Journal of Criminal Law and Criminology

Volume 100
Issue 3 *Summer*

Article 4

Summer 2010

A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right

Nancy Gertner

0091-4169/10/10003-0691
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 100, No. 3

Printed in U.S.A.

A SHORT HISTORY OF AMERICAN SENTENCING: TOO LITTLE LAW, TOO MUCH LAW, OR JUST RIGHT

JUDGE NANCY GERTNER*

For the centennial of this renowned *Journal*, I have been asked to tell the history of American sentencing—concisely, to be sure. The history of sentencing in the United States can be recounted from a number of perspectives. First, there is an institutional story—the story of the division of labor between all of the sentencing players. Sentencing is, after all, a *system*; sentencing institutions work in relation to, and not independent of, one another. Players in the sentencing system include the traditional ones: judges, lawyers—both prosecutors and defense—as well as the Congress, the public, sometimes the jury, and most recently, administrative agencies. Second, and as a corollary of that division of labor, sentencing can be examined through the different sources of its rules and standards, which can be common law rules crafted by judges, statutes drafted by legislatures, regulations promulgated by agencies, or standards articulated by academic experts, like penologists, sociologists, political scientists—the kind of scholars who write in this estimable *Journal*.

Third, sentencing can be viewed through the lens of the changing substantive law, reflecting the shifting winds of penal theory, from rehabilitation, retribution, and deterrence, to incapacitation, and various permutations of each. Different theories of sentencing, in turn, confer power on different sentencing players. For example, rehabilitation theories necessarily enhanced the role of judges and parole officers, the purported experts in individualized punishment aimed at "curing" deviant behavior. Retributive theories did the same for Congress and the public, not to mention radio "shock jocks" and 24/7 cable television pundits. If the most important question was the culpability of the offender—what punishment this crime deserved—everyone was suddenly an expert, or so it seemed.

* Judge Nancy Gertner is a judge of the District of Massachusetts, appointed in April 1994. In addition, Judge Gertner has been teaching a year-long seminar on sentencing at the Yale Law School for the past decade.

Finally, the political entity in whose name the punishment is imposed is critical: most law enforcement is the province of the state. A national federal sentencing system, owing to what some have called the "federalization" of crime,[1] has far different pressures—few financial pressures (the federal government prints money, after all), and many more political pressures—than a state one, and necessarily produces a different sentencing regime.

This Article will range over the various stages of American sentencing over time, focusing mostly on federal sentencing, and having these issues in mind—division of labor, source of sentencing standards, substantive law, and federal-state divisions and their shifting permutations.

I. COLONIAL JURIES AND SENTENCING

In colonial times, and particularly in the period before American independence, juries were de facto sentencers with substantial power.[2] Many crimes were capital offenses.[3] The result was binary—guilty and death, or not guilty and freedom. There were few scalable punishments, or punishments involving a term of years.[4] This is so because penitentiaries were not common until the end of the eighteenth century.[5] Jurors plainly understood the impact of a guilty verdict on the defendant because of the relative simplicity of the criminal law and its penalty structure, and often because of the process by which they were selected. They were picked from the rolls of white men with property. Indeed, steps were sometimes taken to secure better qualified people to serve on juries. Juries were hardly representative in the sense that we understand today.[6] The substantive criminal law was the province of the states, and was, for the most part, state

---

[1] *See* Michael E. Horowitz & April Oliver, *Foreword: The State of Federal Prosecution*, 43 AM. CRIM. L. REV. 1033, 1039-40 (2006).

[2] *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 869-76 (1994) (reviewing early jury trials); Judge Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 424 (1999).

[3] Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 832-33 (1968).

[4] While Langbein describes this development in terms of the English jury system, his observations apply with special force to the colonial jury. *See* JOHN H. LANGBEIN, THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL 64 (2003).

[5] SOL RUBIN, THE LAW OF CRIMINAL CORRECTION 27-30 (1973).

[6] Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 432 (1996).

common law, often deriving from cases with which the jurors were familiar.[7]

Like the modern jury, colonial jurors were authorized to give a general verdict without explanation, but unlike the modern jury, the colonial jury was explicitly permitted to find both the facts and the law.[8] If capital punishment were inappropriate, they would simply decline to find guilt, or find the defendant guilty of a lesser crime in order to avoid the penalty of death.[9] No one disparaged this as "jury nullification." Ignoring the law to effect a more lenient outcome was well within the jury's role.[10] In fact, several colonies explicitly provided for jury sentencing.[11]

---

[7] Lance Cassack & Milton Heumann, *Old Wine in New Bottles: A Reconsideration of Informing Jurors about Punishment in Determinate- and Mandatory-Sentencing Cases*, 4 RUTGERS J.L. & PUB. POL'Y 411, 439-40 (2007) (citing J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800 (1986)).

[8] Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991). As Professor Amar noted:

> [I]t was widely believed in late eighteenth-century America that the jury, when rendering a general verdict, could take upon itself the right to decide both law and fact. So said a unanimous Supreme Court in one of its earliest cases (decided before *Callender*) [*Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794)] in language that resonates with the writings of some of the most eminent American lawyers of the age—Jefferson, Adams, and Wilson, to mention just three. Indeed, Chase himself went out of his way to concede that juries were judges of law as well as of fact. Perhaps, however, this concession had to do with the pecularities of sedition law and its somewhat unusual procedures—driven, it will be recalled, by the struggle between judge and jury.

Id. at 1193; *see, e.g.*, R. J. Farley, *Instructions to Juries—Their Role in the Judicial Process*, 42 YALE L.J. 194, 303 (1932) ("In America by the time of the Revolution and for some time thereafter, the power to decide the law in criminal cases seems to have been almost universally accorded the jury . . . ."); *see also* David A. Pepper, *Nullifying History: Modern-Day Misuse of the Right to Decide the Law*, 50 CASE W. RES. L. REV. 599, 609 (2000) (arguing that colonial juries had the right to decide the law as outlined by the Court); *cf.* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966) (distinguishing between civil and criminal juries, and dismissing *Brailsford* as anomalous). *But see* Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 131 (1998) (suggesting that the historical record is not clear).

[9] RUBIN, *supra* note 5, at 31.

[10] Blackstone called the jury practice of convicting of a lesser charge to mitigate against the death penalty as "pious perjury." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 239; *see also* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON ENGLISH CRIMINAL TRIAL JURY, 1200-1800 295 (1985); LANGBEIN, *supra* note 4, at 234-35.

[11] There is some disagreement as to how widespread jury sentencing was in non-capital cases at the time of the Constitution's ratification. *Compare* Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1790 (1999) ("Jury sentencing in noncapital cases was a colonial innovation."), *with* Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1506 (2001) ("American juries at the time of the adoption of the Bill of Rights played a minor role in

Thus, in the colonial division of labor, juries had a preeminent role.[12] There was no need for a priori punishment standards or rules, because there was, for the most part, a single punishment. Penal philosophy, at least as a formal matter, was retributive. There was little national federal law, even after independence. Most criminal law derived from the common law and in time, statutes from state legislatures—law with which jurors were familiar.[13]

II. THE ERA OF INDETERMINATE SENTENCING

The turn of the nineteenth century brought scalable punishments—penitentiaries and, in time, reformatories—and thus, a more complex set of sentencing outcomes.[14] The jury could no longer link conviction to a particular sentence even if it had the power to sentence or decide questions of law—and it did not. Now, they were explicitly instructed to find only the facts; judges determined the applicable law. Federal substantive criminal law began to evolve, although most criminal prosecutions were still state-based. And the jury changed: it was more diverse as barriers to serving as jurors were lifted for minorities and women, as were property restrictions.[15] With more and more access to education, a professional class of judges and lawyers evolved, and with it, the power of the jury declined, including the power to affect the sentence.[16]

Over time, a different division of labor evolved as between judges and juries: juries decided liability; judges sentenced. Selection procedures sought to insure that the jury would be selected in direct proportion to what they did *not know* about the issues, or the parties.[17] And that was not too

---

sentencing."). Lanni reports that "as recently as three decades ago more than one-quarter of U.S. states provided for jury sentencing in noncapital cases." Lanni, *supra*, at 1790.

[12] Nancy J. King emphasizes judicial power even in the colonial period through the practice called "benefit of clergy," which derived from seventeenth-century English law. "Clergy was a judicial pardon of sorts," which rested entirely with the judge after conviction. Nancy J. King, "*The Origins of Felony Jury Sentencing in the United States*, 78 CHI.-KENT L. REV. 938, 948 (2003).

[13] On the absence of federal criminal law, see Sarah Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 41 (1996). On the fact that jurors were familiar with the law, see Judith L. Ritter, *Your Lips are Moving . . . but the Words Aren't Clear: Dissecting the Presumption that Jurors Understand Instructions*, 69 MO. L. REV. 163, 188-189 (2004).

[14] NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 4-5 (1974); *see also* Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003).

[15] Alschuler & Deiss, *supra* note 2, at 915-916 (1994).

[16] Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 380.

[17] *See generally* NANCY GERTNER & JUDITH H. MIZNER, THE LAW OF JURIES (2009).

difficult in an urbanizing, diverse country.[18] Juries became more and more passive, deferring to the professional judge.[19]

This was especially true by the early twentieth century, when the dominant penal philosophy was rehabilitation and an indeterminate sentencing regime took hold.[20] In indeterminate sentencing, the judge's role was essentially therapeutic, much like a physician's. Crime was a "moral disease,"[21] whose cure was delegated to experts in the criminal justice field, one of whom was the judge. Different standards of proof and of evidence evolved between the trial stage and the sentencing stage, reflecting the very different roles of judges and juries.[22] The trial stage was the stage law students studied. It was the stage of constitutional rights, formal evidentiary rules, and proof beyond a reasonable doubt. At the sentencing stage, the rules of evidence did not apply; the standard of proof was the lowest in the criminal justice system: a fair preponderance of the evidence. The rationale was straightforward: it made no more sense to limit the kind of information that a judge should get at sentencing to exercise his or her "clinical" role than to limit the information available to a medical doctor in determining a diagnosis.[23]

Unlike other common law countries, appellate review of sentences was extremely limited in American courts.[24] In the federal system, the "doctrine of non-reviewability" prevailed until 1987, when the Federal Sentencing

---

[18] With urbanization, the juries lost their "proximity to persons and events of the cases brought before them" and "lost their capacity to inform themselves." LANGBEIN, *supra* note 4, at 64. Akhil Amar describes the "present day jury" as "only a shadow of its former self." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 97 (1998).

[19] LANGBEIN, *supra* note 4, at 64.

[20] *See* Honorable Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 570, 571 (2005) (describing the evolution of federal sentencing).

[21] *See* Elizabeth T. Lear, *Is Conviction Irrelevant*?, 40 UCLA L. REV. 1179, 1187 (1993).

[22] Gertner, *supra* note 20, at 571.

[23] *Williams v. New York*, 337 U.S. 241 (1949), exemplified this approach. A jury convicted Williams of first-degree murder and recommended life imprisonment. The judge disagreed and sentenced the defendant to death. While Williams had no criminal record, the judge, relying on the pre-sentence report that contained information inadmissible at trial, concluded that the defendant had committed a string of uncharged burglaries, that he had a "morbid sexuality," and that he was a "menace to society." *Id.* at 244. "Retribution is no longer the dominant objective of the criminal law," the Court declared. *Id.* at 248. Rather, "reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." *Id.* Any restrictions upon a trial judge's ability to obtain pertinent information "would undermine modern penological procedural policies." *Id.* at 249-50.

[24] *See* Comment, *Appellate Modification of Excessive Sentence*, 46 IOWA L. REV. 159, 159-60 (1960) ("The federal and majority state rule which precludes appellate modification of seemingly excessive sentences within statutory limits seems to be a vestige of the early common law doctrine denying any judicial review as of right in criminal cases.").

Guidelines became effective.[25] Likewise, only a few states had appellate review of sentencing, and even then it was used "sparingly."[26] A trial judge's authority to sentence was virtually unquestioned.

Consistent with this view of judges as the sentencing experts, Congress took a back seat, prescribing a broad range of punishments for each offense, and intervening only occasionally to increase the maximum penalty for specific crimes in response to public demand. Judges had substantial discretion to sentence, so long as it was within the statutory range. In effect, the breadth of the sentencing range left to the courts the task of "distinguishing between more or less serious crimes within the same category."[27] While prosecutors had discretion to bring the charges, which, given the broad definitions of crimes, was not insubstantial, and defense lawyers could argue for creative "therapeutic" solutions, the judge had the final word. And even the judge's sentence did not fully determine the length of time a defendant would serve. Parole was available depending upon the defendant's conduct while incarcerated.

To sum up, judges and parole authorities had the most power relative to the other sentencing players. They were the acknowledged sentencing experts. There were few a priori rules or standards. Each case was resolved on its own merits; to the extent there were standards, they evolved from the day-to-day experience of sentencing individuals. There was little or no appellate review of sentencing. And the substantive law of sentencing was shaped by rehabilitation, a penal philosophy that necessarily reinforced the judge's role and limited Congress's and the public's. After all, neither was in a position to second guess the judge concerning what would rehabilitate an individual defendant. Finally, although federal criminal power was growing, most criminal law was state originated.

As I have written elsewhere,[28] there were problems with indeterminate sentencing, problems that sowed the seeds of the next institutional shakeup. In fact, judges had no training in how to exercise their considerable discretion. Whatever the criminological literature, judges did not know about it. Sentencing was not taught in law schools; and to the extent there was any debate about deterrence and rehabilitation—such as on the pages of

---

[25] Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L .REV. 1441, 1444 (1997).

[26] *Id.*

[27] KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 23 (1998).

[28] *See* Gertner, *Sentencing Reform*, *supra* note 20; *see also* Judge Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523 (2007).

this *Journal*—it was not reflected in judicial training.[29] "It was as if judges were functioning as diagnosticians without authoritative texts, surgeons without *Gray's Anatomy*."[30]

In the absence of any review, judges had little incentive to generate standards for sentencing which might be applied in future cases; few judges bothered to write sentencing opinions at all. Other efforts aimed at guiding judicial discretion, or even enhancing judicial decisionmaking, like sentencing councils, mimicking the clinical rounds of physicians, or sentencing information systems, were rejected.

Disparity was inevitable, although nowhere near as much as pre-Guidelines scholarship suggested.[31] Marvin Frankel described this period as "the unruliness, the absence of rational ordering, the unbridled power of the sentencers to be arbitrary and discriminatory."[32] There was no common law of sentencing to create precedents to constrain discretion as exists in torts or contract. Without appellate review, no common law of sentencing could evolve. Constitutional review of sentencing decisions was limited; Eighth Amendment or due process review was rarely invoked, and even more rarely successful.[33] Furthermore, Congress had tried—and failed—to rationalize the criminal code, as the American Law Institute's Model Penal Code had done with respect to state substantive criminal law.[34] The Model Penal Code simplified state law, recommending a limited number of broad categories based on seriousness (felonies in the first, second, and third degrees) and mens rea. While the Model Penal Code also reflected the prevailing views of indeterminate sentencing—the categories are still relatively broad and judicial sentencing discretion is explicitly acknowledged—it did frame that discretion to some degree by systematizing offenses and listing sentencing factors a judge may consider. So long as the federal substantive law was chaotic, with overlapping categories and muddled distinctions among offenses, federal sentencing was bound to seem lawless. [35]

---

[29] Stith and Cabranes note that "law faculties had long regarded sentencing as a 'soft' sub-specialty of criminal law, populated primarily by aficionados of psychiatry, sociology, social work, and other such branches of the 'social' sciences." STITH & CABRANES, *supra* note 27, at 26.

[30] Gertner, *From Omnipotence to Impotence*, *supra* note 28, at 528.

[31] STITH & CABRANES, *supra* note 27, at 111.

[32] MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 49 (1972).

[33] Reitz, *supra* note 25, at 1443.

[34] Kenneth W. Simons, *Should the Model Penal Code's* Mens Rea *Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 179 (2003).

[35] Robert H. Joost, *Federal Criminal Code Reform: Is It Possible?*, 1 BUFF. CRIM. L. REV. 195, 202 (1997).

III. GUIDELINE MOVEMENT

In response to widespread calls to reform the indeterminate system, a number of states implemented sentencing guidelines. The sentencing guideline approach introduced a new institutional player, an administrative agency—the sentencing commission—charged with generating sentencing standards.[36] The role of the commission, its powers vis-à-vis the other sentencing players, and its animating penal philosophy varied from state to state.

In 1984, the federal government entered into the act with a version of sentencing reform that by the end of the decade would be widely criticized. Congress passed the Sentencing Reform Act of 1984 (SRA), creating the United States Sentencing Commission and abolishing parole.[37] The Commission was supposed to do what Congress had been wholly unable to do, namely, to rationalize sentencing free of political influence, separate from the ever popular "crime du jour." At the same time, the dominant penal philosophy changed. The public, and certain members of the academy, gave up on rehabilitation as a central purpose of sentencing,[38] instead championing a philosophy known as "limited" retribution.[39] With that change, the locus of sentencing expertise moved from the judges and parole authorities to the Commission, Congress, and, to a degree, the public. Retribution made sentencing more accessible to the public and, ironically, to Congress. What the crime and the criminal deserved could be the subject of debate with the late night talk show host, or in time, the blogosphere.[40]

To be sure, the institutional implications of the SRA were not immediately apparent. To some reformers, it was not clear whether the Guidelines would become a mandatory or an advisory system, or, put

---

[36] *See generally* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 9 NW. U. L. REV. 1441 (1997).

[37] 18 U.S.C. § 3551--3673 (2006); 28 U.S.C. § 991--998 (2006).

[38] *See* Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974). Martinson's 1974 work was then recanted in his later work, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 252 (1979) (noting that "new evidence" leads him to reject his prior conclusion).

[39] *See* U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINE SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 14 (2004) ("This approach places primary emphasis on punishment proportionate to the seriousness of the crime and, within the broad parameters of this retributivism, lengthier incarceration for offenders who are most likely to recidivate.").

[40] *See generally*, Franklin E. Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California*, 28 PAC. L.J. 243, 254 (1996).

otherwise, whether they would *supplement* or *supplant* the judges.[41] Where the system would land on the continuum from advisory to mandatory would have a substantial impact on the institutional division of labor.

Some who believed that the SRA would herald a truly advisory system pointed to such things as the fact that the Guidelines authorized a judge to depart from its confines whenever he or she concluded there was a factor "of a kind, or to a degree, not adequately taken into consideration" by the Commission.[42] To others, the Guideline regime was unquestionably mandatory, underscoring the fact that the Guidelines were meant to determine sentencing outcomes in the vast majority of cases, and judges' power to depart was intended to be exercised sparingly.[43]

As a result of various factors, many of which continue to shape the debate over sentencing today, the more onerous and mandatory vision of the system quickly took hold.[44] Meanwhile, Congress, rather than taking a back seat to its newly created expert Commission, followed the passage of the SRA with a success of even more punitive mandatory minimum statutes and "three strikes and you're out" type sentencing enhancements. While cause and effect may not be clear, the following trends paralleled the Guideline movement.

A. POPULIST PUNITIVENESS

Crime became the fodder of political campaigns;[45] "lenient" judges were parodied on the evening news and the bourgeoning 24/7 cable outlets. But the popular rage went beyond judges who were supposedly "soft on crime." Efforts to restrict or even eliminate judicial discretion in sentencing paralleled efforts to strip judges of authority in a number of other areas. In 1981 and 1982 alone, more than two dozen bills stripping or altering federal courts' jurisdiction were introduced in the Ninety-Seventh Congress.[46] And the anti-judge, significantly anti-*federal* judge language was vituperative.[47]

---

[41] Gertner, *From Omnipotence to Impotence*, *supra* note 28, at 530.

[42] 18 U.S.C. § 3553(b)(1) (Supp. 2004).

[43] Judge Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL'Y REV. 261, 267 (2009).

[44] For further discussion of the factors shaping sentencing, see generally Gertner, *From Omnipotence to Impotence*, *supra* note 28; Gertner, *supra* note 43.

[45] Sara S. Beale, *What's Law Got To Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 49-51 (1997).

[46] This discussion draws on Christopher LeConey, *Rhetorical Branding of Judges as Outlaws: Recasting the SRA of 1984 as Symptom of the Reagan-Era Anti-Judiciary Zeitgeist* (on file with author); *see also* Max Baucus & Kenneth Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts and Congress*, 27 VILL. L. REV. 988 (1982); *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority*

B. MANDATORY MINIMUMS

Congress, propelled by this atmosphere, passed a succession of mandatory minimum statutes, statutes that were wholly inconsistent with the SRA's approach and surely with deference to the new "expert" Commission. Indeed, over time Congress directly intervened in Guideline determinations, ordering the Commission to increase this or that guideline.[48] Congress's role grew as the criminal law became more and more federalized, now accounting for the prosecution of more and more local gun and drug offenses, the kind of street crime that had traditionally been the state's bailiwick.[49]

C. THE COMPOSITION OF THE COMMISSION AND ITS GUIDELINES

The composition of the Commission and the guidelines it drafted exacerbated these trends. While the Commission was supposed to be made up of sentencing experts,[50] the first Commission was not. Indeed, no one on the first Commission had experience in the day-to-day experience of sentencing offenders.[51] It was, as many described it, political from the

---

to Regulate the Jurisdiction of Federal Courts, 95 HARV. L. REV. 17, 18 n.3 (1981) (identifying bills introduced in the Ninety-Seventh Congress to strip the federal courts of jurisdiction to hear various constitutional claims against state or local officials).

[47] *See* LeConey, *supra* note 46. LeConey cites to Senator Jesse Helms of North Carolina as stating that:

> Mr. President, unrestricted power has always been the mortal enemy of the rule of law. In our day, we have learned that this is as true in the case of judges as it has been in the case of tyrannical kings and communist dictators. . . . Federal judges have abdicated their role as upholders of the rule of law and become instead tyrants who substitute their own personal views for law. . . . Congress fortunately has authority to correct judicial abuses . . . I urge my colleagues to consider the available congressional remedies and move expeditiously to put them into law . . . . [t]he survival of the rule of law is at stake.

Id. at 1 (citing 128 CONG. REC. 32733-734 (1982) (statement of Sen. Helms)).

[48] Frank O. Bowman III, *Pour Encourager Les Autres*, 1 OHIO ST. J. CRIM. L. 373, 435-436 (2004). *See generally* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003).

[49] *See* James A. Strazzella & William W. Taylor III, *Federalizing Crime: Examining the Congressional Trend to Duplicate State Laws*, 14 CRIM. JUST. 4 (1999); AM. BAR ASS'N TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 15, 27 (1998).

[50] FRANKEL, *supra* note 32, at 119-20 (explaining that the commission had called for only "people of stature, competence, devotion, and eloquence," in particular, "[l]awyers, judges, penologists . . , criminologists . . , sociologists . . , psychologists, business people, artists, and . . . former or present prison inmates").

[51] STITH & CABRANES, *supra* note 27, at 49.

start[52] and decidedly pro-prosecution.[53] Without the patina of real sentencing expertise on the Commission, much less real independence, Congress had no problem regularly intervening in the Commission's decisionmaking and regularly ignoring it.[54]

Additionally, the Commission made a number of problematic decisions in its initial drafting that had important institutional consequences. The Guidelines were complex and numerical. In an effort to minimize judicial discretion, they were keyed to the "objective" facts of the offense and the offender, such as the quantity of drugs or the amount of loss on the one hand and criminal record on the other. It rejected mens rea, the traditional basis for moral culpability, or other factors that judges had taken into account in the pre-Guidelines era.[55]

And the Guidelines were severe, far more punitive than federal sentencing had ever been. While the Commission claimed to base the new Guidelines on existing practice, its data were limited and its analysis skewed. Moreover, it simply took existing sentencing lengths and then increased them. Notably, it chose to use Congress's mandatory minimum sentences as the base levels for the Guidelines, in effect requiring sentences even above the levels that Congress had set.[56] Indeed, the Guidelines resulted in a marked increase in the percentage of all defendants sentenced to prison rather than probation, and for markedly longer terms of imprisonment.[57] The severity of the Guidelines necessarily increased the

---

[52] SENTENCING MATTERS 63 (Norval Morris & Michael Tonry eds., 1996) ("Most proponents of guidelines have seen its one-step-removed-from-politics character as a great strength. . . . The U.S. Commission, by contrast, made no effort to insulate its policies from law-and-order politics and short-term emotions.").

[53] Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 763-64 (2005) (describing the extent to which the United States Sentencing Commission was "stacked" in favor of prosecution interests from its inception and throughout its history).

[54] *See id.* at 765-69.

[55] *See* Gerald E. Lynch, *The Federal Guidelines as a Not-So-Model Code*, 10 FED. SENT'G REP., July-Aug. 1997, at 25; Jack B. Weinstein & Fred Bernstein, *The Denigrating of* Mens Rea *in Drug Sentencing*, 7 FED. SENT'G REP., Nov.-Dec. 1994, at 121.

[56] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, § 3 (2000) (indicating that the Commission departed from existing sentencing practice to increase drug sentences because of Congressional directives); *id.* at ch. 1, pt. A, § 4(g) (2000) (indicating that the provisions of the Anti Drug Abuse Act of 1986—setting up drug mandatory minimum sentences—trumped the SRA's requirement that the Commission consider the impact on prison populations); *id.* § 2D1.1 cmt. background (2000) (describing the relationship between the drug base offense levels in the guidelines and the 1986 statute).

[57] *See* U.S. SENTENCING COMM'N, *supra* note 39, at 46 ("Average prison time for federal offenders more than doubled after implementation of the Guidelines."); *see also id.* at 43 (examining the drop in federal sentences to probation); ALLEN J. BECK & DARRELL K. GILLIARD, U.S. DEP'T OF JUSTICE, PRISONERS IN 1994 (1995) (discussing numbers of federal inmates), *available at* http://bjs.ojp.usdoj.gov/.

power of the prosecutor who could now credibly threaten substantial sentences to extract guilty pleas.

The Commission chose to implement a "real offense" system, which allowed a judge to consider additional facts about the criminal conduct of the defendant, beyond the offense of conviction, and under the usual sentencing standard, a fair preponderance of the evidence.[58] Moreover, the requirement to consider uncharged conduct that was part of the "real offense" led to the requirement that a judge consider even "acquitted conduct."[59] While a judge, pre-Guidelines, had the discretion to consider uncharged conduct or acquitted conduct, post-Guidelines, it was mandatory, and that conduct came to have specific determinate consequences—an increase in one's sentencing score and a concomitant increase in one's sentence.[60] And "real offense" sentencing also enhanced the prosecutor's power to determine what to charge and what to leave in reserve for sentencing, under a lesser burden of proof and few evidentiary standards.

And these decisions, effectively out of whole cloth, not correlated with the purposes of sentencing on the one hand, or empirical data, on the other, had an impact on judges.[61] Kate Stith and Jose Cabranes said it best:

> [T]he Guidelines are simply a compilation of administrative *diktats*. A set of unexplained directives may warrant unquestioning obedience if they are thought to constitute divine revelation or its equivalent (the Ten Commandments come to mind), but this is not a common occurrence in human affairs—at least not in democratic societies. . . . The Commission's reluctance to explain itself to the public thus leaves us with a set of rules promulgated and enforced *ipse dixit*—because the Commission says so. In the absence of some reasoned explanation for a particular rule, it is difficult to understand, much less defend, the rule. Unless there is reason to believe that the Commission has some unusual capacity to discover important or eternal truths, its argument from authority leaves the Guidelines with little or no independent validity or legitimacy.[62]

---

[58] *See* David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 418-19 (1993).

[59] Hofer & Allenbaugh, *supra* note 48, at 21 (noting that members of the Commission could not articulate a philosophy of sentencing to explain the Guidelines' priorities). While there is no Guideline provision explicitly requiring the consideration of acquitted conduct, it is part and parcel of "real offense" and the courts have concluded there is no justification for not considering it. In fact, all efforts to amend the Guidelines to exclude consideration of acquitted conduct have failed. *See* 57 Fed. Reg. 62,832 (Dec. 31, 1992); 58 Fed. Reg. 67,522 (Dec. 21, 1993); *see also* Barry L. Johnson, *If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct*, 75 N.C. L. REV. 153 (1996).

[60] Gertner, *supra* note 2, at 434.

[61] STITH & CABRANES, *supra* note 27, at 59-66.

[62] Kate Stith & José Cabranes, *Judging under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1271-72 (1997).

D. THE FEDERAL JUDICIARY

This quality of the Guidelines—administrative diktats—then had an influence on the courts charged with applying them. As I have written elsewhere,[63] federal judges at both the trial and appellate levels could have played a critical role in mitigating the harsh effects of this Guideline system. They could have created a robust law of departures, or they could have critically evaluated them in formal opinions. Instead, the federal judiciary, which had overwhelmingly opposed the Guidelines, suddenly became wholly "passive" in their sentencing decisionmaking.[64] They enforced the Guidelines with a rigor required by neither the SRA nor the Guidelines.[65] This response was due in part to a continuation of conditions that existed prior to the promulgation of the Guidelines, the flaws of the indeterminate era. Judges *still* lacked training on how to sentence, and many did not have backgrounds in criminal justice. As a result, many judges—especially those who arrived on the bench after the Guidelines were promulgated—had no perspective independent of the Guidelines and no critical context within which to judge the Guideline outcomes. To them, the Guidelines seemed to define the fair sentencing outcome; it was the only one they knew. In part, judges mechanically followed the Guidelines because of how the federal guidelines were crafted and sold to them—what I have described as a civil code ideology of sentencing reform created by the SRA and the Guidelines.[66] They believed that experts promulgated the comprehensive Guidelines, that they were based on empirical data, and that any gaps in their coverage were best filled by the expert Commission, rather than by the common law rulemaking of the federal bench.[67] They believed

---

[63] *See generally* Gertner, *From Omnipotence to Impotence*, *supra* note 28.

[64] Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 93-94 (1999).

[65] *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1720-21& n.199 (1992).

[66] Gertner, *From Omnipotence to Impotence*, *supra* note 28. John Merryman's description of civil code judges resonated under the SRA:

> The judge becomes a kind of expert clerk. . . . His function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union. The whole process of judicial decision is made to fit into the formal syllogism of scholastic logic. The major premise is the statute, the facts of the case furnish the minor premise, and the conclusion inevitably follows.

Gertner, *From Omnipotence to Impotence*, *supra* note 28, at 534 (quoting JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 36 (2d. ed. 1985)).

[67] *See* United States v. Wilson (*Wilson I*), 350 F. Supp. 2d 910, 915, 920 (D. Utah 2005) (noting that the Guidelines are entitled to "heavy weight" because of these assumptions); United States v. Wilson (*Wilson II*), 355 F. Supp. 2d 1269 (D. Utah 2005); United States v.

this—and many still do—even though these assumptions were flawed, as recent Supreme Court case law has suggested.[68] The Guidelines' Introduction acknowledges that they are not comprehensive but rather have gaps intended to be filled in by judges' power to depart.[69] Nor have they been drafted by sentencing experts, at least not the kind of experts envisioned by the SRA. Nor are they based on data or keyed to the purposes of sentencing.

In any event, even though the Guidelines were in fact enforced as if they were mandatory, that was not sufficient for some members of Congress. In 2003, Congress passed the PROTECT Act.[70] The Act sought to eliminate virtually all departures from the Guidelines by creating a reporting mechanism for the judges who were not "compliant."

The result was a division of labor that gave extraordinary power to prosecutors who could effectively determine sentences, either by what they charged in the first instance or what they held in reserve for the sentencing "real offense" determination. It also gave power to Congress, which could also determine sentencing outcomes through mandatory minimum sentences or its edicts to the Commission. The power of judges to sentence was substantially diminished; parole had been abolished since the implementation of the Guidelines. Congress and the Commission became the exclusive source of sentencing rules. While the SRA was supposed to implement all of the purposes of sentencing, retribution was in fact the dominant philosophy. And with a growing federal criminal code, the federalization of crime, there were few external constraints on Congress. Unlike in the states, the federal correctional budget was a fraction of the total budget.[71]

IV. *UNITED STATES V. BOOKER*: REENTER THE JURY

The implementation of the SRA sowed the seeds of a major constitutional challenge to the Guidelines. Under the still broad definition of crimes—the chaotic federal criminal code remained unchanged—the jury only found facts necessary to delineate the outer limits of punishments,

---

Jaber, 362 F. Supp. 2d 365, 370-76 (D. Mass. 2005) (criticizing *Wilson II*); *see also* Gertner, *From Omnipotence to Impotence*, *supra* note 28, 534-35.

[68] Spears v. United States, 129 S. Ct. 840 (2009); United States v. Kimbrough, 552 U.S. 85 (2007).

[69] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A1, introductory cmt. 4(b) (2010); U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 cmt.5.

[70] Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

[71] Frank O. Bowman, *Beyond Bandaids: A Proposal for Reconfiguring Federal Sentencing After* Booker, 2005 U. CHI. LEGAL F. 149, 172 n.131 (2005).

facts that would trigger the application of the still broad statutory sentencing ranges. Then at the sentencing stage, the judge was obliged to make additional findings of fact in order to determine exactly where the offender fit in the sentencing grid. What was becoming more and more clear was that the judge was now nothing more than another fact finder, rather than a sentencing expert exercising any sentencing judgment, adding any kind of expertise. His or her job was to find facts with determinate numerical consequences under the Guidelines, a job which began to look more and more like the jury's.

In 2005, the United States Supreme Court handed down *United States v. Booker*,[72] which held that the Guidelines were unconstitutional because of their impact on the jury. The Court found that the Guidelines violated the Sixth Amendment precisely because they obligated judges to find facts with the determinate consequences of increasing a defendant's sentence beyond the range required by a jury's verdict or a guilty plea.[73] Suddenly, the jury was important in the sentencing division of labor, although as I have described, the jury of the twenty-first century looked nothing like the powerful colonial jury. This constitutional defect, according to the Court, required severance of the provisions of the SRA that made the Guidelines mandatory.[74] The Court deemed the Guidelines to be "advisory," such that judges were to "consider" Guideline ranges but were permitted to tailor sentences in light of other statutory concerns.[75]

In effect, making the Guidelines advisory restored judicial power or more specifically, judicial *expertise* to the sentencing calculus:

> When [sentencing was] indeterminate and juries determined guilt or innocence, judges exercised "therapeutic judgment" within the broad limits set by the Congress. What the jury did was different from what the judge did. As the Guidelines became mandatory, what the judge did and the jury began to look alike, finding facts with mandatory consequences. In effect, *Booker* announced that in order to avoid the constitutional consequences of the mandatory regime, the courts had to exercise judgment again. The Guidelines had to be advisory . . . .[76]

In particular, a sentencing judge was instructed to follow the SRA's directive to weigh a number of factors, including "the nature and circumstances of the offense and the history and characteristics of the defendant."[77] The sentencing court was also advised to consider the purposes of sentencing listed in the Act, which include not only the

---

[72] United States v. Booker, 543 U.S. 220 (2005).

[73] *Id.* at 237.

[74] *Id.* at 259.

[75] *Id.* at 266, 270.

[76] Gertner, *From Omnipotence to Impotence*, *supra* note 28, at 536.

[77] *Booker*, 543 U.S. at 250.

retributive goals concerning the seriousness of the offense, but also the prevention of recidivism, the deterrence of future criminality, and the rehabilitation of the offender.[78]

At first, not much happened. The trends that predated the decision continued afterwards. Even after the Supreme Court declared mandatory application of the Guidelines to be unconstitutional, many judges continued to believe in the ideology of the Guidelines and urged continued deference. Many judges seemed to be uncomfortable exercising the discretion they now had. Many continued to use the numbers in the Guideline framework as a point of reference, illustrating the phenomenon known to cognitive researchers as anchoring.[79]

But in a series of four cases after *Booker*, the Court made it quite clear that it meant what it had said. In *Gall v. United States*,[80] the Court held that a judge could consider factors, such as offender and offense characteristics, regardless of whether they were allowable under the Guidelines. With *Kimbrough v. United States*[81] and *Spears v. United States*,[82] the Court indicated that a trial judge could even reject advisory Guidelines based solely on policy considerations, such as a conclusion that the applicable Guideline did not properly reflect national sentencing data and empirical research. And in *Nelson v. United States*, in a per curiam decision, the Court reversed a within-Guideline sentence, holding that "[t]he Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable."[83]

It is too early to say concretely what *Booker* and its progeny will do to the sentencing division of labor. It is clear that *Booker* has enhanced the position of the judge, whose sentencing expertise has been formally acknowledged again, at the cost of diminishing the position of the Sentencing Commission. *Booker* stripped the Guidelines of the force of law, transforming the Commission into a more traditional administrative agency, now subject to review akin to that required by the Administrative Procedure Act.[84] Congress's role, to a degree, is unchanged, so long as it

---

[78] *Id.* at 264.

[79] Nancy Gertner, *What Yogi Berra Teaches About Post*-Booker *Sentencing*, 15 YALE L.J. POCKET PART 137, 137 (2006), http://www.yalelawjournal.org/images/pdfs/50.pdf.

[80] 552 U.S. 38 (2007).

[81] 552 U.S. 85 (2007).

[82] 129 S. Ct. 840 (2009).

[83] 129 S. Ct. 890, 891 (2009) (per curiam).

[84] *See* Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217 (2005); *cf.* Administrative Procedure Act of 1946 § 10, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 701--706 (2006)) (describing the scope of judicial review of administrative decisions).

continues to legislate mandatory minimum statutes, although its influence on the Commission no longer translates into a direct influence on sentencing. The prosecutor's role is somewhat diminished to the extent that his or her charging decisions are no longer effectively outcome determinative. But given the remaining arsenal of federal offenses with mandatory minimum sentences, or enhanced penalties, that reduction is hardly substantial. And the role of the jury, whose diminished position was the initial concern of the Court in *Booker*, has effectively not changed.

While retribution remains an important purpose of sentencing, the other purposes of the SRA—including rehabilitation—have new importance in the federal sentencing scheme, making sentencing outcomes more complex and, I would argue, far more fair. Federal judges have an opportunity to participate in fashioning new sentencing standards, alongside the Sentencing Commission and Congress, although it is not at all clear how much they will use their power.

One might argue that *Booker* should bring new experts to the sentencing system. It invites scholars, judges, lawyers, and legislatures to participate in a multilayered discussion about federal sentencing, a discussion that had been largely squelched in an era of Guideline diktats. In fact, it invites just the kind of discussion that this *Journal* has encouraged for the past one hundred years.