & Koh, *supra* note 6, at 245-46; Miller & Wright, *supra* note 6, at 736. Prior to the passage of that amendment, the bill required only that judges consider the guidelines promulgated by the Commission. 124 CONG. REC. 371, 383 (1978).

20. The debate over the provision that made the Guidelines binding upon judges was debated on the floor of the Senate for less than a page of the Congressional Record. 124 CONG. REC. 371, 382-83 (1978). Senator Kennedy supported the amendment, saying that what the amendment did was "make clearer the basic presumptive aspects of the guidelines." *Id.*

21. S. 1762, 98th Cong. (1983).

22. Stith & Koh, *supra* note 6, at 258.

23. *Id.* at 261-62 ("'[I am] disturbed by the point of view that each offense and offender should necessarily be approached from the lenient perspective . . . [I prefer] guidelines and policy statements that have teeth in them.'") (quoting Senator Thurmond explaining his support for the bill); STITH & CABRANES, *supra* note 12, at 43 ("[The Sentencing Reform Act] was consistent with the 'get tough' approach of the Comprehensive Crime Control Act of which it was a part.").

24. *See* Miller & Wright, *supra* note 6, at 738-40 (detailing the debate about the Mathias amendment in the Senate Judiciary Committee).

them.[25] Thus, in 1978, the convergence of interests of liberal senators concerned about sentencing disparity and conservative senators concerned about overly-lenient judges resulted in the passage, by a vote of ninety-one to one, of the Sentencing Reform Act as a part of the Omnibus Crime Control Act of 1984.[26]

While the idea of binding guidelines appeared relatively non-controversial to the Senate, the House of Representatives felt differently. When Senate Bill 1762 reached the House, the House Judiciary Committee refused to act on it, at least in part because of the mandatory nature of the proposed guidelines scheme.[27] Instead, the House Judiciary Committee passed House Resolution 6012, which would have led to the promulgation of advisory sentencing guidelines.[28] Representing a compromise about which no member of the House was particularly enthusiastic, House Resolution 6012 never came before the full House for a vote[29] and it appeared that sentencing reform had been stalled as it was in 1978. Finally, Senate Bill 1762 was attached to an appropriations bill that had to be considered by the House because of a looming government shut-down.[30] Because of parliamentary procedure, the entire appropriations act had to be considered without amendment.[31] Ultimately, by virtue of this maneuver, the Sentencing Reform Act was passed by the House and the President signed the Act into law on October 12, 1984.[32]

Three years later, pursuant to the directive in the Sentencing Reform Act, the Commission promulgated the Guidelines, which took effect on November 1, 1987.[33] The Guidelines set narrow sentencing ranges that were determined by applying a grid to a complex set of factors. Most significantly, pursuant to the direction of the Sentencing Reform Act, judges were not permitted to sentence outside of the Guidelines' range absent extraordinary circumstances.[34]

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25. *See id.* In explaining its rejection of Senator Mathias' proposed amendment, the Judiciary Committee pointed to the failure of advisory guidelines in Massachusetts. S. REP. NO. 98-1762, at 79 (1983).

26. *See* Stith & Koh, *supra* note 6, at 261. Senator Mathias, a liberal senator who had tried to make the guidelines voluntary rather than binding, cast the only dissenting vote. *Id.* at 260-61.

27. *Id.* at 262-63. Representative Conyers, the Chair of the Subcommittee on Criminal Justice, was adamantly opposed to mandatory sentencing guidelines "because he believed that justice required 'leaving judges free to tailor sentences to the unique circumstances involved in each case.'" STITH & CABRANES, *supra* note 12, at 46-48.

28. *See* Stith & Koh, *supra* note 6, at 262 (noting that H.R. 6012 provided for both "advisory" and judicial guidelines); Miller & Wright, *supra* note 6, at 742-43 (describing the guidelines called for in H.R. 6012 as somewhere between voluntary and binding).

29. H.R. 6012, 98th Cong. (1983).

30. Miller & Wright, *supra* note 6, at 744-45; STITH & CABRANES, *supra* note 12, at 47-48.

31. Stith & Koh, *supra* note 6, at 264-65.

32. STITH & CABRANES, *supra* note 12, at 47-48.

33. *Id.* at 58.

34. Because the Sentencing Reform Act provided that a judge could depart from the Guidelines only if he or she found that "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that" prescribed by the Guidelines, judges retained limited discretion to "depart" from the Guidelines in certain extraordinary cases. 18 U.S.C.A. § 3553(b)(1) (West 1995); *see*

Even with sentencing guidelines firmly in place and clearly binding upon judges, members of Congress apparently still believed that district court judges were exercising too much discretion in sentencing.[35] In contrast to the debates of the late 1970s and early 1980s, the criticism of federal court sentencing in the 1990s focused solely on the perceived excessive leniency of federal judges and not on the concern that sentences might be disparate.[36] That criticism culminated in 2003, when, citing the lawlessness of federal judges, Congress struck out against what it still perceived as excessive discretion in the hands of federal judges; most notably, Congress questioned the discretion to depart from the applicable Guidelines range in extraordinary cases.[37] This modicum of discretion, although not used particularly frequently by judges, had become a source of great consternation to Congress, and so it limited that discretion by passing the PROTECT Act.[38] As the bill's sponsor put it, amending the Guidelines would correct the "serious problem of downward departures from the Federal Sentencing Guidelines by judges across the country."[39] Although passed as part of a bill aimed at enhancing penalties for offenders in child sexual abuse cases, the amendments to the Guidelines more broadly restricted district court judges in all types of cases by (1) prohibiting judges from adjusting sentences downward for acceptance of responsibility (i.e., a guilty plea), except upon a government motion; (2) requiring written statements of reasons for any grant of a downward departure; and (3) providing a *de novo* standard of review for all departures.[40] Thus, by 2005, the Sentencing Reform Act and the amendments in the PROTECT Act had combined to strip federal judges of virtually all discretion in sentencing decisions.

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also Koon v. United States, 518 U.S. 81 (1993). That discretion, however, was fairly circumscribed both by the Guidelines themselves and by review of the appellate courts.

35. *See infra* note 39 and accompanying text.

36. *Id.*

37. *See* PROTECT Act, Pub. L. No. 108-21, § 401, 117 Stat. 650, 667 (2003) (directing the Commission to amend the Guidelines).

38. *Id.* In the overwhelming majority of cases, judges did not grant downward departures unless requested by the government. For instance, in fiscal year 2002, sentences within the Guidelines range were imposed in sixty-five percent of cases. *See* U.S. SENTENCING COMM'N, SPECIAL POST-*BOOKER* CODING PROJECT 7 (Jan. 5, 2006), *available at* http://www.ussc.gov/Blakely/PostBooker_010506.pdf (on file with the *McGeorge Law Review*). In half of the cases involving departures, however, the government moved for the departure because the defendant had provided substantial assistance to the government in the prosecution of another. *Id.* In only 16.8% of the total cases did the district court judge, without a government request, depart downward pursuant to the authority granted in *United States v. Koon*, 518 U.S. 81 (1996).

39. 149 CONG. REC. H3061 (daily ed. Mar. 27, 2003) (statement of Representative Tom Feeney).

40. *See* Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 718-19 (2005). In order to further limit the authority of the judiciary in sentencing matters, the Act altered the composition of the Sentencing Commission. PROTECT Act, Pub. L. No. 108-21, § 401, 117 Stat. 650, 667 (2003). Although the Sentencing Reform Act previously required that at least three members of the Commission be active judges, the PROTECT Act amended the composition to provide that judges can constitute *no more than* three members. *Id.*

In 2005, sentencing discretion was restored to federal judges. In *United States v. Booker*, the Supreme Court held that the mandatory nature of the Guidelines scheme was unconstitutional because defendants' sentences were enhanced based on factual findings made by judges, rather than juries.[41] The remedy, according to a different majority of the Court, was to excise that portion of the Sentencing Reform Act that made the Guidelines mandatory and make them discretionary.[42] Thus, under the Court's remedy, federal district court judges now have only to *consider* the Guidelines, along with other factors, to arrive at a sentence, but they are not *required* to impose a sentence within the applicable Guidelines range.[43] Moreover, although the courts of appeals retain some authority to review sentences, that role is not as significant as it was pre-*Booker*.[44]

III. ARE MANDATORY GUIDELINES NECESSARY?

In light of the Court's conclusion that the current guidelines scheme is unconstitutional if mandatory, Congress is back where it was in 1984, facing a decision whether to retain the voluntary guidelines now in place or try to adopt a mandatory scheme that would achieve the same effect as the pre-*Booker* Guidelines.[45] If mandatory guidelines were necessary to address the concerns

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41. United States v. Booker, 543 U.S. 220, 243-44. Until 2000, when the Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000), virtually nobody could have anticipated the decision in *Booker*. The cases leading up to the Court's decision in *Booker* and the unlikely coalition that formed the majority in those cases make for fascinating history and have been explored and debated in numerous articles. *See, e.g.*, Ronald J. Allen & Ethan A. Hastert, *From* Winship *to* Apprendi *to* Booker*: Constitutional Command or Constitutional Blunder?*, 58 STAN. L. REV. 195 (2005).

42. *Booker*, 543 U.S. 245-46. The majority opinion of the Court finding the Guidelines unconstitutional was authored by Justice Stevens and joined by Justices Scalia, Thomas, Souter, and Ginsburg. The other four dissented from the conclusion that the Guidelines were unconstitutional. Four of the five Justices who had joined the majority opinion (all except Justice Ginsburg) concluded that the appropriate remedy was to maintain the Guidelines structure and the mandatory nature of that structure, but require that the government prove any enhancement factors to a jury beyond a reasonable doubt, rather than to a judge by a preponderance of the evidence. For reasons that are not entirely clear, Justice Ginsburg joined the merits dissenters to form a different majority on the remedy. *See* Klein, *supra* note 40, at 716-17 (speculating that the reason Justice Ginsburg switched sides on the remedy was due either to her friendship with Justice Breyer, the author of the majority opinion on remedy, or to her desire to see a return to judicial discretion in sentencing).

43. *Booker*, 543 U.S. 245-46. The other sentencing factors that a sentencing judge "shall" consider include "the nature and circumstances of the offense and the history and characteristics of the defendant," "the need for the sentence to afford adequate deterrence . . . [and] protect the public, . . . [and] the need to avoid unwarranted sentenc[ing] disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C.A. § 3553(a)(1), (2), (6) (West 2000).

44. *Booker*, 543 U.S. 260-61.

45. Although the Supreme Court held that the mandatory nature of the Sentencing Guidelines as promulgated rendered the scheme unconstitutional, there still are mandatory guidelines schemes that might be deemed constitutional. For instance, it appears that if Congress adjusted the top end of the guideline range (or the *maximum*) to the statutory maximum penalty for the offense, and altered only the bottom end of the range (the *minimum* sentence to be imposed) based upon findings by the judge, such a scheme would not implicate the Court's ruling in *Booker*. This is because the antecedents to *Booker*, both *Blakely v. Washington*, 542 U.S. 296, 304-05 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 491-97 (2000), held that findings as to facts that increase the *maximum* presumptive penalty are required to be submitted to a jury and proven beyond a

expressed in 1984, then perhaps it would make sense to consider enacting a mandatory guidelines scheme rather than retaining the advisory guidelines that already have been ruled constitutional.[46] In fact, however, all of the evidence points to the conclusion that mandatory guidelines were not necessary in 1984 and certainly are not necessary in federal court today.

Sentencing reformers in the 1970s and 1980s dismissed advisory guidelines too quickly. The dual concerns that motivated the passage of the Sentencing Reform Act–sentence disparity and excessive leniency–could have resulted either from intentional decisions by judges to impose sentences that were both disparate and excessively lenient, or from a lack of information and guidance from Congress.[47] If those problems were the result of the former, then mandatory guidelines were necessary. If the problems were a result of the latter, however, advisory guidelines would solve the problem equally as well as mandatory guidelines. Although advisory guidelines were quickly dismissed during Congressional debates, there really was no evidence that either of these perceived problems resulted from intentional decisions by federal district court judges to impose divergent or overly-lenient sentences. Instead, to the extent that "divergent" sentences were imposed, it is just as likely that those divergences resulted from a lack of information as from a deliberate attempt to impose arbitrary sentences.

Imagine a judge in 1983, prior to the passage of the Guidelines, faced with sentencing a defendant who has been convicted at trial of three counts of robbing federally insured banks in the District of Maryland, but who has no prior criminal history. The statute of conviction provides that a defendant convicted of such an offense "[s]hall be fined not more than $5,000 or imprisoned not more than

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reasonable doubt, but both cases specifically distinguished findings of fact that increase the mandatory *minimum* penalty.

46. Despite the fact that a binding guidelines scheme might be constitutional if it altered only the minimum presumptive sentence, such a system certainly would be subject to extensive constitutional litigation and uncertainty. The advisory guidelines scheme, by contrast, already has been found constitutional. *Booker*, 543 U.S. at 260-61.

47. For the purpose of analyzing the advisory guidelines' ability to respond to the concerns Congress expressed in 1984, this article assumes that its identification of the problems was accurate. In other words, this article assumes that there was sentencing disparity in federal courts and that judges were being excessively lenient. Both of these propositions, however, are subject to dispute. For starters, the differing sentences of two defendants are only *impermissibly* divergent or disparate if the two defendants are similarly situated. That assessment, however, masks normative assumptions regarding the degree and type of similarity necessary to deem two defendants similarly situated. *See generally* Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Guidelines*, 58 STAN. L. REV. 85 (2005). Thus, merely knowing that two defendants have received different sentences tells us nothing about whether those sentences are impermissibly "disparate."

In addition, much of the empirical evidence that was used to support the argument that there were egregious sentencing disparities in federal court has proven flawed. STITH & CABRANES, *supra* note 12, at 106-07. And while Senators pointed to a few instances in which a district judge imposed a sentence that the Senators deemed too lenient, there were no empirical studies at the time to either catalog sentences imposed or explain the reasons for those sentences. Absent that data, it is difficult to ascertain whether in fact sentences were lenient or not.

twenty years, or both."[48] Because the defendant was convicted of three counts, there would be three potential twenty-year terms and the district judge therefore would have the option of giving the defendant a sentence of probation (at the extreme low end) or up to sixty years imprisonment (at the high end).

Then imagine that the judge decides she wants to give the defendant a rational sentence, consistent with the sentence a similarly-situated defendant would receive from other judges across the nation. In determining the sentence, she turns first to any guidance provided by Congress. Unfortunately, the only guidance provided by Congress is that there is "[n]o limitation . . . on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purposes of imposing an appropriate sentence."[49] No further guidance regarding the type of sentence, or the factors the judge should consider, is provided anywhere in the federal criminal code. Lacking any more specific direction from Congress, perhaps she decides upon other factors that, in her view, make this defendant similarly situated to other defendants, so as to sentence this defendant consistently. She takes note of the fact that the defendant used a gun in holding up the banks, received $40,000 from his heists, and acted alone. On the mitigating side, she acknowledges that he had held a steady job for twenty years, but had been laid off and that it was only after he was evicted from his apartment and sued for failure to pay child support that he robbed the banks. Now that she has determined the appropriate factors to consider, where does she turn for information regarding what other judges nationwide would do in a similar case with a similar defendant?

The simple answer is that in 1984 such information was not available. At most, and only with a significant amount of effort, she might have been able to gather nationwide statistics on sentences for defendants convicted of violating the bank robbery statute. But how should she weigh the aggravating and mitigating factors?

Perhaps she turns to her colleagues in her district and asks them how they have sentenced bank robbers. Certainly some of them will have sentenced defendants convicted of bank robbery, but given her small pool of data, she can find no sentence for a defendant who, in her view, was similarly situated. Our judge is then left to follow the general advice given to her by other judges and rely on her intuition regarding the appropriate sentence. And if she decides that forty years imprisonment is the appropriate sentence, should she be blamed when a district court judge in Hawaii sentenced what our judge would have thought to be a similarly-situated defendant to three years imprisonment? I think not. In other words, to the extent that pre-Guidelines sentences in federal court were

48. 18 U.S.C. § 2113 (1988) (as enacted in 1982).

49. 18 U.S.C. §. 3577 (1982) *amended by* Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 1987 (current version at 18 U.S.C. § 3661 (2000)).

different from judge to judge, it may well have been the result of a lack of information, rather than lawless behavior by judges.

Similarly, with respect to the concern that federal judges pre-Guidelines were using their discretion to sentence too leniently, it is not at all clear that pre-Guidelines judges were intentionally trying to flout the will of Congress in imposing such sentences. Instead, Congress simply had failed to provide district court judges with any guidance as to what would constitute an appropriately severe sentence.[50] Indeed, Congress failed even to articulate a philosophy to guide sentencing judges in exercising their discretion, let alone to specify factors that Congress wanted judges to consider in sentencing.[51] Left to their own devices, without any guidance, district judges fashioned sentences that they believed appropriate.[52] Given that state of affairs, it is difficult to understand how a district court judge pre-Guidelines was supposed to have determined, and sentenced within, the will of Congress other than by sentencing within the broad statutory ranges set by Congress.

Thus, it appears that mandatory guidelines were not necessary to solve the problems identified by Congress in 1984. Now, twenty years later, the case for mandatory guidelines is even weaker. First, the informational problems that arguably led to disparate or overly-lenient sentences no longer exist, or at least not to the same extent. Data regarding sentencing for a myriad of offenders and offense characteristics now are available, in large part because one of the primary functions of the Sentencing Commission has been to collect and disseminate such data.[53] Thus, the advisory guidelines and the additional data published by the Sentencing Commission provide federal judges today with a baseline that they

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50. *Id.* As discussed above, Congress provided absolutely no guidance to district court judges regarding what an appropriately severe sentence would be. *See supra* note 49 and accompanying text.

51. *See* FRANKEL, *supra* note 13, at 7 ("Our Congress and state legislatures have failed even to study and resolve the most basic of the questions affecting criminal penalties, the questions of justification and purpose . . . I make the point that our legislators have not done the most rudimentary job of enacting meaningful sentencing 'laws' when they have neglected even to sketch democratically determined statements of basic purpose.").

52. Even Judge Frankel, who sharply criticized the lawlessness of federal sentencing, recognized that much of the problem was due to lack of guidance from Congress. *See id.* ("Broad statutory ranges might approach a degree of ordered rationality if there were prescribed any standards for locating a particular case within any range. But neither our federal law nor that of any other state I know contains meaningful criteria for this purpose.").

53. 28 U.S.C.A. § 995(a)(12)-(16) (West 1996). Although the information-gathering functions are contained within § 995 ("Powers of the Commission") and not in § 994's "Duties of the Commission," the Sentencing Commission certainly appears to view the collection and dissemination of data as one of its primary purposes. *See* U.S. SENTENCING COMM'N, AN OVERVIEW OF THE U.S. SENTENCING COMMISSION (June 2005), *available at* http://www.ussc.gov/general/USSCoverview_2005.pdf (on file with the *McGeorge Law Review*) (listing among the three primary purposes of the Commission "to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public"). In addition, the Commission publishes significant statistical information about sentencing in federal courts. *Id.*

can use to ensure that their own sentences do not vary drastically from those of other judges.[54]

Second, there is empirical evidence to suggest that advisory guidelines are just as effective as mandatory guidelines in controlling disparity and in ensuring that the severity of sentences is consistent with the expressed will of Congress.[55] In the year following the Court's decision in *Booker*, the rate of sentencing within the Guidelines range was only slightly lower than in the years when the Guidelines were mandatory.[56] If within-range cases and government-sponsored below-range cases are combined,[57] district court judges post-*Booker* complied with the Guidelines in 85.9% of the cases.[58] This compliance rate is only slightly below the pre-PROTECT Act compliance rate of 90.6%, and the post-PROTECT Act compliance rate of 93.7%.[59]

The evidence also suggests that district court judges are not being excessively lenient with their newfound discretion. Contrary to the prevalent view in Congress that sentencing judges would be inclined to be more lenient if given additional discretion, the average sentence length post-*Booker* has increased.[60] In addition, the post-*Booker* rate of *upward* departures is approximately double the pre-*Booker* rate of upward departures.[61] Moreover, to the extent that the concern motivating Congress to consider mandatory guidelines is excessive leniency, the vast majority of cases in which sentences are imposed below the Guidelines range are the result of government motions. In the eleven months after *Booker* was decided, downward

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54. *See* Marc Miller & Ronald Wright, *"The Wisdom We Have Lost": Sentencing Information and Its Uses*, 58 STANFORD L. REV. 361, 370-72 (2005) (arguing that the Sentencing Commission should collect data in part for the use of judges).

55. There is significant debate regarding whether the mandatory Guidelines in fact controlled disparity in sentencing. *See, e.g.*, Alschuler, *supra* note 47 (arguing that the Guidelines increased disparity in sentencing). While I agree that the Guidelines may not have eliminated disparity, my only point here is that advisory guidelines appear to control disparity as effectively as mandatory guidelines.

56. *See* U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 46 (Mar. 2006), *available at* http://www.ussc.gov/booker_report/Booker_Report.pdf (on file with the *McGeorge Law Review*).

57. The category of government-sponsored below-range sentences includes cases in which the government (1) moved for a downward departure based upon the defendant's substantial assistance to the government pursuant to section 5K1.1 of the Guidelines, (2) moved for a downard departure based upon the defendant's early plea in so-called fast-track cases pursuant to section 5K3.1, or (3) otherwise agreed to a sentence outside of the Guidelines range. *See id.* at 53. These government-sponsored departures are included as part of the Guidelines "compliance" rate because the Guidelines specifically authorize prosecutors to seek these departures, and because a motion by the government is required before the sentence deviated from the applicable Guidelines range.

58. *Id.* at 57.

59. *Id.* The pre-PROTECT Act period covers cases decided between October 1, 2002 (the beginning of the government's fiscal year) and April 30, 2003 (the date of enactment of the PROTECT Act). *Id.* at 45. The Post-PROTECT Act period covers cases decided between May 1, 2003 (when the PROTECT Act went into effect) and June 24, 2004 (when the Supreme Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), the pre-curser to *Booker*). *Id.*

60. *Id.* at 46, 75.

61. *Id.* at 58. Post-*Booker* sentences exceeded the applicable Guidelines range in 1.6% of all cases. *Id.*

departures for substantial assistance to the government were granted in approximately fifteen percent of the cases sentenced in federal court.[62] Although sentences below the Guidelines range, other than for substantial assistance to the government, were imposed in another twenty-two percent of the cases post-*Booker*, forty-three percent of those below-range sentences were as a result of requests by the government.[63] In other words, to the extent that defendants in federal court are being sentenced leniently, it is due not to the excessive leniency of federal judges but instead to the determination by prosecutors that sentences within the Guidelines ranges are not appropriate in certain cases.[64] And, given that the Guidelines specifically provide prosecuting authorities with the discretion to make those decisions, and that Congress has endorsed those departures, federal judges can hardly be faulted for granting the government's motions.[65]

To be fair, Congress's skepticism regarding the potential abuse of sentencing discretion by federal judges stems, at least in part, from the reaction of judges to the Guidelines.[66] Much of the reaction of the judiciary, however, was to the mandatory nature of the Guidelines, rather than to the concept of guided discretion. Given the opportunity to use advisory guidelines post-*Booker*, it is clear that judges understand the importance of exercising their discretion carefully and staying within Guidelines ranges absent extraordinary circumstances.[67]

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62. U.S. SENTENCING COMM'N SPECIAL POST-*BOOKER* CODING PROJECT, *supra* note 38, at 1. Section 5K1.1 of the Guidelines permits a judge to depart downward upon motion of the government in a case in which the defendant has offered substantial assistance to the government in the arrest or prosecution of another. *Id.* at 7. Prior to *Booker*, a district judge was not permitted to depart pursuant to section 5K1.1, absent a government motion. *See, e.g.*, *In re* Sealed Case No. 97-3112, 181 F.3d 128 (D.C. Cir. 1999) (holding that a government motion is required for a departure pursuant to section 5K1.1).

63. U.S. SENTENCING COMM'N SPECIAL POST-*BOOKER* CODING PROJECT, *supra* note 38, at 7. Outside of substantial assistance cases, the primary category of departures initiated by the government is in so-called fast-track cases. In the PROTECT Act, Congress amended the Guidelines to provide for a downward departure upon motion of the government in cases in which defendants waive procedural rights. *See id.* at 7.

64. *See, e.g.*, Alschuler, *supra* note 47, at 112-15 (noting that even during the period when the Guidelines were mandatory, government-sponsored departures were prevalent).

65. In particular, Congress's endorsement of another government-sponsored downward departure in the PROTECT Act indicated that it was willing to endorse downward departures sought by the government. PROTECT Act, Pub. L. No. 108-21, § 401, 117 Stat. 650, 667 (2003); Alschuler, *supra* note 47, at 113-16.

66. *See, e.g.*, United States v. Hively, 61 F.3d 1358, 1365 (8th Cir. 1995) (Bright, J. concurring) (citing to a 1992 Federal Judicial Center study that found 86.4% of all federal district court judges "support[ed] changing the current sentencing rules to increase discretion of the judge" and "[m]ore than half would eliminate sentencing guidelines"); United States v. Harrington, 947 F.2d 956, 963-71 (D.C. Cir. 1991) (Edwards, J., concurring) (arguing that the Guidelines are flawed and need reform and listing in the appendix nearly twenty judicial opinions critical of the Guidelines); Laurie P. Cohen, *Ashcroft Intensifies Campaign Against Soft Sentences by Judges*, WALL ST. J., Aug. 6, 2003, at A (noting that the judiciary's "criticism of the Justice Department and the Congress has been at a fever pitch since President Bush signed the Feeney Amendment [to the PROTECT Act] into law"); Joseph B. Treaster, *2 Judges Decline Drug Cases, Protesting Sentencing Rules*, N.Y. TIMES, Apr. 17, 1993 (reporting that Judge Jack B. Weinstein of the Eastern District of New York and Judge Whitman Knapp of the Southern District of New York, would no longer preside over drug cases "in protest against national drug policies and Federal sentencing guidelines").

67. *See, e.g.*, United States v. Wilson, 350 F. Supp. 2d 910, 931-32 (D. Utah 2005) (concluding post-*Booker*, that it would "generally hew to the Guidelines in imposing criminal punishments" and noting that

Finally, advisory guidelines, in addition to being constitutional, appear to further the goals of the Sentencing Reform Act. In particular, it appears that sentencing will be more transparent with the advent of the advisory guidelines. Although the rate of sentencing within the Guidelines range post-*Booker* has remained relatively consistent with the rate pre-*Booker*, the method of departure has altered somewhat. In fiscal years 2001-2002, downward departures, other than those sponsored by the government, were granted in seventeen to eighteen percent of the cases sentenced in federal court.[68] Post-*Booker*, downward departures pursuant to the Guidelines, other than those sponsored by the government, were granted in only 3.2% of the cases, while defendants sentenced below the Guidelines range pursuant to the authority granted to judges in *Booker* occurred in 6.3% of the cases.[69] It appears that in cases sentenced below the Guidelines range, federal judges now are being more honest about their reasons for departing.[70] Allowing judges to articulate their true reasons for sentencing outside of the Guidelines range, rather than requiring them to attempt to fit all cases within the rigid structure of the Guidelines, will allow better, and more forthright review of the factors that ultimately lead district court judges to depart.

IV. CONCLUSION

An advisory guidelines system addresses the two concerns that initially led to the passage of the Sentencing Reform Act of 1984—disparity and excessive leniency—at least as well, and probably better than, mandatory guidelines. With hindsight, it appears that mandatory guidelines may not have been necessary in the first place, and certainly now, with twenty years of Guidelines experience, there is strong evidence that district judges will adhere to advisory guidelines just as they did to mandatory guidelines. *Booker* gave federal judges the opportunity to prove to Congress that they would follow advisory guidelines and that mandatory guidelines are not necessary. Congress should take the opportunity offered by *Booker* to recognize the value and appropriateness of advisory guidelines.

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the "congressional view" on how to structure a post-*Booker* sentencing scheme "will surely be informed by how judges respond to their newly-granted freedom under the 'advisory' Guidelines system"). "If that discretion is abused by sentences that thwart congressional objectives, Congress has ample power to respond with mandatory minimum sentences and the like." *Id.*

68. U.S. SENTENCING COMM'N SPECIAL POST-*BOOKER* CODING PROJECT, *supra* note 38, at 7.

69. *Id.* at 1.

70. District courts under the new system still are required to articulate their reasons for the sentence imposed. 18 U.S.C.A. § 3553(c)(2) (West 2000) (requiring district judges to "state in open court the reasons for its imposition of the particular sentence, and, if the sentence . . . is outside the range [set forth in the Guidelines], the specific reason for the imposition of a sentence different from that described"); United States v. Johnson, 427 F.3d 423, 426-27 (7th Cir. 2005) (holding that the district court must articulate its reasons for departing from applicable guidelines range); United States v. Menyweather, 431 F.3d 692, 695 (9th Cir. 2005).