

2012

The U.S. Sentencing Commission's Best Response to Booker Is to Do Nothing

Michael Tonry

University of Minnesota Law School, tonry001@umn.edu

Follow this and additional works at: https://scholarship.law.umn.edu/faculty_articles



Part of the [Law Commons](#)

Recommended Citation

Michael Tonry, *The U.S. Sentencing Commission's Best Response to Booker Is to Do Nothing*, 24 FED. SENTENCING R. 387 (2012), available at https://scholarship.law.umn.edu/faculty_articles/512.

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in the Faculty Scholarship collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

The U.S. Sentencing Commission's Best Response to Booker Is to Do Nothing

Feedback the Commission has received suggests that district court judges generally view the appeals process as functioning well. . . . District court judges generally consider proper the discretion afforded to them under the Booker standard of review. Indeed, 75 percent of federal district judges believe that the current advisory guidelines system best achieves the purposes of sentencing.

In fiscal year 2010, the courts imposed sentences within the applicable advisory guideline range or below the range at the request of the government in 80.4 percent of all cases: 55.0 percent of all cases were sentenced within the applicable guideline range, 25.4 percent received a government-sponsored below-range sentence. In fiscal year 2010, the non-government-sponsored below-range rate was 17.8 percent, and the rate of sentences imposed above the guidelines range was 1.8 percent.

—Judge Patti B. Saris¹

The tale is told by the two passages from Judge Patti B. Saris's testimony to a House Judiciary Subcommittee that appear as epigraphs. Despite its tortured history, the federal sentencing system in its post-Booker advisory form is about as sensible, workable, and just as it is likely to be in our time. Eighty percent of sentences fall within the applicable guidelines or below them with government approval. That measure—"within . . . or below with government approval"—though odd at first blush, makes sense. It means that the vast majority of sentences are imposed within the applicable guideline ranges or, if lower, reflect agreements between the prosecutors and sentencing judges directly involved that some lesser punishment is appropriate.

Having 80 percent of sentences be consonant with guidelines is pretty good; it's comparable to the most admired state systems. Higher consonancy levels in a country that spans a continent of culturally and politically diverse states is unachievable without recreating a system of arbitrarily unjust—and therefore often disingenuously and inconsistently circumvented—sentencing like the federal guidelines in the 1990s. Most district court judges believe the system is working well; 75 percent believe "that the current advisory guidelines system best achieves the purposes of sentencing."² They are the people who are most likely to know.

Judge Saris made three major proposals in her testimony. The first—that a more robust appellate review standard be created that includes a presumption of reasonableness for sentences falling within guideline ranges—is unnecessary. There is no evidence that the current system is working badly relative to any real-world measure of what a federal sentencing system can reasonably be expected to accomplish. Judge Saris noted in her testimony that "some appeals court judges view the appeals process as broken" and devoted four pages to a summary of their complaints.³ Discontent among court of appeals judges, however, is not evidence that the current system is inadequate; it shows only that some liked to micro-manage the decisions of trial judges under the pre-Booker regime and are frustrated that they can no longer do so.

The second—clarification of arguable inconsistencies between § 994 of Title 28, which sets out commission responsibilities, and 18 U.S.C. § 3553(a), which directs sentencing judges to consider offender characteristics—is dangerous. It would risk reducing judicial authority to individualize sentences in ways most line prosecutors, sentencing judges, and defense counsel believe is just and appropriate.⁴

The third—codifying the "three-step process"—is also dangerous. It would require judges first to calculate the formally applicable guideline range, then to consider whether *under the Commission's highly restrictive criteria* concerning offender characteristics a departure is called for, and only then to consider whether a "variance" is appropriate to tailor the sentence to the characteristics of the offense and the circumstances of the offender. That is dangerous because it would unduly restrict judges' discretion to impose situationally just and appropriate sentences. Details of individual cases vary enormously, as do prevailing cultural and social norms in different parts of the country. Ignoring either set of differences invites injustice and circumvention.

Other people have given detailed accounts of their views on the three recommendations, so I see no value in elaborating on mine here. Instead, in three steps I explain why the current federal sentencing system for all its imperfections is about as good as is obtainable. First, I offer a few salient reminders about the history of the



MICHAEL TONRY*

Professor of Law and Public Policy, University of Minnesota

Federal Sentencing Reporter, Vol. 24, No. 5, pp. 387–393, ISSN 1053-9867 electronic ISSN 1533-8363.
©2012 Vera Institute of Justice. All rights reserved. Please direct requests for permission to photocopy or reproduce article content through the University of California Press's Rights and Permissions website, <http://www.ucpressjournals.com/reprintInfo.asp>. DOI: 10.1525/fsr.2012.24.5.387.

federal guidelines. Second, I explain why— architecturally—*Booker* inadvertently produced a federal sentencing system at least as well designed as any other imaginable one to make gross injustices less likely than before *Booker*. (At judges’ hands, that is; Congress and the Commission in general and individual federal prosecutors in particular cases bear responsibility for unconscionably lengthy mandatory minimum and recommended guideline sentences.) Third, I explain why the existing 80 percent consonance rate is about as high as can be expected.

I. The History

The early U.S. Sentencing Commission during Judge William Wilkins’s chairmanship was a rogue agency, aspiring to be “a junior varsity Congress,” as Justice Scalia put it in *Mistretta*.⁵ Judge Marvin Frankel’s original proposal was for creation of a specialized rule-making agency intended to insulate the sentencing system from public emotion and political influence.⁶ Instead, the initial Commission was highly sensitive to political ramifications of its decisions and overly deferential to Congress.⁷ The U.S. Supreme Court in *Kimbrough*⁸ eventually admonished the Commission for abandoning its independent specialist role during its formative years. The Court authorized sentencing judges to reject guideline sentences “because [in Judge Saris’s words] of a policy disagreement with the underlying rationale for the guideline. The Court suggests this ‘policy disagreement’ analysis is appropriate because guidelines that result from congressional directive, particularly specific directives, ‘do not exemplify the Commission’s exercise of its characteristic institutional role.’”⁹ As a result of its political sensitivity and subservience, the early Commission adopted guidelines antithetical to the modest and gradualist reforms Frankel proposed. Instead it created much more detailed and tougher sentencing policies than had previously existed in the federal courts, in any state, or in any guidelines system.

Along the way, the Commission (1) ignored statutory language in 28 U.S.C. § 994(i) calling for a presumption against imprisonment for most first offenders; (2) ignored statutory language in 28 U.S.C. 994(g) directing that any guidelines “minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons”; (3) attempted to nullify 18 U.S.C. § 3553(a), which directed judges to take account of offender circumstances and statutory sentencing purposes; (4) declared that many important defendant characteristics such as drug dependence, family responsibilities, employment records, and disadvantaged childhoods are “not ordinarily relevant in determining whether a departure is warranted”; (5) radically reduced use of community penalties except as part of a split sentence involving prison time; (6) attempted effectively to rewrite the 1984 Sentencing Reform Act by referring to the presumptive guideline system it authorized as “mandatory” guidelines; and (7) ignored the by-then-extensive state experience with successful guidelines.

The first five points are self-evident and have been widely acknowledged for a quarter century.¹⁰ The last two may benefit from explanation.

A. “Mandatory” Federal Guidelines

The Sentencing Reform Act of 1984 was a successor to a continuous series of Senate bills, beginning with S.B. 181, introduced by Senator Edward Kennedy in 1974, all of which called for establishment of presumptive sentencing guidelines. So did the ’84 Act, as any plain reading of its text reveals. As was true of each presumptive state guidelines statute that preceded it, the Sentencing Reform Act of 1984 established a commission, charged it to develop guidelines, and authorized a system of appellate review of sentences that departed from the guidelines. The conventional language then in use distinguished between “voluntary” (or advisory) guidelines and presumptive guidelines. “Mandatory guidelines,” an oxymoron, was not a term of art in the early 1980s and, so far as I know, did not become one until the Commission coined it. Many states experimented with voluntary guidelines in the 1970s, and by the mid-’80s a near-consensus view emerged that presumptive guidelines, backed up by appellate sentence review, were the more effective means to reduce sentencing disparities.¹¹

The 1984 Act does not mention “mandatory guidelines.” No such system existed (and none has since been created except in a loose sense in cells of North Carolina’s guidelines that specify prison sentences; those guidelines are literally mandatory in the fundamental sense that any sentence not authorized in those cells is unlawful). “Mandatory” then as now in relation to sentencing always refers to laws in which legislation directs the judge to impose at least a specified sentence on every person convicted of a particular offense. That was never the legal status of the federal guidelines.

In the late 1980s and early 1990s, however, Commission members, publications, and staff began to refer to the guidelines as mandatory. This they never were, as statutory provisions on sentence appeals and the Commission’s rules on approved and disapproved bases for departures make clear. A sentencing law is by definition not mandatory if judges are given statutory authority to impose some other sentence. Use of that term, however, may have reified the statutorily presumptive guidelines system in the minds of Commission members and appellate judges into something they were not—mandatory.

B. State Experience

By 1985, when the federal Commission began its work, there were fifteen years of experience with state guidelines. Voluntary guidelines had been attempted in many states in the 1970s and early ’80s; evaluations of their effects on reducing disparities were discouraging. Presumptive guidelines in Minnesota, however, had been convincingly shown to reduce unwarranted disparities, especially in relation to race and ethnicity, and to make correctional

populations predictable, which greatly aided rational planning by corrections departments and legislatures. By the mid-1980s, analyses of presumptive guidelines in Washington and Oregon reached the same conclusions.¹²

Through trial and error, states had learned what does and does not work. The U.S. Sentencing Commission ignored that learning. Lots of examples could be given, starting with the “relevant conduct” rule that called for sentencing judges to take account of uncharged and acquitted alleged crimes (every state commission before and after rejected that idea out of hand). Here are three especially important additional examples. First is the problem of what came to be known as the “sentencing machine.”¹³ Washington State’s commission for a time considered adopting a grid with thirty levels of offense severity, but quickly abandoned the proposal when the commission recognized that sentencing judges would be fundamentally alienated from guidelines that were not intuitively plausible on their face. A “just” sentence that could be determined only after plugging a series of variables into an algorithm (effectively what the federal guidelines do) is not only not intuitively plausible, it is alienating.

The mechanical, non-intuitive, arbitrary character of the Commission’s “mandatory” guidelines is a principal reason why most judges in the guidelines’ early years hated them. Some judges appointed after the decision in *Mistretta* had no experience of anything else and appear to have accepted them as a fact of federal judicial life. However, the high levels of support for the post-*Booker* advisory guidelines among district court judges that Judge Saris noted makes it clear that, given a choice, most sentencing judges prefer the current regime.

The second important lesson not learned from the states is that judges and other courtroom participants believe that just sentences should be individualized to take account of the offender’s situation and circumstances. A vast literature on mandatory minimum sentences, going back centuries, shows that judges, lawyers, and juries often circumvent their imposition if they require punishments more severe than courtroom actors believe to be just.¹⁴ Prosecutors have inherent and unreviewable power to use their charging and bargaining decisions to avoid application of guidelines they consider unjustly severe. Judges have to be more covert in their efforts to avoid imposing sentences they believe to be unjust, but they often do exactly that, frequently in complicity with counsel. Some legislators may fume about “frustration of the legislative will,” but that’s how it always has been and likely always will be. As anyone familiar with the federal guidelines system knows, it was not only judges and defense counsel who wanted to—and did—avoid imposing unduly severe punishments called for by mandatory minimums and “mandatory” sentencing guidelines. Prosecutors were willing accomplices, as U.S. Sentencing Commission-sponsored research showed.¹⁵

The third important lesson concerned the basic structure of guidelines. No state tried to micro-manage sentencing. Guidelines that existed in the states when the Commission did its original drafting were simple. They were typically set out in a grid, dividing offenses into six to ten seriousness categories, creating four to six criminal history categories, and setting out non-exclusive lists of aggravating and mitigating circumstances. No state tried to incorporate details about use or presence of weapons, injuries, detailed property loss values, or role in the offense explicitly into the guideline calculations except to the extent that such details were statutory offense elements. Otherwise they were to be considered case by case.

State guidelines were simple because state commissions recognized that sentencing raises complicated issues, that offense circumstances and offender characteristics vary significantly among cases, that plea bargaining counsel have enormous influence over sentencing outcomes, and that judges want to impose sentences that are just and appropriate.

The aim of the state systems was to provide starting points. Counsel could be expected to bargain in the shadow of the guidelines, with most cases therefore resulting in sentences less severe than if they had been fully prosecuted and sentenced under the guidelines. In cases not resolved through negotiations, judges could be expected to start thinking about sentencing by looking at the appropriate guidelines range, but then adjusting upward or downward to take account of aggravating and mitigating circumstances. State experience showed that judges much more often depart downward than upward.

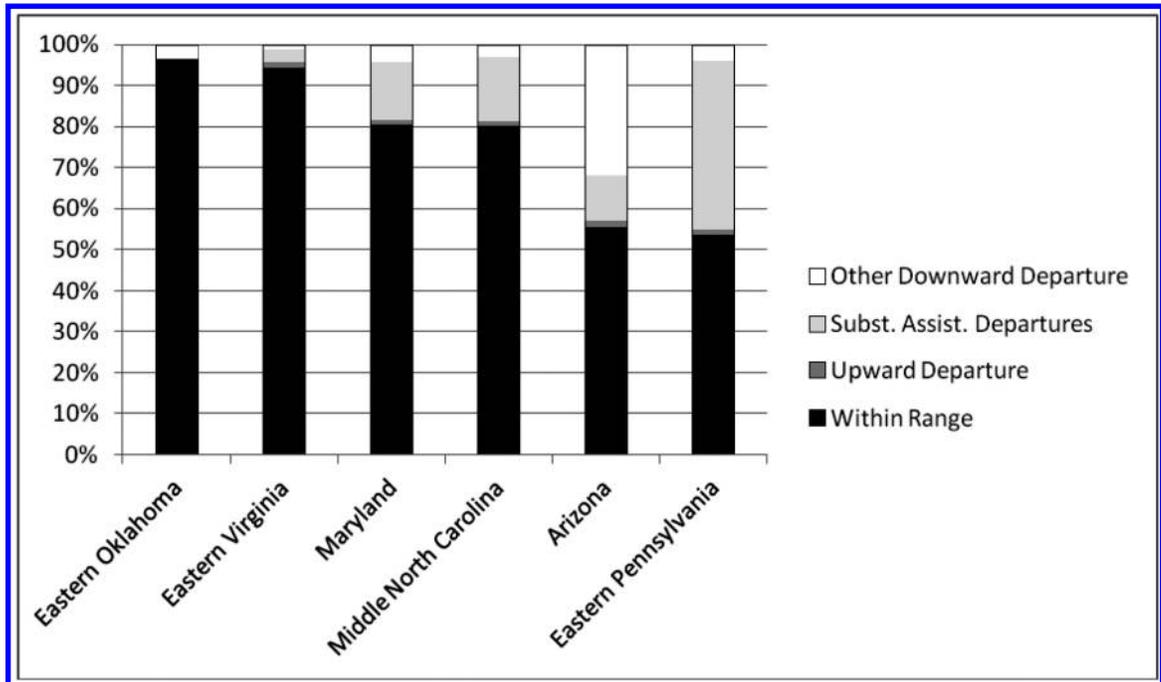
If the U.S. Sentencing Commission had paid attention to the state experience on these three crucial points, and many lesser ones, the guidelines would have looked very different, been resisted less vigorously, and been circumvented less often.

II. A Better Mousetrap

For mostly ill, the initial members of the U.S. Sentencing Commission adopted overly complex, overly detailed, “mandatory” guidelines. Fixing them eventually required a series of sometimes tortured U.S. Supreme Court decisions. In the end, the system is not so bad, for two reasons.

First, to a large extent it addresses the greatest injustices in sentencing—aberrantly harsh, disproportionately severe punishments. By allowing sentencing judges substantial discretion to impose less severe sentences than the notoriously harsh federal guidelines specify, the current system allows judges in many more cases than before *Booker* to ameliorate what would otherwise be unduly harsh punishments. The current system does not do as well concerning unduly harsh sentences attributable to idiosyncratic decision making by individual judges. Sentence appeals are, of course, available, but that is not foolproof. No doubt some poor souls languish in prison for vastly longer than can be justified. The partial solace under the post-*Booker* system is that fewer people suffer that fate. In a better world, parole

Figure 1.



release or its equivalent would be available to deal quietly and more humanely with such cases.

From the beginning of sustained efforts in the eighteenth and early nineteenth centuries to think about just punishment, nearly all normative theorists have agreed that disproportionately severe punishments are fundamentally unjust. Jeremy Bentham, the prototypical utilitarian (now we say “consequentialist”) punishment theorist, believed that punishment can be justified only by its good effects, and that to be an effective deterrent, it

must be closely proportioned to the severity of the crime. Immanuel Kant, the prototypical retributive theorist, believed that punishments must be closely proportioned to the offender’s blameworthiness. Each, however, believed that punishments more severe than his calculus would permit were fundamentally unjust.

Similar ideas are expressed and supported in our time. The second edition of the *Model Penal Code*, for example, endorses “limiting retributivism,” the idea that offenders may sometimes, perhaps often, be punished less than they

Figure 2.

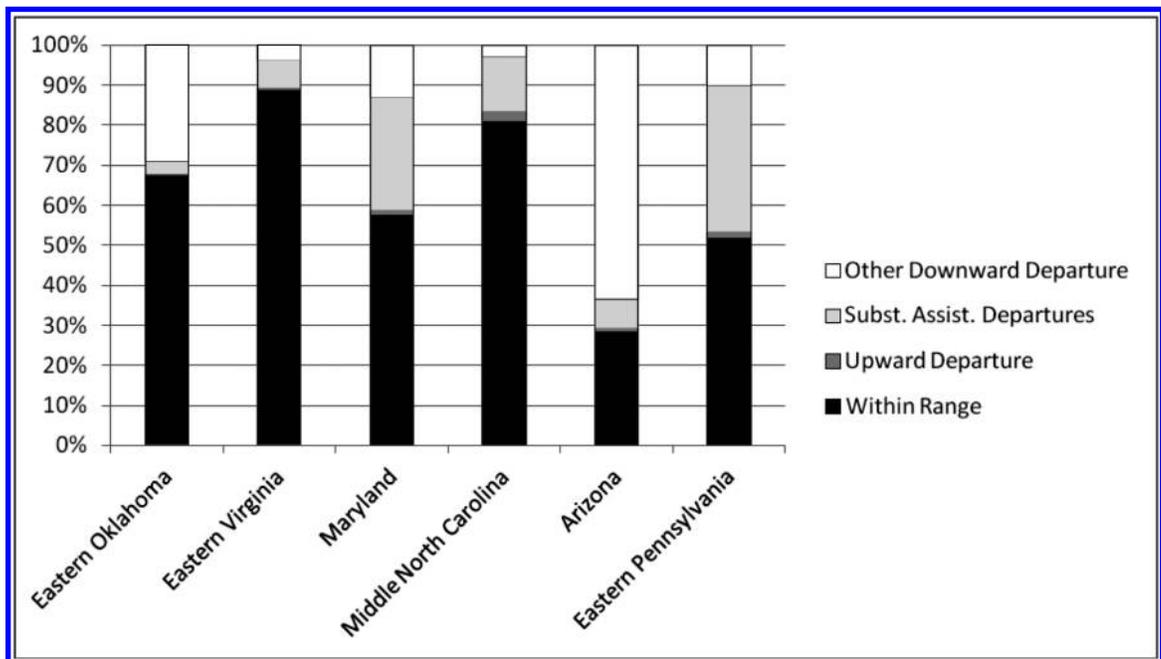
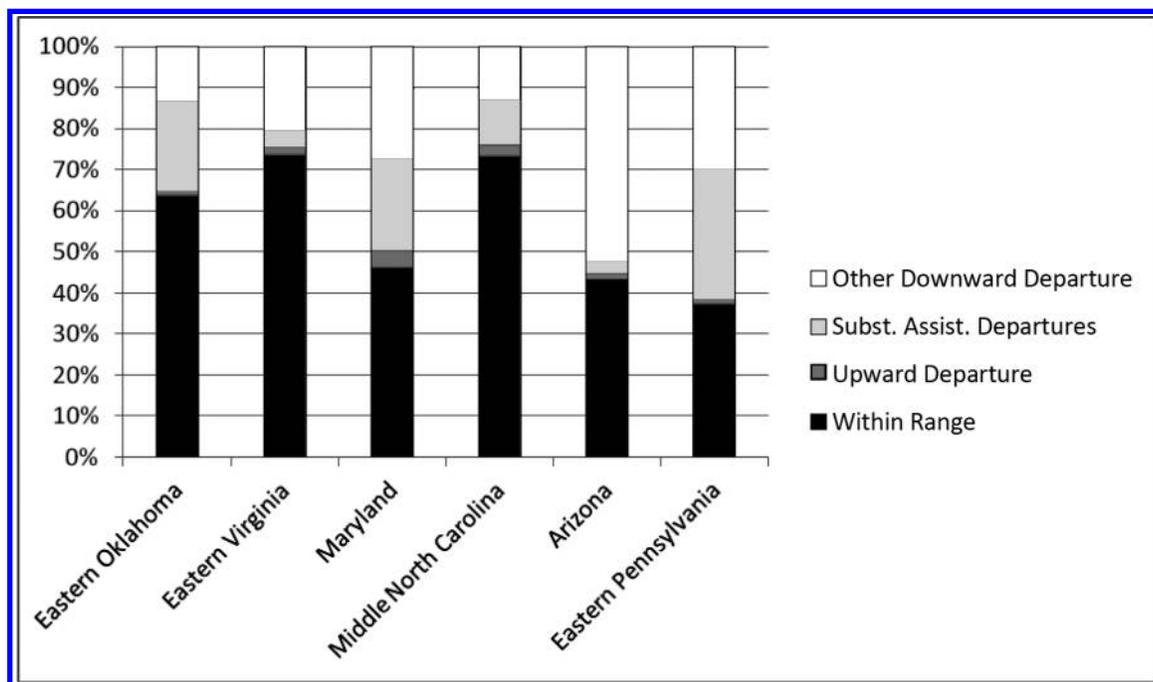


Figure 3.



deserve but never more. In much of Northern Europe, the prevailing theory is “asymmetric proportionality,” which expresses much the same ideas: punishments should never be more severe than is deserved but may be made less severe to take account of the offenders’ characteristics and circumstances.¹⁶ Most civil law countries in Europe have tight statutory limits on the maximum severity of sentences in individual cases and strong doctrinal principles requiring that punishments be apportioned to the offender’s wrongdoing.

As a practical matter (see Figures 1–3), judges very seldom impose sentences more severe than the upper limit of a guideline range. That’s not the same as the absolute bars envisaged by limiting retributivism or asymmetric proportionality, but it shows that in practice sentences above the upper limit are uncommon.

Second, judges by themselves and in concert usually with prosecutors and defense lawyers, can take account of offenders’ situations and circumstances in ways they believe to be just and appropriate. In the pre-1987 federal indeterminate sentencing system, the absence of upper limits short of statutory maxima invited idiosyncratically and aberrantly severe punishments. After 1987, federal law retained the exceedingly long statutory maxima created for an indeterminate sentencing system in which the parole board set actual release dates, which made the statutory maxima almost irrelevant. In the post-*Booker* federal sentencing system, the risks of disproportionately severe punishments are much reduced.

III. The Limits of the Possible

It is unrealistic verging on naïve to imagine than any sentencing system can substantially eliminate disparities

between sentences imposed in different courts in a continent-wide country. It is equally unrealistic to imagine eliminating or dramatically diminishing disparities within a single state. Every state sentencing commission that surveyed state sentencing patterns as part of its work learned that there are significant differences among rural, suburban, and urban sentencing patterns, and often learned that communities of the same size in different parts of a state have distinctive sentencing patterns. There is nothing surprising about that. Local judges, prosecutors, defense counsel, and probation officers almost always come from the communities in which they work and inevitably more or less strongly share the cultural norms and moral beliefs prevalent in their communities. These differ widely within a state, and it would be astonishing if they did not influence sentencing patterns. They do—markedly.

What’s true of a single state in the nature of things is true in a country well known to be characterized by major regional differences in cultural tradition and political belief. It would be astonishing if cultural attitudes toward crime and punishment were the same in Oklahoma, Montana, and Maine, or in “Red” and “Blue” states generally. The U.S. Sentencing Commission, in its research on past sentencing practices, like every other sentencing commission, learned that there were major differences in sentencing patterns in different district courts, and either naïvely or in willful denial acted as if guidelines can substantially alleviate them.

It’s not true that guidelines can substantially reduce disparities across an entire continent, as Figures 1–3 (and the accompanying tables presenting data numerically) show. The figures show within-range sentences, substantial assistance departures, aggravated departures, and mitigated

departures in six federal district courts in 1991, 2000, and 2010. Two of the districts were selected because they had especially low departure rates in 1991, two because they had especially high departure rates, and two because their departure rates reflected national means.

There were dramatic differences in formal guidelines compliance in 1991 in terms of percentages of cases falling within guidelines ranges—above 95 percent in two districts, around 80 percent in two districts, and just above 50 percent in two districts. Among the districts with lower compliance rates, there were major differences in the roles played by substantial assistance motions and other mitigated departures.

Those patterns repeat in 2000 and 2010—both in districts that have distinctive levels of within-range sentences (especially when within-range and substantial assistance sentences are combined) and between districts in which substantial assistance motions are common and those in which mitigated departures are common. Departures of any kind were uncommon in the eastern district of Virginia in

1991 and remained much less common than elsewhere in 2000 and 2010. Departures were common in Arizona and the Eastern District of Pennsylvania in 1990 and remained common in 2000 and 2010. In these two districts even the prevalent forms of departure remained the same over twenty years—self-initiated downward departures by judges in Arizona and downward departures following substantial assistance motions in Pennsylvania.

Each of the six districts is in recognizably the same place in 1991, 2000, and 2010 relative to the others and carries on its own distinctive practices. No system of federal guidelines is going to produce similar sentencing patterns in Arizona, Maine, Louisiana, and Philadelphia.

From that perspective, that 80 percent of federal sentences nationally fall within ranges or result from substantial assistance motions is little short of remarkable. If revised guidelines achieve seemingly higher levels of compliance, it will only be because new methods of circumvention have developed.

Table 1
1991 Sentencing by Guidelines Compliance, Six U.S. District Courts

1991	Within Range	Upward Departure	Substantial Assistance Departure	Other Downward Departure
E.D. Oklahoma	96.8	0	0	3.2
E.D. Virginia	94.5	1.1	3.1	1.3
Maryland	80.6	0.8	14.3	4.2
M.D. North Carolina	80.3	1.0	15.8	2.9
Arizona	55.7	1.4	10.9	32.0
E.D. Pennsylvania	54.0	1.0	41.0	4.0

Source: U.S. Sentencing Commission, 1991 Annual Report (available in hard copy only).

Table 2
2000 Sentencing by Guidelines Compliance, Six U.S. District Courts

2000	Within Range	Upward Departure	Substantial Assistance Departure	Other Downward Departure
E.D. Oklahoma	67.7	0	3.1	29.2
E.D. Virginia	89.0	0.1	7.4	3.5
Maryland	57.7	0.8	28.2	13.3
M.D. North Carolina	81.2	2.0	13.9	30.0
Arizona	28.6	0.6	7.2	63.5
E.D. Pennsylvania	52.2	1.1	36.6	10.2

Source: U.S. Sentencing Commission, Office of Policy Analysis, 2000 Datafile, OPAFY00, available at http://www.ussc.gov/Data_and_Statistics/index.cfm.

Table 3
2010 Sentencing by Guidelines Compliance, Six U.S. District Courts

2010	Within Range	Upward Departure	Substantial Assistance Departure	Other Downward Departure
E.D. Oklahoma	63.7	0.9	22.1	13.3
E.D. Virginia	73.7	1.9	4.1	20.3
Maryland	46.2	4.0	22.3	27.3
M.D. North Carolina	73.2	2.9	10.9	13.0
Arizona	43.5	1.3	2.8	52.3
E.D. Pennsylvania	37.3	0.8	32.0	29.8

Source: U.S. Sentencing Commission, Office of Policy Analysis, 2010 Datafile, OPAFY10, available at http://www.ussc.gov/Data_and_Statistics/index.cfm.

That current federal sentencing policies and practices are probably the best possible in our time does not, of course, mean they could not be made better in some other time. There is something odd about celebrating 80 percent “compliance” with guidelines in which 25 percent of the total represents “government-approved” downward departures. In any other developed country the idea that prosecutors have authority to “permit” judges to depart by filing motions would be seen as *prima facie* wrong. Judges, not prosecutors, are supposed to sentence offenders. Likewise in most developed countries, it would be *prima facie* wrong to take account at sentencing of an offender’s assistance in the prosecution of other defendants. In the federal system in our time, however, prosecutors have been given that power, and the motions *do* liberate the judge to impose a non-guideline sentence he or she considers appropriate.

In a different political climate, a new sentencing commission could start over and develop a system of presumptive sentencing guidelines that honors *Blakely*’s strictures on above-guideline sentences and provides meaningful guidance to judges without handcuffs. Such guidelines have worked well in Minnesota and elsewhere, reducing racial and other unwarranted disparities, improving consistency by allowing counsel to bargain in the shadows of the guidelines, and making use of correctional resources predictable and thus controllable. An entirely new and better system of federal guidelines is not, alas, achievable in the current political climate.

Notes

* An earlier version of this writing was prepared as a Summary of Testimony presented to the U.S. Sentencing Commission at the “Public Hearing on Federal Sentencing Options after Booker” in Washington, D.C., on February 16, 2012.

¹ Judge Patti B. Saris, Testimony before the Subcommittee on Crime, Terrorism, and Homeland Security, House Judiciary Committee, October 12, 2011, http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Testimony/20111012_Saris_Testimony.pdf.

² *Id.*

³ *Id.*

⁴ I write “line” prosecutors advisedly. There is little doubt that senior prosecutors as a policy matter, and many, possibly most, prosecutors in theory, favor harsh sentencing laws and mandatory minimums because they provide leverage for plea negotiations. However, both the long history of experience with mandatory minimums and the literature on courtroom cultures make clear that many or possibly most prosecutors handling individual cases want sentences to be just and appropriate. Judge Saris pointed out in her testimony that of all sentenced defendants in FY 2010, “25.4 percent received a government sponsored below range sentence.” Saris, *supra* note 1.

⁵ *Mistretta v. United States*, 488 U.S. 361 (1989).

⁶ MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

⁷ For details, see Andrew von Hirsch, “Federal Sentencing Guidelines: The United States and Canadian Schemes Compared,” *Occasional Papers from the Center for Research in Crime and Justice*, no. 4, New York University Law School (1988); MICHAEL TONRY, *SENTENCING MATTERS* 83–89 (1996); and KATE STITH & JOSÉ CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).

⁸ 552 U.S. 85 (2007).

⁹ See Saris, *supra* note 1.

¹⁰ Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 *FED. SENT’G REP.* 355 (1992).

¹¹ Alfred Blumstein, Jacqueline Cohen, Susan Martin, & Michael Tonry, eds., *Research on Sentencing: The Search for Reform*, Report of the National Academy of Sciences Panel on Sentencing Research (1983).

¹² *Id.*; TONRY, *supra* note 7, at chs. 2 and 3.

¹³ See Blumstein et al., *supra* note 11, at 146. The NAS Panel summarizes the earliest research. I summarized the evidence available when the Commission was developing its initial guidelines in MICHAEL TONRY, *SENTENCING REFORM IMPACTS* (1987).

¹⁴ Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 *CRIME & JUST.: REV. RES.* 65, Michael Tonry ed. (2009).

¹⁵ See, e.g., U.S. SENTENCING COMMISSION, *MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM* (1991); Stephen J. Schulhofer & Ilene Nagel, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 *S. CAL. L. REV.* 501 (1992); Ilene Nagel & Stephen J. Schulhofer, *Plea Negotiations under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the post-Mistretta Period*, 91 *NW. U. L. REV.* 1284 (1997).

¹⁶ Tapio Lappi-Seppälä, *Sentencing and Punishment in Finland: The Decline of the Repressive Ideal*, in *PUNISHMENT AND PENAL SYSTEMS IN WESTERN COUNTRIES* 92 (Michael Tonry & Richard Frase eds., 2001).