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# THE BUREAUCRATIC TAKEOVER OF CRIMINAL SENTENCING

Maimon Schwarzschild\*

## I. INTRODUCTION

A tendency towards more bureaucracy is notable in various public and private American institutions in recent times. The courts have not been immune to this trend. Perhaps the most interesting and almost certainly the most consequential rise of bureaucracy over the courts in the past quarter century has been the transfer of power and discretion over criminal sentencing from federal judges to a bureaucratic sentencing commission. If only as a dramatic instance of growing regulatory power at the expense of the judiciary, it is worth considering how this happened, why it happened, what the legal consequences for the criminal justice system have been, and what are the social circumstances that help account for what happened.

## II. SENTENCING BEFORE SENTENCING REFORM

Throughout American history, until just fifteen years or so before the end of the twentieth century, judges—especially federal judges—had very substantial discretion over criminal sentencing.<sup>1</sup> It was relatively rare for criminal statutes in the United States even to stipulate a minimum prison sentence upon conviction.<sup>2</sup> A typical statute provided only a maximum: “no more than fifteen years” for example. Judges had power and discretion to impose any sentence—ranging from probation or no prison sentence at all, up to a maximum prison term fixed by the criminal statute under which the offender was convicted.<sup>3</sup>

American sentencing policy reflected a variety of theories or justifications for criminal punishment: the deontological principle of “just deserts”<sup>4</sup>—although non-academics would hardly use the word “deontological”—and the utilitarian or

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1. Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1248 (1997).

2. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9 (1998) (noting that, historically, the majority of federal criminal statutes stipulated only a maximum term of years and a maximum monetary fine).

3. *Id.* at 19.

4. Brian Forst & Charles Wellford, *Punishment and Sentencing: Developing Sentencing Guidelines Empirically from Principles of Punishment*, 33 RUTGERS L. REV. 799, 802–04 (1981).

consequentialist principles of general and specific deterrence,<sup>5</sup> incapacitation,<sup>6</sup> and rehabilitation.<sup>7</sup> For most of the twentieth century, pride of place went to rehabilitation, at least rhetorically, in legislative and authoritative public statements about the goal of imprisonment.<sup>8</sup> But legislation did not impose any clear criminological theory on judges, and judges—both at the federal and state levels—were overwhelmingly free to sentence in accordance with one or other, or a combination, or (most often) no explicit governing philosophy of punishment. Judges were free and responsible, that is, to impose a just sentence, as best the judge could judge, taking into account the circumstances, the characteristics of the particular offence and of the offender in each case.

That is not to say that the sentencing judge, or even the judiciary, had exclusive power over the punishment that would actually be inflicted. Federal judges commonly imposed “indeterminate sentences” during most of the 20th century: a prison sentence would be “up to” a stated period of years (or months), equal or less than the statutory maximum for the offense.<sup>9</sup> This was in accordance with the rehabilitative ideal.<sup>10</sup> The theory was that the prisoner would be considered for parole, and released from prison, once the prisoner was rehabilitated (or was deemed to be).<sup>11</sup> A federal prisoner was eligible for parole, for example, after serving one-third of his or her sentence.<sup>12</sup> The parole decision was in the hands of an administrative Parole Commission, not the court.<sup>13</sup> On average, federal prisoners actually served approximately sixty percent of the maximum to which they were sentenced.<sup>14</sup> Judges were well aware of all this, of course, and could take it into account in deciding upon a sentence.<sup>15</sup>

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5. STITH & CABRANES, *supra* note 2, at 14 (defining general deterrence as the discouraging of others from committing crimes, and specific deterrence as “discourag[ing] *the defendant* from committing more crimes”) (emphasis added).

6. STITH & CABRANES, *supra* note 2, at 14 (noting that criminal sanctions have the incapacitating effect of protecting others by removing the offender from the general population).

7. Derek Neal & Armin Rick, *The Prison Boom and Sentencing Policy*, 45 J. LEGAL STUD. 1, 2 (2016) (noting that the indeterminate-sentencing model was meant to promote rehabilitation—providing incentives for “good behavior and self-improvement”).

8. See Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker*, 89 N.Y.U. L. REV. 1268, 1280 (2014).

9. *Id.*

10. *Id.*

11. See STITH & CABRANES, *supra* note 2, at 17.

12. See Stith & Cabranes, *supra* note 1.

13. DAVID J. ROTHMAN, *Crime & Delinquency: Sentencing Reforms in Historical Perspective* 631, 637 (Anne Newton, 1983).

14. See Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform, U.S. SENTENCING COMM’N 45 (Nov. 2004), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15\\_year\\_study\\_full.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf).

15. See STITH & CABRANES, *supra* note 2, at 19.

### A. The Sentencing Reform Movement

This entire approach to criminal sentencing was challenged—with growing political resonance—during the 1970s and early 1980s, for essentially three very different reasons and from at least two very different ideological points of view.<sup>16</sup>

The first objection was that sentencing was arbitrary and depended on the whim, or at least upon the predilections or prejudices, of the judge who happened to be assigned to a case.<sup>17</sup> Your judge might be “Cut ‘em-loose Bruce”—alluding to an actual New York State judge named Bruce Wright, who claimed that he should instead be nicknamed “Civil” Wright,<sup>18</sup> or your judge might instead be “Maximum John”—the sobriquet of John Sirica, the federal judge who (righteously or self-righteously, depending on your point of view) helped bring down President Richard Nixon.<sup>19</sup> A leading critic of this “judicial lottery” was Marvin Frankel, himself a federal judge,<sup>20</sup> who denounced the “unruliness” and the “unbridled power” of judges as “terrifying and intolerable” and called for a sentencing commission that would provide a “chart or calculus” to rein in judicial discretion over sentencing.<sup>21</sup>

A second objection came essentially from civil rights advocates, who were concerned that judicial discretion enabled unfavorable bias against minority and poor defendants.<sup>22</sup> It was this concern—from the political Left—that prompted Senator Edward M. Kennedy to take up the cause of sentencing reform with the aim of reducing judicial discretion over criminal sentencing.<sup>23</sup>

A third objection came instead from the political Right: from critics of judicial leniency who urged that judges—federal judges in particular—were failing or refusing to sentence severely enough, and hence failing adequately to deter and punish crime,<sup>24</sup> at a time when crime and disorder had grown rapidly during the later 1960s and 1970s.<sup>25</sup>

These disparate political forces, usually so much at odds with one another, came together in Congress and led to the enactment of the Sentencing Reform Act of 1984, sponsored by Senator Kennedy.<sup>26</sup>

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16. See Frank O. Bowman III, *Debate: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 374, 376–77 (2010).

17. See Yang, *supra* note 8, at 1281.

18. See Marc Galanter, Frank S. Palen, & John M. Thomas, *The Crusading Judge: Judicial Activism in Trial Courts*, 52 S. CAL. L. REV. 699, 729–30 (1979); Peter Kihss, *Judge Wright Terms His Attack on Officers Possibly ‘Excessive,’* N.Y. TIMES, July 26, 1979, at B8.

19. See Robert L. Jackson, *John J. Sirica, Watergate Case Judge, Dies at 88*, L.A. TIMES (Aug. 15, 1992), [http://articles.latimes.com/1992-08-15/news/mn-4868\\_1\\_watergate-scandal](http://articles.latimes.com/1992-08-15/news/mn-4868_1_watergate-scandal).

20. STITH & CABRANES, *supra* note 2, at 35.

21. Marvin E. Frankel, *Criminal Sentences: Law Without Order* 5, 49, 113–14 (1973).

22. See Yang, *supra* note 8, at 1281.

23. See STITH & CABRANES, *supra* note 2, at 38–43.

24. See Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1247 (2005).

25. Bowman III, *supra* note 16, at 374.

26. STITH & CABRANES, *supra* note 2, at 43–48.

## B. The Federal Sentencing Guidelines

The Act created a United States Sentencing Commission, with (eventually, after the law was amended) seven members: three of them federal judges, and a staff of about one hundred.<sup>27</sup> The commission was empowered—and required—to issue “sentencing guidelines” for the federal courts.<sup>28</sup> The Commission declared (without clear statutory authority) that these Guidelines were not what is usually meant by the word “guidelines”; rather, that they were compulsorily binding on federal judges.<sup>29</sup> The federal courts of appeals—and ultimately the Supreme Court of the United States—undertook to enforce compliance by federal district judges, and enforce it they did.<sup>30</sup>

The Guidelines were—and are—issued and subsequently amended by the Commission without the procedural safeguards otherwise applicable to federal administrative rulemaking. The Commission does not deliberate in open forum;<sup>31</sup> there is no public notice-and-comment procedure;<sup>32</sup> the Commission is not required to provide rationales for new rules,<sup>33</sup> and the rules themselves are not subject to appeal or judicial review.<sup>34</sup>

The Guidelines are immensely detailed and “algebraic” in their application. The centerpiece of the Guidelines is the Sentencing Table, or grid. It lists 43 “Offense Levels” vertically, and 6 categories of “Criminal History” (i.e. number and seriousness of past offenses) horizontally.<sup>35</sup> The offense level for each criminal offense is fixed by the guidelines, the level varying—levels added or subtracted—for further circumstances specified in elaborate detail in the Guidelines. At the

27. U.S. SENTENCING COMM’N, An Overview of the United States Sentencing Commission 3 (2011), [http://isb.ussc.gov/files/USSC\\_Overview.pdf](http://isb.ussc.gov/files/USSC_Overview.pdf).

28. Yang, *supra* note 8, at 1269–71.

29. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 248 (1993). Initially, congressional concerns over a mandatory guidelines regime were assuaged by language inserted into the original Senate Bill that only required judges to “consider” a wide range of factors in fashioning sentences. *Id.* at 244. However, a subsequent amendment to the Bill inserted a provision that also required judges to “impose a sentence within the range [specified by the guidelines] unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a different sentence.” *Id.* at 245. The Sentencing Commission then took it upon itself to determine the correct interpretation of the Bill’s contradictory language, declaring the Guidelines mandatory and granting itself a great expansion of power. *See id.* at 247–48.

30. *See id.* at 248 n.152 and accompanying text. The Supreme Court upheld the Guidelines as constitutional and legally binding in *Mistretta v. United States*, 488 U.S. 361 (1989), (Scalia, J. dissenting). *See also* Bowman III, *supra* note 16, at 420 n.262 (“[F]or some years after the Guidelines were promulgated, the Commission was often at odds with district judges as it sought to establish its authority. In this early contest, the Supreme Court and the courts of appeals generally backed the Commission, holding that the Guidelines were indeed legally binding.”).

31. See MICHAEL TONRY, SENTENCING MATTERS 72 (Michael Tonry & Norval Morris eds., 1996).

32. Penal Populism, Sentencing Councils and Sentencing Policy 107–08 (Arie Freiberg & Karen Gelb eds., 2014).

33. *Id.*

34. *Id.*

35. See U.S. SENTENCING COMM’N, U.S. SENTENCING COMMISSION GUIDELINES MANUAL 420 (2016), <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf>.

intersection of the offense level and the criminal history category is a “box” with a range of months-of-imprisonment, within which the judge must sentence the convicted offender.<sup>36</sup>

The Sentencing Table alone does not begin to represent the complexity of the Guidelines, which are as voluminous as the Internal Revenue Code (a byword for impenetrable complexity).<sup>37</sup> For example, the Guidelines reduce the offense level for many offenses in case of “minor” participation in the offense, and more so for “minimal” participation.<sup>38</sup> These concepts are hazily defined, but it can make a great difference to the sentence depending on whether participation is found to be “minor” or “minimal.”<sup>39</sup> Likewise, the offense level goes up for “leadership” or “managerial” roles in the offense,<sup>40</sup> the concepts once again being hazily defined.<sup>41</sup> It can make a great difference to the sentence depending upon whether the offender is found to have exercised “leadership” or to have been “managerial.”<sup>42</sup>

### 1. *The Guidelines in Practice*

The Guidelines thus substitute a regulatory scheme of sentencing, elaborated in a very bureaucratic style, issued by a central administrative body and applicable nationwide, in place of any individual moral confrontation between judge and offender. The stated goal—or at least, one key goal—is equality and elimination of disparities in sentencing.<sup>43</sup> Another implicit goal is surely to reduce reliance on the judgment of judges, themselves admittedly fallible human beings.

The Guidelines further reduce the “human element” in sentencing by explicitly forbidding judges to consider such human factors as the offender’s education and vocational skills,<sup>44</sup> drug or alcohol dependence,<sup>45</sup> youthful

36. *See id.*

37. *SEE* ROGER W. HAINES, JR., FRANK O. BOWMAN, III & JENNIFER C. WOLL, FEDERAL SENTENCING GUIDELINES HANDBOOK 18–20 (Nov. 2002 ed.).

38. U.S. SENTENCING COMM’N, U.S. SENTENCING COMMISSION GUIDELINES MANUAL 364 (2016).

39. *See id.* at 366. “Minimal participant” is defined as one who is “plainly among the least culpable of those involved in the conduct of a group,” while “minor participant” is defined as one who is “less culpable than most other participants in the criminal activity, but whose role could not be described as minimal.”

40. *Id.* at 363.

41. *See id.* at 364. Rather than provide even general definitions for “leadership” or “managerial” roles, the Guidelines instead specify a set of factors for the judge to consider when determining the defendant’s role, including “exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.” *Id.*

42. It is not left to the unreviewable – or deferentially reviewed – discretion of the trial judge to decide whether the offender’s role was leadership or managerial, minimal or minor: rather, it is treated as a question of law, reviewable as such. *See* Stith & Cabranes, *supra* note 1, at 1267. “Once the trial judge renders a decision, the distinction between ‘minor’ and ‘minimal’ participation becomes the business of the federal courts of appeals.” There were “869 [appellate] cases reported on this distinction alone” as of September 1996. *Id.* at 1267 n.74.

43. *See* STITH & CABRANES, *supra* note 2, at 31; Yang, *supra* note 8, at 1268.

44. U.S. SENTENCING GUIDELINES MANUAL § 5H1.2 (U.S. SENTENCING COMM’N 2016).

45. *Id.* § 5H1.4.

upbringing,<sup>46</sup> employment history,<sup>47</sup> family ties and responsibilities,<sup>48</sup> community ties,<sup>49</sup> and charitable acts (or lack thereof).<sup>50</sup> Excluding these factors from consideration opens the Guidelines to the charge that “[u]nder the Guidelines, judges thus confront defendants as numbers rather than as human beings”,<sup>51</sup> imposing a “cookie-cutter” and even “Kafkaesque” approach.<sup>52</sup> Yet permitting these considerations would almost inevitably mean relying more on the discretion of the sentencing judge, with the likelihood – indeed the virtual certainty – that different judges would exercise that discretion differently even in similar cases.

The Guidelines, and the underlying Acts of Congress,<sup>53</sup> took several further steps which greatly changed the framework of federal penology. First, applicable sentences were increased in severity.<sup>54</sup> In principle, the Commission’s policy was to survey sentences that had actually been imposed, as a guide to prison terms to be stipulated in the Guidelines.<sup>55</sup> But at many points, the Commission decided—unreviewably of course<sup>56</sup>—that there should be longer, more severe terms of imprisonment, and laid down such sentences accordingly.<sup>57</sup> This was done in particular for many “white collar” offences (thus pleasing the political Left, roughly speaking) and for many drug offences (thus pleasing the political Right, roughly speaking).<sup>58</sup> It was done for many non-“white collar” and non-drug offenses as well.<sup>59</sup>

46. *Id.* § 5H1.12.

47. *Id.* § 5H1.5.

48. *Id.* § 5H1.6.

49. *See id.*

50. *Id.* § 5H1.11. While age, mental and emotional condition (apart from legal insanity), physical condition, and military and public service may be considered relevant when determining whether a departure is warranted, they may only be considered if the characteristics, “individually or in combination with other offender characteristics, [are] present to an unusual degree [such that they distinguish] the case from the typical cases covered by the guidelines.” *Id.* § 5H1.1, 1.3, 1.4, 1.11

51. Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 39 (2005).

52. *Id.* at 40.

53. *See, e.g.*, Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984); PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003) (including the “Feeney Amendment” restricting “downward departures” from Guidelines sentences and abolishing appellate court deference to the sentencing decisions of trial judges).

54. *See* J.C. Oleson, *Blowing Out All the Candles: A Few Thoughts on the Twenty-Fifth Birthday of the Sentencing Reform Act of 1984*, 45 U. Rich. L. Rev. 693, 709–14 (2011).

55. *Id.* at 709–10.

56. *See* Freiberg, *supra* note 32 and accompanying text.

57. *See* STITH & CABRANES, *supra* note 2, at 59–66.

58. *See* Oleson, *supra* note 54, at 710–11.

59. *See id.* at 711. Guidelines sentences were set above historical levels, for example, for robbery, murder, aggravated assault, immigration, as well as rape. U.S. SENTENCING COMM’N, *supra* note 14, at 47. To be fair, the trend toward more severe federal sentences has not been solely at the instance of the Commission. Congress is responsible for much of the increase in prison terms in recent decades. New, more rigorous minimum prison terms have been enacted for many offences, *see, e.g.*, 21 U.S.C. § 841(b) (2010) (increasing the penalty range where specified amounts of drugs are involved); and imposing a minimum and doubling the maximum sentence for drug offences committed within 1000 feet of schools, colleges, playgrounds, public housing, etc. 21 U.S.C. § 860(a) (1994). Congress moreover enacts “directives” to the Sentencing Commission, almost invariably calling for more severe sentences. *See*

Second, parole was abolished in the federal system.<sup>60</sup> Early release on parole was no longer to be available to federal prisoners; to this day, there is no possibility of parole for prisoners sentenced after 1987 when the Reform Act and the Guidelines took effect. (A “good time” reduction of about fifteen percent of the sentence is still available on the basis of good conduct in prison.)<sup>61</sup>

Third, the Guidelines originally called for “real offense” sentencing.<sup>62</sup> This meant that once a defendant is convicted—either by proof of the statutory elements of an offense, or by a plea of guilty to those elements—the judge must take into account other crimes or offenses “in the same course of conduct” and enhance the sentence (i.e. make it more severe) accordingly. This applied even if the jury was never confronted with any allegation of such conduct, nor the defendant in case of a guilty plea.<sup>63</sup> This “relevant conduct” needed not be proved beyond a reasonable doubt: but only “more likely than not.”<sup>64</sup> Indeed, the Supreme Court held that even if the conduct was put to the jury as a separate count, *and the jury acquitted the defendant of it* (but convicted him or her of a “related” offense), the sentence still could and should be increased for it—often very substantially—just so long as the judge found the conduct to have been proved “by a preponderance of the evidence.”<sup>65</sup> Defense counsel must therefore advise a defendant charged with multiple “related” counts that “if you choose to go to trial, you would have to convince the jury to acquit you of all the charges, because if they convict you of a single count, even if they acquit you of all the others, you can still be punished for all the charges”.

## 2. *The Booker Decision; Cutting Back the Guidelines to Mere Guidelines; and Federal Sentencing Now*

This third aspect of the Guidelines regime, namely real-offense sentencing, led to a Supreme Court decision in 2005, *United States v. Booker*, which struck down the mandatory status of the Guidelines and declared them “advisory” instead.<sup>66</sup> The Guidelines, one might say, now became guidelines. Under the mandatory regime (i.e. from 1987 to 2005) an offender might have been convicted (or might have pleaded) to an offense which would yield a sentence in a given “box” on the sentencing grid. Since the Guidelines were mandatory, the maximum sentence in that “box” was, in effect, the maximum legal sentence. Then the “real offense”—not found by a jury or proved beyond a reasonable doubt—might put the offense in a new “box,” leading to a sentence harsher than the maximum in the first “box.” The Supreme Court in

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Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 GEO. MASON L. REV. 1001, 1023–24 (2001).

60. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 218(a)(4), 98 Stat. 1987, 2027 (1985) (repealing the federal parole system).

61. See 18 U.S.C. § 3624(b) (2008). The 15 percent reduction is derived from the ability of a prisoner to receive up to fifty-four “credit” days for each year they serve, with fifty-four days being roughly 15 percent of one year. *Id.*

62. See Bowman III, *supra* note 16, at 424.

63. U.S. SENTENCING COMM’N, U.S. SENTENCING COMMISSION GUIDELINES MANUAL § 1B1.3(a)(2) (2016); Bowman III, *supra* note 16, at 424.

64. See Bowman III, *supra* note 16, at 424.

65. See *United States v. Watts*, 519 U.S. 148, 157 (1997).

66. *United States v. Booker*, 543 U.S. 220, 259 (2005).

*Booker* held it unconstitutional for the offender to receive a harsher sentence, for acts not found by the jury or proved beyond a reasonable doubt (or confessed by guilty plea), than the maximum which could otherwise have been imposed.<sup>67</sup> The Court's solution was to render the Guidelines "advisory."<sup>68</sup> Judges must still take the Guidelines into consideration, but are not legally bound by them.<sup>69</sup> Now the statutory maximum is the maximum provided in the criminal statute itself.<sup>70</sup> (A punishment in the Guidelines never exceeds the statutory maximum: in the lesser "box" it would certainly be less than the statutory maximum.) In sum—putting an exceptionally complex decision as briefly as possible—*Booker* cut away the mandatory force of the Guidelines, at least in principle.

In the years since *Booker*, federal judges have largely continued to sentence within the Guidelines, notwithstanding that they are now advisory, and notwithstanding that a trial judge's sentence—even a sentence non-compliant with the Guidelines—is now seldom reversed on appeal.<sup>71</sup> On average, the Sentencing Commission has found that about eighty percent of post-*Booker* federal sentences comply with the Guidelines.<sup>72</sup> (There is some geographic variation in this: some federal districts and circuits are more compliant than others, and there is variation depending on the category of offence as well, but eighty percent is the nationwide average.)<sup>73</sup> The reasons for the relatively high degree of continued compliance are open to speculation. Some judges might respect the Guidelines on their merits. Some might feel that the Guidelines are a "safe harbor" against appeal and the risk of reversal. For many, no doubt, complying with rules—or what seem like rules—is the right thing to do. A regulatory system, once in place, achieves a kind of stickiness. It is not readily displaced.

What is clear is that in the era of the Sentencing Commission and the Guidelines—whether mandatory or advisory—the severity of the federal penal system has increased dramatically. The number of inmates in the federal prisons rose from about 25,000 in 1980 to over 205,000 in 2015.<sup>74</sup> "The average . . . time served by federal [prison] more than doubled from 1988 to 2012, . . . from 17.9 to 37.5 months."<sup>75</sup> Statutory minimum sentences, enacted by Congress during this era,

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67. *Id.* at 232.

68. *Id.* at 259.

69. *See id.* at 264.

70. *Id.* at 232; Kate Stith, *Principles, Pragmatism, and Politics: The Evolution of Washington State's Sentencing Guidelines*, 76 LAW & CONTEMP. PROBS. 105, 121 (2013).

71. Reversal seldom occurs because appellate court review of sentencing decisions is subject to the deferential "abuse-of-discretion standard." *See* Yang, *supra* note 8, at 1288, 1291 n.118.

72. *See* U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING (2012) [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part\\_A.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf). *But cf.* Bowman III, *supra* note 16, at 468 (calculating that as of 2009, federal sentences within Guidelines ranges were approximately sixty percent of all federal sentences).

73. U.S. SENTENCING COMM'N, *supra* note 72, at 75–88.

74. Nathan James, Cong. Research Serv., R42937, *The Federal Prison Population Buildup: Options for Congress 1* (2016).

75. *Prison Time Surges for Federal Inmates*, THE PEW CHARITABLE TRUSTS, Nov. 2015, at 1, (citation omitted).

especially for drug offences, account in part for the increases.<sup>76</sup> Increased sentences under the Guidelines, including a sharp cutback on the possibility of probation rather than prison, and the abolition of parole altogether, account for much of the rest. There has been an increase both in the proportion of federal offenders sentenced to prison, and in the length of the prison sentences actually served.<sup>77</sup>

### 3. *Ceding Power over Sentencing*

Whom have all these developments empowered at the expense of judges? First, the United States Sentencing Commission: a centralized bureaucratic body which fixes sentences (or rather, sentence ranges) without any personal encounter with individual offenders or victims or their particular circumstances. When the Sentencing Reform Act passed in 1984, creating the Commission and the Guidelines, there was resistance from many federal district judges. In the half-decade after the law was enacted, more than 200 district courts struck down all or part of the Act as unconstitutional,<sup>78</sup> and 179 district courts “invalidated the Guidelines” within one year after they went into effect.<sup>79</sup> But in 1989, these rulings were overturned by the Supreme Court, which upheld the constitutionality of the Act, the Sentencing Commission, and the compulsory force of the Guidelines.<sup>80</sup>

Second, the Probation Service, another body of civil servants. Until the Guidelines era, probation officers would prepare a background report on each convicted offender (unless the defendant waived the report): the judge would take the report into account in considering whether to release the defendant on probation rather than imposing a prison sentence.<sup>81</sup> Under the Guidelines, the role of the Probation Service was transformed. Now, the probation officer functions as an independent fact-finder, settling a version of the offense—including “related” offenses not charged or proved prior to conviction—and calculates the Guidelines sentence.<sup>82</sup> Defendants no longer have any power to waive the report.<sup>83</sup> (Indeed, “defense counsel have come to regard the probation officer as a second prosecutor, whose purpose is to review and then raise the Guideline calculations” of the prosecuting attorney.)<sup>84</sup> Probation officers are commonly described as “guardians of the guidelines.”<sup>85</sup>

Third, the prosecution. The severity of the Sentencing Guidelines, and of many federal criminal statutes, give prosecutors leverage to negotiate—realistically,

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76. *Id.*

77. *Id.* at 2–4.

78. See TONRY *supra* note 31.

79. See Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1337, 1403, 1435 (1998).

80. *Mistretta v. United States*, 488 U.S. 361, 374, 393, 397, 412 (1989) (with a lone dissent from Justice Scalia).

81. See Stith & Cabranes, *supra* note 1, at 1248–51.

82. *Id.* at 1256–57.

83. *Id.* at 1257.

84. *Id.* at 1258.

85. Douglas A. Berman, *Is Fact Bargaining Undermining the Sentencing Guidelines?*, 8 FED. SENT’G. RPT. 300, 301 (1996).

to compel—guilty pleas to lesser but often still very serious offenses.<sup>86</sup> The prosecutor also has the power to introduce new, “related,” offenses at sentencing, which the prosecutor need not prove beyond a reasonable doubt (only “more likely than not”) and which can increase the Guideline sentence significantly.<sup>87</sup> There have been cases of prosecution and conviction—or guilty plea—for robbery, then a showing of (related) murder at sentencing, and a guidelines sentence accordingly;<sup>88</sup> or prosecution for a small quantity of drugs, then a showing of a large quantity at sentencing, with far harsher Guideline punishment accordingly.<sup>89</sup> This prospect gives prosecutors yet more leverage to extract guilty pleas, because of the lower burden of proof at the sentencing phase than at actual trial. Further, the Guidelines provide only one standard reason for imposing a lighter sentence than the Sentencing Table otherwise requires: namely “that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense”—i.e. confession and giving evidence against confederates.<sup>90</sup> (Pity the defendant without information, or without confederates to betray!)<sup>91</sup> Crucially, the judge cannot find “substantial assistance” under the Guidelines unless the prosecutor certifies it and moves for a lighter sentence.<sup>92</sup> Altogether, if the power of federal prosecutors is not boundless, it might fairly seem so to a defendant or to anyone threatened with federal prosecution.

The rate of guilty pleas, accordingly, is now approximately ninety-seven percent of all federal prosecutions.<sup>93</sup> It was eighty-four percent in 1984, and around seventy-five percent in 1977:<sup>94</sup> still high, but not—before the Sentencing Reform Act—virtually every case. Jury trials in criminal cases, once thought a bulwark of Anglo-American liberty, are now exceedingly rare.

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86. See Frank O. Bowman III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 343–46 (2000) (describing the process of “charge bargaining”).

87. See *id.*

88. See STITH & CABRANES, *supra* note 2, at 140.

89. See Johan Bring & Colin Aitken, *Burden of Proof and Estimation of Drug Quantities under the Federal Sentencing Guidelines*, 18 CARDOZO L. REV. 1987, 1989 (1997) (noting that drug quantity at sentencing is the total quantity handled by the defendant—the “real offense”—rather than the amount charged).

90. U.S. SENTENCING COMM’N, U.S. SENTENCING COMMISSION GUIDELINES MANUAL 482-83 (2016).

91. Leniency for “substantial assistance”, i.e. for turning on confederates, goes against consistency in sentencing—the same punishment for the same offence—which is otherwise held out as a fundamental goal and justification of the Guidelines regime. See *United States v. Ives*, 984 F.2d 649 (5th Cir. 1993) (disparity of sentences among equally culpable co-defendants is no ground for objection to a sentence prescribed by the Guidelines). The use of the substantial-assistance motion by prosecutors also differs considerably from jurisdiction to jurisdiction—another factor against consistency. See Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 550 (1992).

92. STITH & CABRANES, *supra* note 2, at 123.

93. Mark Motivans, U.S. Dep’t of Just., Federal Justice Statistics, 2012 – Statistical Tables 17 (2015), <https://www.bjs.gov/content/pub/pdf/fjs12st.pdf>.

94. GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 223 (2003).

### C. Sentencing and the Federal System

It should be remembered, of course, that in the division of labor and jurisdiction between state and federal government in the United States, most criminal prosecutions—and hence most criminal sentences—are in state courts, with sentences served in state prisons. In 2016 there were about 1,317,565 inmates in state prisons in the United States.<sup>95</sup> With about 189,192 inmates in federal prison, this means that some eighty-seven percent of American inmates are in state prisons.<sup>96</sup> Traditionally, almost all criminal prosecution in America was under state law in state court, and punishment in state prisons or jails. (Murder, rape, robbery, burglary and more: all typically state offenses.) Until the second half, or final third, of the 20<sup>th</sup> century, ninety-five percent or more of American criminal convictions were in state court.<sup>97</sup> The recent expansion of federal drug laws, and of federal criminal legislation generally, has meant more federal prosecution and imprisonment. But the lion's share of ordinary criminal prosecution is still in state hands.

The growth in federal criminal law means that more crimes are now liable either to federal or state prosecution. (In theory, although not usually in practice, this makes the offender liable both to federal *and* state prosecution.) This is true of drug crimes in particular. Typically, federal and state prosecutors come to an agreement about which government—federal or state—will prosecute a given case.<sup>98</sup> In general, especially since the Guidelines went into effect, federal sentences are harsher—often much harsher—than the state sentence for the same offense.<sup>99</sup> (This is not true in every case, but it is generally true: and especially so in drug cases.) If one justification—probably the leading justification—for the Guidelines, and for the bureaucratic centralization of federal sentencing, was concern about sentencing discrepancies and a belief that equity requires uniformity, then the discrepancy between federal and state punishment (a discrepancy which tends to increase, as federal sentencing ratchets upward in severity) might seem to challenge the *raison-d'être* of the Guidelines regime.

### D. Sentencing Reform and Social Mistrust

The Sentencing Reform Act, and the Federal Sentencing Guidelines—whether they are formally compulsory or nominally advisory—represent an extraordinary transfer of authority and power from federal trial judges to a centralized and essentially non-judicial bureaucracy. It is worth considering what

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95. E. ANN CARSON, U.S. DEP'T OF JUST., PRISONERS IN 2016 4 (2018) (rev. Aug 7, 2018) <https://www.bjs.gov/content/pub/pdf/p16.pdf>.

96. *Id.*

97. *E.g.*, MATTHEW R. DUROSE ET AL, U.S. DEP'T OF JUST., FELONY SENTENCES IN STATE COURTS, 1998 1, (2001), <https://www.bjs.gov/content/pub/pdf/fssc98.pdf> (noting that in 1998, state courts accounted for ninety-five percent of felony convictions in the United States).

98. *See, e.g.*, Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239, 240–41 (2005) (noting the generally cooperative relationships between federal and state prosecutors).

99. *See id.* at 248. One of the most notable sentencing gaps is for firearms related charges which, under the federal system, often receive mandatory *minimum* sentences that exceed the *maximum* sentences permitted under state law. Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 674 (1997).

social forces might underlie such a divestiture. Mistrust of federal judges was surely animated on the one hand by the idea that judicial discretion invited abuse, specifically that it invited improper discrimination, especially racial discrimination, and this in an era of sharply heightened racial consciousness;<sup>100</sup> it was animated on the other hand by a widespread perception, both in Congress and among the public, that lenient judges—personally insulated from the effects of rapidly increasing crime and social breakdown—were failing to protect the public.<sup>101</sup>

More broadly, there has been erosion of trust in public institutions over the past generation or two in America. There is reason to believe that this is a consequence, in part, of the rapid evolution of American society in the direction of heterogeneity, diversity, and group (or grievance-group) consciousness. Robert Putnam, the Harvard political scientist—author of the well-known study of social breakdown and isolation, “Bowling Alone”<sup>102</sup>—reluctantly concludes that social heterogeneity in America does indeed erode public and private trust.<sup>103</sup> This does not, by itself, explain why power over criminal sentencing would be withdrawn from judges and turned over to an unelected and essentially unaccountable regulatory Commission. But when individual figures of authority, like judges, are increasingly mistrusted, there is a tendency to place or misplace faith in bureaucracy instead, with its attributes, real or imagined, of regularity, rationality, and impartiality.

#### E. Conclusion: The Present and Future of Bureaucratic Sentencing

Since the Supreme Court’s 2005 decision in *Booker*,<sup>104</sup> federal judges are required to calculate and to consider Guidelines sentences, and the “gravitational pull”<sup>105</sup> of the Guidelines is such that most federal sentences still conform to the Guidelines, but they are no longer legally obligatory. Perhaps this is a reasonable or at least a tolerable compromise. The advocates of the Sentencing Reform Act, both on the Left and on the Right, invoked serious considerations in favor of something like the Guidelines regime, after all -- as do critics of bureaucratic power over sentencing. The post-*Booker* settlement is not necessarily stable or permanent however. Advocates of stricter control of judicial sentencing continue to be concerned about sentencing disparities between judges, and about possible abuses of judicial discretion so long as the Guidelines are less than mandatory.<sup>106</sup> Members of Congress have suggested that the obligatory force of the Guidelines should be reinforced after *Booker*, and Judge William K. Sessions III, a former Chair of the Sentencing Commission, has proposed legislation “resurrecting” the mandatory – or “presumptive” – Guidelines. Sessions suggests various plausible ways that Congress

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100. See Yang, *supra* note 8, at 1280–81.

101. See TONRY, *supra* note 31, at 89.

102. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

103. See Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-first Century*, 30 SCANDINAVIAN POL. STUD. 137, 146–53 (2007).

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

105. *Bowman III*, *supra* note 16, at 468.

106. See, e.g., Yang, *supra* note 8 at 1274.

could restore, at least largely, the compulsory force of the Guidelines without violating the constitutional requirements laid down in *Booker*.<sup>107</sup>

Restoring the pre-Guidelines, pre-1984 approach to federal sentencing, on the other hand, would therefore be unlikely at this point, and perhaps not a good idea. Could bureaucratic control or influence over federal sentencing nonetheless be reduced, at least to some degree? This would probably require less partisan division in American society, less federalization of criminal law, or both. The case for centralized regulation of criminal sentencing is especially strong if sentences differ substantially—or seem to the public to do so—depending on the political party of the judge. There is already evidence that “female judges and Democratic-appointed judges issue shorter sentences and are more likely to depart downward from the Guidelines after *Booker*, compared to their male and Republican-appointed peers, respectively.”<sup>108</sup> It is obviously corrosive to a system of criminal justice that your sentence depends on the political party of your judge. If this is happening, or seems to be happening, the impulse to maintain or increase regulatory control over sentencing is liable to be irresistible.

The other engine behind bureaucratic regulation of sentencing is the federalization of criminal law: the expansion in the number and reach of crimes on the federal books.<sup>109</sup> A federal Circuit Judge puts it this way:

Any long-term effort to respect the virtues of individualized sentencing and consistency should account for the role that the federalization of crime has played in creating the problem . . . While Ohio has no obligation to sentence those who commit drug offenses within its borders consistently with those who do the same in North Dakota, Congress does have such an obligation. Anyone interested in balancing consistency with individualized sentencing ought to acknowledge that the task is harder for the Federal Government than for a State, and ought to keep that in mind each time someone proposes federalizing a new area of crime.<sup>110</sup>

So long as federal criminal jurisdiction continues to grow, the desire to monitor and control the sentencing discretion of the judges is likely to remain strong.<sup>111</sup>

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107. See 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, 346–50 (2011).

108. Yang, *supra* note 8, at 1277.

109. See generally Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, in *IN THE NAME OF JUSTICE* 43 (Timothy Lynch ed., 2009) (discussing the proliferation of federal criminal offenses).

110. Jeffrey S. Sutton, *An Appellate Perspective on Federal Sentencing After Booker and Rita*, 85 DENV. U. L. REV. 79, 91 (2007).

111. See generally William H. Pryor Jr., *Federalism and Sentencing Reform in the Post-Blakely/Booker Era*, 8 OHIO ST. J. CRIM. L. 515, 524–30 (2011) (concurring with Sixth Circuit colleague Jeffrey Sutton, *see supra* note 110, that creating too many federal crimes leads to pressure for excessive regulation of federal sentencing).

Whether those on the liberal or progressive Left who supported sentencing reform and a Guidelines regime, out of fear of judicial bias and over-harsh sentencing, have any reason to be pleased with the results up to now under the Guidelines is, to put it as gently as possible, uncertain. The trend toward more severe sentencing under the Guidelines, as well as under state laws in recent decades, surely had a disproportionate effect on black communities. An economists' study notes that "arrest rates for blacks have been at least four times greater than arrest rates for whites for decades. Thus, the shift to more punitive treatment for offenders had a much larger effect on the levels of incarceration rates among blacks than among whites."<sup>112</sup> It might be responded that minority communities suffer disproportionately from crime, and that more rigorous sentencing represents an effort to protect vulnerable and law-abiding people in minority communities. It is unlikely, however, that Senator Kennedy and left-leaning supporters of sentencing reform would have taken that view. Those on the Right, on the other hand, who supported the Sentencing Reform Act and the Guidelines in order to stiffen criminal sentencing in the federal courts did – it can fairly be said —largely and at least for a time achieve their goal.

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112. Neal & Rick, *supra* note 7, at 4–5.