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Federal Judges Need Competing Information to Rival the Misleading Guidelines at Sentencing

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Federal district judges are stuck in a bad marriage with the U.S. Sentencing Guidelines after *Booker v. United States*.¹ While most of the sentencing debate centers around the struggle over judicial discretion and power to control sentencing outcomes,² little attention is given to how poorly we inform the sentencing court's discretion. The information provided to the court at sentencing is lacking and outdated. The *Booker* Court freed district judges from the "mandatory guideline era" (1988–2005),³ but also required that district judges continue to calculate, "consult," and explain variances from the applicable guideline range.⁴ A sentencing court needs better, competing information to rival the distracting and often misleading Guidelines.⁵

In white-collar cases, the Guidelines' numbers and calculations often distort the true story of an individual and his or her offense conduct. The guideline provisions related to loss,⁶ victims, and the defendant's role in the offense⁷ long have drawn criticism. Senior District Judge Jed S. Rakoff, when speaking about the Guidelines in a March 2013 keynote address, criticized the Guidelines and their effect on district judges' sentencing determinations.⁸ Judge Rakoff, like some other judges, favors a multifactor, nonmathematic test.⁹ In fact, Judge Rakoff offered his "modest proposal" that the Guidelines be "scrapped in their entirety."¹⁰ I questioned aspects of that approach and argued that we invite more problems than we solve by offering less information and guidance to judges at sentencing.¹¹ This article is a call for more information to be made available to judges at sentencing.

The unjustified numbers and calculations in the Guidelines dominate the analysis and distract the court at sentencing.¹² The Sentencing Commission has never articulated on what basis it assigns a 2-level enhancement to another \$50,000 in loss, the next 40 victims of a scheme, or for that matter, an additional 20 grams of heroin. Judge Rakoff rightly called the numbers in the Guidelines "unjustified" and "artificially inflated."¹³ Yet, no information dictates the ultimate sentence imposed more than the numbers in the Guidelines. Information provided to the court about the individual qualities of the defendant and specific circumstances of the crime typically modify, and take a back seat to, the unsupported mathematics of the Guidelines.¹⁴ If the numbers and calculations in the Guidelines continue as the best

information we provide to the court,¹⁵ then the sentencing goals of consistency and proportionality will be aspirational only, but not real.

The federal criminal justice system focuses more on *who* has the power to sentence than on *why* a specific sentence is fair in this case for this defendant. This article first argues that the focus on, and power struggle over, judicial discretion is misplaced. Neither granting judges increased discretion, nor Congress' next piece of sentencing legislation designed to restrict judicial discretion, improves the process, or outcomes, of federal sentencing.

Next, the Supreme Court mangled the process of federal sentencing. This article posits that if the judges are procedurally wed to the Guidelines, then we must improve the process in two ways. First, the Commission should phase out the numbers and calculations in the Guidelines, yet preserve the Guidelines' framework as the multifactor test for the Probation Office to describe in a Presentence Report.¹⁶ Second, Probation should furnish the court with better, competing information to rival the Guidelines' numbers and calculations.¹⁷ Federal sentencing can achieve uniformity and proportionality by providing more meaningful, less unjustified information to district judges.

Lastly, this article offers three broad classifications of material to better inform a district judge's discretion at sentencing: (1) "big data" designed to truly promote consistency and proportionality after *Booker*; (2) a searchable, comparable case database; and (3) contractual agreements or recommendations from the parties.

I. Struggling over Judicial Discretion, Instead of Informing It

The *Booker* Court restored sentencing discretion to federal district judges. The Court, however, saddled the district judge's process with the distracting and often misleading numbers and calculations supplied by the Guidelines. The numbers in the Guidelines are as arbitrary and unjustified after *Booker* as they were when mandatory. The Court, however, required that the sentencing court must calculate and consult the applicable guideline range for an offense—in perpetuity. The process itself negatively affects judicial discretion.

The "calculate and consult procedure" of post-*Booker* federal sentencing appears to align with the sentencing

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goals of uniformity and proportionality.¹⁸ In the *initial* years immediately following *Booker*, a district judge *may* have benefited from consulting how a similarly situated defendant was sentenced from the mandatory guideline era. Today, eight years later, forcing a district judge to consider numbers and calculations from a twenty-year stretch in history has, and will continue to, become increasingly less helpful. By comparison, consider how infrequently, if ever, a judge imposing a sentence during the mandatory guideline era referenced pre-Guidelines sentencing decisions to inform *her* decision. Interestingly, however, the bad marriage to the Guidelines and the need for better information at sentencing has *not* been the discussion in federal sentencing.

A. The Struggle to Control Sentencing Outcomes

Much of the debate in federal sentencing over the last forty years resembles a tug-of-war over judicial discretion. Congress and the Sentencing Commission through its mandatory guidelines dictated sentencing outcomes in federal courts for nearly twenty years. Then the Supreme Court in *Booker* tugged the rope back over to favor judicial discretion. Congress now seeks to legislate new ways to tie the court's hands at sentencing.¹⁹ As imposed federal sentences continue to slide downward away from the once "applicable" guideline range, legislators inevitably will consider stepping in to reassert control. One of the few consistencies related to sentencing outcomes has been the power struggle to control them.

When either side—*either* Congress and the Commission or the judiciary—gains an advantage in the struggle over sentencing power, other problems in the criminal justice system arise. On the one hand, Congress and the Commission fight to standardize sentencing results and curb judicial discretion. Yet, when we curb a district judge's discretion at sentencing with mandatory minimum sentences and prejudicial sentencing enhancements, the process reeks of rigidity and cannot properly incorporate individual and case-specific circumstances. No party in the federal criminal justice system—even prosecutors—wants to return to the inflexibility of the mandatory guideline era.²⁰

On the other hand, district judges clamored for more discretion to tailor their decisions to individual circumstances and defendants. Yet, left unbounded, federal sentencing cannot achieve its goals of consistency and proportionality. District judges ascend from a spectrum of professional and personal experiences. For example, a significant percentage of district judges, who practiced and presided over criminal matters during the mandatory guideline era, may adhere more closely to Guideline sentences. The blind adherence could be habit,²¹ but it could also indicate a judge's misplaced notions of consistency or a lack of information to better exercise her discretion.²² Further, the workings of the federal criminal justice system break down when sentencing lacks predictability for the individual defendant.²³

B. Neither More Judicial Discretion nor More Binding Legislation Assists the Process of Sentencing

Neither the judiciary's renewed discretion nor the prospect of more legislatively mandated sentences improves the process of sentencing. The sentencing judge merely reads a report about the crime and the individual defendant before imposing a life-altering sentence. Legislators know even less about individual defendants when they propose legislation aimed at guaranteed sentencing outcomes.

The parties to a federal criminal case who know the most about the offense conduct and the offender—the defendant and prosecutor—inexplicably have the least input into the sentence imposed.²⁴ Of the federal criminal cases charged, 90 percent or more end in guilty pleas.²⁵ The procedural rule governing pleas provides for a recommendation from, or binding agreements of, the parties.²⁶ Yet, these provisions are severely underutilized. Joint party recommendations and binding agreements under Federal Rule of Criminal Procedure 11(c)(1) remain the rare exception, not the rule. Why? Because many district judges disfavor input from the parties, believing that binding agreements either invade their judicial discretion or reduce their role at sentencing to a rubber stamp.²⁷

In the struggle over power to control sentencing, the process and the quality of the information provided to the court at sentencing have suffered. The information available to the district judge at sentencing is weak and outdated. Then it is organized under the Guidelines' distorted and unhelpful numbers and calculations, which dominate the court's attention. Technological advances and informational advancement have passed by, while the static, outdated report sent to chambers before sentencing remains largely unchanged. Elsewhere in industry—even elsewhere in government—information is high-speed, on-demand, and optimized to the user's needs. When it comes to sentencing in federal court, judges might as well be carrying around a typewriter and white-out.

C. Current Information in a Presentence Report

To promote the sentencing goals of consistency and proportionality, the federal judiciary receives a thick Presentence Report (PSR) prepared by the U.S. Probation Office. PSRs contain a lot of information—far more information than may be provided to state, military, or other criminal judges imposing sentence. A typical PSR includes social work-type details about the individual defendant. It includes the case-related details which, especially in the more than 90 percent of cases resolved by guilty plea, are no more than recycled, factual summaries from investigative reports.²⁸ The only new information in PSRs comes from victim impact statements and letters from supporters.

In a white-collar case, for example, the numerous paragraphs in a PSR broadly describe the defendant's role in the fraud scheme within a larger organization, the theory of loss, and the number of victims, from the perspective of the investigators. Then these paragraphs are modified by, and reduced to, a number—again, an unjustified, arbitrary

number. For example, a +14 sentencing enhancement is applied for a loss amount of \$866,000. When the judge reads the description, she cannot help but be instantly affected by the numerical modifier. Much like today's online reviews of products and services that reduce unending streams of information to "4-stars," "80 percent satisfied," and "thumbs down" ratings, the rating dwarfs the reasoning. The reader naturally reacts to the classification and the easily digestible number assigned more so than the underlying descriptions.

Congress empowered the Sentencing Commission to create the Sentencing Guidelines and report sentencing data back to Congress.²⁹ It also told Probation Offices to include calculations based on the applicable guidelines as part of the PSR. The Guidelines represent the most impactful math word problem anywhere in criminal law. However, these numbers and calculations, despite their importance, still lack justification.³⁰

The Guidelines have always valued formulas, even unjustified formulas, over individuals and individual circumstances—and nothing has changed in the decade of post-*Booker* analysis. Section 2B1.1, the fraud guideline,³¹ possibly ranks as the most stark example. It treats individual sentencing outcomes like the estimated monthly payment spit-out of a mortgage calculator. The single overpowering factor of loss amount³² and the stubborn adherence to "relevant conduct" weigh heavily against white-collar offenders. With the Guidelines, white-collar offenders evolved from the traditionally under-sentenced to the most consistently over-sentenced sector of federal defendants. The federal judiciary must improve the process of sentencing, and to do so, it needs other data and non-mathematical information so the Guidelines do not continue to have an overshadowing effect on sentencing determinations.

II. The Two Solutions

We can solve the procedural drawbacks of federal sentencing caused by the *Booker* court in two ways. The first way, while politically unlikely, is to retain the narrative section of the PSR that corresponds to the Guidelines provisions yet *phase out* the accompanying numbers and calculations. The second way, discussed in greater detail in Section III below, is to provide new, competing information to district judges at sentencing to rival the numbers and calculations of the Guidelines.

A. Phase Out the Numbers and Calculations of the Guidelines

The federal government should phase out the numbers and calculations in the Guidelines. As opposed to scrapping them completely, the federal government should convert the Guidelines into factors that the court must consider. District judges could consult the Guidelines as specific factors to consider in individual cases. The numbers and calculations, however, have no sustainable utility. Modern district judges do not consider available sentencing data

from the decades of sentences preceding the Guidelines, because most imposed sentences from the past eras are not helpful to judges imposing a sentence tomorrow.

Judge Rakoff hypothesized that with multifactored, nonnumeric guidance alone, judges would better justify their sentences.³³ I offer some words of caution for that idea. First, requiring judges to consider broad sentencing principles was unsuccessful before the Guidelines.³⁴ Second, the Supreme Court already mandated that federal district judges not only calculate and consult the Guidelines but also consider the long-forgotten sentencing maxims in Title 18, United States Code, § 3553(a).³⁵ This "factors to be considered when imposing sentence" statute includes non-numeric guidance, such as "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."³⁶ Judges, for the most part, parrot the language of the non-numeric guidance and merely touch the bases to pass appellate review. The federal criminal justice system should maintain the structure, organization, and considerations of the Guidelines, but do away with the distracting and misleading numbers and calculations that accompany the Guidelines. Redacting the numbers and calculations from the Guidelines would provide a middle ground between our current system and Judge Rakoff's proposal. It also would ensure more robust judicial reasoning for an imposed sentence by the district judge.

For example, in a fraud case, Probation would continue to *describe* the scheme to defraud under the familiar headings, but *without the numbers and calculations*. The court would pay greater attention to the actual offense conduct organized under the Guidelines' headings, including the dollar amount of the loss, basis of the calculation, number of victims, and the defendant's role in the scheme. District judges have imposed sentences pulling further away from the Guidelines each year since 2005, when the Court decided *Booker*.³⁷ The numbers and calculations of the Guidelines will carry less and less weight for a sentencing judge as more time passes. Phase out the numbers and calculations now before they represent a functionally irrelevant "anchoring point" for judges at sentencing.³⁸

Further, the numbers and calculations of the Guidelines have severely cluttered the appellate courts' true, independent ability to review sentences for reasonableness. A circuit court's substantive "reasonableness" review on appeal has repeatedly turned on the reasonableness of the applicable guideline as much as whether the court's imposed sentence was reasonable.³⁹ If we phase out the numbers and calculations within the Guidelines, then the appellate courts' review and the "reasonableness" standard also will become more robust and meaningful.

B. Provide New, Competing Information

The second solution is to provide district judges with different, competing information to the unhelpful, misleading guidelines. This solution is feasible with a reallocation of resources and attention. Particularly with today's

technological advances and the availability of limitless data, district judges armed with renewed discretion need more and better quality information at sentencing. As set forth below, district judges could be better informed and the goals of sentencing better served with (1) sentencing data reports, (2) searchable, comparable-case databases, and (3) party recommendations and agreements. This information should become part of PSRs and be made available to the sentencing court in addition to the numbers and calculation of the Guidelines. Over time, district courts will pay equal or greater attention to other information at sentencing, like the types discussed below, as compared to the numbers and calculations of Guidelines.

III. Proposed New Information at Sentencing

The conversation must progress beyond the tussle over judicial discretion to the resources we devote to *informing* the court's discretion at sentencing.

A. "Big Data" of Post-Booker Sentencing Statistics

"Big data" is a twenty-first-century term of art that refers to the "tools, processes and procedures allowing an organization to create, manipulate, and manage very large data sets and storage facilities."⁴⁰ Many traditional models have been ushered into retirement because of our capability to gather and interpret vast amounts of data. Today, we gather big data on everything and then adapt the way we slice and evaluate the data to our needs. The post-*Booker* sentencing data, properly gathered and analyzed, could inform district judges' discretion with real-world, meaningful numbers.

Businesses enhance profits, curb expenses, improve marketing efforts, and optimize customer interaction by processing and interpreting large volumes of data. Even our leisure plans,⁴¹ personal fitness,⁴² talent predictors in sports,⁴³ and traditional educational systems⁴⁴ have been forever disrupted⁴⁵ by those who gather and interpret the available data. Unlike the Guidelines' arbitrary numbers assigned to certain conduct or circumstances, big data allows human behavior to produce empirically justified numbers. Efficient, smart, and successful organizations don't assign arbitrarily created numbers to conduct; instead, they gather and interpret actual data derived from behavior.

In the context of federal sentencing, the Probation Office or some other entity could slice useful data for the court.⁴⁶ A court, for instance, could receive data about the percentage of district judges who applied a downward variance, and to what degree, in fraud cases with a loss of more than \$100 million. The Commission collects and reports to Congress about some federal sentencing data. For the post-*Booker* sentencing data that details district judges' behavior and results, the Commission reports its statistics under general crime labels, months of confinement averages, and downward departures and variances, with and without a government or defense motion. Although the Commission's *Booker* Reports are publically available, this data is not even part of the PSR in a specific case. If we gather the

data, then we should organize and analyze it in a way helpful to the district court during sentencing. For example, the PSR could include regional sentencing and district statistics in different categories of cases and specific offense conduct characteristics since 2005, state statistics of comparable offense conduct,⁴⁷ or variance percentages organized according to specific guidelines' provisions or factual commonalities. For example, in a fraud case, a sentencing judge could focus on data related to sentences that applied a particular enhancement or involved a threshold level of loss or victims.

This does not happen currently, but it could soon. If this data is available already and used so widely elsewhere in business and society, then the federal government should use the information to assist in one of our most important societal determinations, the sentencing of criminal defendants.

B. Comparative Cases, Keywords, and User-Optimized Results

Next, the Probation Office could provide or make available *more* user-optimized information to district judges before sentencing. The PSR, a static report developed from other reports, is outdated and lacking functionality. Competitive industry long ago would have organized and made searchable a comparable case analysis from hundreds of similar decisions made each day through the country. Instead, a district judge considers only her own prior cases or, at best, the other judges in the building. More comparable cases could inform the court's discretion at sentencing.

In the age of optimized search results, the judiciary should devote resources to a database capable of geographic, judge-specific, and other "search term" limitations to isolate similar cases. After *Booker*, the district court ideally should better explain the reasoning underlying its imposed sentences. District judges should benefit from the reasoning offered by their colleagues—and not just the judge down the hall. Each imposed sentence, set of findings, judgment, and sentencing hearing transcript provides numerical information outside of the Guidelines' numbers, coupled with analysis and reasoning. Imagine if one federal court could access a database that captured all post-*Booker* sentences, logically coded with tags and search terms to facilitate a user-optimized search.

The database, even if not searched by the sentencing judge in a given case, could produce a digest of comparable cases, complete with a summary of the underlying judicial reasoning and charts of the imposed sentences. Conceivably, the database could be closed and available only internally to the network of district judges, and thus, judges could offer additional (internal use only) notes and tags to assist the next judge handing down a sentence to a similarly situated defendant. In a white-collar case, for example, the defendant's applicable guideline may call for 120–132 months' imprisonment based upon the amount of loss and number of victims. The comparable case database, however, may reveal that in fraud cases with the same loss and

number of victims around the country, judges sentenced on average only 65 months' imprisonment and only 14 percent of courts imposed a Guideline sentence, followed by the reasoning of several federal judges. The numbers and reasoning could truly inform the next judge's discretion.

C. Recommendations or Contractual Agreements of the Parties

Prosecutors, working with the defense, are better positioned to resolve cases and justify fair and reasonable sentences than federal district judges. Federal Rule of Criminal Procedure 11(c)(1) permits prosecutors and counsel for criminal defendants to jointly recommend⁴⁸ or contract for a binding or "agreed-upon" sentence.⁴⁹ As compared to district judges, the prosecution and defense are in the *best* position to articulate *their* justification for a recommendation or an agreed-upon sentence in a written plea agreement and in open court. Yet, the parties rarely use Rule 11(c)(1) and, therefore, seldom provide their joint recommendation to district judges.

District judges cannot participate in plea discussions. But the parties may and should negotiate a specific, numerical outcome and communicate it to the court. By comparison, the joint recommendation of the parties controls sentencing in the military justice system. In state court, the parties routinely negotiate and jointly propose sentencing recommendations to the court. Somewhere along the way, the unwritten (and judge-by-judge) rule in most federal courts discouraged federal criminal litigants from doing the same, despite the clear intent of the legislators in Rule 11(c)(1).

Most federal sentencing hearings proceed without *any* joint recommendation or specific agreement from the parties. Many district judges, because of their long struggle for discretion, simply disfavor agreed-upon sentences from the parties. Because defense attorneys would support more joint recommendations and agreements that, by their very nature, fall below the applicable Guideline range, it is the judiciary and the U.S. Department of Justice that stand in the way of the procedural change. DOJ could change this policy immediately with an Attorney General directive to all prosecutors. The federal judiciary similarly could invite recommendations and agreements in the district "local rules" or local practice.

A district judge should find *this* information from the parties more meaningful than the distracting and misleading Guidelines. Ironically, the Supreme Court intended the advisory Guidelines to promote judicial discretion to ensure uniform, proportional, and fair punishment. To do so, the district court gives great weight to arbitrary numbers and calculations assigned by a legislatively created agency without regard for individual defendants facing sentencing. The court, at the same time, discourages or wholly rejects agreed-upon input from the government who brought the case to court and the individual facing sentencing. Although joint recommendations and binding plea agreements do suffer from some limitations, these tools are far

more reliable than the Guideline numbers that currently dominate the sentencing court's attention.

IV. Conclusion

If the goal is better judicial reasoning for federal sentences, then do not force judges to calculate and consider distracting and misleading numbers in the Guidelines. We must provide better, competing information—*more* numeric data, other than the numbers in the Guidelines, as well as searchable, non-numeric description to the courts. With a smart and pointed reallocation of resources, the federal criminal justice system could move away from the arbitrary and unhelpful information provided to judges at sentencing toward useful and meaningful information.

Notes

- * Associate Professor of Law and Director of the Litigation Center at Golden Gate University School of Law. Professor Porter previously served as a Senior Trial Attorney in the Department of Justice's Criminal Division, Fraud Section, and as an Assistant U.S. Attorney.
- ¹ 543 U.S. 220 (2005).
- ² See 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, 67–70 (2007) (summarizing the ebb and flow of judicial discretion in federal sentencing).
- ³ *Booker*, 543 U.S. at 233 (holding that the once-mandatory guidelines would be relegated to "advisory").
- ⁴ *Id.* at 245–46 (setting out the new process of federal sentencing with "advisory guidelines," whereby the district court must continue to calculate, settle objections under, and "consider" the Guidelines).
- ⁵ Jelani Jefferson Exum, *The More Things Change: A Psychological Case Against Allowing the Federal Sentencing Guidelines to Stay the Same in Light of Gall, Kimbrough, and New Understandings of Reasonableness Review*, 58 CATH. U. L. REV. 115, 124 (2008) ("Researchers have explained that '[t]o the extent that judges use different judgmental anchors to make their sentencing decisions, the resulting sentences are likely to differ'" (citing Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCHOL. 1535, 1537 (2001))).
- ⁶ See Lana L. Freeman, *Sentences Should Be Reasonable, Not Shocking: A De-Emphasis On Loss for Federal Securities Fraud Sentencing*, 2012 U. ILL. L. REV. 969 (2012) (Note); see Derick R. Vollrath, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001, 1012 (2010) ("[T]he key determinant of a white-collar criminal defendant's sentence is the amount of the loss.").
- ⁷ See *infra* note 8 (Keynote) (comparing a particularly "evil" offender who targeted widows at a lesser loss total against a less immoral higher loss defendant). Judge Rakoff called the reliance on loss amounts to drive sentencing as "kind of nuts." *Id.*
- ⁸ As referenced throughout this article, Judge Rakoff delivered the keynote address at the 27th Annual National Institute on White Collar Crime in Las Vegas on March 7, 2013 [hereinafter, Keynote]. Judge Rakoff's Keynote is revised and printed in this Issue. (Jed S. Rakoff, *Why Federal Sentencing Guidelines Should Be Scrapped*, 26 FED. SENT. REP. 6 (2013).) Judge Rakoff described his frustration with the Guidelines, as a set of numbers "drawn from nowhere" that continue to steer most federal judges imposing criminal sentences.
- ⁹ See 18 U.S.C. § 3553(a).

- 10 See *supra* note 8 (discussing Judge Rakoff's keynote address and an article about it).
- 11 Wes R. Porter, *Viewpoint: Sentencing Guidelines Needn't Be "Scrapped,"* THE RECORDER (March 15, 2013) (questioning Judge Rakoff's contention that the Guidelines can be "scrapped" and discussing changes to move toward a better process in federal sentencing).
- 12 See Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 STAN. L. REV. 37, 46 (2005) (criticizing the Guidelines and similar schemes that compel judges to impose sentences "calculated by means of mechanical scoring systems . . . rather than by looking closely at the circumstances of individual cases").
- 13 See *supra* note 8 (Keynote).
- 14 *Id.*
- 15 *Id.*
- 16 The numbers and calculations in the Guidelines dominate the judge's attention at sentencing. Instead, the organization and structure of the Guidelines could represent "considerations" for the court to weigh without the accompanying numbers and calculations. The court's weighing of pertinent factors in fashioning a sentence would be more meaningful than calculating unjustified numbers. If the Guidelines were meant to represent "the expert attempt" of the Commission to "weigh [the § 3553(a)] factors in a variety of situations" then, with the numbers and calculations, that attempt falls short. *United States v. Terrell*, 445 F.3d 1261, 1265 (10th Cir. 2006).
- 17 See *infra* Section III (proposing competing information to benefit the district judges at sentencing).
- 18 See Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 785 (2006) (describing how district judges did not honor the sentencing goals when mandatory). "Rising departure rates [from the Commission's mandates] can thus fairly be characterized as an indication that many judges lack a strong commitment to the guidelines' vision of uniformity." *Id.*; Comment of Judge Patti B. Saris, Chair, United States Sentencing Commission, On the Supreme Court's Decision in *United States v. Peugh* (June 10, 2013) available at http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20130610_News_Advisory.pdf: "The Supreme Court today reaffirmed that the Guidelines perform a meaningful role in federal sentencing. The Court recognized that the post-Booker federal sentencing system aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines, and all members of the Court recognized the continuing influence of the Guidelines."
- 19 See Families Against Mandatory Minimums (FAMM), "Federal Mandatory Minimum Sentences Passed, Expanded, or Increased by Congress, 2002–2012," available at <http://www.famm.org/Repository/Files/Chart%20Fed%20MMs%20passed%2002-12%208.6.12.pdf> (summarizing in a chart the proliferation of federal mandatory minimum legislation from 2002 to 2012) and "Federal Mandatory Minimums," available at <http://www.famm.org/Repository/Files/Chart%20All%20Fed%20MMs%202.25.13.pdf> (summarizing in a chart all federal mandatory minimums); cf. Justice Safety Valve Act of 2013, § 619 (Senate bill proposed by Senators Patrick Leahy and Rand Paul) (fighting to give district judges more discretion including from mandatory minimums set forth by statute); George Will, *Leahy and Paul Plan on Prison Sentences Makes Sense*, WASHINGTON POST, June 5, 2013, available at http://www.washingtonpost.com/opinions/george-will-leahy-and-paul-plan-on-prison-sentences-makes-sense/2013/06/05/9731afba-cdfc-11e2-8845-d970cccb04497_story.html.
- 20 John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 HOFSTRA L. REV. 639, 640–41 (2008) (stating that "the Commission has attempted to strip prosecutors of a power they have had for more than half a century"—the power to negotiate and enter into meaningful plea agreements).
- 21 See *supra* note 8 (Keynote).
- 22 See *infra* Section I.C (describing the current information in U.S. Probation's Presentence Report).
- 23 See Wes R. Porter, *The Pendulum in Federal Sentencing Can Also Swing Toward Predictability: A Renewed Role for Binding Plea Agreements Post-Booker*, 37 WM. MITCHELL L. REV. 469 (2010) (arguing that the Court's post-Booker sentencing procedure offers individual defendants less predictability).
- 24 See Fed. R. Crim. P. 11(c)(1) (setting forth the under-utilized parties' sentencing recommendations and binding agreements about sentencing outcomes).
- 25 See Bureau of Justice Statistics, Office of Justice Programs, *2009 Federal Justice Statistics*, tbl. 10, at 12 (2011), available at <http://www.bjs.gov/content/pub/pdf/fjs09.pdf> (reporting that 90.7% of cases were resolved by guilty pleas in 2009). "Although reliable statistical information is limited, one recent estimate indicated that guilty pleas account for the disposition of as many as 95% of all criminal cases." Fed. R. Crim. P. 11 Advisory Comm. Notes, 1974. "The great majority of all defendants against whom indictments or informations are filed in the federal courts plead guilty. Only a comparatively small number go to trial." *Id.* at Advisory Comm. Notes, 1966.
- 26 Fed. R. Crim. P. 11(c)(1)(B) & (C).
- 27 See, e.g., *United States v. Seidman*, 483 F. Supp. 156, 158 (D. Wis. 1980) ("At the outset, the Court would note that it never will accept a [binding] plea agreement. It is this Court's prerogative to determine the type of sentence that should be imposed upon a defendant for the offense of which he or she has been adjudged guilty."); cf. *United States v. Coney*, 390 F. Supp. 2d 844, 845 (D. Neb. 2005) ("When such a plea agreement smells too much like cow manure siphoned from a feedlot after a swampy, summer rain, judges should not pretend the odor is lilac. On the other hand, if the plea agreement stinks, but the stench is more like kitty litter than cow manure, a judge should hold his or her nose and move on. The trick is to discern the difference.").
- 28 See Steve Y. Koh, *Reestablishing the Federal Judge's Role in Sentencing*, 101 YALE L.J. 1109, 1120–21 (1992) (discussing the prosecutorial gamesmanship inherent in gathering information for the court's consideration at sentencing and in U.S. Probation's presentencing reports).
- 29 See Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 135398 Stat. 1837 (1987), reprinted in 1984 U.S.C.A.N. 3182; S. Rep. No. 98-225, at 38–59 (collectively S. Rep. No. 98-225).
- 30 See, e.g., William W. Wilkins Jr., *The Federal Sentencing Guidelines: Striking an Appropriate Balance*, 25 U.C. DAVIS L. REV. 571, 584 (1992). "In the end, the Commission had to balance the comparative virtues and vices of broad, simple categorization with detailed, complex subcategorization and devise a system that could most effectively meet the statutory goals of sentencing reform." *Id.* at 575.
- 31 U.S.S.G. § 2B1.1 (setting out the loss to enhancement correlation, as well as other enhancements).
- 32 See *supra* note 6 (discussing the dominance of the loss calculation in white-collar sentencing).
- 33 See *supra* note 8 (Keynote).
- 34 See *Mistretta v. United States*, 488 U.S. 361, 364 (1989) ("Congress delegated almost unfettered discretion to the sentencing judge to determine a convicted defendant's sentence, but a review of the legislative history strongly suggests that the sentencing disparity that Congress hoped to eliminate did not stem from prosecutorial discretion, but

instead from unchecked judicial discretion in formulating sentences.”).

³⁵ *Booker*, 543 U.S. at 233–34.

³⁶ 18 U.S.C. § 3553(a).

³⁷ See U.S. Sentencing Commission, 2012 *Booker* Report, 89–90 (2013), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/Part_A.pdf (“For offenses in the aggregate, the average extent of the reduction for non-government sponsored below range sentences has been approximately 40 percent below the guideline minimum” since *Booker*.).

³⁸ See *supra* note 5 (discussing “anchoring” and the psychological effects of Guidelines on judges).

³⁹ *Rita v. United States*, 551 U.S. 338, 341 (2007) (“The federal courts of appeals review federal sentences and set aside those they find ‘unreasonable.’” (citing *Booker*, 543 U.S. at 261–63)); *United States v. Gall*, 552 U.S. 38, 49–50 (2007); *Kimbrough v. United States*, 552 U.S. 85, 91 (2007).

⁴⁰ Dan Kusnetzky, *Look out, Big Data is coming your way*, Zdnet.Com (Feb. 16, 2010), available at <http://www.zdnet.com/blog/virtualization/what-is-big-data/1708>.

⁴¹ See “Yelp” (n.d.), available at <http://www.crunchbase.com/company/yelp>: “By the end of Q4 2012, Yelpers had written more than 36 million rich, local reviews, making Yelp the leading local guide for real word-of-mouth on everything from boutiques and mechanics to restaurants and dentists.”

⁴² See Fitbit at www.Fitbit.com (“we aim to create innovative, inspiring products and online services that harness the power of new technologies to make people more aware of their everyday activities and motivate them to do more”—including steps, calories, heart rate, sleep patterns, etc.).

⁴³ Amazon.Com review of Michael Lewis, *Moneyball: the Art of Winning An Unfair Game* (2004), available at <http://www.amazon.com/Moneyball-The-Winning-Unfair-Game/dp/0393324818> (“[T]he real jackpot is a cache of numbers—

numbers!—collected over the years by a strange brotherhood of amateur baseball enthusiasts: software engineers, statisticians, Wall Street analysts, lawyers and physics professors. [paragraph] What these geek numbers show—no, prove—is that the traditional yardsticks of success for players and teams are fatally flawed. Even the box score misleads us by ignoring the crucial importance of the humble base-on-balls. This information has been around for years, and nobody inside Major League Baseball paid it any mind. And then came Billy Beane, General Manager of the Oakland Athletics.”).

⁴⁴ See Khan Academy, at <https://www.khanacademy.org/> (“We’re a not-for-profit with the goal of changing education for the better by providing a free world-class education for anyone anywhere”); see also *The World’s 100 Most Influential People in 2012*, Time.Com, available at http://www.time.com/time/specials/packages/article/0,28804,2111975_2111976_2111942,00.html.

⁴⁵ See JEAN-MARIE DRU, *DISRUPTION: OVERTURNING CONVENTIONS AND SHAKING UP THE MARKETPLACE* (1996) (“Disruption is about uncovering the culturally embedded biases and conventions that shape standard approaches to business thinking and get in the way of clear, creative thinking. It’s about shattering those biases and conventions and setting creativity free to forge a radical new vision of a product, brand, or service. It’s about spearheading change rather than reacting to it.”).

⁴⁶ Congress already mandates the Commission to collect and report on federal sentencing data as part of its stated mission. 28 U.S.C. § 994(o) (2010).

⁴⁷ Christine DeMaso, *Advisory Sentencing and the Federalization of Crime: Should Federal Sentencing Judges Consider the Disparity Between State and Federal Sentences Under Booker?*, 106 COLUM. L. REV. 2095, 2099 (2006).

⁴⁸ Fed. R. Crim. P. 11(c)(1)(B).

⁴⁹ Fed. R. Crim. P. 11(c)(1)(C) (called a “C” plea or a “binding plea agreement”).