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Sentencing and Interbranch Dialogue

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CRIMINAL LAW

SENTENCING AND INTERBRANCH DIALOGUE

ERIC S. FISH*

American legislatures generally delegate primary control over sentencing policy to one of two actors: trial judges or a sentencing commission. In choosing between these actors, a legislature decides between two values: individualization or uniformity. If it empowers trial judges, sentences will be individually tailored to each defendant, but there will be unjust disparities because different judges have different sentencing practices. If it empowers a sentencing commission, sentences will be uniform across cases, but they will not be tailored to each defendant. This Article proposes a different architecture for American sentencing systems, one that relies on interbranch dialogue to transcend this conflict between individualization and uniformity. In a dialogue-based system, judges and the sentencing commission are coauthors of the sentencing guidelines. They establish sentencing policies through dialogic feedback loops, wherein judges systematically influence the decisions of sentencing commissions, which in turn systematically influence the decisions of judges.

Such dialogue has different institutional forms in different guidelines regimes. In a presumptive guidelines regime (where the guidelines are presumptively binding but judges can depart from them in unusual cases), dialogue takes place through trial judges departing from the guidelines, appellate courts reviewing those departures, and the sentencing commission incorporating this departure case law into the guidelines themselves. In an advisory guidelines regime (where the guidelines are nonbinding), dialogue takes place through the sentencing commission trying to convince judges to follow the guidelines, tracking whether and why judges depart, and updating the guidelines to win more judges' adherence.

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The benefits of a dialogic sentencing system are twofold. First, it minimizes the conflict between individualization and uniformity that has plagued modern sentencing law. Second, it evolves sentencing policy in a morally rational direction by using judges' departure decisions to change the guidelines where they create illogical or unjust results. Whether a dialogic sentencing system is ultimately possible will depend on political factors, especially legislatures' willingness to delegate sentencing authority and refrain from issuing restrictive mandates. Assuming that it is politically feasible, the federal government and most of the states with guidelines could adopt dialogue-based systems without major changes to their current institutions. Indeed, several jurisdictions have already incorporated elements of dialogue into their sentencing systems.

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INTRODUCTION

The current federal sentencing system is incoherent. Before sentencing a defendant, a judge must first calculate the sentence range provided by the

Federal Sentencing Guidelines.¹ But the judge is then free to ignore this range, and impose a sentence outside of the Guidelines. This is because the Supreme Court's decision in *United States v. Booker* rendered the Guidelines "advisory," so judges can no longer be reversed merely for failing to adhere to them.² But the Guidelines were not written to "advise" judges in any meaningful sense. They were written to *dictate* judges' sentencing decisions. The Guidelines manual contains no explanatory discussion that might persuade a judge. Instead, it provides an opaque formula that receives facts about the crime and the defendant as inputs and spits out a range of months. Thus the Guidelines calculation is now little more than a mandatory homework assignment for judges.³ *Booker* has created a basic contradiction—we have advisory guidelines that provide no advice. Federal judges are given two conflicting messages: the Sentencing Commission tells them to follow the Guidelines, while the Supreme Court tells them to follow their consciences.⁴ The Supreme Court has permitted appeals courts to consider the degree of variance from the Guidelines when deciding whether a sentence is substantively reasonable (and thus valid on appeal).⁵ But the Court has also held that deviation from the Guidelines cannot make a sentence presumptively unreasonable,⁶ and has left it to circuit courts to decide whether within-Guidelines sentences are presumptively reasonable.⁷

¹ See *Gall v. United States*, 552 U.S. 38, 51 (2007) (noting that failing to calculate the Guidelines range, or making an error in such calculation, is procedural error).

² *United States v. Booker*, 543 U.S. 220, 245 (2005) (Breyer, J.); see also *Kimbrough v. United States*, 552 U.S. 85, 91 (2007) (holding that a judge's policy disagreement with the crack cocaine guideline is sufficient grounds for departure).

³ "Mandatory" because a sentence can be reversed for procedural error if a judge makes a mistake in the Guidelines calculation. See *Gall*, 552 U.S. at 51 ("[The appellate court] must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . ."); *United States v. Mashek*, 406 F.3d 1012, 1013–14 (8th Cir. 2005) (vacating the district court's sentence due to a Guidelines miscalculation).

⁴ To be more precise, they must follow the sentencing factors provided by 18 U.S.C. § 3553(a) (2012), which are very broadly worded and include, among other things, "the nature and circumstances of the offense and the history and characteristics of the defendant," and "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." Section 3553(a) also requires federal judges "to afford adequate deterrence to criminal conduct; . . . to protect the public from further crimes of the defendant; and . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

⁵ *Gall*, 552 U.S. at 47.

⁶ *Id.*

⁷ See *Rita v. United States*, 551 U.S. 338, 347 (2007) (permitting, but not requiring, appellate courts to accord within-Guidelines sentences a presumption of reasonableness).

These deferential instructions have created a divide between sentencing judges over how often to follow the Guidelines, as well as significant regional variation in Guidelines compliance rates.⁸ They have also led judges to issue a large number of below-Guidelines sentences for certain crimes, such as child pornography possession, where the Guidelines are especially harsh.⁹ Further, they have created a divide among different appellate courts, some of which presume that within-Guidelines sentences are substantively reasonable, and some of which give the Guidelines no such presumption.¹⁰ The same uncertainty about the normative status of sentencing guidelines exists in a number of state systems. Arkansas, Delaware, Maryland, and other states have adopted “advisory” guidelines that have much the same structure as the federal system—a black box formula that provides a recommended sentence with no real explanation.¹¹ Judges are understandably unsure about

⁸ See Ryan W. Scott, *Inter-judge Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 40 (2010) (“The models confirm that, before *Booker*, the identity of the sentencing judge bore a very small and nonsignificant relationship to the distance between the sentence imposed and the guideline range. Since *Booker*, however, the identity of the judge has become a statistically significant predictor of how far a sentence will fall from the Guidelines Together, these measures of sentencing outcomes in Boston tend to corroborate anecdotal reports of a surge in inter-judge sentencing disparity.”). There are also variations in departure rate between different judicial districts and circuits. See U.S. SENTENCING COMM’N, BOOKER REPORT 2012: PART C, STATISTICAL ANALYSIS OF FEDERAL SENTENCING DATA 78–80 (2012), available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_C1_Overview.pdf (showing that the post-*Booker* rates of non-government-sponsored below-Guidelines departures vary from around 40% in districts like Connecticut, Delaware, Vermont, and Manhattan, to around 10% in districts like Louisiana, Mississippi, New Mexico, Texas, Mississippi, and Puerto Rico), archived at <http://perma.cc/V325-K497>.

⁹ See U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, PART A 67 (2012), available at <http://sentencing.typepad.com/files/part-a---continuing-impact-of-booker-on-federal-sentencing.pdf>, archived at <http://perma.cc/QK5T-6SVG>.

¹⁰ The D.C., Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have all established a presumption of reasonableness for within-Guidelines sentences, while the First, Second, Third, and Eleventh Circuits have established no such presumption. Lindsay C. Harrison, *Appellate Discretion and Sentencing After Booker*, 62 U. MIAMI L. REV. 1115, 1129 (2008). See also Melissa Hamilton, *Sentencing Adjudication: Lessons from Child Pornography Policy Nullification*, 30 GA. ST. U. L. REV. 375, 410–32 (2014) (showing a circuit split concerning whether within-Guidelines child pornography sentences are presumptively reasonable); Alison Siegler, *Rebellion: The Courts of Appeals’ Latest Anti-Booker Backlash*, 82 U. CHI. L. REV. 201 (2015) (arguing that circuit judges underpolice within-Guidelines sentences in order to maintain the influence of the Guidelines).

¹¹ See generally NEAL B. KAUDER & BRIAN J. OSTROM, NAT’L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM (2008), available at http://www.ncsc.org/~media/Microsites/Files/CSI/State_Sentencing_Guidelines.ashx (listing states with advisory systems), archived at <http://perma.cc/YLW2-H9EZ>; see also ARK. SENTENCING

why they should follow such recommendations, especially in cases where the recommended sentence seems unjust or inappropriate.

There have been a variety of proposals to reform the post-*Booker* sentencing system so as to clarify the normative status of the Guidelines. These *Booker* “fixes” come in two basic categories. Some argue that the system should be hardened in order to remove or sharply curtail judges’ sentencing discretion.¹² Others argue that the Guidelines should be abolished, significantly scaled back, or simply kept as advisory so as to preserve judges’ sentencing authority.¹³ Each of these proposals carries the assumption that

COMM’N, SENTENCING STANDARDS GRID OFFENSE SERIOUSNESS RANKINGS AND RELATED MATERIAL 1–2 (2011), available at http://www.arkansas.gov/asc/pdfs/FINAL_2011_Bench_Book_-_MASTER_WITH_PAGE_NUMBERS.pdf, archived at <http://perma.cc/RU84-5NJL>; DEL. SENTENCING ACCOUNTABILITY COMM’N, BENCHBOOK 22 (2014), available at http://courts.delaware.gov/Superior/pdf/benchbook_2014.pdf, archived at <http://perma.cc/B67N-ZJTK>; MD. STATE COMM’N ON CRIMINAL SENTENCING POLICY, MARYLAND SENTENCING GUIDELINES MANUAL at II (2015), available at <http://www.msccsp.org/Files/Guidelines/MSGM/guidelinesmanual.pdf>, archived at <http://perma.cc/W4XU-6U3V>.

¹² See, e.g., *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After U.S. v. Booker: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 66–67 (2011) (statement of Hon. Patti B. Saris, Chair, U.S. Sentencing Comm’n), available at http://judiciary.house.gov/_files/hearings/printers/112th/112-142_70669.PDF (proposing (1) that Guidelines sentences be presumed reasonable on appeal, (2) that judges be compelled to provide greater justification for departing from the Guidelines, and (3) that sentences imposed due to “policy disagreement” with the Guidelines be given closer scrutiny), archived at <http://perma.cc/PYK5-HFLX>; Frank Bowman, *Memorandum Presenting a Proposal for Bringing the Federal Sentencing Guidelines into Conformity with Blakely v. Washington*, 16 FED. SENT’G REP. 364, 367 (2004) (proposing to solve the constitutional problem by raising the top of each Guidelines range to the statutory maximum—although this would not work any more, due to the Supreme Court’s decision in *Alleyne v. United States*, 133 S. Ct. 2151, 2163 (2013)); Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 715, 739 (2005) (arguing that Congress should make the Guidelines mandatory, thus requiring that facts leading to sentence enhancement be proved to a jury beyond a reasonable doubt); Adam Lamparello, *Implementing the “Heartland Departure” in a Post-Booker World*, 32 AM. J. CRIM. L. 133, 137 (2005) (arguing that appellate courts should reestablish a presumptive guidelines system); William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission’s Attempts to Achieve Sentencing Reform in the Midst of Inter-branch Power Struggles*, 26 J.L. & POL. 305, 309–10 (2011) (proposing that the Guidelines be changed so that they are binding on judges and that the size of the ranges be increased).

¹³ See, e.g., Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1743 (2012) (arguing that the post-*Booker* advisory system should remain in place); Mark Osler, *After the Implosion: Trailing-Edge Guidelines for a New Era*, 7 OHIO ST. J. CRIM. L. 795 (2010) (arguing for advisory guidelines that only inform judges of national sentencing trends for a given type of case, based on sentences by other district judges); Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 26 FED. SENT’G REP. 6, 9 (2014) (proposing that the Guidelines be replaced with multifactor tests that judges can use to

sentencing policy is a zero-sum game. We must choose either (1) a system where judges control sentencing decisions, or (2) a system where judges are constrained by guidelines.

This Article transcends that dichotomy by proposing a different architectural logic for sentencing guidelines systems: one of dialogue between judges, legislatures, and sentencing commissions. In the conventional architecture, the legislature delegates primary control over sentencing to one actor—either the judiciary or the commission—and that actor dictates sentencing policy while the other is merely an adjunct. In a dialogic architecture, by contrast, the legislature delegates sentencing authority to both actors in concert, making judges and the commission coauthors of the sentencing system. Judges and the commission then establish sentencing policy through iterative feedback loops, wherein judges systematically influence the decisions of sentencing commissions, which in turn systematically influence the decisions of judges. Meanwhile, the legislature can direct the development of this sentencing system by enacting framework statutes (establishing certain values or criteria to guide sentencing decisions) or enacting specific sentencing dictates (mandating particular changes to the guidelines formula). Through such policy feedback loops, the sentencing system can realize the twin goals of individualizing sentences and reducing unwarranted disparity. Empowering only judges or only the commission forces the legislature to choose between those goals. But a dialogic architecture allows judges' departure decisions to be incorporated into the guidelines themselves, so that the sentencing system adapts over time to accommodate more variables without creating unwarranted disparities. Dialogue thus allows the branches to cooperate in building a common law of sentencing.

There are two models for building such feedback loops into sentencing institutions. In the first model ("presumptive" feedback loops), sentencing guidelines are made presumptively binding on judges, but there is a general departure power letting judges give above- or below-guideline sentences if merited by the facts of a case. These departures are then subject to appellate review to determine whether they were in fact justified, and over time the appellate courts' departure case law can be incorporated into the guidelines themselves. In the second model ("advisory" feedback loops), the guidelines

determine sentences); Robert C. "Bobby" Scott, *Booker Is the Fix*, 24 FED. SENT'G REP. 340, 342 (2012) (arguing that the post-*Booker* advisory system should remain in place); cf. Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217, 217 (2005) (arguing that the federal Sentencing Commission should be replaced with a sentencing agency controlled entirely by judges).

are not binding on judges, but are designed to reduce disparity by persuading judges to follow them. They do so in two ways. First, the commission can design the guidelines to reflect judicial practice, such that they inform judges of existing sentencing norms. Second, the commission can issue its own recommendations for changing sentencing practices, and can use its policy expertise and facility with empirical social science to provide arguments for such changes. Judges then respond to the commission's guidelines by following or departing from them, and the guidelines are updated to reflect judges' sentencing decisions. In both models, the sentencing system uses judges' departures as an engine to update the guidelines. These models thus each carry two benefits. First, they permit judges to individualize sentences while limiting the incidence of interjudge disparity. Second, they permit judges to systematically correct the guidelines' oversights and irrational recommendations as these are revealed in particular cases.

A dialogic model is compatible with many existing sentencing institutions. The states of Kansas, Minnesota, North Carolina, and Washington have adopted the basic tools of presumptive feedback loops—presumptively mandatory guidelines, a general departure power for unusual cases, and appellate review of departures.¹⁴ The draft sentencing provisions of the Model Penal Code adopt the same structure, and also instruct the sentencing commission to include commentary explaining the reasoning behind each guideline provision.¹⁵ Virginia has an advisory guidelines system that is designed to reflect judicial practice. Its sentencing commission compiles extensive data about judges' sentencing decisions, provides empirically grounded policy guidance about different sentencing factors, and issues annual recommendations for updating the guidelines to better reflect current sentences.¹⁶ Virginia has thus basically embraced the model of

¹⁴ See KAUDER & OSTROM, *supra* note 11, at 12, 17, 19, 26. According to the National Center for State Courts, the states with presumptive systems are Kansas, Michigan, Minnesota, North Carolina, Oregon, Pennsylvania, and Washington. Most of the remaining guidelines systems are advisory. *See generally id.*

¹⁵ MODEL PENAL CODE: SENTENCING §§ 6B.02(5), 6B.04, 7.ZZ (Tentative Draft No. 1, 2007).

¹⁶ *See generally* BRIAN J. OSTROM ET AL., NAT'L CTR. FOR STATE COURTS, VA. CRIMINAL SENTENCING COMM'N, OFFENDER RISK ASSESSMENT IN VIRGINIA (2002), *available at* http://www.vcsc.virginia.gov/risk_off_rpt.pdf (evaluating Virginia's empirically driven program for determining which defendants are least likely to recidivate based on age and criminal history, among other factors, and diverting those defendants from incarceration), *archived at* <http://perma.cc/6K8V-ASAP>; VA. CRIMINAL SENTENCING COMM'N, 2013 ANNUAL REPORT (2013) [hereinafter VA. CRIMINAL SENTENCING COMM'N (2013)], *available at* <http://www.vcsc.virginia.gov/2013AnnualReport.pdf> (providing a full statistical breakdown of judicial guideline compliance in Virginia, and issuing recommendations to update the guidelines to better reflect judicial practice), *archived at* <http://perma.cc/AA3S-NFG9>.

advisory feedback loops, using the guidelines system both to advise judges of existing sentencing norms and to provide policy arguments for adopting new norms.

Even the framework of the federal sentencing system is compatible with the logic of dialogue. The federal guidelines are now advisory, the federal Sentencing Commission collects exhaustive data about federal judges' sentencing practices,¹⁷ and the Sentencing Reform Act instructs the Commission to consult with judges and other actors when updating the guidelines.¹⁸ Indeed, several of the authors of the federal guidelines originally envisioned that the system would incorporate elements of interbranch dialogue, with the Commission studying and learning from the justifications that judges articulate for their sentences.¹⁹ However, even this modest dialogic practice was not implemented. Post-*Booker*, the federal Sentencing Commission could easily follow Virginia's lead and adopt dialogue as its governing logic. Embracing the concept of feedback loops would return coherence to the federal sentencing system by clarifying the guidelines' force to judges. Indeed, in some ways, federal judges and the Commission have (albeit very recently) begun to engage in such dialogue. The Commission has taken serious note of judicial critiques of (and departures from) certain

¹⁷ See, e.g., U.S. SENTENCING COMM'N, *supra* note 8 (analyzing sentencing statistics for 76,216 offenders in fiscal year 2011).

¹⁸ 28 U.S.C. § 994(o) (2012) ("In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system.").

¹⁹ See U.S. SENTENCING GUIDELINES MANUAL § 1A1.4(b) (2013) (reprinting introductory note to original 1987 edition of the Guidelines Manual: "By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so . . . the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted."); see also *Rita v. United States*, 551 U.S. 338, 357–58 (2007) (Breyer, J.) ("The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court. That being so, his reasoned sentencing judgment, resting upon an effort to filter the Guidelines' general advice through § 3553(a)'s list of factors, can provide relevant information to both the court of appeals and ultimately the Sentencing Commission. The reasoned responses of these latter institutions to the sentencing judge's explanation should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw."); *United States v. Rivera*, 994 F.2d 942, 949–50 (1st Cir. 1993) (Breyer, J.) ("[T]he very theory of the Guidelines system is that when courts, drawing upon experience and informed judgment in such cases, decide to depart, they will explain their departures. The courts of appeals, and the Sentencing Commission, will examine, and learn from, those reasons. And, the resulting knowledge will help the Commission to change, to refine, and to improve, the Guidelines themselves."). Then-judge Breyer was a member of the original federal Sentencing Commission. U.S. SENTENCING GUIDELINES MANUAL (1987), available at http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987_Guidelines_Manual_Full.pdf, archived at <http://perma.cc/4ZXW-U8QE>.

guidelines, and has responded with statistical reports and modest policy changes.²⁰ Hopefully this nascent trend will continue.

The thesis of this Article is thus both theoretical and practical. Policy feedback loops between judges and sentencing commissions are not just a good idea, they are also capable of being implemented within current sentencing systems, and in some systems they have already been implemented. The logic of dialogue should be explicitly embraced by state and federal sentencing commissions, and formally institutionalized as the core principle of the sentencing system, because it offers the best strategy for establishing morally rational sentencing policies and for limiting the conflict between uniformity and individualization.

The academic literature on sentencing policy has largely assumed that it is a zero-sum game between judges and commissions. Sentencing scholars have thus not explored the possibility of embracing dialogue between judges and commissions as the governing theory of sentencing institutions.²¹ In the book that inspired the sentencing reform movement, Judge Marvin Frankel argued forcefully against judicial discretion in sentencing, claiming that it was often exercised cavalierly and resulted in arbitrary disparities.²² In its place he recommended establishing a sentencing commission that would issue binding rules, codifying and constraining judges' sentencing decisions.²³ Once the federal guidelines were enacted and put into practice, a number of scholarly critiques emerged. These attacked the Guidelines as, among other things, too arbitrary, too punitive, too constraining, and too empowering for prosecutors, and many scholars called for judges to be given back much of the sentencing power that was taken from them.²⁴ But none of

²⁰ See Baron-Evans & Stith, *supra* note 13, at 1672–75 (noting that the Commission has recently taken into account judges' views on sentences for crack cocaine distribution, child pornography consumption, and fraud offenses).

²¹ A few authors have suggested that the federal Sentencing Commission does—or ought to—update its guidelines to reflect judges' articulated sentencing views. See, e.g., Baron-Evans & Stith, *supra* note 13, at 1671 (noting that *Booker* has opened a dialogue wherein judges can persuade the Commission to change the Guidelines by systematically departing and explaining why); Paul J. Hofer, *Beyond the "Heartland": Sentencing Under the Advisory Federal Guidelines*, 49 DUQ. L. REV. 675, 700–02 (2011) (lamenting the lack of an adequate feedback mechanism for the Commission to register judicial criticism of flawed sentencing guidelines). Their discussions, however, have been quite abbreviated, and none has explored the possibility, requirements, or implications of adopting dialogue as the governing theory of the sentencing system.

²² MARVIN E. FRANKEL, CRIMINAL SENTENCES (1973).

²³ *Id.* at 118–24.

²⁴ See, e.g., KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING (1998) [hereinafter STITH & CABRANES (1998)]; MICHAEL TONRY, SENTENCING MATTERS (1996); Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the*

these critiques explored the idea that dialogue between judges and the Commission should be the sentencing regime's governing principle. After the pendulum swung again with the Supreme Court's opinion in *Booker*, federal sentencing scholarship has mostly debated the merits of judges' newly rediscovered discretion. Academics have taken a variety of positions along the spectrum from abolishing the Guidelines entirely to making them mandatory once more.²⁵ There has also been a good deal of empirical work on the merits and demerits of judicial discretion, in particular the question of whether or not it leads to racial disparities,²⁶ as well as some work on the

Federal Sentencing Guidelines, 1996 WIS. L. REV. 679 (1996); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991); Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 YALE L.J. 1755 (1992); Marc Miller & Daniel J. Freed, *Honoring Judicial Discretion Under the Sentencing Reform Act*, 3 FED. SENT'G REP. 235 (1991); Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723 (1999); Mark Osler, *Indirect Harms and Proportionality: The Upside-Down World of Federal Sentencing*, 74 MISS. L.J. 1 (2004); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992); Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1252–54 (1997) [hereinafter Stith & Cabranes (1997)]; Ronald F. Wright, *Complexity and Distrust in Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 617 (1992); Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775 (1999).

²⁵ See, e.g., Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2005); Douglas A. Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341 (2006); Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367 (2010); D. Michael Fisher, *Striking a Balance: The Need to Temper Judicial Discretion Against a Background of Legislative Interest in Federal Sentencing*, 46 DUQ. L. REV. 65 (2007); Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082 (2005); Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155 (2005); Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn't*, 117 YALE L.J. 1374 (2008); Scott A. Schumacher, *Sentencing in Tax Cases After Booker: Striking the Right Balance Between Uniformity and Discretion*, 59 VILL. L. REV. 563 (2014); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008); Robert Weisberg, *How Sentencing Commissions Turned Out to Be a Good Idea*, 12 BERKELEY J. CRIM. L. 179 (2007); Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 YALE L.J. POCKET PART 137 (2006), <http://www.yalelawjournal.org/forum/what-yogi-berra-teaches-about-post-booker-sentencing>, archived at <http://perma.cc/62CM-ES7D>; see sources cited *supra* notes 12–13.

²⁶ See, e.g., Baron-Evans & Stith, *supra* note 13, at 1685–1703; Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729 (2012); Scott, *supra* note 8, at 56; Ryan W. Scott, *Race Disparity Under Advisory Guidelines: Dueling Assessments and Potential Responses*, 10 CRIMINOLOGY & PUB. POL'Y 1129 (2011);

political economy of sentencing commissions.²⁷ Again, the possibility of a dialogue-driven sentencing regime has gone unexplored. In contrast with the federal system, there has been relatively little scholarly discussion of state guidelines. Scholars who have analyzed state guidelines in detail have not yet explored the concept of dialogue as the governing logic of a sentencing system.²⁸ This Article thus breaks new ground by proposing a dialogic model of sentencing policy formation, and showing how well such a model could function in particular federal and state sentencing systems.

The argument proceeds in four Parts. Part I traces the history of sentencing policy in the United States, showing that the federal system has swung between delegating significant discretion to judges and imposing uniformity by removing judges' discretion via a sentencing commission, while state systems (though being relatively more stable) have been defined by the same dichotomy between empowering judges and empowering commissions. Part II lays out the argument for dialogue as the master principle of the sentencing system. First, it considers why and how legislatures delegate sentencing power, as well as the relative competencies of the two main actors legislatures delegate that power to: judges and sentencing commissions. Then, it describes the two main models of dialogue

Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2 (2013).

²⁷ See, e.g., Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599 (2012); Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973 (2006); Frank O. Bowman, III, *The Failure of the Federal Sentencing System: A Structural Analysis*, 105 COLUM. L. REV. 1315 (2005); Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235 (2005).

²⁸ See, e.g., David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 CRIME & JUST. 71 (2001); Richard S. Frase, Blakely in Minnesota, *Two Years Out: Guidelines Sentencing Is Alive and Well*, 4 OHIO ST. J. CRIM. L. 73 (2006) [hereinafter Frase, *Blakely in Minnesota*]; Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005) [hereinafter Frase, *State Sentencing Guidelines*]; Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978–2003*, 32 CRIME & JUST. 131 (2005); Richard S. Frase, *The Role of the Legislature, the Sentencing Commission, and Other Officials Under the Minnesota Sentencing Guidelines*, 28 WAKE FOREST L. REV. 345 (1993); Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441 (1997) [hereinafter Reitz (1997)]; Kevin R. Reitz, *Sentencing Reform in the States: An Overview of the Colorado Law Review Symposium*, 64 U. COLO. L. REV. 645 (1993); Kate Stith, *Principles, Pragmatism, and Politics: The Evolution of Washington State's Sentencing Guidelines*, 76 LAW & CONTEMP. PROBS. 105 (2013); Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980–2000*, 29 CRIME & JUST. 39 (2002); Ronald F. Wright & Susan P. Ellis, *A Progress Report on the North Carolina Sentencing and Policy Advisory Commission*, 28 WAKE FOREST L. REV. 421 (1993).

(presumptive and advisory feedback loops) and shows how easily they could be adapted to existing sentencing systems. It concludes by considering the ongoing role of the legislature in a dialogic sentencing system, showing how the legislature participates in sentencing policy feedback loops, and laying out strategies for legislative intervention that will preserve the logic of interbranch dialogue rather than destroying it. Part III explores the particulars of a system governed by feedback loops by considering a number of institutional design questions. These include whether the guidelines impose a new philosophy of punishment or merely aggregate past practice, the logic of appellate review, the role of reason-giving by judges and the commission, sources of guideline stickiness, and the membership and branch of the sentencing commission.

I. SENTENCING IN THE UNITED STATES: THE DIALECTIC OF UNIFORMITY AND DISCRETION

Criminal sentences in eighteenth century America were generally mandatory and incredibly harsh. A jury's decision to convict triggered an automatic sentence, commonly death in felony cases.²⁹ By the time of the Constitution's framing, however, the American justice system had begun to relax the use of mandatory sentences.³⁰ This transition took off over the

²⁹ See *United States v. Grayson*, 438 U.S. 41, 45 (1978) ("In the early days of the Republic, when imprisonment had only recently emerged as an alternative to the death penalty, confinement in public stocks, or whipping in the town square, the period of incarceration was generally prescribed with specificity by the legislature. Each crime had its defined punishment." (citing REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 83–85 (1976))); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 70–71 (2003); Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 693–94 (2010). But see Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1126–27 (2001) (arguing that judges at common law had other forms of discretion, including the power to downgrade felony sentences for certain crimes, to prescribe punishments for misdemeanors, and to trigger the pardon and commutation process).

³⁰ See STITH & CABRANES (1998), *supra* note 24, at 9 ("From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion.") (citation omitted); Barkow, *supra* note 29, at 71. There is some disagreement about the degree of judicial discretion that existed in state systems. Compare Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1506 (2001) ("Compared to jurors on the other side of the Atlantic, American juries at the time of the adoption of the Bill of Rights played a minor role in sentencing. Instead, many—or perhaps most—sentences were set by judges, at their discretion, within broad statutory ranges.") (citation omitted) with Bibas, *supra* note 29, at 1126 n.209 ("While the sources [King and Klein] cite show a nascent trend away from mandatory capital sentences, however, they do not show that judicial discretion in felony sentencing was well established by 1791.").

course of the nineteenth century, as more and more state legislatures limited application of the death penalty and delegated significant sentencing power to judges.³¹ Criminal statutes were given broad sentence ranges, and judges were tasked with evaluating the defendant and the crime to determine an appropriate punishment. This discretion was commonly justified by the theory that judges should calibrate sentences to the defendant's likelihood of rehabilitation.³² Beginning in the late nineteenth century, this judicial discretion was supplemented by the adoption of indeterminate sentences administered by parole boards, which would evaluate criminal defendants' likelihood of rehabilitation and determine their date of release.³³ The Supreme Court forcefully endorsed this rehabilitative ideology in the 1949 case of *Williams v. New York*, noting, "Today's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders. . . . Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."³⁴

By the 1970s, this rehabilitative model of discretionary and indeterminate sentencing had come under attack. The notion that criminals can be rehabilitated at all fell into widespread political and intellectual disfavor.³⁵ Further, reform advocates criticized the disparity in sentences

³¹ Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 CHI.-KENT L. REV. 937, 990–93 (2003) (showing when each state first limited the application of capital punishment and delegated significant sentencing discretion to judges, with most dates clustered in the early-to-mid-1800s).

³² See STITH & CABRANES (1998), *supra* note 24, at 16–18 (describing the rise of early theories of reform through isolation or hard labor); Barkow, *supra* note 29, at 87 (“[B]efore the advent of sentencing guidelines and mandatory minimum sentences, most federal and state statutes gave judges extensive discretion to sentence defendants. The commonly stated purpose for this discretion was an underlying belief in rehabilitation.”); Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 302 & n.55 (1992) (“As the use of the quantifiable sanction of incarceration grew and as rehabilitation became a goal of sentencing, the need for discretion in sentencing increased.”).

³³ See STITH & CABRANES (1998), *supra* note 24, at 18–22 (discussing the introduction of parole laws, beginning with New York's in 1881 and followed by other states and the federal government).

³⁴ *Williams v. New York*, 337 U.S. 241, 248 (1949). Ironically, the Court in *Williams* invoked this reformatory ethos to uphold a judge's decision sentencing a teenager to death based on out-of-court evidence. *Id.* at 251–52.

³⁵ See STITH & CABRANES (1998), *supra* note 24, at 29–31 (noting that growing academic skepticism of rehabilitation intersected with conservative political forces and a growing fear of crime, especially crime committed by parolees); Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for “Fixed” and “Presumptive” Sentencing*, 126 U. PA. L. REV. 550, 552 (1978) (“That I and many other academics adhered in large part to this reformative viewpoint only a decade or so ago seems almost incredible to

between defendants as unjust.³⁶ The most forceful articulation of this anti-disparity argument came from federal district judge Marvin Frankel, whose 1973 book *Criminal Sentences: Law Without Order* and 1974 study of federal sentencing disparities in the Northeast helped catalyze the sentencing reform movement.³⁷ Frankel advocated the creation of an administrative sentencing commission that would issue guidelines to codify judges' sentencing process. This proposal was fleshed out in a series of workshops at Yale Law School that produced draft legislation,³⁸ and became the basis for a bill proposed by Senator Edward Kennedy in 1975.³⁹

Kennedy's initial proposal provided for advisory guidelines, which would not be binding on judges. However, in a 1978 floor amendment the Guidelines were made presumptively binding "unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission."⁴⁰ The proposal also changed significantly as Kennedy sought conservative allies for its passage. It began as essentially an antidiscrimination bill intended to prevent unwarranted sentencing disparities, but transformed into a conservative law-and-order measure that would make the federal criminal justice system

most of us today.").

³⁶ Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227 (1993) ("Beginning in the 1950s, liberal reformers developed three fundamental criticisms of the prevailing regime of indeterminate prison sentencing and parole. First, to the extent it was premised on rehabilitation, it was said to be unsuccessful. Second, indeterminacy bred anxiety among prisoners because of uncertainty in their release dates and because of disparity in the sentences received by persons who had committed the same crime. Third, this discrepancy in sentences was said to be fundamentally at odds with ideals of equality and the rule of law.").

³⁷ See FRANKEL, *supra* note 22; see also ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, FED. JUDICIAL CTR., *THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT (1974)* (showing significant sentencing disparities within the Second Circuit), available at [http://www.fjc.gov/public/pdf.nsf/lookup/2dcrstdy.pdf/\\$file/2dcrstdy.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/2dcrstdy.pdf/$file/2dcrstdy.pdf), archived at <http://perma.cc/ZSG3-DTWU>.

³⁸ See PIERCE O'DONNELL ET AL., *TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM (1977)*; STITH & CABRANES (1998), *supra* note 24, at 36; Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 STAN. L. REV. 37, 40 (2005).

³⁹ S. 2699, 94th Cong. (1975). Senator Kennedy had a history of proposing legislation inspired by legal scholarship. See Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1187 (2012) (describing how a law review article caused Senator Kennedy to propose the legislation that ultimately led to the adoption of the Twenty-Sixth Amendment).

⁴⁰ Stith & Koh, *supra* note 36, at 245 (quoting 124 CONG. REC. 382–83 (1978) (Unprinted Amendment No. 1100 adopted Jan. 23, 1978)) (emphasis omitted).

significantly more punitive.⁴¹ It was ultimately enacted in 1984 as the Sentencing Reform Act.⁴²

From 1985 to 1987, the newly established federal Sentencing Commission set about writing the federal Sentencing Guidelines. Two members of the Commission, both academics, argued that it should adopt a substantive philosophy of criminal justice. Paul Robinson advocated a deontological, retributivist approach to punishment, while Michael Block advocated a consequentialist, crime reduction–focused approach.⁴³ The Commission ultimately followed neither of these proposals, opting instead to base its guidelines on past judicial practice, in particular on the sentences judges had issued in 10,000 cases that the commissioners examined.⁴⁴ It did, however, also follow several congressional directives instructing it to lengthen sentences in areas like drug crimes, violent crimes, repeat offenses, and racketeering crimes.⁴⁵ Thus, while the federal guidelines ostensibly relied on past practice and imposed no new philosophy, they in fact significantly increased sentence lengths in these areas relative to prior practice.⁴⁶ Further, once the Guidelines were put into practice, the departure framework became quite rigid for a number of reasons. The Commission specified that a list of factors commonly considered by judges at sentencing, including age, education, employment, family ties, and mental condition, would not ordinarily warrant departure,⁴⁷ and it explicitly prohibited certain departure grounds (such as alcohol dependence, economic hardship, and lack of guidance as a youth) that judges had used to justify more lenient sentences.⁴⁸ The Commission also interpreted the Sentencing Reform Act’s departure provision as precluding departures based on factors the Commission had

⁴¹ See STITH & CABRANES (1998), *supra* note 24, at 38–39, 43–48.

⁴² Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

⁴³ See STITH & CABRANES (1998), *supra* note 24, at 53–60.

⁴⁴ Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 7–8 (1988).

⁴⁵ See 28 U.S.C. § 994(h)–(i) (2012). Congress also directed the Commission to key its guidelines to the maximum available sentence for a number of crimes, which makes the guidelines for such crimes significantly more punitive. See *id.* § 994(h) (directing the Commission to “assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized” for defendants convicted of “a crime of violence” or one of various drug crimes).

⁴⁶ See STITH & CABRANES (1998), *supra* note 24, at 60; U.S. SENTENCING COMM’N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 18–19 (1987), available at <http://www.fd.org/docs/select-topics---sentencing/Supplementary-Report.pdf>, archived at <http://perma.cc/V4M3-QGL9>.

⁴⁷ U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.1–1.3, 5H1.5, 5H1.6 (2014).

⁴⁸ *Id.* §§ 5H1.4, 5H1.10, 5H1.12.

already considered.⁴⁹ Appellate judges in turn did their part to harden the Guidelines by cracking down on district judges' departures.⁵⁰ The Guidelines' rigidity and punitiveness sparked a scholarly backlash and calls to reform the system so as to return some sentencing discretion to judges.⁵¹ There is, however, evidence that the Guidelines (in combination with new mandatory minimums) succeeded at their principal goal of reducing interjudge sentencing disparities.⁵²

The Supreme Court loosened the departure framework in the mid-1990s. In *Koon v. United States*, it seized on language from the introduction of the Guidelines Manual that distinguished between the "heartland" of cases, where the Guidelines apply, and "atypical" cases justifying departure, in which "a particular guideline linguistically applies but where conduct significantly differs from the norm."⁵³ This more liberal approach to departures eventually sparked a congressional backlash (although, ironically, there is little evidence that *Koon* itself led to an increase in downward departures).⁵⁴ In 2003 Congress enacted the PROTECT Act, which significantly limited judges' power to depart from the Guidelines.⁵⁵ The

⁴⁹ See *id.* ch. 1, pt. A, § 4(b).

⁵⁰ See Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2050 (1992) ("As I have mentioned, and as scholars have noticed, the courts of appeals have been notably narrow in their allowance of departures. That may be the right approach some day, but it is highly doubtful just now."); Freed, *supra* note 24, at 1747 ("Many appeals court judges have adopted a strict enforcement approach, holding district courts accountable to unquestioned guidelines, but not holding the Commission and its guidelines accountable to the SRA."); Schulhofer, *supra* note 24, at 870 ("[T]he appellate courts have become a major source of undue rigidity and excessive uniformity in the federal sentencing process.").

⁵¹ See sources cited *supra* note 24.

⁵² See James M. Anderson et al., *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 303–04 (1999); Paul J. Hofer et al., *The Effect of the Federal Sentencing Guidelines on Inter-judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239 (1999) (concluding that the Guidelines have significantly reduced overall interjudge disparity in sentences imposed); Scott, *supra* note 8, at 10–11.

⁵³ *Koon v. United States*, 518 U.S. 81, 93–96 (1996) (quoting U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(b), introductory cmt. (1995)); see also *United States v. Rogers*, 972 F.2d 489, 493 (2d Cir. 1992) (reading the "heartland" language to permit "sensible flexibility" in sentencing).

⁵⁴ See Stith, *supra* note 25, at 1464 ("In light of the complexity and the particularized nature of both charging and sentencing, neither the raw data, nor the analyses of this data by the Commission in 2003 and Schanzenbach in 2005, allow us to infer the extent to which *Koon* was responsible for the increase in noncooperation departures after that decision was handed down.").

⁵⁵ PROTECT Act, Pub. L. No. 108-21, § 401, 117 Stat. 650, 667–76 (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C., and 42 U.S.C.); see Stith, *supra* note 25, at 1465 ("Yet whatever their deficiencies as evidence of *Koon*'s impact or evidence of actual judicial

PROTECT Act lowered the appellate standard of review for non-Guidelines sentences (from abuse of discretion to *de novo*), instructed the Commission to amend the Guidelines so as to substantially reduce downward departures, prohibited the Commission from recognizing new grounds for downward departure for two years, and directly amended the Guidelines by lengthening sentences for certain sex crime and child pornography offenses.⁵⁶ Thus judges' discretion was again substantially curtailed.

A number of state governments also adopted sentencing guidelines over this time period. The first of these were Alaska and Minnesota in 1980, which were followed by seventeen other states and the District of Columbia over the course of the 1980s, 1990s, and 2000s.⁵⁷ These state sentencing systems came in two main flavors. One group of states, including Kansas, Minnesota, North Carolina, and Washington, adopted "presumptive" guidelines that bind a sentencing judge unless that judge finds sufficient justification for departure.⁵⁸ Another group of states, including Arkansas, Delaware, and Virginia, adopted "advisory" guidelines that have no binding authority over judges.⁵⁹ On the whole, these state guideline systems have developed very differently from the federal system. They are far less rigid, punitive, and complex than the federal system, and much friendlier to judicial departures. States with advisory systems are very open to departures, because trial judges in such states are free to disregard the guidelines. But states with presumptive systems have also given more leeway to departures than has the federal

sentencing behavior, the numbers before Congress in 2003 were powerful. They showed persistent increases in the rate of noncooperation downward departures during the 1990s—especially after the *Koon* decision was handed down in 1996. This presented an opportunity for Congress, aided and abetted by willing officials at Main Justice, to demand an even greater reduction in judicial discretion than had been achieved by the Sentencing Guidelines.” (citations omitted).

⁵⁶ PROTECT Act § 401(d)(2), (m)(2)(A), (j)(2), & (i); see Scott, *supra* note 8, at 11–12.

⁵⁷ The years each state adopted its guideline system are: Alaska (1980); Minnesota (1980); Pennsylvania (1982); Florida (1983); Michigan (1984); Washington (1984); Utah (1985); Wisconsin (1985); Delaware (1987); Oregon (1989); Tennessee (1989); Virginia (1991); Louisiana (1992); Kansas (1993); Arkansas (1994); North Carolina (1995); Ohio (1996); Missouri (1997); Alabama (2006); District of Columbia (2006). Barkow, *supra* note 27, at 1600 n.1; Barkow & O’Neill, *supra* note 27, at 1994; Richard S. Frase, *Sentencing Guidelines in the States: Lessons for State and Federal Reformers*, 6 FED. SENT’G REP. 123, 123 (1993).

⁵⁸ KAUDER & OSTROM, *supra* note 11, at 12, 17, 19, 26.

⁵⁹ *Id.* at 9–10, 25.

system.⁶⁰ State guideline systems are less punitive than the federal system,⁶¹ at least in part because state sentencing commissions face pressure to cut expenses, in contrast with the federal system where the cost of maintaining prisons is miniscule compared to the overall budget.⁶² And the complexity of the federal system also makes it an outlier—its massive, rigid, multifaceted formula is far more complex than the formulas of any of the state guidelines.⁶³ Finally, states have generally been immune to the fluctuations in judicial discretion that have plagued the federal guidelines. A few states have altered their systems over time—Alabama and Michigan have moved from advisory to presumptive sentencing, Ohio has moved from presumptive to advisory, Louisiana has abandoned its guideline system altogether, and Wisconsin has abandoned and then reenacted sentencing guidelines.⁶⁴ But in the main, state sentencing regimes have been much more stable than the federal regime.

⁶⁰ See Rachel E. Barkow, *Our Federal System of Sentencing*, 58 STAN. L. REV. 119, 133–34 (2005) (“In contrast to recent congressional efforts to abolish almost all departures, the states have permitted and indeed encouraged departures when judges find that an individual case falls outside the prototypical case for which the guidelines are designed.”); Frase, *supra* note 57, at 123–24 (“[R]eversal on substantive grounds (improper sentence) has often occurred in states such as Washington and Minnesota, each of which now has a large body of substantive appellate caselaw. But even in these states, trial courts retain substantial areas of discretion, as to both the type and the severity of sanctions. In this respect, the federal guidelines appear to be uniquely rigid.”); Stith, *supra* note 28, at 118 (noting that Washington state’s sentencing guidelines allow far more flexibility to judges than the federal system).

⁶¹ See Rachel E. Barkow, *Panel Four: The Institutional Concerns Inherent in Sentencing Regimes: Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1312–13 (2005) (“Although there is variation depending on the state, some aggregate numbers give an indication of the differences. For violent offenses, the mean state sentence was 66 months, compared with 86.5 months at the federal level. Drug sentences provide a larger gap. The mean sentence in state court was 30 months, whereas the average federal sentence was more than double that, at 75.5 months.”).

⁶² See *id.* at 1301; Frase, *State Sentencing Guidelines*, *supra* note 28, at 1205 (“Another important reform goal that Minnesota recognized at the outset, and that almost all other states have now adopted, is to use guidelines sentencing as a resource management tool—in particular to avoid prison overcrowding, set priorities in the use of limited prison capacity, and gain better control over the growth in prison populations and expenditures.”); Frase, *supra* note 57, at 124 (“Starting in the mid-1980s, as prison overcrowding problems grew around the country, a number of states (North Carolina, Oregon, Tennessee, and Washington) adopted guidelines linked to available resources.”); Kay A. Knapp & Denis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. DAVIS L. REV. 679, 688–89 (1992).

⁶³ See Barkow, *supra* note 60, at 133; Knapp & Hauptly, *supra* note 62, at 689 (“In short, no state would likely consider guidelines as complex as the federal guidelines because it could not afford to do so.”).

⁶⁴ See *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶¶ 88–91 (finding Ohio’s presumptive sentencing statutes unconstitutional and applying the *Booker* remedy to make them advisory); KAUDER & OSTROM, *supra* note 11, at 16; Frase, *State*

In the 2000s, the Supreme Court used the Sixth Amendment to bring about a revolution in sentencing law. This revolution upended the federal sentencing system, while leaving most of the state systems largely intact. First, in *Apprendi v. New Jersey*, the Court held that any fact leading to an increase in the maximum available sentence must be either admitted by the defendant or proved to a jury beyond a reasonable doubt.⁶⁵ In *Blakely v. Washington*, the Court applied its *Apprendi* holding to Washington state's presumptive guidelines system, finding it unconstitutional.⁶⁶ Washington responded by amending its guidelines system so that any fact leading to an increase in the guidelines range must be conceded or proven in court.⁶⁷ Other states with presumptive systems followed suit (and Kansas, anticipating the Court's holding in *Blakely*, had already enacted the same reform).⁶⁸

Then, in *United States v. Booker*, the Court struck down the federal Sentencing Guidelines as violating the Sixth Amendment.⁶⁹ Rather than implementing the aforementioned *Blakely* solution, the Court invalidated the provisions of the Sentencing Reform Act that had made the Guidelines binding on judges, creating the advisory sentencing system we have today.⁷⁰ In its subsequent decisions in *Kimbrough v. United States*⁷¹ and *Gall v. United States*,⁷² the Court further clarified that mere policy disagreement is sufficient grounds for departure from the Guidelines, and that appellate courts cannot presume that outside-Guidelines sentences are substantively unreasonable. Thus sentencing discretion has been returned to federal judges, with the only remaining constraint being appellate review for substantive reasonableness. Perhaps unsurprisingly, the outcome in *Booker* is popular among district judges.⁷³ The federal Sentencing Guidelines have thus been

Sentencing Guidelines, *supra* note 28, at 1203–04; Douglas A. Berman, *Alabama Rolls Out New Presumptive Sentencing Guidelines (Which Prosecutors Mostly Oppose)*, SENT'G L. & POL'Y BLOG, (Oct. 2, 2013, 9:20 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2013/10/interesting-series-of-articles-as-alabama-rolls-out-new-sentencing-reform.html, archived at <http://perma.cc/2CDR-EQZ8>.

⁶⁵ 530 U.S. 466, 490 (2000).

⁶⁶ 542 U.S. 296, 301–05 (2004).

⁶⁷ See Stith, *supra* note 28, at 121–22.

⁶⁸ See Frase, *Blakely in Minnesota*, *supra* note 28 (describing Minnesota's adoption of jury fact-finding at sentencing in light of *Blakely*); Steven J. Crossland, Comment, *Durational and Dispositional Departures Under the Kansas Sentencing Guidelines Act: The Kansas Supreme Court's Uneasy Passage Through Apprendi-Land*, 42 WASHBURN L.J. 687, 703–06 (2003).

⁶⁹ 543 U.S. 220, 243–44 (2005) (Stevens, J.).

⁷⁰ *Id.* at 245 (Breyer, J.).

⁷¹ 552 U.S. 85, 101–02 (2007).

⁷² 552 U.S. 38, 51 (2007).

⁷³ See U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT

banished to an odd limbo. Designed to constrain judges, they can now only advise.

This history has a clear dialectical pattern. Mandatory sentencing led to rehabilitative discretion, discretion led to constraint through the Guidelines, that constraint was loosened in *Koon* but reasserted through the PROTECT Act, and discretion returned with a vengeance in *Booker*. Each swing of this pendulum has been motivated by the same set of concerns. When constraints are imposed on judges, it is because the legislature finds judges' sentencing decisions unprincipled or too lenient, and because it wishes to impose its own criminal justice priorities. When judicial discretion is returned, it is because the system premised on constraint does not sufficiently individualize sentences or protect defendants' rights. While state guideline systems have been much more orderly in their development, they must deal with the same tension that has caused such chaos at the federal level.⁷⁴ If a state system empowers judges, it will have unprincipled disparities and the legislature will have difficulty advancing its preferred sentencing policies. If the system empowers a sentencing commission, criminal sentences will not be tailored to the individual defendant. The remainder of this Article proposes a synthesis for this dialectic of individual and systemic justice: that we should determine sentencing policy through dialogue between judges and sentencing commissions.

II. DELEGATION AND FEEDBACK LOOPS

This Part describes the model of a dialogic sentencing regime, and shows how it can mitigate the tension between individualized and systemic justice. First, it considers the roles and respective competencies of the main government institutions that control criminal sentencing—legislatures, judges, and sentencing commissions. Then it shows how, by implementing dialogic feedback loops, these institutions can create a collaborative sentencing system that maximizes their respective advantages. Next, it discusses the two models of dialogic regime—advisory and presumptive—and shows how each can be adapted to current sentencing systems. It closes

JUDGES JANUARY 2010 THROUGH MARCH 2010, at 21 tbl.19 (2010), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf (reporting a poll showing that 75% of judges express support for the post-*Booker* system, while only 3% support a return to mandatory guidelines and 8% support a system with no guidelines at all), *archived at* <http://perma.cc/C97A-HXJY>. However, many court of appeals judges have sought to maintain the Guidelines' influence by overpolicing departures and underpolicing within-Guideline sentences. *See generally* Siegler, *supra* note 10.

⁷⁴ *See, e.g.*, Stith, *supra* note 28 (describing the development of Washington's sentencing guidelines).

by considering the legislature's role in sentencing dialogue, both as the architect of the system and as a participant in policymaking feedback loops.

A. THE ACTORS DETERMINING SENTENCING POLICY

1. Legislatures

In the United States, Congress and the state legislatures have ultimate creative authority over the criminal law. Legislatures both define criminal conduct and set the punishment ranges for people convicted of crimes. A legislature could, if it so chose, establish a system of mandatory sentences such that every offense leads to a specific determinate sentence—e.g., three years for robbery, thirty years for murder, and so forth. But legislatures in the United States generally delegate the selection of sentence lengths to other actors, namely judges and sentencing commissions.⁷⁵ They do so by providing a range of punishments for violation of a criminal statute (e.g., from zero to four years in prison, and a fine of up to \$10,000) and instructing those other actors to sort defendants into the different regions of that range.

There are several reasons that a legislature may want to delegate the authority to establish sentencing policy. One is specialization. It would be a massive undertaking for a legislature to write a criminal code that specifies every fact justifying an increase or decrease in punishment. It is far more efficient for the legislature to restrict itself to defining criminal conduct in broad terms, and to delegate the selection of sentences to more expert bodies.⁷⁶ A second reason is to insulate sentencing decisions from politics.

⁷⁵ Legislatures do sometimes enact mandatory minimum sentences, and have done so with increasing frequency, but these remain exceptions to the general rule of delegated sentencing. See U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 22–29 (2011), available at <http://www.uscc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>, archived at <http://perma.cc/5LTV-FG8L>; <http://perma.cc/LCL8-YM2N>; <http://perma.cc/SC9Q-JMT8>; Barkow & O'Neill, *supra* note 27, at 1989 (“Unless a legislator wants to recommend one-size-fits-all mandatory punishments for all offenses regardless of circumstances—which, even in an era of mandatory minimum sentences, no legislature has been willing to do—the law will allow some room for discretion.”). In the 1970s some states experimented with fully determinate sentences (e.g., three years for robbery, with no factors considered other than the crime of conviction) but these were not widely adopted. See TONRY, *supra* note 24, at 28.

⁷⁶ See Barkow & O'Neill, *supra* note 27, at 1989 (“The second option—having the legislature enact legislation that specifies how each case is to be sentenced—is not practicable because of resource constraints. Specifying punishments at a finer level of detail than broadly worded offenses requires a great deal of time and effort, and legislators lack those resources, particularly when they have other priorities. These resource demands are even greater when one considers the need to amend sentencing laws as circumstances change and new information is obtained about sentencing and offender practices.”) (citation omitted); Stith &

Legislators face political pressure to increase the severity of criminal sanctions, which can create a one-way ratchet effect leading to ever-higher sentences. One way to mitigate such an effect is to delegate sentencing policy to actors who are more removed from politics. This allows legislators to avoid spending an exorbitant amount on prison facilities and other criminal justice expenses without suffering the political cost of opposing longer sentences.⁷⁷ Contrariwise, a third reason for a legislature to delegate sentencing authority is to establish *greater* control over the sentencing system. This happens most commonly when sentencing policy is already delegated to judges, and the legislature wants to take some control away from judges and shift it to a body that the legislature can more easily influence, namely a sentencing commission.⁷⁸

When a legislature delegates sentencing policy to other actors, it can either enact a statute laying out a guiding framework, or it can let those other actors determine the goals of sentencing for themselves.⁷⁹ Sometimes these two delegation strategies are functionally indistinguishable. For instance, in the federal system, 18 U.S.C. § 3553(a) states the purposes of sentencing at such a high level of generality that virtually any sentencing decision could be

Dunn, *supra* note 13, at 225 (“Even if Congress is tempted to exercise sentencing authority itself, it does not have the time, the resources, or the expertise to produce integrated and reasoned policy across all types of offenses and offenders.”).

⁷⁷ See Barkow & O’Neill, *supra* note 27, at 1986 (“While longer terms of incarceration might make fiscal sense for many offenses and offenders, at some point the money spent on additional prison terms would be better spent on alternatives to incarceration. The political process might not allow reasoned consideration of these options, however, so a commission might be better suited to explore policies that will yield the best long-term results. Delegation in this context can therefore provide a ‘means to escape from legislative excesses’ and can allow more reasoned consideration of alternatives that would improve long-term social welfare and free up resources to pursue other legislative goals.”) (citations omitted); Robert Weisberg, *California’s De Facto Sentencing Commissions*, 64 STAN. L. REV. ONLINE 1, 2 (2011) (“In other words, some states actually began to take a fresh look at incarceration as a matter fit for cost–benefit rationality, just like other government programs, instead of as a theological imperative. As a result, some of these states adopted, and others reinvigorated an older version of, a sentencing commission. Such a commission is a type of administrative agency designed to conduct these cost–benefit analyses in a way at least partly shielded from the vagaries of politics.”).

⁷⁸ See Barkow & O’Neill, *supra* note 27, at 1990–91 (“A commission might be particularly attractive in the context of sentencing because judges are the very actors legislators are trying to control. That is, sentencing legislation not only aims to regulate the behavior of would-be defendants, but it also tells judges what they must do when faced with someone convicted of a specific offense.”).

⁷⁹ The only constitutional restraint on such delegation is that Congress must set forth an “intelligible principle” to which the delegatee is directed to conform. *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

compatible with its language.⁸⁰ A number of state legislatures have adopted similarly broad “purposes of sentencing” statutes that do not seem to restrict the delegates’ discretion.⁸¹ On the other hand, some legislatures have

⁸⁰ 18 U.S.C. § 3553(a) (2012). Section 3553(a) states:

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;

Though it should be noted that at least some improper factors are excluded by § 3553(a). *See, e.g.*, *United States v. Park*, 758 F.3d 193, 198 (2d Cir. 2014) (holding that the cost of incarceration is not a valid sentencing factor under § 3553(a)).

⁸¹ *See, e.g.*, COLO. REV. STAT. § 18-1-102.5 (2013) (“(1) The purposes of this code with respect to sentencing are: (a) To punish a convicted offender by assuring the imposition of a sentence he deserves in relation to the seriousness of his offense; (b) To assure the fair and consistent treatment of all convicted offenders by eliminating unjustified disparity in sentences, providing fair warning of the nature of the sentence to be imposed, and establishing fair procedures for the imposition of sentences; (c) To prevent crime and promote respect for the law by providing an effective deterrent to others likely to commit similar offenses; (d) To promote rehabilitation by encouraging correctional programs that elicit the voluntary cooperation and participation of convicted offenders; (e) To select a sentence, a sentence length, and a level of supervision that addresses the offender’s individual characteristics and reduces the potential that the offender will engage in criminal conduct after completing his or her sentence; and (f) To promote acceptance of responsibility and accountability by offenders and to provide restoration and healing for victims and the community while attempting to reduce recidivism and the costs to society by the use of restorative justice practices.”); CONN. GEN. STAT. ANN. § 54-300(c) (West Supp. 2014) (“(1) The primary purpose of sentencing in the state is to enhance public safety while holding the offender accountable to the community, (2) sentencing should reflect the seriousness of the offense and be proportional to the harm to victims and the community, using the most appropriate sanctions available, including incarceration, community punishment and supervision, (3) sentencing should have as an overriding goal the reduction of criminal activity, the imposition of just punishment and the provision of meaningful and effective rehabilitation and reintegration of the offender, and (4) sentences should be fair, just and equitable while promoting respect for the law.”); N.C. GEN. STAT. § 15A-1340.12 (2013) (“The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender’s culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to

codified more specific framework goals for the sentencing system, which do guide the delegates' decisions. For example, Florida's legislature has enacted a statute establishing, among other things, that: "Sentencing is neutral with respect to race, gender, and social and economic status" and "[t]he primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment."⁸² These provisions outline more specific criteria for judges to follow when issuing sentences, letting them know which factors should and should not be considered, and how much weight to give each factor.

The legislature can also provide different instructions to different delegates.⁸³ For instance, in the federal system judges are governed by the broad criteria in 18 U.S.C. § 3553(a), but the Sentencing Commission must also follow a number of other statutory instructions. For example, 28 U.S.C. § 994 requires that the Guidelines "reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."⁸⁴ This has created a situation where judges can consider factors such as a defendant's family ties, but the Sentencing Commission cannot.⁸⁵ The legislature can use framework statutes such as these to guide the sentencing system by outlining broad goals, or by issuing more specific policy instructions to delegates. Such statutes thus allow the legislature to maintain a degree of control over sentences even as it delegates power to other actors.

Legislatures can also reassert control over the sentencing system by partially undoing delegation. This often happens when the legislature decides that its delegates have set sentences too low for a certain type of crime, and therefore decides to raise the sentences by enacting mandatory minimum laws or legislatively mandating an increase in the guidelines sentences.⁸⁶ The

the community as a lawful citizen; and to provide a general deterrent to criminal behavior.").

⁸² FLA. STAT. ANN. § 921.002(1)(a)–(b) (West Supp. 2014).

⁸³ One illustration of this strategy is the different instructions given to judges and parole boards. The latter are often told more explicitly to focus more on rehabilitative factors than the former. *See, e.g.*, N.Y. EXEC. LAW § 259-c (McKinney 2010).

⁸⁴ 28 U.S.C. § 994(e) (2012).

⁸⁵ After *Booker*, judges have frequently considered such factors. *See* Brenda L. Tofte, *Booker at Seven: Looking Behind Sentencing Decisions: What Is Motivating Judges?*, 65 ARK. L. REV. 529, 564 (2012) ("The offender characteristics that the District judges relied on most to support below-Guidelines sentences were family ties and rehabilitation efforts . . .").

⁸⁶ *See, e.g.*, Bowman, *The Failure of the Federal Sentencing System*, *supra* note 27, at 1342 ("By the spring of 2003, congressional directives consumed the overwhelming majority of the Commission's agenda.") (citation omitted); Emily Lane, *Louisiana House Approves Heroin Bills to Double Penalties, Expand Access to Overdose Antidote*, NOLA.COM (Apr. 3, 2014, 7:13 AM), http://www.nola.com/politics/index.ssf/2014/04/louisiana_house_approves_heroi.html, archived at <http://perma.cc/372Y-C6DQ>. A similar phenomenon occurs in states

difference between such legislative directives and framework statutes is their level of specificity. A framework statute establishes the general calculus that will guide sentencing decisions, while a legislative directive mandates the sentence for a particular crime or fact pattern. Legislative directives are thus better vehicles for legislators to take a symbolic stand against a specific type of crime that has generated moral panic in the community, such as crimes against children or the selling of particular drugs. Such legislative directives are common, because legislators have strong political incentives to take symbolic stands and to appear tough on crime.⁸⁷ The delegation of sentencing power is thus always incomplete, since the politics of crime cause legislators to periodically reassert control over sentencing policy. Delegates of sentencing policy must frequently look over their shoulders, anticipating that a particular ruling or policy decision may provoke a legislative response.⁸⁸

2. Judges

When the legislature delegates sentencing authority to judges, it empowers them to determine proper punishments on a case-by-case basis. Judges' main advantage in the sentencing process is their ability to individualize the administration of justice. Legislatures and sentencing commissions can only make sentencing rules prospectively to govern cases generally. A sentencing judge, on the other hand, can update his or her sentencing framework to reflect unanticipated factors that are presented by a new case. A judge's views about sentencing can develop as the judge sees cases, forms moral judgments about certain fact patterns, and then revises those judgments to accommodate new fact patterns as they arise. The judge does not have to set out a comprehensive framework all at once and then follow it to the letter in all future cases. Judges' capacity to individualize punishments also stems from their knowledge of defendants and engagement with the facts of particular cases, both through their own participation in the criminal process and through investigation conducted by probation officers on their behalf.⁸⁹ Judges are better placed than other actors to observe the defendant and make a decision about the wrongfulness of their actions and

that allow lawmaking through direct democracy, where ballot initiatives are used to increase mandatory minimum sentences. *See, e.g.*, Oregon Ballot Measure 11 (1994); California Proposition 184 (1994).

⁸⁷ *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529–33 (2001).

⁸⁸ *See, e.g., supra* notes 55–56 and accompanying text.

⁸⁹ This authority is often connected to the goal of rehabilitation, given judges' ability to evaluate a defendant's likelihood of recidivism. *See* Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 388–406 (2006); Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 571 (2005).

their likelihood of reoffending. Trial judges gather information about the defendant and the crime that is not available to an external sentencing commission or legislature. This information helps the judges better determine an appropriate sentence. A legislature that seeks to ensure that sentences are individually tailored should thus delegate significant sentencing power to judges.⁹⁰

Beyond this superiority at individualizing justice, judges also provide a human face to punishment. Imposing a term of imprisonment on a specific individual standing before you is very different from deciding sentence lengths for certain fact patterns in the abstract. Judges must live with the consequences of their sentencing decisions, and some report losing sleep over sentences they regret.⁹¹ Thus another advantage judges have in the sentencing process is that their moral judgments gain legitimacy from concrete application, and from the fact that judges must see the lived effects of their decisions. Further, judges who make many considered sentencing decisions over a period of time may cultivate what Anthony Kronman calls “good judgment” in sentencing: a quality of calmness in deliberation, combined with balanced sympathy towards the various interests of the defendant and the criminal justice system.⁹² Certainly not all judges exhibit the qualities of

⁹⁰ A number of states also have parole boards that help determine the length of time a defendant will ultimately serve. Generally, states with parole boards will permit the judge to impose a sentence range, say one to three years, and the parole board to decide how much time in that range the defendant will ultimately serve based on factors like the defendant’s behavior since conviction and his or her likelihood of recidivism. Parole boards are thus given a double delegation—the legislature delegates to the judge by giving a range of punishment in the statute, and the judge in turn delegates to the parole board by giving a range of punishment in the sentence. *See* Barkow & O’Neill, *supra* note 27, at 1991 (“Parole officials also exercised authority over sentencing in these indeterminate regimes, though their authority was derivative of judicial authority. Specifically, while parole officials determined an offender’s ultimate release date, the judicial sentence set the parameters within which parole officials operated.”). Parole decisions can be systematized much like a sentencing commission’s guidelines. *See, e.g.,* MO. SENTENCING ADVISORY COMM’N, USER GUIDE 2012–2013 at 136–42 (2013), available at <http://www.mosac.mo.gov/file.jsp?id=45394> (providing guidelines for the determination of parole eligibility), archived at <https://perma.cc/5VEC-AT6L?type=pdf>. However, there are limits to the effectiveness of parole guidelines. *See* TONRY, *supra* note 24, at 27 (“Because parole boards, however, have no jurisdiction over jail sentences or nonincarcerative penalties, or over the decision whether to incarcerate in state prisons, parole guidelines were at best a partial solution to sentencing disparities . . .”).

⁹¹ *See, e.g.,* Michael A. Ponsor, *The Prisoners I Lose Sleep Over*, WALL ST. J., Feb. 13, 2014, at A13.

⁹² *See* ANTHONY T. KRONMAN, *THE LOST LAWYER* 16 (1993) (“When we attribute good judgment to a person, we imply more than that he has broad knowledge and a quick intelligence. We mean also to suggest that he shows a certain calmness in his deliberations, together with a balanced sympathy toward the various concerns of which his situation . . . requires that he take account.”); *see also* Stith & Cabranes (1997), *supra* note 24, at 1254 (“But

good judgment, but hopefully most do.⁹³ Ideally, judges will be selected for their qualities of good judgment, and experience with the practice of criminal sentencing will help them further develop these qualities. Such a temperament can make a judge an ideal arbiter of punishment, and surely cannot be captured by an abstract formula.

The main disadvantage of granting judges sentencing discretion is that they are unable to effectively coordinate with one another. This problem has several components. First, it is difficult for judges to impose a central moral logic on the sentencing system, because each judge is their own sentencing authority. Every judge is essentially a separate policymaker unto herself or himself. If different judges in the system have different substantive philosophies of criminal justice, then aggregate sentencing practices will be incoherent. Judge Kant might sentence based on the wrongfulness of the crime, while Judge Bentham might focus on deterrence, incapacitation, and rehabilitation. Second, this lack of coordination will create unjustifiable disparities between similar defendants. If a defendant is convicted of a crime that carries a sentence range of between one and thirty years, Judge Merciful can impose a one-year sentence and Judge Harsh a thirty-year sentence. Thus severity will be determined essentially at random based on which judge is assigned to the case. Third, judges have difficulty preventing other judges from sentencing for unjust reasons or for no reasons at all. Judge Frankel's book contains a story about a judge who increased a defendant's sentence from four to five years merely because the defendant criticized the court during his allocution.⁹⁴ There is also some empirical evidence that judges

it is in the nature of moral and juridical principles that they must be informed by a particular set of facts before they can be applied. Only a person can perform this task. Anthony Kronman has called this irreducibly human capacity for judgment 'practical wisdom' or 'prudence.' It is a trait of character acquired by life experience. It can never be reduced to a body of universal rules.").

⁹³ Obviously, this characteristic is impossible to quantify. My own experience with members of the federal bench suggests that they exhibit good judgment, but that is drawn from a small and extremely biased sample size. For a sustained treatment of the question drawing on judicial interviews, see GERALDINE MACKENZIE, *HOW JUDGES SENTENCE* 41–82 (2005). Mackenzie concludes, "The interviews analysed in this book demonstrate (if it were ever in doubt) that judges are strongly defensive of judicial discretion, primarily on grounds of fairness and avoiding injustice. The judges clearly see themselves as well suited to exercise this discretion on the grounds of experience, expertise and judgment." *Id.* at 78.

⁹⁴ FRANKEL, *supra* note 22, at 18 ("Judge X, to designate him in a lawyerlike way, 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 in the courtroom, after hearing counsel, Judge X invited the defendant to exercise his right to address the court in his own behalf. The defendant took a sheaf of papers from his pocket and proceeded to read from them, excoriating 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.

sentence members of minority groups more harshly than white defendants.⁹⁵ If judges are free to sentence for their own subjective reasons, it is difficult to see how they can be prevented from sentencing for bad reasons.

Appellate review of sentences for substantive reasonableness might diminish these problems. Appellate judges could reduce interjudge disparity by striking down outlier sentences as unreasonably high or low, and could limit the subjectivity of sentencing by requiring on-the-record justifications and then scrutinizing those justifications.⁹⁶ However, there are limits to what reasonableness review can achieve. It must be highly deferential to the trial judge's decision, for a number of reasons. Trial judges have significantly more experience with the details of the case—they hear from the defendant, witness the defendant's demeanor, and have greater access to the facts of the crime.⁹⁷ Sentencing decisions are also highly fine-grained, requiring case-specific judgments that balance many different factors that bear on the wrongfulness of the crime and the likelihood of reform.⁹⁸ Appellate courts are not as well equipped to make such judgments, because they are usually not generalizable as pronouncements of law. Further, while an appellate court can identify sentences that are clearly unreasonable, it is more difficult to see how they could strike down a sentence within the reasonable range as incorrect.⁹⁹ Judges disagree on matters of criminal justice policy, and there is

Finally, when he said he was through, I simply gave the son of a bitch five years instead of the four.”).

⁹⁵ See OJMARRH MITCHELL & DORIS L. MACKENZIE, *THE RELATIONSHIP BETWEEN RACE, ETHNICITY, AND SENTENCING OUTCOMES: A META-ANALYSIS OF SENTENCING RESEARCH 2* (2004), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/208129.pdf> (summarizing eighty-five empirical studies of sentencing disparity, concluding that “African-Americans and Latinos were generally sentenced more harshly than whites,” and that “there was some evidence to suggest that structured sentencing mechanisms, such as sentencing guidelines, were associated with smaller unwarranted sentencing disparities”), archived at <https://perma.cc/YT4U-RLGL>. But see Starr & Rehavi, *supra* note 26, at 5 (arguing that presentencing decisions, such as prosecutorial charging decisions, are a significant source of racial disparity in sentencing in the federal system).

⁹⁶ See generally Michael M. O’Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 WM. & MARY L. REV. 2123 (2010).

⁹⁷ See *Gall v. United States*, 552 U.S. 38, 51–52 (2007) (quoting *Rita v. United States*, 551 U.S. 338, 357–58 (2007)) (“The sentencing judge has access to, and greater familiarity with . . . the individual defendant before him than the . . . appeals court.”).

⁹⁸ See *Thomas v. State*, 634 A.2d 1, 7 (Md. 1993) (“A criminal sentencing decision is never one easily made, and involves a plethora of considerations, both obvious and subtle. Thus, it would be illogical to conduct any review of a sentence using stringent and rigid standards.”).

⁹⁹ See *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008) (“Individual judgments as to the proper balance to be struck among these considerations will necessarily vary from person to person, and judges, whether they sit on trial or appellate benches, are no exception. There is thus no right answer as to the proper sentence in any given case.”); *United States v. Jones*,

often no objective sense in which Judge Harsh is right and Judge Merciful is wrong or vice versa.¹⁰⁰ And appellate panels are not equipped to make the policy pronouncements that legislatures and agencies make about criminal justice policy. Appellate panels hear sentencing appeals one at a time, and they can only make law in these individual cases, not by enacting or updating a sentencing code. Judges do not have the time or institutional capacity to establish a comprehensive set of sentencing criteria, much less weigh the costs of incarceration against other budgetary priorities. This is why appellate review of sentences is generally limited, in the American system, to outlier policing rather than the substantive elaboration of sentencing law. Letting judges evaluate one another's sentences in a hierarchical structure is, at best, a partial solution to the defects of judicial sentencing.

3. *Sentencing Commissions*

Legislatures delegate power to sentencing commissions so that they will generate a legal code providing a formula for the sentencing process. This code in turn guides or constrains judges' imposition of sentences. Systems with codified guidelines promulgated by sentencing commissions can thus reduce the problems created by judicial discretion. A defendant who is sentenced in one courtroom is assured that their sentence would have been substantially the same in any other courtroom, and so the randomness of the judicial lottery is eliminated. Judges cannot increase punishment for improper reasons, like the defendant's political views, because such factors are excluded from the guidelines. And further, it is possible for the authors of sentencing guidelines to implement a consistent sentencing philosophy across the entire jurisdiction. Thus, consequentialist guideline planners can design a system that maximizes the benefits of deterrence, incapacitation, and rehabilitation, while retributivist planners can design a system premised on moral desert. The sentencing commission can also conduct empirical sentencing research that will aid it in adapting the guidelines to whatever ends it seeks to maximize. Judges, for their part, can be made to consistently apply whatever framework is adopted. Codified sentencing guidelines thus let us impose central order in the system. They are the realization of eighteenth

531 F.3d 163, 174 (2d Cir. 2008) ("Sentencing is not, after all, a precise science. Rarely, if ever, do the pertinent facts dictate one and only one appropriate sentence. Rather, the facts may frequently point in different directions so that even experienced district judges may reasonably differ . . .") (citation omitted).

¹⁰⁰ Indeed, recent developments in neuroscience suggest that moral judgments such as sentencing decisions have an irreducibly intuitive component—they are made through affective mental processes that are not always conducive to rational persuasion and disagreement. See Rebecca Krauss, Comment, *Neuroscience and Institutional Choice in Federal Sentencing Law*, 120 YALE L.J. 367 (2010).

century jurist Cesare Beccaria's vision of a criminal code that leaves nothing to judicial discretion.¹⁰¹ In every criminal case, the judge comes to a perfect syllogism: the major premise is the sentencing guideline, and the minor premise is the fact that leads to a higher or lower sentence under that guideline.¹⁰² If one knows all of the relevant facts about the defendant and the crime, then one will know the prescribed punishment range. Indeed, a guidelines sentencing system could conceivably be run through a computer.

Sentencing guidelines carry additional benefits for legislators who wish to influence the development of sentencing policy. Guidelines give the sentencing process a definite structure that legislators can understand and, if they so choose, alter. This is not so with purely judicial sentencing. The legislature could theoretically enact a statute instructing judges to provide more weight to a certain sentencing factor, but unless the sentencing process is codified it is difficult to ensure that judges will actually give that factor more weight. Judicial sentencing is not amenable to legislative dictates because it is not reducible to a preordained formula that can be enforced on appeal. However, the codification of sentences through a guidelines system can be extremely useful to the legislature if it wishes to exert control over sentencing. While the legislature can only intervene in judicial sentencing with blunt tools, it can alter codified guidelines with great specificity. The legislature can alter the guidelines directly, or mandate that the sentencing commission do so, whenever legislators feel strongly about a particular issue of sentencing policy. Indeed, Congress has intervened dozens of times to change the formula of the federal Sentencing Guidelines.¹⁰³ Because guidelines reduce sentencing decisions to a mechanistic formula, the legislature can gain more control over sentencing policy by delegating it to a sentencing commission and then monitoring the development of the guidelines.

However, the mechanical aspect of sentencing guidelines also erases the advantages that judges bring to criminal sentencing. It dehumanizes the

¹⁰¹ See CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (David Young trans., Hackett Publ'g Co. 1986) (1764); STITH & CABRANES (1998), *supra* note 24, at 13 ("Like Beccaria in the eighteenth century, the federal Sentencing Guidelines today seek to replace the discretionary power of judges with an elaborate, less intuitive, and more 'scientific' system for the administration of penal sanctions.").

¹⁰² See BECCARIA, *supra* note 101, at 11 ("In every criminal case, the judge should come to a perfect syllogism: the major premise should be the general law; the minor premise, the act which does or does not conform to the law; and the conclusion, acquittal or condemnation. If the judge were constrained to form even two syllogisms, or if he were to choose to do so, then the door to uncertainty would be opened.").

¹⁰³ See Sessions, *supra* note 12, at 318–21; Bowman, *The Failure of the Federal Sentencing System*, *supra* note 27, at 1343.

sentencing process to remove the significance of the face-to-face sentencing hearing, where a judge hears testimony from witnesses and the defendant.¹⁰⁴ By universalizing sentencing decisions into a general formula, and thus reducing sentencing to a box-checking exercise, guideline systems abandon the moral sensitivity and practical wisdom of human judges.¹⁰⁵ And if the goal of constraining judges is to limit arbitrariness in sentencing, making guidelines mandatory may prove pyrrhic. By taking sentencing discretion from judges, a codified sentencing system places discretion in the hands of prosecutors. If sentencing is conducted through a determinate formula, such that charging or pleading certain facts leads to a predictable increase in punishment, then prosecutors' decisions will determine sentence length. This can lead to arbitrariness and disparity that is at least as bad as a system where judges have discretion, unless the prosecutors' decisions are also standardized in a principled way.¹⁰⁶

The largest problem with mandatory guidelines is that they prevent judges from departing in circumstances where the guidelines formula does not adequately consider the relevant factors, or where the guidelines formula weighs them in a way that is arbitrary or nonsensical. While guideline formulas can include a great deal of complexity, as evidenced by the federal guidelines, they could never possibly cover every fact about a crime or a defendant that might justify a higher or lower sentence.¹⁰⁷ To replicate what judges do, the guidelines would have to anticipate every possible fact pattern and provide a recommended sentence. And the sum of hypothetical criminal behavior cannot be reduced to a guidelines manual. Such a task might frustrate a computer the size of a city.¹⁰⁸ Many defendants will, therefore,

¹⁰⁴ See Stith & Cabranes (1997), *supra* note 24, at 1252–54.

¹⁰⁵ See KRONMAN, *supra* note 92, at 41.

¹⁰⁶ See Freed, *supra* note 24, at 1697–98 (“The judge’s sentencing range is now tethered to the prosecutor’s choice of charges and facts, unless the probation officer’s independent inquiry brings some facts into question.”); Lanni, *supra* note 24, at 1786 (“Rather, determinate sentencing merely shifts power and discretion from the sentencing judge to prosecutors and probation officers and may in fact lead to greater racial disparity.”); Stith, *supra* note 25, at 1440–43 (describing efforts by the Department of Justice to standardize the use of prosecutorial discretion).

¹⁰⁷ See Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1953–54 (1988) (criticizing the federal Sentencing Commission for failing to take offender characteristics like age and drug history into account); Barkow, *supra* note 60, at 134 (“States have recognized that the infinite patterns of human behavior cannot be captured in a sentencing grid—no matter how detailed the grid may be—and, therefore, departures are necessary to maintain a just sentencing system.”).

¹⁰⁸ Though such a computer, if it were constructed and put to work, would invariably recommend a sentence of 42. See DOUGLAS ADAMS, *THE HITCHHIKER’S GUIDE TO THE GALAXY* (1979).

end up with unfair sentences because their particular aggravating or mitigating circumstances were not, and could not have been, contemplated by the sentencing commission.

Further, some sentencing factors cannot be easily codified in a guidelines formula even if we try to incorporate them. Factors such as a defendant's motive for committing the crime, family history, employment record, prior good works, and other characteristics might have significant bearing on how sympathetic the defendant is and their likelihood to recidivate. But guidelines can only incorporate such factors by isolating arbitrary facts from the complexity of the full picture. It requires a human judge to give such qualitative variables adequate consideration. Consider two defendants discussed by Judge Jed Rakoff:

One defendant was a guy who went about defrauding widows of their life savings; this was a really evil man, and he typically left these poor widows both distraught and destitute. But the total loss, because none of these women had that much money, was under \$100,000. The other trial involved a "pump and dump" securities scheme, where the guy defrauded about 1,000 high-roller victims—people who loved to invest in high-risk penny stocks—of about \$1,000 each, so that the total loss was about \$1,000,000. When it came time for sentencing—this being before the time of the Guidelines—one judge gave the "pump and dump" guy five years, and a different judge gave the widow-defrauder an unusually heavy sentence for that time, fifteen years. And that seems to me exactly right. They were both bad guys, but the guy who was leaving these widows destitute at a time in their lives when they most needed money was inflicting far greater pain than the more conventional fraudster.

If you look at the Guidelines, however, the "pump and dump" guy would get about ten years and the widow-defrauder, even after an increase for "vulnerable victims," would still only get about three years.¹⁰⁹

The problem here is that guideline systems have trouble drawing fine distinctions between different criminals based on their degree of culpability. Guidelines can provide an arbitrary sentence enhancement if the victims are unusually vulnerable, but are unable to develop a complex sliding scale of victim attributes that precisely measures the wrongfulness of the crime. Thus, distinguishing between the criminal who goes after poor widows and the criminal who goes after high rollers is a matter best left to judges. On the flip side, facts like the amount of money stolen are very easy to measure and reduce to guideline instructions. Thus guideline systems tend to overemphasize such factors, while downplaying more qualitative distinctions that may have more bearing on the crime's wrongfulness.¹¹⁰ This insensitivity to qualitative distinctions exists even where the guidelines take the relevant

¹⁰⁹ Rakoff, *supra* note 13, at 7.

¹¹⁰ *See, e.g., id.* ("And why this bizarre result? Because the Guidelines say that the be-all and end-all in such cases is the amount of the loss.")

factor into account. For instance, an enhancement for obstruction of justice could cover a vast range of behavior, from casually mentioning to an old friend that it would be fortunate if she forgot certain facts during her testimony, to threatening a witness with murder if he testifies. Unless the guideline formula lists separate enhancements for every type of obstruction, it must either assign an arbitrary weight to the obstruction enhancement or leave determination of its weight to judicial discretion.

B. COMBINING INDIVIDUAL AND SYSTEMIC JUSTICE THROUGH DIALOGUE

The current academic and policy discussion about sentencing assumes that the legislature must choose between judges and a sentencing commission.¹¹¹ Either judges are given the authority to sentence with the commission providing nonbinding advice, or the commission is tasked with setting sentencing policy and judges are only allowed to fill in the gaps. In short, each actor must be delegated its own zone of authority where its respective advantages and disadvantages will flourish. The dialogic model of sentencing explodes this premise. It presents a strategy for combining the advantages of judges and sentencing commissions that limits the defects of each, and that causes the sentencing system to rationally evolve over time.

In a dialogic sentencing system, judges and the sentencing commission approach their respective roles not as independent authors of sentencing policy, but as collaborators in elaborating a law of sentencing that serves the ends of both uniformity and individualization.¹¹² This means that judges do more than just follow the guidelines or fill in gaps where the guidelines are incomplete. Rather, judges systematically influence the process of guideline writing by having their departure decisions incorporated into the guidelines formula. The commission, in turn, does more than just provide a set of policy suggestions that judges can take or leave at their discretion. The guidelines actually influence judges, either through the force of persuasion, the force of peer effects, or the force of appellate review. Thus judges' sentences help determine the content of the guidelines, while the guidelines in turn help

¹¹¹ See *supra* notes 12–13, 24–28 and accompanying text.

¹¹² A similar concept of policymaking by dialogue informs debates in Canadian constitutional law. Some have argued that the process of judicial review in Canada involves a dialogic relationship between courts and legislators, wherein the Supreme Court of Canada first reviews the constitutionality of legislation, and then the legislature has an opportunity to revise the legislation or override the Court's judgment. See generally Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75 (1997) (arguing that judicial review under the Canadian Charter of Rights and Freedoms can best be described as a dialogue between the courts and legislature).

determine judges' sentences. And a practice of reciprocal reason giving, wherein the commission provides reasons for its guideline choices and judges provide reasons for departures, ensures that the signal is clear in both directions. Such a system depends on judges and sentencing commissions adopting a cooperative attitude towards each other, rather than fighting with one another to control the sentencing process. If these actors have radically different sentencing views or regard one another as an enemy to be dominated, the dialogic model will fail. In the federal system, for instance, Congress and the Sentencing Commission have often viewed their role as to control judges rather than to cooperate with them,¹¹³ although this dynamic has changed somewhat recently with respect to the Commission.¹¹⁴ The success of dialogue, then, is contingent on politics. But if the various actors adopt a cooperative orientation, this model is superior to the alternatives. There are several different institutional frameworks in which such dialogic feedback loops can work: with advisory guidelines or presumptive guidelines, with or without appellate review, with a sentencing commission controlled by the judiciary or the political branches, and so on. But the basic logic of the system is that each actor systematically influences the decisions of the other.

A feedback loop system reduces the problems associated with rigid guidelines, because it permits a judge to depart in many circumstances where the guidelines produce a sentence that the judge finds unjust. Thus the sentencing hearing retains its meaning, and the individual judge's practical wisdom and moral authority are retained, because the judge can exercise discretion to sentence outside the guideline range. Further, circumstances where the guidelines fail to incorporate the relevant facts (or incorporate them but give them arbitrary and illogical weight) can also be avoided, and indeed fixed, because judges' departures will systematically influence the process of guideline writing. The guidelines will thus change over time, as judicial departures are incorporated into the guidelines in a variety of ways to account for a greater diversity of fact patterns. This change might lead to more complexity, as guidelines are added to incorporate new factors into the calculation, or it might lead to less complexity, as illogical guidelines are deleted to reflect judges' rejection. And this change can happen in a variety of ways: through appellate case law that is incorporated into the guidelines, through commission-collected data on departure practices, or through formal

¹¹³ See Sessions, *supra* note 12, at 311 (arguing that federal sentencing policy is the product of a tug-of-war between different branches of government).

¹¹⁴ See Baron-Evans & Stith, *supra* note 13, at 1672–75 (noting that the Commission has recently taken into account judges' views on sentences for crack cocaine distribution, child pornography consumption, and fraud offenses).

amendments to the guideline formula. The guidelines will adapt over time to reflect judges' views about proper sentences in particular cases, and so will avoid the problem of rigorously applying commission-generated sentencing policies in cases where they are unjust or nonsensical. A feedback loop system thus preserves the main benefits of judicial discretion—it maintains the role of the judge in sentencing and ensures that sentences will be individualized, not the product of an incomplete and rigid formula.

A dialogic sentencing system also limits the pathologies of judicial discretion. In a presumptive sentencing system where departures are appealable, interjudge disparity will obviously be limited by appellate case law. But even in dialogic systems that are purely advisory, feedback loops reduce interjudge disparity by rendering the guidelines more likely to earn judges' compliance. If judges understand the sentencing commission's role as helping judges to develop a comprehensive law of sentencing, and thus recognize the guidelines as stemming in part from judicial practice rather than solely the policy decisions of a separate agency, they will likely be more willing to follow the guidelines.¹¹⁵ Moreover, responsive guidelines are also more likely to accord with judges' views of what a proper sentence should be in a particular case. While judges will still certainly bring their different substantive moral viewpoints to bear on their sentencing decisions, the framework provided by the guidelines can gain judges' adherence through a process akin to John Rawls' idea of "reflective equilibrium."¹¹⁶ According to Rawls, "[w]hen a person is presented with an intuitively appealing account of his sense of justice, he may well revise his judgments to conform to its principles even though the theory does not fit his existing judgments exactly."¹¹⁷ Similarly, when judges are confronted with a guidelines formula that tracks and partly explains their own intuitions about sentencing, they may well revise those intuitions to accommodate the guidelines. This is especially so if the sentencing commission persuades judges by including reasoned explanations for its recommendations, or if the commission can use peer effects by showing that other judges generally follow the guidelines.¹¹⁸

¹¹⁵ Cf. Stith & Dunn, *supra* note 13, at 228 ("An agency consisting in large part of judges, especially judges who actually engage in sentencing, would help legitimate and depoliticize the agency's work and would go far in convincing other judges (who are the objects of the agency's guidance) that the agency works not in opposition to the judiciary but as its natural ally.").

¹¹⁶ JOHN RAWLS, A THEORY OF JUSTICE 48 (1971).

¹¹⁷ *Id.*

¹¹⁸ See Osler, *supra* note 13, at 803–09 (arguing that the federal Sentencing Commission should do nothing more than collect data about judges' sentencing practices, building a sentencing system premised entirely on peer effects).

Finally, a dialogic guidelines system is more morally rational than its alternatives, because the incorporation of judicial departures corrects for oversights, omissions, and errors in the guidelines formula that are made clear in concrete cases. A guidelines system governed by feedback loops follows a very different institutional logic from a guidelines system that is imposed from without by an agency or legislature. In the latter case, the external agency or legislature generates its own abstract moral judgments to cover wide categories of cases and imposes these moral judgments on the sentencing process. By contrast, a system governed by feedback loops generates moral judgments from concrete fact patterns—specific cases where a judge must impose a sentence. These concrete judgments are reported back to the commission, which evaluates them and uses them to update the guidelines in an iterative process. Over time, the system absorbs new data from judges' decisions and incorporates it into an ever more sophisticated and complete framework. Thus, a morally rational system is generated through an experimental process involving many little decisions, not imposed all at once.

Such a system generates sentencing policy through a process of what Charles Lindblom calls “muddling through.”¹¹⁹ Rather than undertaking the impossible task of specifying in advance every relevant sentencing principle and how it should be weighed in every kind of case, the system integrates many individual decisions applying different principles in particular cases over time.¹²⁰ Judges choose principles at the same time as they decide sentences, and these individual decisions are aggregated over time into a self-consistent sentencing system with a coherent set of values. A dialogic system also embodies the contrast between top-down and experimentalist bureaucracy that is developed in Charles Sabel's and William Simon's work on the post-New Deal administrative state. Mandatory guidelines follow an old-line command-and-control model, emphasizing rule-bound bureaucracy and deference to ineffable expertise.¹²¹ Feedback loops, by contrast, are a form of experimental administration. The central authority establishes certain framework goals, and then provides decentralized power to autonomous local units that craft their own methods of achieving the goals. The local units, in turn, must frequently report on their performance to the central authority and provide reasons for their decisions, while the central authority facilitates comparisons between local units. The framework goals and evaluative

¹¹⁹ Charles E. Lindblom, *The Science of “Muddling Through”*, 19 PUB. ADMIN. REV. 79, 79 (1959).

¹²⁰ *See id.*

¹²¹ *See* Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2011).

procedures are updated on the basis of this review process.¹²² A feedback loop system for sentencing follows an analogous logic, with the legislature establishing the framework goals (such as increased severity, more cost savings, a focus on rehabilitation, or whatever else), the sentencing commission functioning as the central authority coordinating and comparing the various local units, and judges working as local units making sentencing decisions. Over time, these institutions develop sentencing policies through an iterative learning process that corrects problems in the initial set of guidelines by testing them in concrete cases, departing where they are incomplete or irrational, and incorporating these departures into the guidelines for future cases.

C. DIALOGUE IN PRESUMPTIVE SYSTEMS

The first model of a dialogic sentencing system is one that contains presumptive guidelines. In such a system, the sentencing commission establishes guidelines that will apply in the standard case, and judges are able to depart only in circumstances where the guidelines do not adequately address factors that merit a higher or lower sentence. Judges' departures are then subject to appellate review, and they are affirmed only if they are justified by factors that should be considered at sentencing but are not reflected in the guidelines (or by factors that are reflected in the guidelines, but not sufficiently to match their importance in a particular case).¹²³ The appellate courts thus develop a substantive law of departures, which is the principal feedback mechanism in a presumptive system. The commission then periodically reviews these appellate court decisions and can either incorporate them into the guidelines formula or reject them on policy grounds.

In a presumptive system, the guidelines will exert significant influence on judges, because their sentences can be reversed for failure to fall within the guidelines range. Unlike in advisory systems, judges cannot depart simply because they have a policy disagreement with the guidelines. This has a few consequences for the system. It means that presumptive systems are well suited to circumstances where the legislature (or the commission) wishes to

¹²² *Id.* at 79.

¹²³ There are several kinds of "presumptive" systems, which vary by the degree of the guidelines' presumptiveness. The full variety of such systems need not be explored here. See MODEL PENAL CODE: SENTENCING § 6B.02, cmt. b, (Tentative Draft No. 1, 2007) ("The word 'presumptive' is not wholly self-defining. On its face it rules out the extremes of a mandatory guidelines system or one in which guidelines are purely advisory. Many possibilities exist in between these two extremes, however, and all of them could potentially be labeled 'presumptive.'").

impose its preferred criminal justice policies through the sentencing system.¹²⁴ The legislature can use presumptive guidelines combined with framework statutes and specific legislative mandates to increase or decrease sentences for particular crimes, impose cost-saving limits on incarceration, establish a new comprehensive philosophy of criminal justice, and undertake countless other projects. Another consequence of presumptive guidelines' binding quality is that factors leading to an increase in the possible sentencing range must be admitted by the defendant or proven to a jury beyond a reasonable doubt, per the Supreme Court's opinions in *Blakely v. Washington* and *Alleyne v. United States*.¹²⁵ In practice, this mandate does not appear to be terribly burdensome for the criminal justice system. Minnesota, Kansas, and Washington have adopted procedures for charging sentencing factors to a jury without suffering major problems.¹²⁶

A number of different states have adopted the basic architecture of presumptive feedback loops. Alabama, Kansas, Michigan, Minnesota, North Carolina, Oregon, Pennsylvania, and Washington all have sentencing systems that combine presumptive guidelines with a departure power that is policed through appellate review.¹²⁷ The draft sentencing provisions of the Model Penal Code also adopt the same basic structure.¹²⁸ The states with presumptive guidelines have adopted different approaches to appellate review of sentences. Pennsylvania's courts, for example, are quite deferential to trial judges' departure decisions, overturning them only in rare cases.¹²⁹ There is not much opportunity for feedback loops to operate in states that

¹²⁴ See Barkow & O'Neill, *supra* note 27, at 1985–92 (discussing the various policy goals that might motivate legislatures to delegate authority to sentencing commissions).

¹²⁵ *Alleyne v. United States*, 133 S. Ct. 2151, 2162–63 (2013); *Blakely v. Washington*, 542 U.S. 296, 301 (2004).

¹²⁶ See Crossland, *supra* note 68, at 703–06; Frase, *Blakely in Minnesota*, *supra* note 28, at 93–94; Stith, *supra* note 28, at 121–22 (noting, however, that the post-*Blakely* changes in Washington led to a decrease in the number of above-guideline departures).

¹²⁷ See KAUDER & OSTROM, *supra* note 11, at 7, 12, 16–17, 19, 21–22, 26; Berman, *supra* note 64 (“The guidelines were developed beginning in 2000 and went into effect in 2006 as ‘voluntary.’ But guideline use varied widely around the state, said Bennet Wright, executive director of the Alabama Sentencing Commission. In 2012, the Alabama Legislature agreed to make the guidelines ‘presumptive’ meaning they would be applied unless compelling reasons were found to deviate from the guidelines.”).

¹²⁸ See MODEL PENAL CODE: SENTENCING §§ 6B.02, 6B.04, 7.ZZ (Tentative Draft No. 1, 2007).

¹²⁹ See Reitz (1997), *supra* note 28, at 1471 (“Unlike the federal appeals bench, however, the Pennsylvania courts have opted to play only a de minimis role in the enforcement of guidelines. Indeed, participants in the Pennsylvania system complain that the appellate courts have virtually abdicated their sentence review function. Ironically, the dominant concern is exactly the opposite of that heard in the federal system: not appellate rigidity, but appellate indifference to disparity.”) (citations omitted).

adopt a hands-off approach to appellate review, because there is no mechanism to sort valid from invalid departures or incorporate departures into the guidelines.

In contrast, the states of Kansas, Minnesota, and Washington have developed robust appellate case law governing departures.¹³⁰ Consider a few examples. In *Dillon v. State*, an intermediate appellate court in Minnesota affirmed a sentence for assault that was more than double the presumptive guidelines sentence, concluding that “lack of remorse and blame shifting,” “vulnerability,” and “particular cruelty” were valid grounds for departure, and that these grounds justified the large upward departure.¹³¹ In *State v. Rhoads*, an intermediate appellate court in Kansas reversed an upward departure, concluding that the defendant’s criminal history was not a “substantial and compelling” basis for departure.¹³² Appellate review of this sort affords an opportunity for both greater sentencing uniformity and the production of feedback that can update the guidelines. However, it can also go overboard: if appellate judges adopt the attitude of the federal appeals courts in the 1990s and reverse nearly all departures, then the guidelines will be made effectively mandatory. When used properly—not too deferentially and not too aggressively—appellate review of departures effectively balances the goals of individualization and uniformity, and (when a departure is affirmed) provides a judicial statement that the guidelines are inadequate in certain cases.

However, neither the Model Penal Code nor any of the state systems that have adopted presumptive guidelines have established a completed feedback loop. They all provide for appellate review of departures, but none creates a mechanism for the guidelines to be updated in light of judicial departure decisions. The existing presumptive systems thus cabin off a limited zone of judicial discretion in departures, rather than using departures as an engine to reform the guidelines. This means that departure case law determines the scope of judges’ ability to go outside the guidelines, but it does not update the guidelines formula itself to accommodate more variables. This is problematic for two reasons. First, the commission is best situated to provide uniformity in departure law across the jurisdiction. Different

¹³⁰ See *id.* at 1480–88; Frase, *State Sentencing Guidelines*, *supra* note 28, at 1199 (“The other states listed in the table have more active appellate review, which, particularly in Kansas, Minnesota, and Washington, has generated a substantial body of substantive appellate case law.”).

¹³¹ See *Dillon v. State*, 781 N.W.2d 588, 598–603 (Minn. Ct. App. 2010); see also *State v. Soto*, 855 N.W.2d 303, 305–06 (Minn. 2014) (reversing a below-guidelines probation sentence for rape).

¹³² *State v. Rhoads*, 892 P.2d 918, 925 (Kan. Ct. App. 1995).

appellate courts may come to different decisions, and the supreme court of a jurisdiction will not be able to pass judgment on every circuit split, nor will it have the policy expertise of the commission.¹³³ Second, the commission can convert departures from discretionary to presumptive, which will limit interjudge disparities. To illustrate, consider Judge Rakoff's fraudster who bilked vulnerable widows out of their money.¹³⁴ If the guidelines do not account for the vulnerability of a defendant's victims, a judge might depart upward when sentencing this widow-defrauder. And if the departure is affirmed on appeal, future judges can also choose to impose an above-guidelines sentence, but will not be required to do so.¹³⁵ We have thus

¹³³ Cf. *Braxton v. United States*, 500 U.S. 344, 347–49 (1991) (concluding that one role of the federal Sentencing Commission is to resolve circuit splits concerning the Guidelines); Douglas A. Berman, *The Sentencing Commission as Guidelines Supreme Court: Responding to Circuit Conflicts*, 7 FED. SENT'G REP. 142, 147–50 (1994) (listing six instances where the federal Sentencing Commission amended the Guidelines and their commentary to resolve circuit splits—these amendments were all clarifications of the Guidelines' rules in light of interpretive disagreement, and did not involve departures).

¹³⁴ See Rakoff, *supra* note 13; *supra* text accompanying note 109.

¹³⁵ An appellate court could theoretically also hold that a departure from presumptive guidelines is mandatory in certain cases. However, this can rarely happen in practice. Most states with presumptive guideline systems prohibit appeals of within-guideline sentences. See KAN. STAT. ANN. § 21-6820(c) (Supp. 2013) (“the appellate court shall not review: (1) Any sentence that is within the presumptive sentence for the crime”); MICH. COMP. LAWS ANN. § 769.34(10) (West 2006) (“If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence”); N.C. GEN. STAT. § 15A-1444 (2013) (providing no right to appeal a within-guideline sentence); OR. REV. STAT. § 138.222(2) (2013) (“[T]he appellate court may not review: (a) Any sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission.”); WASH. REV. CODE ANN. § 9.94A.585(1) (West 2010) (“A sentence within the standard sentence range, under RCW 9.94A.510 or 9.94A.517, for an offense shall not be appealed.”). In the other states with presumptive guidelines, statutes and appellate courts give significantly more deference to a trial judge's decision *not* to depart than a decision to depart. See 42 PA. CONS. STAT. ANN. § 9781(c) (West 2007) (providing for reversal of a departure if it is “unreasonable,” but of a within-guideline sentence only if it is “clearly unreasonable”); *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981) (“[W]e believe that it would be a rare case which would warrant reversal of the refusal to depart. . . . [T]he Guidelines state that when substantial and compelling circumstances are present, the judge ‘may’ depart. This means that the trial court has broad discretion and that we generally will not interfere with the exercise of that discretion.”). It is difficult to imagine that, even if appellate courts were empowered to review within-guideline sentences *de novo*, they would exercise this power frequently rather than deferring to the sentencing commission. In the federal system, which is only advisory, there have been vanishingly few reversals of a within-Guideline sentence for substantive unreasonableness. See FED. PUB. & CMTY. DEFENDERS, APPELLATE DECISIONS AFTER *GALL* 1 (2013), available at <http://www.fd.org/docs/select-topics/sentencing-resources/appellate-decisions-after-gall.pdf?sfvrsn=18> (noting only five federal cases in which a sentence within the guidelines range was reversed as substantively unreasonable), archived at <http://perma.cc/ST9M-L886>.

inserted unwarranted disparity into the system, since the application of this factor to future widow-defrauders will depend on which judge they draw. However, if the appellate court's decision is incorporated into the guidelines formula itself, then future judges must presumptively include this once-excluded variable in every sentencing decision where it is relevant. A system where departure precedents change the guidelines through a feedback loop will thus have less arbitrary disparity than a system where the guidelines are not updated.

There are many ways for a sentencing commission to incorporate appellate case law into its guidelines, and the specifics will depend heavily on the structure of the guidelines. Perhaps the simplest mechanism is to have an annual report summarizing appellate sentencing decisions, and updating the guidelines' departure provisions to account for those decisions that the commission agrees with. The dialogic model will work best if the commission adopts a deferential attitude to judicial departure precedents, presumptively embracing them (or embracing them with some policy modification) unless they clearly conflict with the purposes of the sentencing system.¹³⁶ By completing the loop in this fashion, the commission will better harness judges' capacity for identifying situations where the guidelines are not sufficiently tailored to the particular defendant. And it will do so without giving up the benefits of uniformity.

D. DIALOGUE IN ADVISORY SYSTEMS

In an advisory sentencing system, judges are free to disregard the guidelines and sentence entirely according to their own moral compasses. Appellate review, if it exists in such a system, must be orthogonal to the guidelines. The sentencing commission cannot ally with appellate judges to enforce guideline compliance. Instead it must seduce trial judges, convincing them that the guidelines framework is worthy of their allegiance. Such a system will break down into discretionary sentencing if judges do not follow the guidelines.

In order to avoid such failure, the commission must ensure that judges use their voices to improve the guidelines system rather than simply exiting

¹³⁶ It is important to note that Congress and the United States Sentencing Commission have often adopted the opposite orientation, responding to judicial departure decisions by explicitly limiting the permissible grounds for departure. This political dynamic is not compatible with a successful dialogic sentencing system. See Stith, *supra* note 25, at 1444–45, 1465–68, 1480 (discussing the Commission's general policy of limiting downward departures, and Congress's efforts through the Feeney Amendment to limit them further in response to perceived high departure rates).

it.¹³⁷ There are two ways for the commission to do this. The first is to give justifications for its sentencing policy choices, such that judges could come to agree with the guidelines through a process of reflective equilibrium.¹³⁸ The second is to design the guidelines to accurately reflect judicial practice, and thus to rely on peer effects and judges' commitment to avoiding unwarranted disparities.¹³⁹ The sentencing commission can adopt either or both of these strategies, and each one creates its own kind of feedback loop. With the reason-giving strategy, if judges depart from the guidelines they should be required to provide their own reasons for disagreement. These reasons can then be considered by the sentencing commission in updating the guidelines, hopefully with a view towards making them more persuasive to judges. With the norm-enforcement strategy, the commission should update the guidelines to reflect judicial practice. There are two aspects to such updating. First, as judges depart from the guidelines and provide justifications for such departures, the guidelines formula should be updated so as to reflect judges' decisions in a wider variety of factual circumstances. For instance, if judges tend to depart upward when the defendant uses a certain kind of weapon in committing a crime, the guidelines can be amended to reflect this sentencing practice. Second, if judges' sentencing patterns change over time (or if the initial guidelines were an inaccurate reflection of existing sentences), the guidelines should be updated as more information is made available through additional sentencing decisions. Crucially, both strategies are geared towards convincing judges. Judges have the ultimate authority to set sentencing policy, while the commission merely helps them coordinate with each other and provides policy suggestions.

Most states with sentencing guidelines have adopted an advisory system.¹⁴⁰ The federal government also has an advisory system, thanks to the Supreme Court's judgment in *Booker*.¹⁴¹ Very few of these systems, however, adopt either the reason-giving or the norm-reinforcing strategy for achieving guideline compliance. Thus, for the most part, advisory sentencing regimes have the same confusing status as the federal Guidelines—they provide a recommended sentence without any real justification.¹⁴² There are

¹³⁷ See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970) (contrasting two possible responses to organizational failure: "exit" (leaving the organization) and "voice" (pushing for change within the organization)).

¹³⁸ See *supra* notes 116–117 and accompanying text.

¹³⁹ Cf. Osler, *supra* note 13, at 803–09 (arguing that the federal Guidelines should be replaced with data about judges' sentencing practices).

¹⁴⁰ See generally NAT'L CTR FOR STATE COURTS, *supra* note 11 (categorizing at least twelve jurisdictions as having advisory guidelines).

¹⁴¹ *United States v. Booker*, 543 U.S. 220 (2005).

¹⁴² See *supra* note 11 and accompanying text.

some exceptions, however.¹⁴³ Missouri, for example, has built its advisory guidelines regime entirely around the principle of norm reinforcement. The only function of Missouri's guidelines is to inform judges about their colleagues' sentencing practices; the Missouri guidelines comprise a grid of sentencing ranges based on three years of data from Missouri's judges.¹⁴⁴ And Missouri reports a high guidelines compliance rate—in a 2005 sample study, 83% of judges' sentences were within the range recommended by the guidelines.¹⁴⁵

Virginia is also a model patient for advisory feedback loops. Virginia's system bases the guidelines on judicial practice, and annually updates the guidelines formula to provide a more sophisticated and accurate model of what judges are doing. For example, in 2013 the Virginia Sentencing Commission made six recommendations to change the guidelines so that they more accurately reflect judicial practice. These included increasing the base penalty for electronic solicitation of a child and child pornography possession (because the judicial compliance rate was low, and there were more upward departures than downward), turning electronic solicitation and child pornography into distinct crime categories (instead of lumping them into the "Other Sexual Assault" guidelines), lowering the base penalty for burglary without a deadly weapon, and more.¹⁴⁶ For each of these revisions, the Commission estimates how much the change will increase guideline compliance.¹⁴⁷ And the overall compliance rate for Virginia's Guidelines has steadily improved over time, going from 75% in the mid-1990s to around 80% today.¹⁴⁸ Virginia has also, simultaneously, adopted a reason-giving strategy for guideline compliance. For example, the Virginia Sentencing Commission has developed a controversial offender risk assessment program that uses empirical data to show the correlation between recidivism and factors like age, employment, marital status, and gender, and judges have used this information to inform their sentencing decisions.¹⁴⁹ Virginia's

¹⁴³ See D.C. ADVISORY COMM'N ON SENTENCING, 2002 ANNUAL REPORT app. A, tbl. A-1 (2002), available at <http://sdc.dc.gov/node/630422> (listing Maryland, Tennessee, Utah, Virginia, and Wisconsin as having descriptive guidelines among the states with advisory guidelines systems as of 2002), archived at <https://perma.cc/HB8U-6G64?type=image>; <http://perma.cc/7FML-RUNK>; <http://perma.cc/ZJF7-GVCK>; Michael A. Wolff, *Missouri's Information-Based Discretionary Sentencing System*, 4 OHIO ST. J. CRIM. L. 95 (2006).

¹⁴⁴ See MO. SENTENCING ADVISORY COMM'N, *supra* note 90, at 1; Wolff, *supra* note 143, at 98–100.

¹⁴⁵ Wolff, *supra* note 143, at 118.

¹⁴⁶ VA. CRIMINAL SENTENCING COMM'N (2013), *supra* note 16, at 79–107.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 18.

¹⁴⁹ See NAT'L CTR. FOR STATE COURTS, *supra* note 16; see also BERNARD E. HARCOURT,

commission has also developed methods to predict the likelihood of recidivism in sex offenders to help determine which should be civilly committed,¹⁵⁰ and has undertaken empirical studies of specific issues bearing on criminal sentencing, such as the effects of committing a crime in the presence of a child and the characteristics of inmates eligible for geriatric release.¹⁵¹ Virginia has thus embraced the principle that sentencing policy should be determined through dialogue between judges and sentencing commissions.

The federal Sentencing Commission could fix its guidelines system if it endorsed the concept of advisory feedback loops. The Commission already collects a vast amount of data on federal judges' sentencing practices.¹⁵² It could easily use that data to update the Guidelines so that they better approximate how judges actually sentence. Then the Guidelines would influence judges through peer effects, much as in the Missouri and Virginia systems. Alternatively, the federal Sentencing Commission could provide more extensive and empirically grounded justifications for its recommendations, though given the current state of the federal Guidelines it seems unlikely that a reason-giving strategy will be effective without major revisions. Indeed, the Supreme Court has implicitly called for the Commission to justify some of its guideline decisions better, criticizing the Commission's crack cocaine guidelines in *Kimbrough v. United States* as not exemplifying the "exercise of its characteristic institutional role," since they were not based on "empirical data and national experience."¹⁵³

However, in fairness to the federal Sentencing Commission, major changes to the Guidelines structure (especially changes that make the Guidelines less punitive) could provoke a countervailing congressional response. If the past is a guide, attempting to lower Guidelines sentences so that they better fit judicial practice can spark a legislative backlash, possibly

AGAINST PREDICTION 10–13, 109–92 (2007) (discussing and critiquing this program); Brian Netter, *Using Group Statistics to Sentence Individual Criminals: An Ethical and Statistical Critique of the Virginia Risk Assessment Program*, 97 J. CRIM. L. & CRIMINOLOGY 699 (2007) (criticizing Virginia's actuarial risk assessment tool).

¹⁵⁰ HARCOURT, *supra* note 149, at 13–15.

¹⁵¹ See. VA. CRIMINAL SENTENCING COMM'N, 2009 ANNUAL REPORT 80–105 (2009), available at <http://www.vsc.virginia.gov/2009AnnualReport.pdf>, archived at <http://perma.cc/7SVQ-ERS8>; VA. CRIMINAL SENTENCING COMM'N, 2008 ANNUAL REPORT 39–72 (2008), available at <http://www.vsc.virginia.gov/2008AnnualReport.pdf>, archived at <http://perma.cc/XBE2-BWDQ>.

¹⁵² See, e.g., U.S. SENTENCING COMM'N, *supra* note 8 (analyzing sentencing statistics for 76,216 offenders in fiscal year 2011).

¹⁵³ 552 U.S. 85, 109–10 (2007).

causing the imposition of new mandatory minimum sentences.¹⁵⁴ It is also worth noting that, in a system where the Guidelines are purely advisory, all communications from the Commission are “guidelines” in a certain respect. Thus the Commission can speak with two voices—an official formula that will satisfy the legislature, and a set of “shadow guidelines” that reflect the reasoned judgment of the Commission or current judicial practice. For example, the Commission regularly publishes exhaustive data about federal sentencing practices, and this data shows that more often than not federal judges issue below-Guidelines sentences for fraud and child pornography possession offenses.¹⁵⁵ Judges who see this data, and who are concerned about avoiding unjustified disparity in sentences, will probably be less likely to issue within-Guideline sentences for these crimes because they know that such sentences would be harsher than the sentences given by their colleagues. (This data-as-shadow-guidelines approach could even be adopted by states, like Connecticut and Massachusetts, with sentencing commissions that lack authority to write guidelines—simply collecting data on sentencing practices does much of the work of an advisory guidelines system.)¹⁵⁶ Similarly, when the Commission calls for a revision to the Guidelines for various policy reasons (such as its recent proposal to lower sentences for certain drug offenses), it is effectively already advising judges that they should impose lower sentences.¹⁵⁷ Thus, the federal Sentencing Commission might be

¹⁵⁴ See, e.g., Sessions, *supra* note 12, at 337 (“With members of Congress questioning the viability of the guidelines system, the calls for more and more mandatory minimum sentences continue to grow.”); *supra* notes 55–56 and accompanying text (showing how an earlier period of sentencing liberalization led to a legislative crackdown); see also RANDALL KENNEDY, RACE, CRIME, AND THE LAW 380–86 (1997) (describing an episode in 1995 when Congress overrode the federal Sentencing Commission’s proposal to reduce the difference between the guidelines sentences for crack and powder cocaine).

¹⁵⁵ See, e.g., U.S. SENTENCING COMM’N, *supra* note 9, at 67.

¹⁵⁶ Cf. Osler, *supra* note 13, at 803–09 (arguing that the federal Guidelines should be replaced with data about judges’ sentencing practices). But see Ryan W. Scott, *The Skeptic’s Guide to Information Sharing at Sentencing*, 2013 UTAH L. REV. 345 (2013) (pointing to several difficulties with using sentencing data as quasi-guidelines).

¹⁵⁷ See Douglas A. Berman, *Two Professorial Perspectives on the USSC’s Proposal to Reduce All Federal Drug Sentences*, SENTENCING LAW & POLICY BLOG (Jan. 14, 2014), sentencing.typepad.com/sentencing_law_and_policy/2014/01/two-professorial-perspectives-on-the-usscs-proposal-to-reduce-all-federal-drug-sentences.html, archived at <http://perma.cc/5CD8-87LB>. Berman notes:

[E]very time the Commission comes out in support of (or even hints at) a sentencing reduction, it runs the risk of creating a “shadow guideline”—a hypothetical, less harsh version of a given guideline that, regardless of whether it is ultimately adopted, defense attorneys will argue should sway the court in the post-*Booker*, variance-driven regime. . . . The Commission’s concern over creating shadow guidelines (and over the related Congressional reaction) has probably scuttled a number of proposals over the years to reduce unfair and disparity-producing guidelines.

interpreted as establishing a “shadow” sentencing system based on something approximating dialogue principles, even as the incoherent official system remains in place. By undermining existing guideline recommendations, either through a report or a proposed reform, the Commission in effect endorses departure. The problem is that such a system of shadow guidelines is less effective at coordinating judges’ sentencing behavior, since different judges can draw different conclusions from the Commission’s communications.

E. THE LEGISLATURE’S ROLE IN SENTENCING FEEDBACK LOOPS

Thus far, this Article has built a model of dialogic policymaking that mainly involves two actors—judges and sentencing commissions. Now we expand the model to consider where the legislature fits into the dialogue. In short, the legislature has two roles to play. First, it receives information about the criminal justice system as feedback from judges and the sentencing commission, and that information influences the legislature’s own political process. Second, the legislature controls the process of establishing sentencing policy by enacting framework statutes (which articulate the goals of sentencing and direct the delegates to advance those goals) and specific legislative directives (which mandate certain specific sentencing practices). Thus the feedback loop between judges and the sentencing commission is embedded in a larger feedback loop involving the legislature and, ultimately, the voting public. The legislature consumes information about sentencing practices, and then uses this information to intervene in the dialogue between judges and the sentencing commission to further its own sentencing priorities. This intervention can either end the dialogue by imposing mandatory sentences and leaving no discretion to its delegates, or it can enact more flexible changes that let dialogue continue.

The first way that legislatures participate in sentencing dialogue is as consumers of sentencing information. This information then becomes an input into the political process. The most common form of feedback to the legislature is information about judicial sentencing patterns. Sentencing commissions are ideally situated to produce and translate this information for the legislature. In the federal system, there is now a long tradition of Congress learning that judges are being particularly soft on a certain type of criminal, or departing downward frequently in a certain kind of case, and turning that information into an opportunity to rail against crime and enact more punitive sentencing laws.¹⁵⁸ However, this information feedback process can take

Id.

¹⁵⁸ See, e.g., *supra* notes 54–56, 154, *infra* notes 164, 167, and accompanying text.

other forms as well. In a number of states, the sentencing commission is tasked with developing reports and recommendations concerning how to save costs in the criminal justice system. These reports help put sentence reduction on the political agenda as a mechanism of cost savings.¹⁵⁹ There is even some empirical evidence that states where the commission issues such reports see the prison population grow more slowly.¹⁶⁰ The efficacy of this information will of course depend on other political variables in the jurisdiction, such as which party is in power, the state's criminal justice culture, whether there is pressure to cut expenditures, and so on.¹⁶¹ But instructing the commission to look at costs will at least prevent the political feedback mechanism from flowing only in the direction of harsher penalties. And sentencing commissions can influence criminal justice debates beyond the legislature as well. For instance, the federal Sentencing Commission has issued reports and recommendations on topics like mandatory minimums and the crack powder sentencing disparity, and while these were largely ignored or rejected by Congress they have been influential in helping shape public and elite perception of those issues.¹⁶² The Commission sometimes even calls upon Congress to act.¹⁶³

Legislatures undermine dialogue when they enact mandatory minimum sentences that give other actors no leeway to shape sentencing policy. If a statute compels judges to sentence all convicted defendants to a certain amount of time in prison, there is nothing more for judges or the sentencing commission to consider. But mandatory minimums are blunt instruments,

¹⁵⁹ See Barkow, *supra* note 60, at 132.

¹⁶⁰ See Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. CRIM. L. & CRIMINOLOGY 696, 703–04 (1995); see also Kevin R. Reitz, *The Status of Sentencing Guideline Reforms in the United States*, in PENAL REFORM IN OVERCROWDED TIMES 31, 31 (Michael Tonry ed., 2001).

¹⁶¹ See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 805–12 (2005).

¹⁶² See Barkow, *supra* note 27, at 1608 (“The Sentencing Commission has produced extensive and well-researched reports on issues such as mandatory minimum sentencing laws, the disparity between crack and powder cocaine, alternatives to incarceration, and a host of other topics. Congress has often ignored the Commission’s advice and recommendations—as it did when the Commission proposed eliminating the disparity between sentences for crack and powder cocaine in 1995. But Commission reports that Congress and the Executive branch initially ignored have, over time, influenced the debate over sentencing.”) (citations omitted).

¹⁶³ See, e.g., News Advisory, U.S. Sentencing Commission, Comment of Honorable Patti B. Saris, Chair, U.S. Sentencing Commission, on Amendment Reducing Drug Guidelines Becoming Effective Tomorrow (Oct. 31, 2014), available at http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/news-advisories/20141031_News_Advisory.pdf (“Still, only Congress can act to fully solve the crisis in federal prison budgets and populations and address the many systemic problems the Commission has found resulting from mandatory minimum penalties. I hope that Congress will act promptly to pass comprehensive sentencing reform legislation.”), archived at <http://perma.cc/XCX9-BKCE>.

and the legislature can achieve more sophisticated policy changes by instead mandating that the sentencing commission make particular changes to its guidelines. This has been an especially common approach at the federal level, where the detail of the Guidelines makes them ideal for legislative intervention.¹⁶⁴ Thus Congress has issued dozens of direct mandates to amend the Guidelines.¹⁶⁵ Before *Booker*, such congressional intervention destroyed sentencing dialogue because it ended the conversation—the Commission had to adopt Congress’s changes, and judges had to follow them, much as with mandatory minimums. But in the post-*Booker* advisory system, these legislative mandates carry no binding force for judges. Now for many crimes with congressionally dictated advisory sentences, most notably child pornography possession offenses, many judges are disregarding the Guidelines.¹⁶⁶

This new reality has not ended Congress’s efforts to control sentencing policy through Guidelines mandates—since 2005, Congress has issued dozens of directives to the Commission.¹⁶⁷ These directives undermine interbranch dialogue by preventing the Commission from amending the advisory Guidelines to convince judges to follow them. Unless the legislature gives compelling reasons for its changes, judges can simply ignore them and sentence according to their own views. Such legislative mandates commonly

¹⁶⁴ See Bowman, *The Failure of the Federal Sentencing System*, *supra* note 27, at 1343 (“The complexity of the federal guidelines has also had a significant, if unappreciated, effect on the relationship of Congress to the postguidelines development of sentencing law. Put simply, the complexity of the guidelines and the federal sentencing table encourage continuing congressional intervention in the particulars of federal sentencing law.”).

¹⁶⁵ See *id.* at 1342 (“By the spring of 2003, congressional directives consumed the overwhelming majority of the Commission’s agenda. . . . Not only has the frequency of congressional directives increased, but their content has pushed progressively deeper into the core functions of the Sentencing Commission.”) (citation omitted). Congress also famously overrode the Commission’s proposal to equalize the guidelines sentences for crack and powder cocaine offenses, thus mandating a continued disparity between those crimes. See KENNEDY, *supra* note 154, at 380–86.

¹⁶⁶ See Sessions, *supra* note 12, at 321 (“Congress’s specific directives to the Commission have prompted some judges categorically to refuse to follow certain guidelines promulgated pursuant to such directives (the child pornography guidelines being the primary but not only example). In particular, these judges have held that guidelines rooted in congressional mandates rather than in the traditional expertise of the Commission—and its reliance on empirical data—are not entitled to the same type of deference as other guidelines.”).

¹⁶⁷ *Id.* at 320–21 (“Congress continued after *Booker* to assert its authority respecting the Commission. Since 2005, dozens of directives have been issued to the Commission, including a detailed directive in the Fair Sentencing Act of 2010 that dictated the Commission’s guidelines amendments with respect to the drug-trafficking guideline—USSG §2D1.1. In addition, numerous new mandatory minimum statutory penalties have been enacted, which the Commission necessarily must factor into setting guidelines ranges for such offenses.”) (citations omitted).

do not reflect considered judgments about criminal justice policy, but instead the political incentive to ratchet up sentences and take symbolic stands against certain crimes.¹⁶⁸ Thus the legislature can undermine sentencing dialogue either by taking away discretion through restrictive mandates, or by enacting its own advisory sentences without regard for the need to persuade judges.

However, legislatures can also intervene in ways that preserve sentencing dialogue. They can enact changes to the framework statute, altering the general goals of the sentencing system while letting its particulars get sorted out through delegated dialogue. For instance, the legislature could declare that most nonviolent criminals should not be incarcerated, or that rehabilitation is no longer a goal of sentencing, and let judges and the commission implement these framework goals in dialogue with each other. For more specific interventions, the legislature must be sensitive to the logic of feedback loops. If it enacts specific changes in an advisory guideline system, it should beware of the need to persuade judges, and potentially to tailor its changes to address judicial concerns. If it enacts specific changes in a presumptive system, it should let judges exercise their departure power in dialogue with the commission to work out the contours of the new sentencing policy.

The legislature of Alabama adopted a dialogue-friendly approach in 2012, when it set about trying to save costs by incarcerating fewer nonviolent offenders. Prior to 2012 Alabama's sentencing guidelines were entirely advisory, but that year the legislature decided to impose new presumptive guidelines for minor offenses.¹⁶⁹ These new guidelines are weighted against

¹⁶⁸ Congress's 1995 reversal of the federal Sentencing Commission's crack cocaine proposal is illustrative. The Commission issued a detailed report laying out reasoned justifications for its proposed guidelines changes, and Congress (with President Clinton's support) overrode those changes in order to appear tough on crime. See KENNEDY, *supra* note 154, at 381 ("Congress and the president probably took the action they did not so much on the basis of a careful review of the Commission's recommendation but instead on the basis of a political dynamic that . . . rewards perceived 'toughness' and punishes perceived 'softness' in the war on crime."); CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE 236 (1996) ("[F]rom the president's perspective the question of crack sentencing seemed quite simple because the politics were so compelling: whatever the substantive merits of reducing the disparities in sentencing, it would have been impossible from a *communications* standpoint to explain to the American people that it was anything but a soft-on-crime retreat in the war on drugs.").

¹⁶⁹ Kala Kachmar, *Sentencing Reform Has Slowed, Not Stopped, Inmate Growth*, MONTGOMERY ADVERTISER (Oct. 19, 2014), <http://www.montgomeryadvertiser.com/story/news/2014/10/19/sentencing-reform-has-slowed-not-stopped-inmate-growth/17530207/>, archived at <http://perma.cc/5DSA-4PYS>.

incarceration, and towards finding alternative forms of punishment.¹⁷⁰ They have been resisted by some Alabama judges, with one claiming at a public forum that “[w]e can no longer put people in jail who steal from us or who sell drugs to our children.”¹⁷¹ But since the guidelines are presumptive such judges must generally follow them, departing only in unusual cases. And thus far they have slowed the growth of Alabama’s prison population.¹⁷² These new guidelines thus present a strategy for advancing the legislature’s goals without sacrificing the possibility of building a dialogic sentencing system. Rather than imposing dialogue-destroying mandates, the Alabama legislature moved one portion of its sentencing system from an advisory model to a presumptive model, and specified that a key framework goal in that part of the system will be lowering incarceration. Judges and the commission can now work out the details of the new system through a process of dialogue involving guideline writing followed by appellate review of departures.

III. INSTITUTIONAL DESIGN QUESTIONS

A number of design choices must be made when creating a dialogic sentencing system. Here I explore the tradeoffs that these choices involve, and their respective benefits and consequences in both advisory and presumptive systems. These choices include whether the guidelines impose a new philosophy of punishment or merely aggregate past practice, the scope of appellate review, the role of reason-giving by judges and the commission, the sources of guideline stickiness, and the membership and branch of the sentencing commission (whether it is purely judicial or also beholden to political actors).

A. AGGREGATING PAST PRACTICE OR IMPOSING A NEW PHILOSOPHY

When writing a new system of guidelines, one of the biggest design questions is whether to simply take past judicial sentences as the benchmark or to impose an entirely new penal philosophy. The answer to this question speaks to the nature of the authority exercised by the legislature and the sentencing commission. Are they imposing a new value framework or merely

¹⁷⁰ See ALA. SENTENCING COMM’N, 2013 REPORT (2013), available at <http://sentencingcommission.alacourt.gov/Publications/ASC%202013%20Final%20Report.pdf>, archived at <http://perma.cc/V633-DPJE>.

¹⁷¹ See Jennifer Cohron, *Judges Criticize Sentencing Guidelines*, DAILY MOUNTAIN EAGLE (Jasper, Ala.), Mar. 12, 2014, at A1.

¹⁷² See Kachmar, *supra* note 169 (“[T]he presumptive guidelines are projected to slow the tremendous growth that the prison population would have seen otherwise.” (quoting Bennet Wright, executive director of the Ala. Sentencing Comm’n)).

helping judges coordinate their sentencing decisions?¹⁷³ The authors of the federal Guidelines considered precisely this question. Two of the original commissioners, Paul Robinson and Michael Block, argued that the Commission should embrace a specific philosophy of criminal punishment. Robinson argued for a retributivist sentencing system based on the moral desert of criminal defendants, while Block argued for a consequentialist system designed to optimally reduce crime.¹⁷⁴ The Commission followed neither of these proposals, opting to base its guidelines on past judicial practice.¹⁷⁵ State sentencing systems, for their part, have taken a variety of approaches to this question. Several jurisdictions—including Florida, Tennessee, Utah, and Washington—have fashioned essentially descriptive guidelines that mirror past judicial practice.¹⁷⁶ Others have embraced explicit penal philosophies; for example, Kansas’s and Minnesota’s sentencing systems are premised on retributivist theories of punishment.¹⁷⁷

In an advisory feedback loop system, the most logical starting point for the sentencing guidelines is past judicial practice. This is because the guidelines gain persuasive force from the fact that they reflect decisions by judges, and judges are presumably more likely to follow guidelines that codify what they have already been doing. But it is possible for an advisory system to establish guidelines that impose a novel philosophy of punishment. To succeed, however, this philosophy must gain the adherence of the judges. The difficulty in this is obvious. Imagine if the advisory Federal Guidelines were rewritten today to establish a purely retributivist approach to sentencing, *a la* Robinson’s proposal. Judges committed to consequentialism would probably not be convinced to follow it, no matter how strong the Commission’s arguments. Imposing a new philosophy is much easier in a

¹⁷³ This distinction maps onto the distinction between “reactive” and “activist” states drawn by Mirjan Damaska. The former supports diffuse entities pursuing their own goals, while the latter imposes its own substantive goals on the society. See MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 71–88 (1986).

¹⁷⁴ See STITH & CABRANES (1998), *supra* note 24, at 53–60.

¹⁷⁵ See Breyer, *supra* note 44, at 20–22.

¹⁷⁶ See Frase, *State Sentencing Guidelines*, *supra* note 28, at 1202 (“A few jurisdictions have more or less ‘descriptive,’ or historically based, guidelines. Recommended sentences reflect existing sentencing norms and the goal is simply to get judges to apply these norms more consistently. But even these states usually make some changes in prior norms—especially to reduce racial disparities.”) (citation omitted); see also D.C. ADVISORY COMM’N ON SENTENCING, *supra* note 143 (listing states with “descriptive” guidelines).

¹⁷⁷ MINN. SENTENCING GUIDELINES COMM’N, REPORT TO THE LEGISLATURE 9 (1980), available at <http://mn.gov/sentencing-guidelines/images/1980%2520Legislative%2520Report.pdf>, archived at <http://perma.cc/7T9G-3NX2>; Frase, *State Sentencing Guidelines*, *supra* note 28, at 1202; David J. Gottlieb, *Kansas Adopts Sentencing Guidelines*, 6 FED. SENT’G REP. 158, 158–59 (1993).

presumptive system, because the sentencing commission can enlist the help of appellate judges in ensuring that departures only happen in extraordinary cases. Feedback in such systems happens more at the margins, as appellate judges define the circumstances that justify departure, and there is less opportunity to dissent from the fundamental principles of the guidelines framework.

B. APPELLATE REVIEW

Appellate review works very differently in presumptive and advisory systems. In presumptive systems, it is the main mechanism for enforcing the guidelines. Judges' sentences are reversed on appeal if they depart with insufficient justification, and so appeals are guideline-reinforcing. But in advisory systems, appellate review must be unconnected to the guidelines, since judges are free to disagree with the guidelines. Thus appellate review does not monitor guidelines compliance, but instead ensures the substantive reasonableness of the sentence according to the views of the appellate court. Appellate review defines the outer limit of permitted sentencing practices, but does nothing to clarify or update the content of the guidelines. Indeed, reasonableness review and the guidelines can be at cross-purposes. If an appellate panel finds that a within-guidelines sentence is unreasonable, it can establish a precedent requiring departure from the guidelines.¹⁷⁸ The Second Circuit Court of Appeals made such a ruling in *United States v. Dorvee*, where it reversed a within-guideline twenty-year sentence for child pornography possession,¹⁷⁹ and a small number of other federal appellate panels have made similar rulings in recent years.¹⁸⁰

¹⁷⁸ It is also theoretically possible to have appellate decisions that mandate departure in a presumptive guideline system, though such decisions would necessarily be very rare if they existed at all. *See supra* note 135.

¹⁷⁹ 616 F.3d 174, 186–88 (2d Cir. 2010).

¹⁸⁰ *United States v. Sanders*, 472 F. App'x 376, 382 (6th Cir. 2012) (remanding for resentencing because district court improperly considered rehabilitative concerns in lengthening defendant's sentence); *United States v. Wright*, 426 F. App'x 412, 415–17 (6th Cir. 2011) (remanding for resentencing because district court improperly considered an unfounded assumption that defendant had committed crimes for which he had not been punished); *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1054–56 (9th Cir. 2009) (remanding for resentencing because within-Guidelines sentence imposed was substantively unreasonable given the staleness of defendant's prior convictions and subsequent history showing no harm to others); *United States v. Paul*, 561 F.3d 970, 973–74 (9th Cir. 2009) (remanding for resentencing with a new judge because district judge failed to heed appellate court's instructions that this case does not fit within heartland of cases to which Sentencing Guidelines are most appropriate and failed to consider mitigating evidence that appellate court directed it to consider); *see also* FED. PUB. & CMTY. DEFENDERS, *supra* note 135, at 1 (noting only five federal cases in which a sentence within the guidelines range was reversed as

Reasonableness review does, however, help advisory feedback loops function. It does so through outlier policing—judges with extreme sentencing views are likely to have their sentences reversed as substantively unreasonable. Thus appellate review can facilitate feedback loops by eliminating persistent outliers. To illustrate, consider a jurisdiction with twenty judges. Eighteen of these judges sentence the typical defendant convicted of crime X to between eight and twelve years in prison. The guidelines are written to reflect this practice and recommend a ten-year sentence, which those eighteen judges generally follow. But the other two judges consistently provide sentences of one year and twenty years for the same crime, because of their own penological views. Appellate reasonableness review could be used to bring these persistent outliers into the system by reversing their sentences.¹⁸¹ And, in systems like Virginia and Missouri that keep detailed track of judges' sentencing practices, the commission can in fact assist appellate reasonableness review by showing how far an outlier judge is from their colleagues' sentencing patterns. However, despite these benefits, it bears emphasis that appellate review only helps around the margins in an advisory feedback loops system. It is by necessity deferential to trial judges.¹⁸²

C. REASON-GIVING BY JUDGES AND COMMISSIONS

Another question is whether the guidelines must provide reasons for their dictates, and in turn whether judges must provide reasons for departure. Generally, reciprocal reason-giving is necessary for any kind of feedback loop system to function well, whether it be advisory or presumptive. It is crucial for judges to understand the rationale behind the guidelines, and for the commission to understand the justifications for judges' departures. Unfortunately, however, the reason-giving requirement has largely been unidirectional in American sentencing systems. Judges must explain themselves when they sentence outside the guidelines, even in some purely

substantively unreasonable).

¹⁸¹ This feature partly supports the Supreme Court's assertion that appellate review can be used alongside guidelines to reduce disparity. *See* *Kimbrough v. United States*, 552 U.S. 85, 107 (2007) (“[A]dvisory Guidelines combined with appellate review for reasonableness and ongoing revision of the Guidelines in response to sentencing practices will help to ‘avoid excessive sentencing disparities.’” (quoting *United States v. Booker*, 543 U.S. 220, 264 (2005))); *Booker*, 543 U.S. at 264–65 (predicting that reasonableness review will “continue to move sentencing in Congress’ preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary”).

¹⁸² *See supra* notes 96–100 and accompanying text.

advisory systems.¹⁸³ Indeed, in many systems a sentence can be reversed for inadequate explanation.¹⁸⁴ However, most guidelines lack any explanatory commentary justifying the choices the commission has made. A few states' sentencing manuals, such as Minnesota's, contain reasoned explanations that help judges understand the guidelines.¹⁸⁵ And the draft sentencing provisions of the Model Penal Code contain a requirement for explanatory commentary.¹⁸⁶ But these are outliers. That is unfortunate, because such commentary is crucial for feedback loops to function well. Judges must know the reasons behind a particular guideline in order to intelligently depart on policy grounds, or in order to gauge what kinds of cases are typical and what kinds atypical within the logic of a guideline. The reverse is also true—both presumptive and advisory systems that involve feedback loops should require judges to give reasons for departure. Such a reason-giving requirement will help the sentencing commission to better analyze the feedback from judges, because it will let the commission know precisely why and in what circumstances judges disagree with the guidelines. It will also, in a presumptive system, help appellate judges better evaluate whether a judge's sentence falls within the typical case governed by a guideline, or whether there are unusual circumstances justifying departure.

¹⁸³ See *Rita v. United States*, 551 U.S. 338, 357 (2007) (“Where the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so.”); Jon Wool & Don Stemen, *Aggravated Sentencing: Blakely v. Washington*, 17 FED. SENT’G REP. 60, 67 n.22 (2004) (“Arkansas, Delaware, and Virginia statutorily require judges to provide reasons for a sentence beyond the guidelines range. In Maryland, Rhode Island, and Utah, on the other hand, sentencing commission policy or court rule, rather than statute, provides the source of the legal rule that requires reasons to be stated for a sentence above the guidelines recommendation.”).

¹⁸⁴ See Michael M. O’Hear, *Appellate Review of Sentence Explanations: Learning from the Wisconsin and Federal Experiences*, 93 MARQ. L. REV. 751, 762–82 (2009).

¹⁸⁵ See, e.g., MINN. SENTENCING GUIDELINES COMM’N, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY 8–9 (2010), available at <http://mn.gov/sentencing-guidelines/images/2010%2520Guidelines.pdf> (“To limit the impact of past variability in prosecutorial discretion, the Commission decided that for prior multiple felony sentences arising out of a single course of conduct in which there were multiple victims, consideration should be given only for the two most severe offenses.”), archived at <http://perma.cc/47BD-A7BQ>; *id.* at 15 (“The Commission believes that offenders whose current conviction is for criminal vehicular homicide or operation or first degree (felony) driving while impaired . . . are also more culpable and for these offenders there is no limit to the total number of misdemeanor points included in the criminal history score due to DWI or criminal vehicular homicide or operation (CVO) violations.”); *id.* at 17 (“The juvenile adjudications must result from offenses committed after the offender’s fourteenth birthday. The Commission chose the date of the offense rather than the date of adjudication to eliminate variability in application based on differing juvenile court practices.”). There are many more such examples in the Minnesota Guidelines.

¹⁸⁶ See MODEL PENAL CODE: SENTENCING § 6B.02(5) (Tentative Draft No. 1, 2007).

One potential pathway for reason-giving would be direct communications between the sentencing commission and judges. It would be valuable for judges to be able to delve into the sentencing commission's deliberative process in order to better understand how the commission came to adopt the policies that are reflected in the guidelines. This is especially true in an advisory system, where the guidelines are only as powerful as their ability to persuade. Unfortunately, the federal Sentencing Commission has rejected this mode of communication. In 2008, a district court judge in New Jersey requested that the Commission send a representative to explain the reasoning behind the severity of the child pornography possession guidelines.¹⁸⁷ The Commission declined to send someone, stating in a letter to the court that "a representative would not be able to provide the Court with information beyond what is contained in the legislative history of the Guidelines."¹⁸⁸ But there is precious little information in the legislative history explaining the reasoning behind these guidelines.¹⁸⁹ If judges are to be persuaded to follow these guidelines, the Commission should provide explanations that justify them, either in the guidelines themselves or in other communications.

D. SOURCES OF STICKINESS

Another design issue is how to ensure that guidelines will gain judges' acceptance. This is simple enough in presumptive systems, where appellate review ensures that judges will follow the guidelines in normal circumstances. But it is trickier in advisory systems. Beyond peer effects and the power of persuasion, which have already been discussed, there are a number of other mechanisms for achieving guideline compliance. But it is crucial that these mechanisms are not *too* effective, and the guidelines thereby become too sticky for advisory feedback loops to function.¹⁹⁰ In

¹⁸⁷ See *United States v. Grober*, 595 F. Supp. 2d 382, 389 (D.N.J. 2008), *aff'd*, 624 F.3d 592 (3d Cir. 2010) ("Because of the extraordinarily harsh sentence called for under the guidelines, the Court requested the government to produce a witness from, or involved with, the United States Sentencing Commission. The Court sought the data behind the guidelines calculation to assist it in understanding how a first offender who pleaded guilty was facing a sentence at, and above, the 20 year statutory maximum.").

¹⁸⁸ See *id.* (internal quotation marks omitted); Hamilton, *supra* note 10, at 417.

¹⁸⁹ Indeed, the child pornography possession guidelines are so high largely due to legislative mandates rather than the Commission's own decisionmaking. See Hamilton, *supra* note 10, at 394–97.

¹⁹⁰ Cf. Nancy Gertner, Gall, Kimbrough *and Me*, OHIO ST. J. CRIM. L. AMICI: VIEWS FROM THE FIELD, Jan. 2008, at 1, http://osjcl.blogspot.com/2008_01_01_archive.html (full text available on HeinOnline) ("It is *not* the danger of rampant disparity as some may say, the 'free-at-last regime' where trial judges do whatever they want without meaningful review. Rather, it is the opposite: the danger of mindless Guideline compliance, even while intoning 'the

designing the optimal advisory system, it is best to find a happy medium where judges are drawn into the guidelines framework but also feel free to depart from the guidelines when departure seems well-justified.

There are many strategies for making advisory guidelines stickier. Requiring judges to calculate the advisory sentence will cause the sentence to influence their decision through the psychological phenomenon of anchoring.¹⁹¹ There is a great deal of evidence that simply looking at the number given by the guidelines will influence judges to sentence closer to that number.¹⁹² And more careerist impulses can also contribute to judicial deference to the guidelines—if a judge must be reelected, as in most state systems, or if they seek to be promoted in the federal system, it is generally a good strategy to sentence within the guidelines. For instance, Senator Jeff Sessions regularly presses judicial nominees during their confirmation hearings on whether they support the Guidelines and commit to abide by them.¹⁹³ And Congressman James Sensenbrenner once berated Judge James Rosenbaum for frequent departures while he was testifying before Congress, and threatened him with an investigation of his past sentences.¹⁹⁴ Kate Stith has actually traced the beginning of a reduction in the rate of departures to the period in which Judge Rosenbaum was targeted by Representative

Guidelines are advisory.’ It is the danger that the Supreme Court will stop taking sentencing appeals, leaving the application of *Gall* and *Kimbrough* to the appellate courts, many of whom have yet to see a Guideline sentence they do not like, or a variance they can support.”)

¹⁹¹ See Birte English & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCHOL. 1535, 1536 (2001); Daniel M. Isaacs, *Baseline Framing in Sentencing*, 121 YALE L.J. 426 (2011) (arguing that policymakers should account for baseline framing effects when designing sentencing guidelines); Stith, *supra* note 25, at 1496 (“[T]he Guidelines remain the starting point for all sentences, with an anchoring effect made all the more powerful by *Rita*’s go-ahead to the courts of appeals to treat Guideline sentences as presumptively reasonable. The Guidelines are now the frame, in both law and practice, in which sentences are viewed.”) (citations omitted).

¹⁹² See Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 495 (2014) (“When it comes to numbers, ‘[o]verwhelming psychological research demonstrates that people estimate or evaluate numbers by ‘anchoring’ on a preliminary number and then adjusting, usually inadequately, from the initial anchor.”) (quoting Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 201 (2007)).

¹⁹³ See, e.g., Sam Stein, *Sotomayor, Sessions Sparred in 1997*, HUFFINGTON POST (May 25, 2011, 1:25 PM), http://www.huffingtonpost.com/2009/05/27/sotomayor-sessions-sparre_n_207917.html, archived at <http://perma.cc/FGW9-NS5V>.

¹⁹⁴ See Tresa Baldas, *Congress Comes After a Federal Judge*, NAT’L L.J., Mar. 24, 2003, at A1 (“In a rare and controversial move that has judges nationwide expressing concern, the House Judiciary Committee has threatened to issue subpoenas for records relating to Rosenbaum’s sentencing decisions, and has requested a federal review of the entire Minnesota federal bench as part of a broader inquiry into drug sentencing.”).

Sensenbrenner, and suggests that this event may have had an intimidating effect on judges.¹⁹⁵ Further, Judge Robert Chatigny, who was nominated by President Obama to the Second Circuit, had his nomination derailed in part because he had departed downward in a number of child pornography possession cases.¹⁹⁶ This pressure is potentially even greater for elected judges, who must stand periodically for reelection and explain their departure rates to electors.¹⁹⁷ For such political forms of pressure, the distinction between within-guideline departures and outside-guideline departures may be significant. Thus if there is no general provision permitting departure (as in the federal system), judges face more pressure to sentence within the guidelines than if departures are still technically “within” the guidelines (as in Washington).¹⁹⁸ Finally, there are also ways to put the burden of the inertia on departures, such as requiring judges to provide written reasons for departures (but not within-guideline sentences) or providing less deference on appeal to outside-the-guidelines sentences.¹⁹⁹ None of these sources of stickiness is necessarily sufficient to render advisory guidelines effectively mandatory. But they do cause the guidelines to exercise more gravitational pull.

¹⁹⁵ See Stith, *supra* note 25, at 1471 & n.203.

¹⁹⁶ See Editorial, *Sexual Sadism, Unleaded*, WASH. TIMES, May 26, 2010, at 2 (“In 12 child-pornography cases, Judge Chatigny imposed a sentence either at or more lenient than the recommended minimum—with most downward departures involving sentences less than half as long.”).

¹⁹⁷ See Frase, *State Sentencing Guidelines*, *supra* note 28, at 1199 (“However, Pennsylvania may have found another way to encourage judicial compliance with guidelines recommendations: Since 1999, judges’ departure rates have been made public, and this change appears to have slightly increased compliance rates.”); Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 916–18 (2004) (“Judges and lawyers alike explained that guidelines adherence was linked to the judicial apprehension that upward departures would be considered negatively by the legislature at reelection.”). *But see* Stith, *supra* note 28, at 123 (“Although there were widespread concerns that those requirements would curtail judicial discretion and subject Washington’s judges, who are elected, to possible retaliation for seemingly lenient sentences, the data collected from the reporting requirements have not yet figured prominently in contested judicial elections.”) (citation omitted).

¹⁹⁸ See Stith, *supra* note 28, at 118 (“Sentencing authorities in Washington have thus provided significant opportunities for the exercise of judicial discretion within the structure of the guidelines themselves, such that sentencing judges can often ‘comply’ while imposing a non-guideline sentence. The result is a high rate of ‘compliance,’ which has been achieved not by trying to eliminate judicial discretion (as the Federal Sentencing Guidelines sought to do), but by specifying a broad set of circumstances under which discretion is available.”).

¹⁹⁹ See *Rita v. United States*, 551 U.S. 338, 347, 356 (2007) (establishing that within-Guidelines sentences receive a presumption of reasonableness, and need not be accompanied by a statement of reasons).

E. THE SENTENCING COMMISSION'S BRANCH AND MEMBERSHIP

A final design question to consider is the makeup and placement of the sentencing commission itself, in particular whether the commission will be run by judges as part of the judicial branch, or whether it will be controlled by politicians and other stakeholders in the criminal justice system. The majority of sentencing commissions in the United States adopt the latter model, with commissioners being appointed by the elected branches and representing prosecutors, the defense bar, community members, victims of crime, and so on.²⁰⁰ Virginia has one of the few sentencing commissions that is largely controlled by the judicial branch, although much of its membership is still appointed by the governor and legislature of the state, in addition to the chief justice.²⁰¹ Virginia's system seems to have stayed relatively above the political fray over the course of its existence. By contrast, the federal Sentencing Commission has been extremely politicized, to the point that it has often been reduced to an instrument of Congress's drive to make the justice system more punitive.²⁰² As Justice Stephen Breyer, one of the original commissioners, has noted: "Some compromises were forced upon the Commission . . . by the fact that the Commission was appointed by politically responsible officials and is therefore, at least to some degree, a 'political' body."²⁰³ And a number of state systems feature aspects of direct legislative control, with legislative approval required for changes to the guidelines or legislators serving on the sentencing commission itself.²⁰⁴

²⁰⁰ See generally KAUDER & OSTROM, *supra* note 11 (profiling the sentencing guidelines systems in twenty-one states).

²⁰¹ VA. CRIMINAL SENTENCING COMM'N (2013), *supra* note 16, at 7.

²⁰² See STITH & CABRANES (1998), *supra* note 24, at 60 (showing how congressional pressure has prompted the Sentencing Commission to raise sentences); Sessions, *supra* note 12, at 317–21 (same); Rakoff, *supra* note 13, at 7 ("[T]he nonjudicial members of the Sentencing Commission would be more subject to political pressures, or political desires—this was a period in our history when 'law and order' was the watchword of the day—and they would therefore be inclined to enact fairly severe sentencing guidelines that would be binding on all concerned."); Bowman, *Mr. Madison Meets a Time Machine*, *supra* note 27, at 236 ("The current federal sentencing regime, with its Sentencing Commission and complex Guidelines, was intended to insulate the process of making sentencing rules from the passions of politics. But as we will see, the architects of the system miscalculated and created a sentencing structure almost perfectly designed for capture and manipulation by the political branches.").

²⁰³ Breyer, *supra* note 44, at 8.

²⁰⁴ See Barkow, *supra* note 161, at 802 & n.369 (discussing several states where legislators serve on the commission as voting or non-voting members, including Arkansas, Maryland, Missouri, North Carolina, Oregon, Utah, Virginia, Washington, and Wisconsin); *id.* at 778, 782–83, 788, 791 (discussing several states where the guidelines must be approved by the legislature, including Massachusetts, North Carolina, Oklahoma, Oregon, and Washington).

Whether system planners want the sentencing commission to be controlled by the judiciary or by politicians will depend largely on what function they wish it to serve. It is a gamble to put an advisory guidelines system in the hands of political actors, because judges need not follow its recommendations if they are perceived as politicized. Judicial branches should thus probably administer advisory sentencing commissions, so that judges can oversee their own mechanism of internal coordination through feedback loops.²⁰⁵ On the other hand, if the legislature principally seeks to impose certain changes in sentencing policy, or to delegate the determination of sentencing policy to a group of agents that will further the legislature's goals, it makes sense to establish a presumptive system with a politicized sentencing commission that represents the legislature's preferred stakeholders (whether it be prosecutors, the defense bar, victim rights advocates, etc.).²⁰⁶ Commonly the legislature's goal will be to increase the punitiveness of the criminal justice system, whether due to panic over a particular kind of crime or the general structural incentive to appear tough on crime.²⁰⁷ However the legislature sometimes, particularly in state systems, also uses its political influence over the sentencing commission to push for cost-cutting measures that will reduce the overall level of incarceration.²⁰⁸ Beyond this issue of judicial versus political control, commissions might also be designed to reflect the views of the local communities that are affected by sentencing policy. For instance, Washington D.C.'s sentencing commission is comprised entirely of local community members and has tried to craft

²⁰⁵ See Stith & Dunn, *supra* note 13, at 224–29 (arguing that, after *Booker*, the federal sentencing commission should be structurally and functionally located in the judicial branch so as to preserve its utility).

²⁰⁶ See generally Barkow & O'Neill, *supra* note 27 (discussing the political incentives that might motivate judges to delegate sentencing authority to commissions).

²⁰⁷ See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 173 (2011) (“When writing and enacting criminal prohibitions, legislators usually ignore tradeoffs and rarely need to compromise. Save for law enforcement lobbies, few organized, well-funded interest groups take an interest in criminal statutes; criminal defendants’ interests nearly always go unrepresented in legislative hallways. Legislators thus have little reason to focus carefully on the consequences of the prohibitions they write. That makes criminal legislation more a bidding war than an exercise in horse-trading . . .”).

²⁰⁸ See Barkow, *supra* note 60, at 132 (“Another key characteristic of state commissions is their attention to cost considerations and prison capacity. As noted above, the political process on its own tends to do a poor job drawing attention to these facts. Many states have recognized this limitation and have ordered their commissions to pay particular attention to costs. This directive has generally allowed states with commissions to keep their incarceration rates from increasing too rapidly and to ensure that there is available prison space for the most violent offenders. It has also enabled states to spend their money on crime in the most effective manner.”).

policies that accord with local views about proper punishment.²⁰⁹ Such an approach could improve the legitimacy of the justice system by making it better reflect community norms. The composition of the sentencing commission will, in sum, likely influence the quality and purposes of its dialogue with the other branches.

CONCLUSION

This Article has sought to defend the concept of dialogue between judges and sentencing commissions as the best available governing principle for a sentencing system. Embracing dialogue would help to minimize the tension between individualized justice and systemic justice that has dominated sentencing reform debates for the last several decades, and that has caused the federal sentencing system to undergo such dramatic changes. It would also let judges correct mistakes and oversights in the guidelines as they are revealed in concrete cases. By letting judges' departures systematically influence the guidelines, and letting the guidelines in turn systematically influence judges' sentences, we can construct sentencing systems that are more coherent, morally rational, and just than the alternatives.

²⁰⁹ See Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2322–23 (2014) (“A ready illustration of the potential of local voice in sentencing policy is the District of Columbia. Its sentencing commission, comprised entirely of local community members, has made concerted efforts to develop sentencing policy in line with the views of local judges and residents.”).