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Guidance from Above and Beyond

Steven L. Chanenson*

*Villanova University School of Law, chanenson@law.villanova.edu

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Guidance from Above and Beyond

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Abstract

Criminal sentencing does not just happen in the courtroom. Some key sentencing decisions happen long before court convenes, while other critical sentencing decisions take place long after court adjourns. Although the public focuses primarily on the black-robed figure wielding the gavel, sentencing reflects decisions by a veritable parade of actors, including legislators, sentencing commissioners, police officers, prosecutors, juries, trial judges, appellate judges, and executive branch officials. All of these people guide and constrain the sentencing process. Through their official actions, they inform each other about what is happening in their corners of the sentencing drama, and prod their counterparts to respond appropriately. As the Supreme Court has written, the federal constitutional design assumes that the branches of government "converse with each other on matters of vital common interest."

Many of the points of communication, leverage, and decision that operate before the trial judge imposes the sentence—including the congressionally set maximum for the offense, mandatory minimums, and the Federal Sentencing Guidelines—have played a central role in the policy and scholarly debate following the Sentencing Reform Act of 1984. Less discussed over the past two decades—but just as vital—are several devices that can provide important post-sentencing guidance, communication, and action. These mechanisms can enhance a sentencing system's vitality by providing guidance from "above and beyond."

This Article explores three post-sentencing tools, and provides advice to Congress on how they could be used. Part I advocates for the meaningful appellate review of sentences. There are various ways to organize such review, and it remains unclear how the federal system will operate after the dust settles from the Supreme Court's recent decisions in Blakely v. Washington and United States v. Booker.

Regardless, Congress can build on the recognized value of sustained and substantial interchange between sentencers by taking tangible steps to improve the communicative role of appellate review and to reinforce its structural framework. For example, Congress can work to reduce appellate conflict over the Guidelines by creating a special appellate court, the Court of Appeals for Sentencing, which would resolve important questions of sentencing law.

Part II explores the role of discretionary parole release authority and concludes that a modest version of this device can offer important benefits in a post-Booker world. It observes that a properly structured indeterminate sentencing scheme, which by definition includes discretionary parole release, would both enable Congress to create a more tightly controlled front-end sentencing system if it so chose, and to institutionalize communication from the back-end sentencers.

Finally, Part III examines the possibility of Extended Sentence Review (ESR) for certain long-serving, older offenders. This type of hybrid review—part clemency and part discretionary parole release—may have a significant, but limited part to play in modern sentencing. At a systemic level, ESR, by evaluating past sentencing decisions, would offer insights and lessons that current sentencers can use to craft sentencing policy today. Nevertheless, responsible sentencing decisions at the front-end should restrict the need for substantial ESR activity.

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GUIDANCE FROM ABOVE AND BEYOND

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* Associate Professor of Law, Villanova University School of Law. J.D., University of Chicago Law School; M.S., B.A., University of Pennsylvania. Editor, *Federal Sentencing Reporter* (2000–present). Member, Pennsylvania Commission on Sentencing (2002–present). The views expressed are not necessarily those of the Pennsylvania Commission on Sentencing, its other members, or staff. I thank Bill Adams, Mark Bergstrom, Douglas Berman, Nora Demleitner, Richard Frase, Daniel Freed, Ann Juliano, Marc Miller, Mark Motivans, Kevin Reitz, Michael Tonry, and Ron Wright for their wise advice and counsel. I am also indebted to Amanda Dovidio, Shevon Scarafile, and Rebecca Soto for their excellent research assistance.

1. *See, e.g.*, Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L. J. 1681, 1721 & n.198 (1992) (identifying several sentencers); *see also* Franklin E. Zimring, *Making the Punishment Fit the Crime: A Consumer's Guide to Sentencing Reform*, *in* 12 OCCASIONAL PAPERS FROM THE LAW SCHOOL, THE UNIVERSITY OF CHICAGO LAW SCHOOL 4-6 (1977) (discussing "multiple discretions in sentencing").

and prod their counterparts to respond appropriately. As the Supreme Court has written, the federal constitutional design assumes that the branches of government "converse with each other on matters of vital common interest."[2]

Many of the points of communication, leverage, and decision that operate *before* the trial judge imposes the sentence—including the congressionally set maximum for the offense, mandatory minimums, and the Federal Sentencing Guidelines—have played a central role in the policy and scholarly debate following the Sentencing Reform Act of 1984. Less discussed over the past two decades—but just as vital—are several devices that can provide important *post-sentencing* guidance, communication, and action. These mechanisms can enhance a sentencing system's vitality by providing guidance from "above and beyond."

This Article explores three post-sentencing tools. Part I advocates for the meaningful appellate review of sentences. There are various ways to organize such review, and it remains unclear how the federal system will operate after the dust settles from the Supreme Court's recent decisions in *Blakely v. Washington*[3] and *United States v. Booker*.[4] Regardless, Congress can build on the recognized value of sustained and substantial interchange between sentencers by taking tangible steps to improve the communicative role of appellate review and to reinforce its structural framework. For example, Congress can work to reduce appellate conflict over the Guidelines by creating a special appellate court, the Court of Appeals for Sentencing, which would resolve important questions of sentencing law.

Part II explores the role of discretionary parole release authority and concludes that a modest version of this device can offer significant benefits in a post-*Booker* world. It observes that a properly structured indeterminate sentencing scheme, which by definition includes discretionary parole release, would both enable Congress to create a more tightly controlled front-end sentencing system if it so chose, and to institutionalize communication from the back-end sentencers.

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2. Mistretta v. United States, 488 U.S. 361, 408 (1989). *See also* Blakely v. Washington, 124 S. Ct. 2531, 2550 (2004) (Kennedy, J., dissenting) ("Constant, constructive discourse between our courts and our legislatures is an integral and admirable part of the constitutional design. . . . Sentencing guidelines are a prime example of this collaborative process.").

3. 124 S. Ct. 2531 (2004) (finding that the ceiling of a sentencing range calculated from legislatively enacted guidelines is the "statutory maximum" which, under the Sixth Amendment, cannot be exceeded without a jury's finding or a defendant's admission). The *Blakely* Court stated that "the 'statutory maximum' for [Sixth Amendment] purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id*. at 2537 (emphasis in original).

4. 135 S. Ct. 738 (2005) (making federal Guidelines "effectively advisory" with appellate review for "reasonableness" through two, dueling majority opinions). In particular, the Court in *Booker* divided into two, 5-4 majority opinions, announcing separate holdings on the merits and the remedy. *See id*. at 639 (merits majority opinion of Stevens, J.); *id* at 651 (remedial majority opinion of Breyer, J.). I assume readers are familiar with *Blakely* and *Booker*.

Finally, Part III examines the possibility of Extended Sentence Review (ESR) for certain long-serving, older offenders. This type of hybrid review—part clemency and part discretionary parole release—may have an important, but limited part to play in modern sentencing. At a systemic level, ESR, by evaluating past sentencing decisions, would offer insights and lessons that current sentencers can use to craft sentencing policy today. Nevertheless, responsible sentencing decisions at the front-end should restrict the need for substantial ESR activity.

I. APPELLATE REVIEW AFTER BOOKER: THE PATH NOT YET TAKEN

Appellate courts should be key players in the consultative and interactive process of sentencing guidance and communication. Appellate review ought to be the fulcrum around which guided sentencing systems revolve.[5] With their dual focus on establishing broad principles of sentencing law and evaluating individual cases, appellate courts can bring a distinctive voice to the sentencing discussion. Indeed, the Supreme Court's decision in *Booker* encourages the courts of appeals to take a more active role in conversing with the Sentencing Commission and the Congress. At this point, Congress might want to leave the specifics of appellate review largely alone and allow the Courts of Appeals to resolve some of the post-*Booker* uncertainty. Nevertheless, Congress should act now to improve the structural framework supporting appellate review, which in turn will enhance the federal sentencing system. To that end, Congress should ban sentence appeal waivers from plea agreements, release all sentencing data, and create the Court of Appeals for Sentencing.

A. *Operating Within the Present Framework*

Every jurisdiction has recognized that no set of ex ante rules—be they criminal statutes or guidelines—can either anticipate every circumstance or provide the appropriate sentence for every case.[6] For example, Congress sets the maximum punishment, but that is only suitable for the most severe version of the offense committed by the most serious offender.[7] Sentencing guidelines provide suggestions (of varying degrees of authority, or "bite") just for the typical case, leaving sentencing judges with differing levels of bounded discretion to do their jobs appropriately.[8] This discretion and its boundaries

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5. *Cf.* Joseph A. Del Sole, *Appellate Review in a Sentencing Guidelines Jurisdiction: The Pennsylvania Experience*, 31 DUQ. L. REV. 479, 482 (1992) (arguing that "appellate review is a necessary component of an effective guideline system").

6. *Cf.* Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L. J. 271, 275 (2005) ("Absolute apparent equality can be demonstrably unjust.").

7. *Cf.* ROSEMARY PATTENDEN, ENGLISH CRIMINAL APPEALS 1844-1994, at 244 (1996). ("Statutes set maximum penalties which are not suitable for the majority of convicted offenders.").

8. *Cf.* Miller, *Sentencing Equality Pathology*, *supra* note 6, at 275 (showing that the

serve as part of a web of checks and balances, an approach that serves us well in other governmental arenas.[9] A key question, of course, is how to construct the limits on that discretion. In many systems, appellate courts play a vital role in that process as part of the proper functioning of a sensible, guided sentencing system.[10] As Professor Kevin Reitz explains elsewhere in this Issue, the existence and amount of appellate review largely determines whether the entire guidelines scheme is more "voluntary" or more "mandatory."[11]

Even in the world before *Booker*, modern federal district judges possessed some discretion and, under certain circumstances, deviated from the otherwise applicable Guidelines sentence. In doing so, they gave feedback concerning the Guidelines to the Sentencing Commission and Congress. Appellate judges, in turn, can give similar feedback in the post-*Booker* world while serving their traditional functions of checking the sentencing discretion of the lower court, correcting errors, and developing the law.[12] In theory, this kind of feedback will facilitate "the continuous evolution of sentencing law and policy within the guidelines system."[13] Although perhaps reflecting too much naïveté, this "reformist ideal" desires to capitalize on "the interlocking substantive lawmaking competencies of the commission and the judiciary."[14]

Booker may yield a system that Congress finds acceptable; if so, appellate courts are likely to play a pivotal role. For example, appellate review could ensure that district courts continue to take the Guidelines seriously. Although *Booker* produced an "effectively advisory"[15] guidelines system policed by a reasonableness standard on appeal, the true extent and manner of that review

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Sentencing Reform Act "recognized . . . that some variation and individualization of sentences was essential to a system of warranted sentences").

9. *Cf.* Marc L. Miller, *Domination & Dissatisfaction: Prosecutors As Sentencers*, 56 STAN. L. REV. 1211, 1259 (2004) ("The fundamental lesson of the federal guidelines system, however, is that sentencing authority must be shared across several actors to be just. Absolute power in sentencing, as in so many other areas, invites abuse.").

10. *See, e.g.*, Douglas A. Berman, *Balanced and Purposeful Departures: Fixing A Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 34 (2000); Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 101, 133-34 (2005). Appellate review, however, need not reflect equal power between sentencers. *See* Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. __ (pages 6 - 7) (2005).

11. Reitz, *Enforceability*, *supra* note 10, at __ (page 15).

12. *Cf.* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1451 (1997) (referring to "an enforcement mode" and "a creative lawmaking mode," and noting that "there is occasional overlap between these two activities"). For present purposes, it matters not if these categories blend together; the goal is simply to highlight these roles.

13. Berman, *Balanced*, *supra* note 10, at 34.

14. Reitz, *Sentencing Guideline Systems*, *supra* note 12, at 1455. On this score, the results from the Guidelines' first fifteen years were less than inspiring. *Cf. id.* at 1471 ("[A]ppellate sentence review under the federal guidelines, for most of the guidelines' first decade, has been a far cry from the reformist partnership model advocated in the 1970s.").

15. *Booker*, 125 S. Ct. at 757.

remains obscured.[16] The courts can flesh out a "reasonableness" standard of review in various ways. It may mean comparatively little or it may result in a system similar[17] to the pre-*Booker* regime.

As of June 2005, only vague appellate trends can be discerned and even these may be unreliable because most (if not all) of the decisions involve sentences imposed pre-*Booker*. Nevertheless, it seems as though district court judges must still calculate and consider the applicable Guidelines range.[18] Sentencing judges cannot ignore the Guidelines on a "whim," and appellate courts will reverse sentences with procedural errors as unreasonable.[19] Just as they did before *Booker*, sentencing judges must work through the Guidelines (including the departure analysis) and find facts by a preponderance of the evidence in order to determine the applicable range.[20] In fact, appellate courts seem likely to continue to review the Guidelines calculations, interpretations, and departures *de novo*.[21] Thus, the Guidelines' now-advisory sentencing range still appears to be rather tightly controlled.

Once the Guidelines range is determined, the sentencing judge must consider all of the statutory purposes of sentencing—including the Guidelines range—set forth in 18 U.S.C. § 3553(a) when imposing the actual sentence.[22] It appears that at least several Courts of Appeals will subject *only* the imposition of the final sentence to the more pliable reasonableness review.[23]

What this will actually mean is unknown. The Supreme Court has said that the Courts of Appeals must link their appellate review for "reasonableness" to the Guidelines,[24] but just how close of a link is required or permissible remains to be seen. The Second Circuit, in its initial post-*Booker* pronouncement, referred to "reasonableness" as "inherently a concept of flexible meaning, generally lacking precise boundaries."[25] Within some still-evolving limits,[26]

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16. *See, e.g.*, Reitz, *Enforceability*, *supra* note 10, at __ (pages 11-12, 19).

17. Presumably, the post-*Booker* system will be less stringent than the system it replaced. *See Booker*, 125 S. Ct. at 766-67 ("We cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure."). Justice Scalia predicts that the post-*Booker* system will permit sentencing judges to "apply [their] own perceptions of just punishment, deterrence, and protection of the public even when these differ from the perceptions of the Commission members who drew up the Guidelines." *Id.* at 790 (Scalia, J., dissenting in part).

18. *See, e.g.*, United States v. Crosby, 397 F.3d 103, 111 (2d Cir. 2005). *But cf. id.* at 112 (noting that precise Guidelines calculation may not be required in some limited circumstances).

19. *Id.* at 113-15.

20. *See, e.g.*, *id.* at 115.

21. *See, e.g.*, United States v. Mathijssen, 406 F.3d 496, 498 (8th Cir. 2005).

22. *See Booker*, 125 S. Ct. at 764-65.

23. *See, e.g.*, United States v. Davidson, 409 F.3d 304, 310 (6th Cir. 2005); *Mathijssen*, 406 F.3d at 498; United States v. Scott, 405 F.3d 615, 617 (7th Cir. 2005).

24. *Booker*, 125 S. Ct. 738, 766 (2005) (noting that the factors of § 3553(a), including the Guidelines, "will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable").

25. *Crosby*, 397 F.3d at 115; *see also* United States v. Bartram, 407 F.3d 307, 313 (4th

there may be "more than one right answer."[27] Perhaps this kind of "reasonableness" review will primarily aim to remedy significant legal errors and eliminate outliers (however defined). Appellate review of differences from the now-advisory Guidelines range cannot be exactly what it was before without functionally reintroducing the former guidelines system and violating the holding of the *Booker* merits majority. Although the Courts of Appeals may be able to come close to the old system by setting common law, appellate benchmarks for reasonable sentences, it is possible that this, too, would contravene *Booker*.[28]

More broadly, *Booker* may facilitate better communication between the sentencers by encouraging a fundamental review of the Guidelines by the federal courts and by retaining (and perhaps invigorating) an important feedback tool. In fact, *Booker* may even spark a "'common-law-like'"[29] revolution in sentencing by encouraging appellate courts to evaluate (and perhaps reject as unreasonable) individual sections of the Guidelines themselves in its conversation with the Sentencing Commission and Congress. The *Booker* remedial majority opinion makes clear that sentences *within* the advisory Guidelines range are also subject to appellate review for reasonableness.[30] No one knows how this will unfold in practice, but it seems

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Cir. 2005) (viewing reasonable as "in agreement with right thinking or right judgment"); United States v. Fleming, 372 F.3d 95, 100 (2d Cir. 2005) ("Although the brevity or length of a sentence can exceed the bounds of 'reasonableness' we anticipate encountering such circumstances infrequently.").

26. *Cf.* United States v. Toohey, No. 04-4565, 2004 WL 75374, at *2 (2d Cir. May 23, 2005) (evaluating § 3553(a)(6)'s admonition against disparity on a national—not individual case—level, thus effectively encouraging Guidelines compliance).

27. GEORGE FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 194 (1996) (discussing the concept of reasonableness in American law).

28. *See, e.g.*, Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. (forthcoming 2005) (manuscript at 25 n.109, *available at* http://ssrn.com/abstract=704602 (last visited Aug. 16, 2005)) (noting issue); David Yellen, *Saving Federal Sentencing Reform After* Apprendi, Blakely *and* Booker, 50 VILL. L. REV. 163, 184 (2005) ("Appellate review that effectively establishes fact-finding requirements . . . may run afoul of the *Apprendi* line of cases.").

29. Marc L. Miller, *Guidelines Are Not Enough: The Need for Written Sentencing Opinions*, 7 BEHAV. SCI. & THE LAW 3, 21 (1989) (coining the phrase in an effort to recognize the judicial effort is within a "complex administrative framework in which courts recognize the sentencing commission's role in periodically 'codifying' aspects of this common law").

30. *Booker*, 125 S. Ct. at 765 (allowing reasonableness review of sentences both in and out of suggested Guidelines range); *see also Crosby*, 397 F.3d at 115 (refusing to hold that sentences within an applicable Guidelines range are per se reasonable or that sentences outside of an applicable Guidelines range are per se unreasonable); United States v. Webb, 403 F.3d 373, 385 n.9 (6th Cir. 2005) (declining to hold that a Guidelines-compliant sentence is per se reasonable). *But see id.* at 386 (Kennedy, J., concurring in part and dissenting in part) (stating that "it is hard to conclude that the amounts or factors the Commission selected were not reasonable"). The *Crosby* and *Webb* majorities seem to have the better side of the argument. If the Guidelines are the infallible touchstone of reasonableness (even with some non-Guidelines sentences also being deemed reasonable), we would seem to be back in the former and now-invalid world of more "mandatory"

unlikely that the appellate courts will invalidate a sentence within a properly calculated Guidelines range lightly. Nevertheless, this ability to engage on a topic previously considered largely off-limits—whether the Guidelines themselves are reasonable—furthers the dialogue between the various sentencers and places sentencing closer to the familiar footing of most other rules and regulations. This general idea finds some constructive heritage in the Pennsylvania appellate review statute[31] and in the ideas of administrative law as explored by Professors Ronald Wright and Marc Miller.[32]

Furthermore, the *Booker* remedial majority left an important aspect of the old Guidelines system intact: namely, a strong requirement to justify sentences that diverge from the Guidelines recommendations. Despite an apparent tension with the *Booker* merits majority, if the sentencing judge decides to vary from the properly calculated advisory Guidelines range, she must announce why in open court and commit those reasons to paper "with specificity in the written order of judgment and commitment."[33] This requirement will not only further the conversation between sentencers,[34] but it will also encourage sentencing judges to take the Guidelines seriously and to think twice before disregarding the Commission's recommendations.[35] Some post-*Booker* courts[36] have vigorously enforced this statutory requirement to announce and memorialize

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Guidelines with occasionally approved departures. *But see* Reitz, *Enforceability*, *supra* note 10, at ___ (Page 11) (discussing views of Professor Albert Alschuler).

31. 42 PA. CON. STAT. § 9781 (West 2005). Although the trend may be turning, Pennsylvania's appellate courts have not historically exercised their powers aggressively. *See, e.g.*, Reitz, *Enforceability*, *supra* note 10, at ___ (Pages 10-11).

32. *See, e.g.*, Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 802-10 (1999); Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 1, 40-74 (1991).

33. 18 U.S.C. § 3553(c)(2); *see also Crosby*, 397 F.3d at 116.

34. Professor Miller put it well more than fifteen years ago: "Full written opinions, rather than transcripts or sentencing 'forms,' may provide the best source of commentary on the sentencing rules selected by a commission, and offer the best hope for further refinement, revisions, and reform." Miller, *Not Enough*, *supra* note 29, at 4.

35. *See* Reitz, *Enforceability*, *supra* note 10, at ___ (Page 10).

36. The Sixth Circuit recently reversed a downward departure sentence imposed before *Booker* or *Blakely* because the sentencing judge did not provide sufficient reasons to justify the sentence. United States v. Jackson, 408 F.3d 301, 304 (6th Cir. 2005) ("The question before us on appeal is what quality of analysis and explanation, if any, is necessary where the district court exercises its discretion to vary a defendant's sentence from the applicable range provided by the now-advisory Guidelines."). The Court of Appeals objected because the lower court's reasoning did not "include any reference to the applicable Guidelines provisions or further explication of the reasons for the particular sentence imposed." *Id.* at 305. Implicitly confirming that sentencing courts will often be able to rely on the reasoning (if not the actual *reasonableness* of the Guidelines), the *Jackson* Court further stated, "*Booker* requires an acknowledgement of the defendant's applicable Guidelines range as well as a discussion of the reasonableness of a variation from that range." *Id.* If other appellate courts enforce the reasons requirement (let alone adopt this rather aggressive substantive link to the Guidelines range), district courts will get the message that they must take the Guidelines seriously. *Cf. Toohey*, 2004 WL 75374, at *1-2 (discussing § 3553(c)).

specific reasons for rejecting the recommended sentence, which bodes well for substantial compliance with the Guidelines.

B. *Creating a Responsive Guidelines System*

Regardless of the functional level of appellate review and the resulting strength of the Guidelines' bite, Congress can promote a responsive Guidelines system in three ways that relate, in varying degrees, to appellate review. By banning sentence appeal waivers, releasing all sentencing information, and establishing a special sentencing appellate court, Congress can act to limit (1) evasion of the Guidelines, (2) stunted development of sentencing law, and (3) communication breakdowns within the sentencing system.

Abolish Sentence Appeal Waivers. First, Congress should statutorily eliminate sentence appeal waivers. Sentence appeal waivers, which are often memorialized in and agreed to as part of plea agreements, entail the defendant's (and sometimes the government's) voluntary forfeiture of the statutory right to appeal the yet-to-be-imposed sentence. Although regularly enforced by appellate courts,[37] sentence appeal waivers create often-hidden pockets of disparity or even lawlessness.[38] While some have argued that defendants should have the ability to exchange their appeal right for more lenient treatment, there is reason to question how much real trading occurs. It appears that a defendant's ability to extract meaningful concessions from the government varies widely across the country.[39] As a result of this disturbing inconsistency, defendants in some judicial districts are more often able to bargain for such things as reduced charges or stipulations limiting the use of relevant conduct, while defendants in other districts more often get nothing.[40] Beyond the concerns about inter-district disparity and whether these waivers *really* benefit individual defendants, there are larger, systemic issues at stake justifying a ban on sentence appeal waivers.[41] How can appellate review provide a meaningful check on district courts and valuable feedback to the

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37. *See, e.g.*, United States v. Bushert, 997 F.2d 1343, 1350 (11th Cir. 1993) (Kravitch, J.).

38. *Cf.* Freed, *Unacceptable Limits*, *supra* note 1 at 1739; John C. Keeney, *Justice Department Memo: Use of Sentencing Appeal Waivers to Reduce the Number of Sentencing Appeals*, 10 FED. SENT. REP. 209, 210 (1998) (reprinting memo from Acting Assistant Attorney General Keeney) ("The disadvantage of the broad sentencing appeal waiver is that it could result in guideline-free sentencing of defendants in guilty plea cases, and it could encourage a lawless district court to impose sentences in violation of the guidelines.").

39. Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. ___ (forthcoming 2005) (manuscript at 16-22, 26-27, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=772884 (last visited Aug. 16, 2005)) (discussing empirical study of federal sentencing appeal waivers).

40. *Id.*

41. *See, e.g.*, United States v. Melancon, 972 F.2d 566, 575 (5th Cir. 1992) (Parker, J., concurring specially) (assailing appeal waivers and noting that they "breach . . . the Judiciary's duty to ensure that the goals of Congress and the Sentencing Commission are met").

other sentencers if many cases have escaped review before the sentence is even imposed?[42] As Professor Doug Berman has astutely noted, "broad appeal waivers frustrate Congress's policy decision in the Sentencing Reform Act to utilize appellate review to help eliminate unwarranted sentencing disparity."[43]

Release Sentencing Data. Second, Congress must free the sentencing data. We can hardly expect appellate courts (not to mention the Commission and Congress) to engage in a sophisticated discourse concerning important sentencing issues if they do not understand what is happening in the system as a whole.[44] Despite some limited positive congressional action as part of the PROTECT Act,[45] much of the information about how specific district judges discharge their grave sentencing responsibilities—all of which is nominally accessible to the public—remains functionally hidden. This secrecy is unjustifiable. Congress should make all[46] sentencing information fully and readily available to the public, including information about the practices of individual judges. "Sentencing data involve public records created with public funds reflecting the exercise of a public trust."[47] We should not fear what this information might reveal. Indeed, we should welcome the opportunity to know as much as possible about our sentencing systems.

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42. Critics may raise the concern that an overloaded appellate docket may result if Congress abolishes appeal waivers. This perennial doomsday scenario of judges buried by their dockets may be factually questionable; no one forces a litigant to appeal (and risk a cross-appeal) once the sentence is actually imposed. Furthermore, the evolving appellate standard of reasonableness may discourage disappointed litigants from appealing certain issues or facilitate streamlined resolution in the Court of Appeals. More importantly, however, judicial resource questions should largely be beside the point. If we as a society want a sentencing system that actually gives true boundaries for judicial discretion (to whatever degree), appellate review must be available. We cannot expect this system to function as designed if the parties can preclude appellate review *before* the judge imposes the sentence.

43. Douglas A. Berman, *The Fate and Future of Appeal Waivers* (March 4, 2005), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/2005/03/the_fate_and_fu.html (last visited Aug. 16, 2005).

44. *See* Marc L. Miller & Ronald F. Wright, *"The Wisdom We Have Lost": Sentencing Information and Its Uses*, 56 STAN. L. REV. __ (ms at 5).

45. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified at 28 U.S.C. § 994(w)). Indeed, the incomplete and one-sided effort to release judge-specific sentencing information was one of the few comparatively bright spots in that legislation. *See, e.g.*, Steven L. Chanenson, *The Return of Hammurabi*, 26 PENN. LAW WEEKLY 390 (2003).

46. In order to reap the benefits of better aggregate sentencing data, Congress need not—and should not—release sensitive, personal information about victims, witnesses, or defendants. *See* Steven L. Chanenson, Statement at Initial Hearing of the ABA Justice Kennedy Commission (Nov. 13, 2003), *available at* http://www.abanet.org/crimjust/kennedy/stevechanenson1.html (last visited Aug. 16, 2005).

47. *Id.*; *cf.* Marc L. Miller, *Sentencing Reform "Reform": The Sentencing Information System Alternative to Sentencing Guidelines*, *in* THE FUTURE OF IMPRISONMENT IN THE 21ST CENTURY 145 (Michael Tonry ed., 2004) ("Judges, scholars and everyone interested in open government and wise sentencing should call for judge identifiers to be made public."); Miller, *Domination*, *supra* note 9, at 1263 (same).

Disclosing this sentencing data, while not free from risks,[48] would bring many benefits. For example, the mere knowledge that sentencing decisions will be easily and publicly available might encourage judges to provide even fuller reasons for their sentences and perhaps prompt them to hew closer to the now-advisory Guidelines.[49] Furthermore, this kind of information will enhance the communication between the various interested parties. The court of appeals will be better able to give meaning to the concept of "reasonableness" if it knows how the various district courts in the Circuit exercise their sentencing discretion. Similarly, the district courts themselves will benefit from this information when striving to impose a "reasonable" sentence in the first place. The government and the defense bar might be more inclined to appeal sentences imposed by those judges who consistently reject the calculated Guidelines range in the hope that this pattern of rejection might garner appellate attention. Congress might have a different view of so-called sentencing noncompliance if it knew that just a few judges were the cause of much of the deviation or that many deviations were small in magnitude. This kind of openness, including the full and automatic release of judge-specific information, will allow Congress and the judiciary to understand each other better. It may even help to reduce the corrosive mutual distrust between these two branches of government.

Establish the Court of Appeals for Sentencing. Finally, Congress should consider ways to reduce appellate conflict concerning the Guidelines.[50] For years, commentators have observed that the various federal Courts of Appeals interpret the Guidelines differently.[51] Perhaps inter-circuit disagreements concerning the Guidelines can explain some of the variation in rates of departures across the circuits.[52] These disagreements hamper the ability of the

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48. One can hope that the sad story of the House Judiciary Committee's treatment of Reagan-appointee Chief Judge James Rosenbaum, who still presides in the District of Minnesota, was nothing more than an ugly aberration. *See, e.g.*, Miller, *Domination*, *supra* note 9, at 1239-40; *cf.* Mark H. Bergstrom & Joseph Sabino Mistick, *The Pennsylvania Experience*, 16 FED. SENT. REP. 57 (2003) (discussing risks in the context of the Pennsylvania Commission on Sentencing's release policy). Yet, it does not change the bottom line that the judiciary must publicly disclose this kind of information. *See* Chanenson, *Kennedy*, *supra* note 46 ("No one said that judging was easy or for the faint of heart.").

49. *Cf.* Bergstrom & Mistick, *supra* note 48, at 60.

50. Of course, another potential source of sentencing conflict and disparity stems from prosecutorial behavior that may differ from circuit to circuit or district to district. While beyond the scope of this Article, Congress and the Sentencing Commission can certainly explore ways to regulate or promote the more effective self-regulation of prosecutors. *See generally* Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010 (2005).

51. *See, e.g.*, Steven L. Chanenson, *Consistently Inconsistent: Circuit Rulings on the Guidelines in 1994*, 7 FED. SENT. REP. 224 (1995); Nora V. Demleitner, *The Nonuniform Development of Guideline Law in the Circuits*, 6 FED. SENT. REP. 239 (1994); Reitz, *Enforceability*, *supra* note 10, at __ (Page 18).

52. *See* U.S. SENTENCING COMMISSION, ANNUAL REPORT tbl.26 (2003), *available at* http://www.ussc.gov/annrpt/2003/table26.pdf (last visited Aug. 16, 2005) (noting for

judiciary to communicate effectively with the Commission and Congress. Long ago, the Supreme Court abdicated any active role in reconciling these disputes in favor of allowing the Sentencing Commission to handle them.[53] The Commission, however, has been neither particularly aggressive about resolving these conflicts, nor particularly clear or principled in explaining and justifying the resolutions it does impose.[54]

Congress could respond by somehow exhorting the Commission to step in more forcefully. Yet it seems unlikely that Congress can easily or effectively impel the Commission to offer a kind of coherent rationale on par with appellate court opinions reconciling inconsistent precedent. Furthermore, Congress has kept the Commission quite busy in recent years simply implementing its long list of directives.

Congress should establish the Court of Appeals for Sentencing.[55] This Court would have national subject-matter jurisdiction over at least certain aspects of sentencing law. In that way, it would be somewhat—but not completely—analogous to the Court of Appeals for the Federal Circuit's supervision of patent appeals. While Congress could direct this new Article III court to handle all criminal appeals, a less dramatic and disruptive option is available.

Specifically, Congress could require the Court of Appeals for Sentencing to resolve unsettled questions of sentencing law or Guidelines interpretation[56] through a *mandatory* certification process triggered by request of a litigant or *sua sponte* by the traditional appellate court.[57] It might even be possible for the

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example, that 59.6% of Ninth Circuit sentences were within the Guidelines range while 74.5% of Eleventh Circuit sentences were within the Guidelines range).

53. Braxton v. United States, 500 U.S. 344, 347-49 (1991).

54. *See, e.g.*, Miller & Wright, *Wisdom Lost*, *supra* note 44 (manuscript at 4) (noting that the Commission has "acted like a Supreme Court for Sentencing, but without issuing opinions or reasons" and that "it has developed weak habits of explanation and justification."); Andrew D. Goldstein, Comment, *What Feeney Got Right: Why Courts of Appeals Should Review Sentencing Departures De Novo*, 113 YALE L. J. 1955, 1985 (2004) ("The problem is that when the Commission plays the role of Supreme Court to resolve conflicts among the circuits, it almost never explains or justifies its resolutions, turning the Guidelines into 'administrative diktats' rather than carefully reasoned and explained rules."); *see also* Douglas A. Berman, *The Sentencing Commission as Guidelines Supreme Court: Responding to Circuit Conflicts*, 7 FED. SENT. REP. 142 (1994).

55. This proposal builds on an idea first raised more than a dozen years ago by Steven Zipperstein. *See* Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S. CAL. L. REV. 621, 656 (1992) (proposing "a single national court of sentencing appeals").

56. *Cf.* Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 712-14 (2001) (discussing distinct, but intertwined, appellate court functions of error-correction and law-making); Douglas A. Berman & Jeffrey O. Cooper, *In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin*, 60 OHIO ST. L. J. 2025, 2035-36 (1999) (same).

57. *Cf.* Randall T. Shepard, *Is Making State Constitutional Law Through Certified Questions A Good Idea or a Bad Idea?*, 38 VAL. U. L. REV. 327, 336-39 (2004) (discussing process of federal court certification of questions to state supreme courts and the Uniform

parties to seek rehearing before the Court of Appeals for Sentencing of legal/interpretive issues they feel were improperly decided by the traditional appellate court. The pronouncements of the Court of Appeals for Sentencing would be binding on all other appellate courts and on all district courts throughout the country. The workload would be quite heavy at first, but should eventually recede. Given the comparatively limited role of this conception of the Court of Appeals for Sentencing, it should be possible to staff it with just a few jurists, thus encouraging internal cohesion.

Potential benefits of this Court of Appeals for Sentencing include the more consistent (and perhaps more thoughtful) exposition of sentencing principles. Indeed, this vision of the new appellate court could help to reduce Justice Scalia's fears, expressed in his *Booker* dissent, that "'unreasonableness' review will produce a discordant symphony of different standards, varying from court to court and judge to judge . . . ." [58] By speaking with one appellate analytic voice on matters of broad sentencing policy, the judiciary would communicate more effectively with the Commission and Congress.

After *Booker*, some observers are understandably concerned about the ability of the Guidelines to promote the congressionally desired amount of sentencing uniformity. Although preliminary statistics reveal increased deviation from the Guidelines, the appellate courts have yet to have their say. We should be careful not to judge this brave new sentencing world too quickly. If the Courts of Appeals take an expansive and internally consistent view of their post-*Booker* responsibilities, they may restrain those sentencing judges who would otherwise desire to dismiss the Guidelines rashly. In fact, *Booker* may actually inspire a golden age of meaningful guidance and communication from "above." Congress can nurture such a salutary development by acting to reinforce the superstructure of appellate review.

II. DISCRETIONARY PAROLE RELEASE: A NEW LIFE FOR AN OLD IDEA

Although discretionary parole release is largely off the national sentencing reform radar, it remains a vital part of American criminal justice. In fact, indeterminate sentencing regimes—that is, systems with discretionary parole release[59]—continue to be the most common approach to sentencing in the United States.[60] In an indeterminate system, the trial judge announces the nominal sentence at the front-end. However, it is the parole board, acting as a back-end sentencer, which determines the actual incarceration length by deciding if or when to grant the inmate discretionary parole release. Through its release behavior, parole boards offer another form of communication between,

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Certification of Questions of Law Act promulgated by the National Conference of Commissioners on Uniform State Laws).

58. 125 S. Ct. at 794 (Scalia, J., dissenting in part).

59. *See* Steven L. Chanenson, *The Next Era of Sentencing* Reform, 54 EMORY L. J. 377, 381-86 (2005) (discussing terminology).

60. *See, e.g.*, MICHAEL TONRY, THINKING ABOUT CRIME 212 (2004).

and guidance for, sentencers.

The romantic vision of discretionary parole release involves a wise parole board divining, based in large part on assessments of an inmate's rehabilitative progress, when an inmate *should* be released, and thus producing a just result. The reality can be quite different. Parole release has historically been an unstructured and wildly discretionary power, subject to the same kinds of irrationalities and abuses that afflict old-style, fully discretionary judicial sentencing on the front-end.[61] It is also questionable at best whether parole boards are able to make meaningful predictions about inmates' future criminal behavior.[62] Traditional discretionary parole release often comes at a significant cost in terms of deterrence, perceived fairness, sentence predictability, and resource allocation.[63] Indeed, these are some of the reasons why Congress abolished discretionary parole release as part of the Sentencing Reform Act of 1984.[64]

Yet, in the wake of *Blakely* and *Booker*, there may be new life for a reformed and coordinated version of discretionary parole release. Elsewhere, I have proposed a system of Indeterminate Structured Sentencing (ISS).[65] An ISS system includes guidelines for both sentencing and parole release within an indeterminate sentencing structure. ISS allows for more fully binding front-end sentencing guidelines; it permits sentencing guidelines that in a determinate sentencing scheme would now be prohibited by *Blakely* and *Booker*. It also allows for any level of appellate review, including review closely linked to more "mandatory" guidelines. For example, appellate review of ISS sentencing guidelines could include explicit, multi-tiered standards of review as advocated by the American Law Institute's draft sentencing proposal.[66]

At the center of the ISS system is a "Super Commission" that promulgates two sets of coordinated guidelines that constrain and guide both sentencing and release powers. This Super Commission takes the place of and has all the qualities of the traditional sentencing commission, but it possesses expanded powers to channel back-end parole release authority as well as front-end sentencing authority. Reflecting the best ideas of pre-*Blakely* guideline schemes, ISS sentencing guidelines channel a trial judge's decisional authority while maintaining important repositories of judicial discretion. Through its parole release guidelines, ISS encourages the predictable exercise of

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61. *See, e.g.*, Chanenson, *Next Era*, *supra* note 59, at 450.

62. *See, e.g.*, *id.* at 453-55.

63. *See, e.g.*, Frase, *State Sentencing Guidelines*, *supra* note 10, at 1222.

64. It is interesting to recall that some systems of discretionary parole release underwent their own substantial reform similar to—but *before*—structured sentencing. *See, e.g.*, DON M. GOTTFREDSON ET AL., GUIDELINES FOR PAROLE AND SENTENCING 23, 70 (1978) (describing a parole guidelines model in which parole board sets severity ratings for offenses). Many of these reforms focused largely on issues that could and should have been determined upfront rather than in post-sentencing forums.

65. *See* Chanenson, *Next Era*, *supra* note 59, at 432-58.

66. MODEL PENAL CODE: SENTENCING § 7.ZZ (Preliminary Draft No. 3 2004).

discretionary, yet humbly conceived, parole release authority.

At a practical level, judges operating under an ISS system impose a "minimum" and a "maximum" sentence—for example, two to four years—for virtually all sentences of incarceration. The minimum sentence is the least amount of time an offender will spend in prison. The maximum sentence is the most time an offender can be required to spend in prison or, once released, on parole supervision. ISS presumptive sentencing guidelines address *only* the judge's imposition of the minimum term, not the maximum term. The judge's ability to impose a *maximum* sentence up to and including the traditional statutory maximum set by the legislature for the offense of conviction is unguided and unconstrained; the guidelines simply do not speak to the imposition of the maximum sentence. In the ISS system, the traditional, legislative statutory maximum is thus the same as the *Blakely* statutory maximum.[67] As such, neither *Blakely* nor *Booker* impinge on ISS presumptive sentencing guidelines.[68]

A defendant will be *eligible* for parole release at the expiration of his minimum sentence, but it will be the parole board—exercising its discretion as guided by the Super Commission—that decides precisely when to release the inmate on parole. As noted above, the parole release power that results from this indeterminate system is a considerable and potentially troubling limitation of the ISS model. Nevertheless, it is possible to lessen this difficulty through a modest conception of the role of parole release authority and comprehensive parole release guidelines. The Super Commission's parole release guidelines would direct the exercise of the parole board's discretionary release power and would usually work to channel the board's discretion in favor of releasing inmates at or near the expiration of their minimum sentence.[69]

The Super Commission would recognize that because the sentencing judge typically has superior information about the offense, the judge's retributive judgment—channeled by the sentencing guidelines and expressed through the minimum sentence imposed—is entitled to substantial weight in the parole release process. Accordingly, ISS parole release guidelines generally encourage the parole board to exercise its discretion to grant parole release at or near the expiration of the typical defendant's judicially imposed minimum sentence. Yet, the parole release guidelines would both provide for circumstances when release upon the expiration of the minimum sentence is presumptively inappropriate (such as if an inmate violates prison rules), and permit departures when appropriate.

Acting as the central coordinator of the jurisdiction's sentencing and punishment policy, the Super Commission "harmonize[s] otherwise potentially

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67. *See supra* note 3.

68. *See, e.g.*, Chanenson, *Next Era*, *supra* note 59, at 436-40.

69. Not only must the Super Commission guide the parole board, the board must exercise its guided discretion openly, with appropriate process, and subject to some form of review. *Id*. at 446-58.

conflicting sentencing and parole release principles."[70] This is possible, in part, because the ISS approach offers bounded judicial sentencing discretion that is policed by meaningful appellate review but, as noted above, is unconstrained by *Blakely* and *Booker*.

Under the ISS approach, vital communication from "beyond"—here, including the paroling and prison authorities—is hard-wired into an overarching system of sentencing and release. For example, the legislature and the Super Commission will study the actual parole release dates, which themselves are subject to guidelines and appellate review, and decide how that information influences (or does not influence) the upfront sentencing guidance. By including release policies in the conversation, sentencers may also be more inclined to concentrate on the vital issue of how those released prisoners reenter society. An ISS regime institutionalizes front- and back-end communication through the Super Commission while allowing the legislature to select any level of guidelines enforcement it desires.

III. EXTENDED SENTENCE REVIEW: SO THE PRESENT CAN LEARN FROM THE PAST

We know that both appellate review and a modestly conceived discretionary parole release authority can provide beneficial post-sentencing guidance and communication to actors situated earlier in the process. Yet what informs our upfront sentencing judgments in the first place? Could we benefit from a long-term feedback mechanism focusing on some of the consequences of our actions? Perhaps we can develop a device to help inform our front-end retributive judgments by evaluating some of the aftermath of our previous determinations.

One such instrument could be a form of Extended Sentence Review (ESR). ESR calls for a panel of experienced sentencing professionals, acting through either a legislative mandate or delegated executive authority, to evaluate older inmates who have already served long periods of incarceration (i.e., fifty years old with at least fifteen years in custody),[71] and determine who (if anyone) should be released to some form of community supervision.[72]

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70. Chanenson, *Next Era*, *supra* note 59, at 434

71. In designing an ESR system, opinions would, of course, vary as to who is "older" and how long is a "long period" of incarceration. *See, e.g.*, RONALD H. ADAY, AGING PRISONERS: CRISIS IN AMERICAN CORRECTIONS 11-12 (2003) (noting that there is "no uniform agreement about what constitutes 'long-term'"). As for the definition of older, the age of fifty seems to be a line of demarcation in the correctional world. *Id*. at 16. Given the desire to provide guidance from "beyond" and the extraordinary nature of ESR relief, a very conservative definition of fifteen years for long-term sentences seems appropriate, although reasonable minds could certainly differ on this point. *See, e.g.*, Timothy J. Flanagan, *Long-Term Incarceration*, *in* LONG-TERM IMPRISONMENT 4 (Timothy J. Flanagan ed., 1995) (describing evolution of his views of long-term imprisonment from five years in 1970s to eight to ten years in the mid-1990s).

72. Congress has already provided for a provision somewhat analogous to ESR.

ESR operates on both an individual and a systemic plane. At the individual level, the ESR process is a blend of clemency (and compassionate release),[73] and, perhaps disturbingly,[74] old-fashioned discretionary parole release.[75] Reflecting clemency's substantial role in this procedure, the ESR panel would consider questions of mercy, forgiveness, the risk to public safety, and utilitarian concerns such as the increasing cost of incarcerating older inmates. Indeed, ESR would focus on an inmate population that some people think is deserving of mercy in any event—long-serving, older inmates[76]—and help to guide the use of these arguably anomalous[77] sentences in the future.

Ultimately, the systemic and communicative functions of ESR are its most significant aspects. The idea is to adjust *today's* sentencing arithmetic in light

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Inmates serving a three-strikes sentence pursuant to 18 U.S.C. § 3559(c) who are at least seventy years old and have been incarcerated for at least thirty years, may be released if the Director of the Bureau of Prisons concludes that they are not a danger to any other person or to the community. 18 U.S.C. § 3582(c)(1)(A)(ii).

As a matter of fairness, ESR should not be available for some inmates. For example, those inmates who received a sentence of natural life instead of the death penalty should likely be ineligible for ESR. Of course, the President and most governors would still have the ability to pardon or commute this kind of sentence. However, they would have to issue the pardon or commutation in the traditional, open, and political environment.

73. Federal compassionate release for "extraordinary and compelling" reasons is authorized by 18 U.S.C. § 3582(c)(1)(A)(i), but that sentence-reducing provision is rarely used and then often for prisoners who are close to death. *See* Mary Price, *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A)*, 13 FED. SENT. REP. 188, 188 (2000).

74. *See, e.g.*, Frase, *State Sentencing Guidelines*, *supra* note 10, at 1222 (discussing concerns). Some commentators have advocated for the return of, essentially, discretionary parole release for long-term inmates. *See, e.g.*, TONRY, *supra* note 60, at 19 (2004); *id.* at 215-16 (advocating for a "safety valve" law that allows early release consideration for inmates sentenced to more than ten years who have served the lesser of five years or one-third of their sentence, with re-examinations every two years). This approach, however, may spark some of the same problems and pitfalls of traditional, unguided discretionary parole release. The harder, but more desirable, approach is to get it right on the front-end. At the aggregate level, ESR can help that process by informing the sentencers of today about some of the consequences of their predecessors' actions. At the individual level, ESR offers a limited opportunity for society to exercise self-interested compassion that may result in financial and human savings at little cost to public safety. Sadly, ESR decisions at the individual level are unlikely to be completely costless. Some of the released inmates will commit crimes while on ESR-granted community supervision, although they may have done so years later upon their normal release as well.

75. In some situations, clemency and parole release have already had an intertwined relationship. For example, parole in California "was proposed, and used for more than a decade, selectively to provide 'early' release for prisoners serving 'excessive' terms. As such, it was intended as a partial substitute for executive clemency." Sheldon L. Messinger et al., *The Foundations of Parole in California*, 19 LAW & SOC. REV. 1, 1 (1985).

76. *Cf.* Frase, *State Sentencing Guidelines*, *supra* note 10, at 1221 (criticizing discretionary parole release but noting that "reassessments of the continuing need for custody seem especially important for offenders serving very long prison terms").

77. The mean federal prison sentence imposed in 2003 was fifty-six months, while the median sentence imposed was thirty-three months. UNITED STATES SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2003).

of information about *past* sentencing policies and decisions gleaned from the ESR process. Looking at these offenders at a different point in time may allow us to reevaluate the wisdom of our decisions that sent them there long ago. Is our retributive judgment sufficiently robust to determine reliably that fifteen years, as opposed to, say, ten, is the appropriate sentence? Are our retributive notions at the time of sentencing sufficiently refined once we start to consider "long-term" sentences? Or does projecting so far into the future have a distorting effect on our judgment? Have what Professor Michael Tonry calls "moral panics"[78] skewed our previous retributive judgments? Perhaps looking at an aggregation of these ESR cases—the consequences of sentencing policies and decisions from the past—can offer us insights on the challenges and "moral panics" we face today.

This kind of ESR review is particularly important now because of the rapidly rising and record-breaking federal prison population, fueled in part by long-term sentences.[79] Indeed, the relatively narrow ESR target group of inmates age fifty or older with fifteen or more years in custody still yields a rather large federal population. At the end of FY 2003, 1617 inmates met these criteria.[80] Of that group, the plurality (584) were convicted of drug offenses.[81] Given that federal drug mandatory sentences were still new and ultimately incomplete[82] in 1987 (fifteen years before this data year), this group of federal ESR-eligible offenders may well grow in the years to come.

The judicious composition of the ESR panel can bolster its effectiveness as

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78. TONRY, *supra* note 60, at 5 (stating that moral panics "typically occur when horrifying or notorious events galvanize public emotion, and produce concern, sympathy, emotion, and overreaction").

79. *See, e.g.*, PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISON AND JAIL INMATES AT MIDYEAR 2004 tbl.1 (2005) (describing federal prison population of 179,210 as of June 30, 2004); *see also* ADAY, *supra* note 71, at 11 ("Since 1980 long-term incarceration has become a major contributor to the explosion of the American prison population."); *id.* at 12 ("The average percentage of inmates serving twenty years or more remained steady from the early 1990s to 2000, but the overall number of long-term inmates increased dramatically during the same period."); Flanagan, *supra* note 71, at 3 ("Long-term incarceration is a major factor in the explosion of the American prison population in the last 15 years.").

Furthermore, Professor van Zyl Smit reports "a persistent increase in overall numbers of lifers and of other long-term prisoners of all kinds in the system" from 1989 to 1999, based on data covering many states and frequently the federal system. DIRK VAN ZYL SMIT, TAKING LIFE IMPRISONMENT SERIOUSLY 24-25 (2002).

80. Federal Bureau of Prisons, SENTRY data file, FY2003, Federal Justice Statistics Program (on file with author). In this data snapshot, the inmates' age was calculated as of Sept. 30, 2003.

81. *Id.* As categorized by the Bureau of Prisons, (i) 580 inmates were convicted of violent offenses, including 300 for robbery, (ii) 181 were convicted of property offenses, including 5 arson and explosives offenses, (iii) 143 were convicted of public-order offenses, (iv) 83 were convicted of weapons offenses, (v) 33 were convicted of immigration offenses, and (vi) 13 were convicted of unknown offenses. *Id*.

82. *See, e.g.*, Pub. L. No. 100-690, §§ 6371, 6470(a), 6481, 102 Stat. 4181, 4377 (1988) (codified as amended at 21 U.S.C. §§ 844(a), 846, 848(a)) (expanding, in part, drug mandatory minimum penalties to conspiracies).

a guidance and communication tool. Experienced sentencers who are likely to continue to shape the sentencing system for years to come are the ideal candidates. Mid-career sentencing professionals—including judges, legislators, sentencing commissioners, correctional officers, prosecutors, defenders and even academics—seem to fit that bill. Perhaps we can think of the systemic aspect of ESR as an advanced sentencing school.[83] At the individual level, the students study these older, long-serving inmates and decide whether to grant release. Moving to the systemic arena, the students seek out larger lessons and relevant trends from the inmates as a group, and then go on to educate other people who are making sentencing decisions now.

Although sharing some lineage with discretionary parole release, ESR is a different animal. Contrary to the parole release model proposed above as part of a system of Indeterminate Structured Sentencing, release at the time of review cannot be presumed. In fact, the rebuttable presumption may be in favor of continued incarceration. After all, the ESR process is swimming against the considerable tide of the retributive judgment expressed by the sentencing court, itself informed by the actions of such other sentencers as the Congress and the Commission. Some offenders deserve to remain in prison for fifteen years, twenty years, or even their natural lives. Principles of just deserts and public safety demand no less.[84] Yet, can we always be certain of our retributive judgments rendered at least a decade and a half earlier?[85]

Reasonable minds can and will differ as to how many inmates should be released pursuant to ESR procedures. Some people believe that virtually all properly convicted inmates deserve to remain incarcerated as sentenced. Others, however, believe that at least some inmates should have been released long ago.[86] Regardless of the resolution of this question in individual cases, the

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83. As a Professor, I try to expose my students to some of the consequences of crime and punishment for both victims and offenders. Concerning the offenders, I encourage my sentencing students to visit a maximum-security prison with me. I do not do so out of a desire for the students to have sympathy or scorn for the inmates. Rather, I do so for the students to begin to have an understanding of some—and only some—of the consequences of our punishment decisions. It is very easy to throw around large numbers when it comes to incarceration. If five is good, ten must be better and fifteen better still. ESR, like those student visits to the prison, may help sentencers understand more of the consequences of their decisions and the decisions of their predecessors.

84. *Cf.* Daniel J. Freed & Steven L. Chanenson, *Pardon Power and Sentencing Policy*, 13 FED. SENT. REP. 119, 123 (2000) ("As a general matter, considerations of crime control are of vital importance whenever clemency is contemplated. There are many crimes for which lengthy prison sentences are appropriate.").

85. There is reason to believe that even some of today's prosecutors question the Guidelines' retributive judgments in certain cases. *See, e.g.*, Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Date from the District Level*, 87 IOWA L. REV. 477, 559 (2002) ("[P]rosecutors, and the judges they appear before, use their discretion liberally, but irregularly, to reduce drug sentences.").

86. *See, e.g.*, Frank O. Bowman, III, *Murder, Meth, Mammon and Moral Values: The Political Landscape of American Sentencing Reform*, 44 WASHBURN L.J. 495, 507 (2005) (asserting that "both social science and commonsense tell us that thousands of prisoners are

crucial point is the willingness to question our own judgment, re-examine our own assumptions, and apply the resulting knowledge in a methodical way.[87]

Many federal sentences today are more severe than they were before Congress passed the Sentencing Reform Act.[88] Have we made the right decisions? Are we sure that the push for longer terms of incarceration over the past decades was the right path? ESR is one way to evaluate that query. Exposure to the feedback afforded by the ESR "school" might help to prevent sentencing policy makers from "los[ing] their senses of humility and proportion and los[ing] sight of timeless values."[89] ESR can help us communicate about and capitalize on changes in thinking about crime that have not yet translated into changes in policy.[90]

Ultimately, if society is careful and humble about its sentencing policies on the front-end, ESR should not yield many releases. But ESR can act as a limited fail-safe for those situations when our retributive judgments—at least as seen through contemporary eyes—were lacking. ESR can help us to understand the consequences of yesterday's judgments and actions, while striving to improve tomorrow's reality.

CONCLUSION

Irrespective of a particular system's specific contours, the preferred approach to guided sentencing embraces the constitutionally inspired technique of checks and balances promoted by a dynamic interchange of guidance and ideas between sentencers. A disappointingly small portion of that ideally vibrant conversation comes from "above and beyond" the sentencing judge. Yet we can give life to those presently quiet voices. By encouraging meaningful appellate review, and deploying other devices, such as ESR, to promote a richer sentencing discourse, Congress can continue to move the

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being kept behind bars for years, and sometimes decades, past the point at which they represent a really significant risk of doing more serious harm").

87. *Cf.* Steven L. Chanenson, *Sentencing and Data: The Not-So-Odd Couple*, 16 FED. SENT. REP. 1, 4 (2003) ("We must acknowledge the boundaries of our knowledge . . . to prompt us to periodically re-examine the decisions we make. . . . A healthy dose of humility may keep us from getting perilously set in our ways.").

88. *See* Yellen, *supra* note 28, at 182-83.

89. TONRY, supra *note* 60, at 167.

90. Of course, just knowing about potential problems with any existing theory—including a sentencing theory—may not be enough to overcome our natural tendencies to resist change. *Cf.* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. (forthcoming 2005) (manuscript at 7, *available at* http://ssrn.com/abstract=707138 (last visited Aug. 16, 2005)) ("Once a theory is formed, people fail to adjust the strength of their beliefs when confronted with evidence that challenges the theory's accuracy."); *id.* (manuscript at 13) ("[T]he phenomenon of belief perseverance demonstrates peoples' tendency to adhere to theories even when new information wholly discredits the theory's entire evidentiary basis."). Furthermore ESR panels cannot be completely insulated from larger political pressures that may advocate for one substantive result over another.

federal sentencing system forward.