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Giving Guidance to the Guidelines

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GIVING GUIDANCE TO THE GUIDELINES

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Throughout the country, we are seeing sentencing reform efforts reshape the way resources are being used to control crime and punish offenders.[1] Fueled mostly by the practical challenges of overcrowded prisons and mounting costs, lawmakers have been willing to amend existing law in order to reduce incarceration for low-level, nonviolent offenders.[2] This same effort at being "smart on crime" has been embraced by the federal government as well.[3] While most of these changes are in the form of changes to mandatory minimum laws, the use of evidence-based sentencing

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1. *See, e.g.*, Marc A. Levin, *Smart on Crime: With Prison Costs on the Rise, Ohio Needs Better Policies for Protecting the Future*, BUCKEYE INST. FOR PUB. POL'Y. SOLUTIONS (Nov. 2010), http://www.buckeyeinstitute.org/uploads/files/buckeye-smart-on-crime (1).pdf.

2. *Id.* at 12–13.

3. For example, in 2013 the U.S. Attorney General launched a "Smart on Crime" initiative, designed to "identify reforms that would ensure federal laws are enforced more fairly and—in an era of reduced budgets—more efficiently." U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S SMART ON CRIME INITIATIVE (2013).

practices, and a focus on diversion and re-entry programs,[4] the role that the actual sentencers—the judges—play in the process should not be ignored. Any reform of federal sentencing necessarily requires reforming the U.S. Sentencing Guidelines to incorporate those changes. However, now that the sentencing guidelines are advisory, judges can follow their own policy rationales in deciding what sentences are reasonable for each offender before them.[5] Therefore, though Congress may have made certain changes to sentencing law, and the Attorney General may have shifted law enforcement and punishment priorities, when it comes to individual sentencing decisions, judges are free to follow their own vision of sentencing reform. While judicial sentencing discretion has its benefits when it comes to individualizing sentences, unfortunately, judges often do not have enough relevant information to adequately determine what amount and type of punishment is appropriate to achieve punishment goals. However, my interviews with federal district judges indicate that many judges are very open to receiving such information. Thus, federal sentencing reform efforts should include the development of a way to effectively deliver information about sentencing goals and purposes to district judges. The Guidelines could be used to accomplish this task, but that would require allowing the needs of judges to give guidance to the Guidelines.

In the decade since the U.S. Sentencing Guidelines became advisory under *U.S. v. Booker*,[6] much attention has been paid to the frequency with which federal district judges still sentence within those Guidelines.[7] The U.S. Sentencing Commission has undoubtedly spent valuable time and resources in meetings, research, and data collection for the Guidelines, yet those judges who have chosen to depart from the applicable Guidelines ranges do so because they find a non-Guidelines sentence to be reasonable and in line with the 18 U.S.C. 3553(a) factors[8] in a specific case or for a specific set of offenses.[9] While it may be the case that the Guidelines could never (and perhaps should not aim to) capture all of the factors that judges

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4. *See, e.g.*, NAT'L GOVERNOR'S ASS'N., NAT'L GOVERNOR'S ASS'N. CTR. FOR BEST PRACTICES, STATE EFFORTS IN SENTENCING AND CORRECTIONS REFORM 2–5 (2011).

5. *See* United States v. Kimbrough, 552 U.S. 85, 85 (2007).

6. United States v. Booker, 543 U.S. 220, 245 (2005).

7. Each year the Sentencing Commission publishes Federal Sentencing Statistics, including data on sentences imposed and their relation to the applicable Guidelines ranges. For example, see U.S. SENTENCING COMM'N., FEDERAL SENTENCING STATISTICS 2015 (Apr. 2016).

8. *See infra* note 26.

9. *See* U.S. SENTENCING COMM'N., AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES (2016) (explaining that judges may depart from the guideline range in certain situations).

may find compelling in a precise case, this Article argues that more focus needs to be paid to what can be learned from the instances in which judges depart from the Guidelines.[10] These departures may teach us valuable lessons about what motivates judges in their sentencing decisions and will allow the Commission to determine whether certain sentencing factors and considerations should be included, deleted, or altered in the Guidelines calculations.[11]

This Article explores the Author's findings gathered in the course of several interviews with federal district judges throughout the country. While the Guidelines remain a significant force in sentencing, sentencing judges have a host of opinions regarding the utility and reliability of their content. As this Article explains, many of the reasons for the variety of those views are founded on varied perceptions of the transparency (or lack thereof) of the Guideline range determination process, and the ease (or lack thereof) of access to information regarding sentencing ranges, factors, and other data from the Sentencing Commission. Ultimately, this Article argues that there is an opportunity for the Sentencing Commission to revamp the Guidelines to satisfy the criticisms of skeptical judges and to bolster the usefulness of the Guidelines even for judges who are already inclined to find Guidelines range sentences reasonable in many cases. Such a re-envisioning of the Sentencing Guidelines as responsive to the needs of sentencing judges will allow judges to more consistently and effectively fulfill the requirement that they impose reasonable sentences that reflect the § 3553(a) factors. In this way, judges can be brought into the fold of sentencing reform.

I. GUIDELINES RESPONSES TO SENTENCING REFORM

When federal sentencing laws change, so do the U.S. Sentencing Guidelines. While some changes to the Guidelines are based on the Sentencing Commission's desire to clarify language or to bring Guidelines provisions more in line with the Commission's policy statements, a number of Guidelines amendments are a response to Congressional changes to sentencing laws. In a recent report of Guidelines amendments that will take effect in November 2016, the Commission listed several changes to the

10. *See* U.S. SENTENCING COMM'N., AMENDMENTS TO THE SENTENCING GUIDELINES (effective Nov. 1, 2016) (explaining that the reasons for some of the proposed amendments are in response to changes in sentencing laws). The full updated 2016 Guidelines Manual can be found at http://www.ussc.gov/guidelines/2016-guidelines-manual.

11. *See id.* (explaining the various reasons for each proposed amendment to the sentencing guidelines).

Guidelines that were based on new offenses or changes in punishment.[12] For example, in 2008 and 2014, Congress made changes to the Animal Welfare Act, including increasing the punishment for certain animal fighting offenses and creating two new offenses related to attending animal fights.[13] In response, the Sentencing Commission adopted new Guidelines provisions that increased the base offense level for those animal fighting offenses receiving harsher punishment and created a base offense level for the new offenses.[14] The Commission also developed new departure Guidelines for these offenses.[15] Thus, when judges sentence for these changed offenses, they will have new Guidelines provisions to consult.[16] In developing these new provisions, the Sentencing Commission explains that it is informed by public commentary and testimony, as well as other data relevant to sentencing such as the frequency that certain lengths of sentences are imposed.[17] Therefore, when judges sentence in cases of these new or changed offenses, they are not only consulting new Guidelines, they are consulting new Guidelines that are the basis of thorough research and extensive deliberation.

The research and data collection undertaken by the U.S. Sentencing Commission often results in Guidelines being ahead of Congress in taking progressive sentencing reform stances. The animal fighting offenses provide an example of Congress increasing punishment, even in the face of trends toward reducing incarceration. The Sentencing Commission, though, sometimes urges Congress to reduce punishment when its research shows that current sentencing laws are out of line with justice and fairness. A clear example of this Guidelines-led reform is the story of cocaine offense sentencing. The Anti-Drug Abuse Act of 1986 imposed the infamous 100 to 1 crack to powder cocaine sentencing ratio, which required 100 times more powder cocaine to trigger the same mandatory minimum sentence applicable to crack cocaine trafficking offenses.[18] The criticisms of the Act were immediate and continued for decades. Those criticisms focused mainly on

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12. *Id.*

13. Agricultural Act of 2014, Pub. L. No. 113-79, § 12308, 128 Stat. 990, 990 (2014); Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 14207(b), 122 Stat. 1461, 1462 (2008).

14. U.S. SENTENCING COMM'N., *supra* note 10, at 6–8.

15. *Id.* at 9.

16. *Id.* at 6–8.

17. *Id.*

18. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207 (1986); *See generally* Jelani Jefferson Exum, *Forget Sentencing Equality: Moving From the "Cracked" Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95, 102–05 (2014) (explaining the development of this ratio).

the disparate racial impact that the 100 to 1 ratio created.[19] The Sentencing Commission was among those repeatedly calling for Congress to reform these racially biased drug sentencing laws. The Sentencing Commission issued recommendations to Congress to change crack cocaine sentencing in February and May of 1995, again in 1997, and yet again in 2002 and 2004.[20] In each instance, Congress failed to answer with any cocaine sentencing reform. Finally, in 2007, the Commission took matters into its own hands and enacted a series of Guidelines' amendments to deal with this sentencing disparity issue. Amendment 706, effective November 1, 2007, reduced by two levels the base offense level for most crack offenses.[21] As the Commission noted when it enacted Amendment 706:

> The Commission, however, views the amendment only as a partial remedy to some of the problems associated with the 100-to-1 drug quantity ratio. It is neither a permanent nor a complete solution to those problems. Any comprehensive solution requires appropriate legislative action by Congress. It is the Commission's firm desire

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19. *See, e.g.*, Richard Dvorak, *Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 613 (1999) (arguing that "members of Congress and the media 'coded' messages to gain support for the passage of the Anti-Drug Abuse Act of 1986"); Knoll D. Lowney, *Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?*, 45 WASH. U. J. URB. & CONTEMP. L. 121, 121 (1994) (discussing the rate of incarceration among African Americans with drug-related crimes, demographics of crack cocaine users, and failure by the Federal government to provide equal protection to all races); Kenneth B. Nunn, *Race, Crime, and the Pool of Surplus Criminality: Or Why the "War on Drugs" was a "War on Blacks"*, 6 J. GENDER, RACE & JUSTICE 381, 397 (2002) (discussing the history of the war on drugs and resulting racial implications); *see also* Marcia G. Shein, *Race and Crack Cocaine Offense: Correcting A Troubling Injustice Post-Booker*, CHAMPION, Apr. 2007, at 18.

20. Amendments to the Sentencing Guidelines for U.S. Courts, 60 Fed. Reg. 25075 (May 10, 1995); U.S. SENTENCING COMM., 105TH CONG., SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1997); U.S. SENTENCING COMM., 107TH CONG., REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 1–14 (2002); U.S. SENTENCING COMM., 108TH CONG., FIFTEEN YEARS OF GUIDELINES SENTENCING (2004).

21. *See* Amendments to the Sentencing Guidelines for U.S. Courts, 72 Fed. Reg. 51882–83 (Sept. 11, 2007) (assigning a base offense level to every federal criminal offense). Chapter Three of the Sentencing Guidelines also included several sections of adjustments that add points to the base offense level based on particular offense factors and offender conduct (i.e., role in the offense, type of victim, etc.) because the Sentencing Commission adopted a system of "real offense sentencing." The sum of the total offense level which corresponds to the Sentencing Grid is matched up with a criminal history category to result in a sentencing range. *Id.*

> that this report will facilitate prompt congressional action addressing the 100-to-1 drug quantity ratio.[22]

Though it took three years, the Commission's hope for Congressional action was finally realized. The resulting Fair Sentencing Act of 2010 (the "FSA") decreased the powder to crack cocaine sentencing ratio to nearly 18:1.[23] During this period of discourse that eventually led to reform, some district court judges were acting out their own ideas about sentencing fairness. Judicial responses to the crack-powder cocaine sentencing disparities indicate that, for some judges, the guidelines were not providing enough valuable guidance in this sentencing area.

II. HOW JUDGES RESPOND TO NEEDS FOR REFORM

To understand how sentencing judges respond to their perception that sentencing reform is needed, one must first think about the context in which federal district judges are making their sentencing decisions. In 2005, the U.S. Supreme Court decided *U.S. v. Booker*, in which it solved the then-mandatory U.S. Sentencing Guideline's violation of the Sixth Amendment jury trial right by making the Guidelines advisory.[24] District judges must still calculate and consider the applicable Guidelines range for each case, but then the judge is free to impose any reasonable sentence, even if it is one outside of the applicable Guidelines range.[25] To be reasonable, a sentence must comport with the sentencing factors delineated in 18 U.S.C. § 3553(a).[26] In the years following *Booker*, the Supreme Court had to clarify what limits there would be to a judge's sentencing discretion.

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22. *Id.*

23. Pub. L. No. 111-220, 124 Stat. 2372 (codified at 21 U.S.C. § 841 (2010)).

24. United States v. Booker, 543 U.S. 220, 226–27 (2005).

25. United States v. Gall, 552 U.S. 38, 39 (2007).

26. 18 U.S.C. § 3553(a) (2014). Pursuant to the relevant parts of 18. U.S.C. § 3553(a), sentencing courts shall consider:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment . . . ; to afford adequate deterrence . . . ; to protect the public . . . ; to provide the defendant with needed educational or vocational training, medical care, or correctional treatment;
> (3) the kinds of sentences available;
> (4) the kinds of sentence[s] and the sentencing range established for . . . the . . . offense;
> (5) any pertinent policy statement . . . issued by the Sentencing Commission;
> (6) the need to avoid unwarranted sentence disparities; and
> (7) the need to provide restitution to . . . victims." *Id.*

One particularly important case that opened the door for judge-made sentencing reform was the 2007 case, *U.S. v. Kimbrough*.[27] In that case, the Supreme Court held that district courts "may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses" in deciding how to sentence a defendant.[28] After explaining the history and development of the cocaine sentencing Guidelines, the Supreme Court stated:

> The crack cocaine Guidelines, however, present no occasion for elaborative discussion of this matter because those Guidelines do not exemplify the Commission's exercise of its characteristic institutional role. In formulating Guidelines ranges for crack cocaine offenses, as we earlier noted, the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of "empirical data and national experience." Indeed, the Commission itself has reported that the crack/powder disparity produces disproportionately harsh sanctions, *i.e.,* sentences for crack cocaine offenses "greater than necessary" in light of the purposes of sentencing set forth in § 3553(a). Given all this, it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence "greater than necessary" to achieve § 3553(a)'s purposes, even in a mine-run case.[29]

In other words, according to the U.S. Supreme Court, when it came to cocaine sentencing, the U.S. Sentencing Guidelines did not give adequate guidance toward a reasonable sentence. And, as the Court pointed out, even the U.S. Sentencing Commission agreed with the potential failure of the Guidelines in this area. In the 2009 case *Spears v. U.S.*, the Supreme Court re-iterated its *Kimbrough* holding by clarifying that it is permissible for a sentencing judge to come up with his or her own sentencing ratio for cocaine offenses.[30] The door was open for judges to act as sentencing reformers, but from where they would draw their guidance was unclear.

Several sentencing judges took this freedom and ran with it—regularly departing from the Guidelines in crack cocaine cases as well as in the cases of other offenses for which the judges felt the Sentencing Guidelines would

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27. 552 U.S. 85 (2007).

28. *Id.* at 85.

29. *Id.* at 109–10 (internal citations omitted).

30. 555 U.S. 261, 265–66 (2009). As the Court explained in Spears, however, while a sentencing judges may impose her own sentencing ratio, she is still bound by the mandatory minimum sentencing laws for crack and powder cocaine offenses. *Id.* at 267.

be unreasonable. When it came to sentencing crack cocaine offenders, some judges looked at the information available and created their own ratio. For Judge Lynn Adelman in the Eastern District of Wisconsin, that ratio was 20:1, which he adopted based on the Commission's recommendation to Congress at the time.[31] Several other judges have chosen the same course.[32] For other judges, the plan of attack was to impose complete parity—thus adopting a 1:1 sentencing ratio in cocaine cases. For instance, Judge Mark W. Bennett in the Northern District of Iowa (the sentencing judge in *Spears*) first decided to implement a 1:1 sentencing ratio for crack and powder cocaine offenders in 2009, prior to the FSA.[33] He has maintained the commitment to that parity since the FSA imposed the 18:1 ratio. In the 2011 case, *U.S. v. Williams*,[34] Judge Bennett explained that he adopted a 1:1 ratio in the first place "on policy grounds, for several reasons, not least of which were the failure of the Sentencing Commission to exercise its characteristic institutional role in developing the Guidelines, the lack of support for the assumptions that apparently motivated adoption of the ratio, and the disparate impact of the ratio on black offenders."[35] Once the FSA changed the ratio to 18:1, which was also reflected in the Sentencing Guidelines, Judge Bennett expressed a disappointment with the lack of expert reasoning for settling upon this new ratio. Judge Bennett explained:

> When I first learned that the 2010 FSA was about to be passed, I just assumed that I would change my opinion from a 1:1 ratio to the new 18:1 ratio, because I assumed that Congress would have had persuasive evidence—or at least some empirical or other evidence—before it as the basis to adopt that new ratio. I likewise assumed that the Sentencing Commission would have brought its institutional expertise and empirical evidence to bear, both in

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31. United States v. Smith, 359 F. Supp. 2d 771, 781–82 (E.D. Wis. 2005).

32. *See, e.g.*, United States v. Perry, 389 F. Supp. 2d 278, 308 (D.R.I 2005) (adopting a 20:1 ratio); *see also* United States v. Castillo, No. 03 CR 835, 2005 WL 1214280, at *5 (S.D.N.Y. 2005) (adopting a 20:1 ratio); United States v. Clay, No. 2:03CR73, 2005 WL 1076243, at *4 (E.D. Tenn. 2005) (rejecting the 100:1 ratio).

33. United States v. Gully, 619 F. Supp. 2d 633, 637 (N.D. Iowa 2009). The Defendant pleaded guilty to one count of distributing less than four grams of crack cocaine and three counts of distributing less than four grams of crack within 1,000 feet of a public playground or school after having previously been convicted of a felony. Judge Bennett sentenced the defendant to eighty-four months of incarceration instead of selecting a sentence within the 100:1 Guidelines range of 108-135 months. *Id.*

34. *See* United States v. Williams, 788 F. Supp. 2d 847 (N.D. Iowa 2011) (criminal drug case where Judge Bennett applied a 1:1 crack-to-power ratio when deciding an appropriate sentence for the defendant).

35. *Id.* at 853.

advising Congress and in adopting crack cocaine Sentencing Guidelines based on the 18:1 ratio.[36]

What is clear from Judge Bennett's opinion is that he considered the new ratio imposed by the FSA was just as arbitrarily decided as the problematic 100:1 ratio. What we learn from the responses of all of these judges who forged out on their own to reform cocaine sentencing is that the Sentencing Guidelines did not provide them with the sentencing information they deemed relevant.

III. WHEN JUDGES QUESTION SENTENCING GUIDELINES: PRELIMINARY RESEARCH FINDING

As part of my research for an upcoming book project entitled, *Sentencing with Purpose: Conversations with Judges*, I have interviewed federal district judges across the country regarding their sentencing philosophies and practices.[37] This project will highlight what judges feel they need (and what they in fact need) in order to sentence with the purposes they, and society, hope to achieve through the criminal justice system. As the tide of sentencing reform is turning toward giving judges even more discretion in sentencing, it is vitally important to give judges the sentencing resources and support that they need to sentence with purpose. Each chapter of the book will address a different issue raised by the judges, including: (1) developing consistency in sentencing purpose through sentencing collaboration among judges; (2) the use of sentencing expert witnesses at sentencing hearings; (3) the appropriate and inappropriate use of studies in sentencing; and (4) dealing with the obstacles of incorporating purpose sentencing in an age of mandatory minimum sentencing. Within all of these topics, the use of the Federal Sentencing Guidelines is relevant and came up regularly in my discussions with the judges.

It is important to note that many federal district judges both trust and appreciate the guidance given in the Sentencing Guidelines. During several interviews, judges noted the extensive research conducted by the U.S. Sentencing Commission and the value of much of the information that can

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36. *Id.* at 849–50.

37. As of the time of this Article's publication, I have interviewed 20 federal district judges, spanning 14 federal districts and covering 8 federal circuits, with an ever-growing list of judges who have committed to being interviewed. Before publication of the final book project, judges have the option of remaining anonymous or having either ideas or direct quotes attributed to them. Because these anonymity elections are still pending, I will not identify any of the participating judges to whom I refer in this Article.

be found on the Commission's website and in its publications. Therefore, the focus of this Article is not to suggest that the Sentencing Commission does not provide any meaningful information to sentencing judges. Rather, the purpose of sharing my findings is to think about what can be learned from those instances in which judges question the usefulness of the Guidelines, and how those lessons might be incorporated into the larger sentencing reform discussion. With that in mind, the following are the types of criticisms of the Sentencing Guidelines that judges have shared with me during our interview sessions.

A. Overall Concerns About Sentencing Guidelines

Some district judges have problems with sentencing guidelines in general and will likely always take issue with them, regardless of their form. One judge said she had "never been a fan" of sentencing guidelines; another said that he found guidelines to be "unnecessary." These comments reflect a view that judges ought to be trusted to make sentencing decisions based on the information before them, and that judges are capable of making appropriate sentencing decisions without needing sentencing guidelines. Of course, judges with this view understand that they are required by law to calculate and consider the applicable Guidelines range for all cases before them. They are simply indicating that they do not find much value in that exercise and are not of the opinion that the uniformity goal of sentencing guidelines is either achievable or necessary. Other judges, however, pointed to concerns that they have specifically about the U.S. Sentencing Guidelines.

Those judges who have criticisms, particularly about the Federal Sentencing Guidelines, often refer to the complexity of the Guidelines themselves. One judge called them the "so-called Guidelines" because having so many factors ends up making them no help at all in creating uniformity. Others note this complexity as proof that the Guidelines contain many irrelevant factors, making the final range "unreliable" in many cases. While there are certainly judges who find the complexity of the Guidelines admirable, even some of those judges thought that the Guidelines got the punishment "calibration wrong", leading to sentences that are often longer than necessary to accomplish the goals of sentencing. These judges all indicate an overall uneasiness about the sentencing guidelines, which tends to cause them to doubt the reasonableness of Guidelines sentence in any particular case. When it comes to thinking about sentencing reform, these judges are telling us that they are looking for reliable information to use in making their sentencing decisions, but they do not always believe that the Guidelines are providing such material.

B. Particular Aspects of the Guidelines More Suspicious Than Others

For several judges, even if they had an overall appreciation for the Guidelines, they believed that there were certain aspects of the Sentencing Guidelines that regularly provided less reliable and relevant information than other parts of the Guidelines. The two culprits that were usually raised as "suspicious" were the portions of the Guidelines applicable to drug offenses, and those applicable to child pornography possession and receipt offenses. Here are some of the highly critical perceptions that some district judges have of the drug Guidelines: "drug sentences are out of control"; "drug Guidelines are out of whack"; "Guidelines are obsessed with drug quantities"; and "these Guidelines are being used to drive prison populations and destroy lives." These are quite serious indictments. To be fair, when it comes to drug quantities, the Guidelines have been reflective of Congressional directives and highly-punitive mandatory minimum sentencing laws. The same is true for child pornography Guidelines, which one judges referred to as "astronomical for political reasons." However, what is important to gather from judicial commentary is the impression that judges have about the reliability of the Guidelines for drug offenses. For those critical of these Guidelines, their tendency is to discount the Guidelines' relevance. If the Sentencing Commission feels that there is important information being offered in the drug offense Guidelines, then that message must be communicated to judges. As sentencing judges continue to reform sentencing on their own, it is to the Commission's advantage to provide information to judges in ways that explain how the data behind the Guidelines finds its way into the Guidelines ranges that judges are required to consider.

C. Criticism Regarding the Development of Guidelines

A recurring theme that was raised in my conversations with judges was the concern that much of the Sentencing Guidelines is not empirically based. Some judges seemed to express a feeling of betrayal about this, with one saying, "They told us all of the guidelines are empirically based, but that's not true . . . they aren't." For those judges concerned about this aspect of the Guidelines development, the thought was that, what could be useful about sentencing guidelines would be if they were indicating what other judges were actually doing. In other words, for a Guidelines sentence to reflect the "heartland" of cases, it should be representative of the types of sentences that other judges were imposing. The difficulty with this view, of course, is that for nearly two decades judges have been required to sentence within the Guideline range except in very specific instances. As one judge put it,

"unfortunately the Guidelines provide an anchor/base that in some cases is completely an artificial construct of the politics of that time, so you have to sentence against that backdrop." Though still imperfect, one suggestion to deal with this is to begin now with a re-do at empirically based Guidelines. If judges' current sentencing practices, including those instances when judges are regularly departing from the applicable Guidelines range, were reflected in revised Guidelines ranges, then at least some judges would find that more useful than Guidelines that are divorced from current practice and seem to miss certain aspects of judicial concern. One judge commented that in this post-*Booker* era, the only way she can figure out what other judges are doing is to get statistics from the Commission by asking the Commission to run certain data points for her. Though she noted that the Commission makes this information available to any judge who may want it, she also indicated that it takes time and effort to get this information given the way it is currently collected and stored. Judges of this view are looking for the Guidelines themselves to already incorporate statistics on judicial sentencing practices.

D. The Missing Pieces of the Guidelines

In addition to wishing that the Sentencing Guidelines ranges mirrored judges' own sentencing decisions and concerns, several judges indicated that the Guidelines were missing other key pieces of information about which they cared in making their sentencing determinations. More than one judge indicated a concern about a defendant's history of violence and noted that there was no history of violence upward departure in the Guidelines calculation. One judge said that the when it came to protecting the public, the Guidelines are "woefully inadequate about taking into account violence and history of violence." For other judges, it was general information about a defendant's background which the judge wished had a place for consideration within the Guidelines calculation. In deciding whether a defendant's background justified a below-guidelines sentence, some judges wished that the Commission would give guidance on how certain background factors play into recidivism and dangerousness. While all of this may be a tall order for the Commission to accomplish, these comments from judges indicate that many judges are looking for the Sentencing Guidelines to present information different in kind and format than what the Commission has done since 1986.

IV. CONCLUSION: JUDGES, SENTENCING REFORM, AND THE POTENTIAL OF THE GUIDELINES

For many judges, an ultimate concern about the Sentencing Guidelines is that there has not been a guiding purpose in federal sentencing. But, there is certainly a desire among judges to have the Sentencing Commission think about sentencing goals and to tailor the Guidelines to achieving those goals. As one judge put it, "if we take recidivism, the Sentencing Commission could concentrate on that; if you wanted to put in a rehabilitative ideal, then the Sentencing Commission could be doing more with that." What one can take from all of these conversations with judges is that judges are open to information. They are all trying to come to the "right" sentence for defendants and they welcome statistics and data-driven reports about sentencing. However, there are several district judges who do not feel as though the Sentencing Guidelines are regularly providing them with information that helps them to accomplish their mandated sentencing goal of imposing a reasonable sentence. For those judges, the options are to look to information provided elsewhere, or to their own sentencing experience, to decide on appropriate sentences. While these approaches may not necessarily be a bad thing, there is a missed opportunity when it comes to sentencing reform. As trends continue toward reducing incarceration and re-focusing resources to address recidivism and to reduce over-punishment on low-level offenders, judges should be brought into the fold in more consistent ways. Rather than leaving it up to judges to determine for themselves on a case-by-case basis whether a sentencing policy put forth by the Guidelines is too harsh, the Guidelines can be adapted to present information to judges that would show how the Guidelines are responding to those sentencing reform trends and objectives. Of course, it would be necessary for the Sentencing Guidelines to actually be doing this before such a message could be communicated to judges. And, perhaps that is the most useful lesson presented by these conversations with judges—that the Guidelines could use more guidance from the in reflecting today's punishment goals.

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