IX
LUNCHEON ADDRESS

By The Honorable William H. Pryor Jr.
Judge of the U.S. Court of Appeals for the Eleventh Circuit

The Wednesday luncheon session
of The American Law Institute
convened in Salon III
of the Ritz-Carlton, Washington, DC,
on May 18, 2016.
President Roberta Cooper Ramo presided.

President Ramo: One of the important duties of the President, David, is that you get to choose who speaks at the Wednesday lunch. I first met, I think, Judge Pryor during a discussion about the death penalty in which we were trying to figure out, from all points of view, what the right thing to do would be. I was so impressed with the quality of his intellect and the thoughtful way in which he approached everything, and I wasn't quite sure who he was at the time. Then I went back and saw, oh, he was Judge Wisdom's clerk, and that explained all kinds of things to me.

Judge Wisdom, of course, not only loved the ALI. He was much beloved by the ALI, although I will tell you, Judge, sort of a funny story. When I was President of the ABA, I encouraged the ABA to give the ABA Medal to Judge Wisdom. So my husband came with me to our annual meeting, and I'd never really met Judge Wisdom before, and neither had my husband. And over the course of the two days, we had an opportunity to spend an enormous amount of time with him.

And I am told—we were seated at different tables—that at the final dinner where we had him for dinner, somebody, a waiter asked Judge Wisdom what he wanted to have for dessert and then asked Barry, my husband, what he wanted. And he said, "I'll have what Judge Wisdom is having." (*Laughter*)

Judge Pryor is, I think, as most people in this room know, a federal circuit judge on the U.S. Court of Appeals for the Eleventh Circuit. He was appointed by George W. Bush. President Obama appointed Judge Pryor to serve for four years on the U.S. Sentencing Commission, which, for our guests, is an enormously important group that you heard a little bit about today. It's a seven-member, bipartisan agency that establishes federal sentencing guidelines.

Judge Pryor graduated, *magna cum laude*, from Tulane, the Order of the Coif. But sometimes those people are just, as you know, really good at taking exams, but it is later in life, when people see how their intellect is applied, when those honors really start to make sense. Judge Pryor, among other things, has clearly applied his great intellect in serious ways.

What I appreciate so much about him is that while in the bench he has continued to teach and lecture, which I think is an underappreciated value for the members of our judiciary. So it's my honor to invite to address us today Judge Pryor. (*Applause*)

[*Endnotes provided by the speaker have been included here for the benefit of the reader.*]

Judge William H. Pryor Jr. (AL): Good afternoon. Thank you for that kind introduction. It's always a special moment when you remember Judge Wisdom, who instilled in all of his law clerks a love for the Institute and its work, and without his mentorship I don't think I would be here.

I also want to dedicate my remarks today to Justice Scalia's memory, who had a lot to say about the topic I'm going to talk about and had a lot of influence and, some might say, created some of the problems that we now have to address.

Thirty years ago last month, the newly formed United States Sentencing Commission circulated the first "discussion draft" of proposed sentencing guidelines. That draft had been prepared under the direction of one of the original commissioners, Professor Paul Robinson.[1] It was mathematical and complex—with "harm values," "multipliers," and "sanction units." It sought to account for a wide array of aggravating and mitigating factors.[2] It attempted to achieve something approaching "perfect justice."[3]

The reaction to that draft was resoundingly negative. Circuit Judge Jon Newman, an early proponent of the need for sentencing guidelines, wrote, "My first point challenges a basic assumption that underlies the entire proposal—the idea that every increment of harm that can possibly be measured should be reflected in an increment of additional punishment. I seriously doubt that there is moral validity to this idea." Judge Newman predicted, "The complexity of the proposed system will create enormous grounds for error in application of the guidelines and appeals to challenge the sentence. This is the inevitable consequence of a system that tries for ultimate precision. If everything

matters, then every statement of definition must be interpreted, with inevitable mistake and subsequent legal challenge."[4]

Although later discussion drafts were less complex, the final product, which became effective in 1987, was obviously influenced by the original draft.[5] The 1987 *Guidelines Manual* was complex and mathematical and sought to account for myriad aggravating and mitigating factors other than the offense of conviction.[6] Most stakeholders reacted negatively to the new guidelines.[7]

Over 200 federal judges ruled that the new guidelines were unconstitutional.[8] But in 1989, in Mistretta v. United States, the Supreme Court, over Justice Antonin Scalia's lone dissent, upheld the constitutionality of the Commission and its new guidelines.[9] Sixteen years later in United States v. Booker, the Supreme Court—with Justice Scalia now in the majority—invalidated the mandatory guidelines as violating the right to a jury trial under the Sixth Amendment.[10] As a temporary fix, a different majority of that Court, in a remedial opinion written by Justice Stephen Breyer, one of the original commissioners, held that the guidelines could continue to operate as advisory, but the remedial opinion told Congress that "the ball lies in [its] court" to come up with a workable and constitutional guidelines system.[11]

Congress has not picked up the ball. Over 11 years later, the advisory guideline system created by the Court as a short-term remedy in *Booker* remains in place. Well over half a million federal offenders have been sentenced under the post-*Booker* guidelines.[12] The *Guidelines Manual* has grown in complexity. And empirical evidence proves that sentencing disparities—the primary concern that led to the creation of the guidelines—have increased since the guidelines became advisory.

I want to propose a solution both to the original problems created by the mandatory guidelines and to the new problems created by *Booker*. My proposal adheres to the first principles of sentencing reform initially articulated by Judge Marvin Frankel in the early 1970s and later embodied in the Sentencing Reform Act of 1984. But my proposal differs from both the original guidelines and the post-*Booker* guidelines.

I propose that Congress and the Commission create a system of presumptive guidelines, a radically simpler system with wider sentencing ranges and fewer enhancements. Those enhancements would be found by juries, not judges, unless a defendant admitted to the enhancements in pleading guilty. This system would better resemble the architecture proposed by The American Law Institute in our revision of the Model Penal Code.[13]

Three different experiences influence my perspective. First, since 2004, as a federal judge, I have decided more than a thousand sentencing appeals. Second, from 1997 to 2004, as Attorney General of Alabama, I worked closely with other state leaders to create the Alabama Sentencing Commission, which promulgated simpler guidelines.[14] And third, since 2013, I have served as a member of the U.S. Sentencing Commission.

Since that time, the Commission has made significant strides toward reforming federal sentencing. For instance, in 2014, we unanimously reduced the guideline penalties for the majority of drug-trafficking offenders—including those already serving their prison sentences—by approximately 25 percent.[15] Earlier this year, we promulgated a reform of the career offender guideline and other provisions for recidivists by simplifying the definition of a prior "crime of violence."[16] And last month, we promulgated an overhaul of the immigration guideline for illegal reentry cases.[17] These reforms affect the great majority of federal offenders and represent what I think is most of what we can hope to achieve working with the current *Manual*.

Instead of continuing to tinker with the advisory guidelines, we now need to tackle a more fundamental reform. We need to address why the guidelines have failed to achieve the first principles of sentencing and consider how, with structural reforms, they could do so in the future. I will begin by discussing those first principles. I then will discuss how the original guidelines went wrong, how *Booker* failed to fix those problems and made some things worse, and why we need a second generation of guidelines to implement the first principles of sentencing and to avoid the elusive quest for perfect justice.

My comments do not reflect the official position of the Sentencing Commission. They are solely my opinions, at least for now. (*Laughter*)

The first principles of modern sentencing were initially articulated by Judge Frankel over 40 years ago.[18] Those principles, embraced by Senators Kennedy and Thurmond in the passage of the Act,[19] are, one, sentences should meaningfully reflect the *purposes of punishment*.[20] Two, a sentencing system should result in *proportional punishments*.[21] Three, a system should avoid *unwarranted disparities*.[22] Four, a sentencing system should achieve reasonable *certainty* in sentencing.[23] Five, there should be *honesty* in sentencing.[24] And six, there should be *transparency* in the sentencing system.[25]

Judge Frankel envisioned a "codified [system of] weights and measures"[26] with "binding" rules,[27]—his description of what later would be called "sentencing guidelines." He proposed an expert "commission on sentencing" to create the guidelines.[28] And he stressed that appellate review was necessary to enforce the guidelines uniformly throughout the country.[29] Judge Frankel also believed both before and after the Sentencing Reform Act that federal sentences were often more severe than needed to achieve the purposes of punishment.[30]

Judge Frankel was under no illusion that his proposal would lead to "perfect justice." As he explained, he was not operating under "delusions of precision" about the level of detail needed in the guidelines.[31] Although his ideas were still nascent in 1973, he proposed simple guidelines that "could be graded along a scale from, perhaps, 1 to 5."[32]

Fast forward to 1992, when Judge Frankel gave the keynote address at the *Yale Law Journal* conference on the federal guidelines,[33] the new guidelines had been implemented for only three years following *Mistretta*.[34] Judge Frankel recounted the criticisms that the guidelines were complex, "rigid," "harsh," too "mechanical," and unduly constrained judicial discretion concerning mitigating factors.[35] He intimated his agreement with those criticisms, which his friend, Judge

Newman, later confirmed after he died.[36] Judge Frankel was mostly right in 1992, and his criticisms became more cogent in the ensuing decades.

So let's begin with complexity. The 1987 *Manual* was 268 pages (without appendices).[37] By 1992, when Judge Frankel gave the speech at Yale, the *Manual* was 393 pages.[38] By 2005, when the Court decided *Booker*, the *Manual* had grown to 514 pages.[39] It's currently 542 pages,[40] twice as long as in 1987.

Many of the most commonly applied guidelines—such as those for fraud and theft and for drug trafficking[41]—have expanded in a disproportionate manner. For instance, in 1987, the original drug-trafficking guideline was 115 words long (without the quantity table and commentary). That same guideline today has 1397 words.[42]

The expanding girth of the *Manual* has been a function of nearly 800 amendments since 1987.[43] Many of those amendments were the result of "directives" from Congress, which required or strongly suggested that the Commission amend the guidelines,[44] typically by increasing penalties.[45] Often those amendments concerned minor or arcane sentencing issues, such as the weighty issue of the enhancement for a theft or destruction of "property from a national cemetery or veteran's memorial."[46]

The original guidelines were rigid. They required the sentencing judge to be as much of an accountant as an arbiter of justice. They required and still require numerous mathematical calculations: a "base offense level" plus or minus myriad "specific offense characteristics," plus or minus several "adjustments," followed by a criminal-history calculus. That calculation then yields a narrow sentencing range—for instance, 46 to 57 months or 70 to 87 months of imprisonment.

Before *Booker*, the guidelines constrained judicial discretion to sentence outside those narrow ranges. So long as the Commission had considered a particular issue about offense conduct in the guidelines, a "departure from the guideline [was] warranted only if the factor [was] present to a degree substantially in excess of that which ordinarily is

involved in the offense of conviction."[47] The *Manual* also restricted the consideration of offender characteristics—such as an offender's age, mental illness, drug addiction, or family responsibilities—as a basis to depart from the sentencing range.[48]

Much of the rigidity was dictated by the Sentencing Reform Act. Congress directed the Commission to narrow sentencing discretion in three ways:

> (1) create a "detailed set of sentencing guidelines" that "reflect every important factor relevant to sentencing";[49]
>
> (2) prohibit or limit consideration of several personal characteristics of defendants;[50] and
>
> (3) limit the breadth of the individual sentencing ranges within the guidelines' Sentencing Table such that "the maximum of the range . . . shall not exceed the minimum of the range by more than the greater of 25 percent or six months"—which is known as the "25 percent rule."[51]

For the most part, Congress, not the Commission, made the guidelines rigid, although the Commission exacerbated the problem by making the guidelines complex and mathematical.

The guidelines were and are severe. In 1992, when Judge Frankel gave his speech at Yale, the average federal prison sentence was 66.7 months.[52] Before the guidelines, the average federal prison sentence was 65.2 months,[53] yet the amount of prison time actually served was much lower because of the availability of parole, which was abolished with the advent of the guidelines.[54] Today, the average federal prison sentence is 53 months, over a year lower than the average in 1992, but still longer than the average time served by federal prisoners before the guidelines.[55] And it is over one year longer than the average sentence for a felony conviction in state court where the offense—such as murder or rape—may be far more serious than most federal felonies and where parole may shorten the sentence actually served.[56]

A lot of credit (or blame) goes to Congress. In the Sentencing Reform Act, Congress not only abolished parole but also envisioned

more severe sentences—particularly for white-collar offenders and drug traffickers—and the original Commission faithfully followed Congress's directives.[57] Congress's enactment of mandatory-minimum penalties for drug-trafficking, firearm, and child-pornography offenses since the mid-1980s has also contributed to the increase in the federal prison population.[58] And during the last three decades, Congress has issued many "directives" requiring or strongly suggesting that the Commission increase guideline ranges for a variety of offenses.

In addition to their complexity and severity, the original guidelines suffered from another problem—one that led the Supreme Court to invalidate the mandatory guidelines in *Booker*. Because the Act required judges, not juries, to find enhancements by a preponderance of the evidence, it was unconstitutional.[59] In its remedy, the Supreme Court excised the provisions that made the guidelines mandatory and made them advisory. That remedy meant that juries would not be required to find sentencing facts. District judges still find those facts by a preponderance of the evidence, but judges now enjoy the discretion to vary from the advisory guideline ranges.[60]

The *Booker* remedy, now in its 11th year, has not advanced Judge Frankel's first principles. On the contrary, the advisory system has made some things even worse. Judges are now freer to consider offender characteristics.[61] That freedom has led to growing disparities. Data analyses by the Commission establish that the disparities are not only a matter of judicial assignment or the district or circuit in which sentencing occurs; differences in sentencing length are also associated with race and gender.[62] Black males receive higher sentences than white males, and women receive lower sentences than men, even after controlling for other factors.[63]

I do not suggest that federal judges are biased. But when a sentencing system gives judges free rein to consider virtually all aspects of an offender's "history and characteristics,"[64] those associated with offenders' demographics—such as employment, education, and family support—inevitably will result in sentencing disparities correlated with race, class, and gender. That fact explains why the original Commis-

sion restricted departures from the guideline range based on individual characteristics.[65] Perhaps the original Commission went too far, but *Booker* effectively removed all limitations. We went from one extreme to the other.

The advisory guidelines are, in some ways, the worst of both worlds. On the one hand, they have increased sentencing disparities. On the other hand, they are as complex as the mandatory guidelines. Indeed, they are even more complex today than they were in 2005, because a court has to jump through all of the same hoops that existed before *Booker* and then engage in an additional inquiry about whether to vary from the guideline range.[66]

The Commission has continued to amend the guidelines on a regular basis, and Congress has continued to seek to influence the Commission. In addition to legislation directing the Commission to make the *Manual* more complicated, members of Congress frequently urge the Commission to amend the guidelines when those members have been unable to enact legislation raising statutory penalties. For instance, last year, two Senators (one from each party) requested that the Commission amend the guidelines to increase the penalties for "candy flavored drugs," even though we were unable to find any evidence that candy-flavored drugs had become a national problem requiring yet another sentencing enhancement.[67]

One might expect that a sentencing regime with advisory guidelines would engender fewer, not more, attempts to add minutiae to the *Manual*. From my experience on the Commission, I've not seen any evidence of a reduction in attempts to add minutiae.

Despite his misgivings about the original guidelines, Judge Frankel remained a proponent of some type of *mandatory* guidelines to achieve the principles of sentencing that he articulated in the early 1970s. He believed that the guidelines needed to be retooled.[68] Like other critics, Judge Frankel recognized that the Commission had followed congressional directives in promulgating the original guidelines.[69] Thus, the retooling that he proposed had to involve Congress.

I agree with Judge Frankel's perspective. We need a system of enforceable guidelines in which judges adhere to sentencing ranges absent substantial and compelling reasons to depart from them. And we need to cabin the unrestrained consideration of offender characteristics. Otherwise, we will continue to see unwarranted sentencing disparities and a lack of certainty in sentencing. But we also need some consideration of offender characteristics. And we need to reduce the severity of some guidelines, at least for nonviolent offenders.

I prefer the term "presumptive" instead of "mandatory" because even the pre-*Booker* guidelines were never truly mandatory (in the same sense as a statutory mandatory minimum). Presumptive guidelines would bind judges in most cases, subject to meaningful appellate review, but they would have some flexibility. They would also be less objectionable to judges than the pre-*Booker* guidelines if they had wider ranges and less severity.

I do not propose making the current guidelines presumptive. I propose a radically simpler system that would incorporate only the most important and common aggravating and mitigating factors. For instance, the drug-trafficking guideline would look more like it did in 1987. Many of those factors in the current guidelines—called "specific offense characteristics" in Chapter Two and "adjustments" in Chapter Three—would be deleted. Perhaps it would have aggravating factors for possession of a firearm or one or two other common aggravating factors. But it would not have the laundry list of aggravating factors in the current guideline. Many factors could be moved to the commentary—as reasons for sentencing courts to consider in deciding where *within* the broader ranges to impose a specific sentence.

A presumptive guideline system would have broader ranges. Congress would need to amend the Sentencing Reform Act by repealing the "25 percent rule." That rule in large part explains why the current Sentencing Table is so complex, with 258 different cells, and ranges that are so narrow. If the 25 percent rule were repealed, the Commission could create broader ranges and a simpler sentencing grid.

To comply with the right to a jury trial under the Sixth Amendment, a presumptive system would use juries to find aggravating facts that would raise a guideline range. The preponderance standard used by judges in the advisory system would be replaced by the reasonable-doubt standard. And related constitutional rules would apply too, such as the requirement that sentencing facts that would raise the guideline range be pleaded in an indictment[70] and the requirement that the defendant be able to confront witnesses against him about facts that would raise the guideline range.[71] In other words, sentencing under a presumptive system in many ways would resemble a criminal trial. The days of uncharged "relevant conduct"[72] found by a sentencing judge by a preponderance of the evidence—often based on hearsay in a presentence report—would be over.

Based on the experience of several states that have enacted presumptive guidelines in the last decade, it is unlikely that a presumptive federal system would lead to a significant number of lengthy, contested sentencing trials.[73] The vast majority of defendants likely would continue to plead guilty both to the charge and the relevant sentencing facts that would raise guideline ranges. But, if we ended up having more sentencing juries, that development would not be a bad thing. The jury is the primary feature of the American criminal-justice system that promotes democratic accountability under the Constitution.[74]

A word about severity: I do not suggest dramatic, across-the-board reductions in federal sentences. Many offenders—particularly violent offenders, sex offenders, and large-scale drug traffickers and fraudsters—should go to prison for a long time. But penalties could be reduced for many first-time and low-level nonviolent offenders. Criminologists tell us that *certainty* and *swiftness* in punishment are more important than *severity* in punishment.[75]

In a system with less severe penalties and broader ranges, most cases would not present a reason for departure from the guideline range. Downward departures would be appropriate in those cases outside the heartland where the guidelines fail to account for some compelling offender or offense characteristic. Because of the constitu-

tional requirement that aggravating facts that would raise ranges be pleaded in an indictment and proved to a jury beyond a reasonable doubt, upward departures would no longer exist in a presumptive system.

For criminal-history calculations in the system, the current Chapter Four of the *Manual* should be retained with minor simplifications. The criminal-history rules, though complex, work well and have received relatively little criticism. There is a strong empirical basis for retaining those rules.

There must be meaningful appellate review in a presumptive system. Let me explain what I mean by contrasting what I envision with what existed before *Booker* and what exists now.

Before *Booker*, appellate courts had to deal with the same guidelines minutiae that district courts did. After *Booker*, appellate courts continue to check the district courts' math about guidelines minutiae—what is called review for "procedural reasonableness."[76]

In addition to that review, appellate courts review whether sentences are "substantively reasonable."[77] I and other appellate judges liken this form of review to deciding whether a sentence "shocks the conscience."[78] This highly deferential review rarely leads to reversals.[79]

Reasonableness review does almost nothing to promote the first principles of sentencing. If an appellate court reverses a district court for miscalculating the guideline range and remands, the district court can apply the correct guideline range and vary from that range to impose the exact same sentence as before. Under the shocks-the-conscience standard, appellate review almost never leads to a reversal of a sentence as substantively unreasonable.

For presumptive guidelines, meaningful appellate review would do two things: first, appellate courts would review for clear error whether sufficient evidence supports an enhancement;[80] and, second, they would decide whether a district court erred in departing below a guideline range. They would review *de novo* questions of lawful authority to depart and review for abuse of discretion exercises of that

authority. Departures would be governed by the statutory purposes of sentencing and would be accompanied by written reasons. Appellate review would deter excessive departures and reduce the types of sentencing disparities that we see in the current advisory system.

This proposal for guidelines reform is not mine alone. Similar proposals have been made by others, including former Commission Chair Judge William Sessions[81] and the nonpartisan Constitution Project.[82] But my proposal differs in one important respect: I propose that Congress enact into law the portions of the new guidelines that would increase guideline ranges instead of allowing them to go into effect 180 days after the Commission promulgates them, as ordinarily happens under current law.[83] Any later amendment to the guidelines that increases penalty ranges also should be enacted into law by Congress.

Requiring Congress to enact the enhancements for presumptive guidelines would serve two purposes. First, it would remove any constitutional doubt about the guidelines in a post-*Booker* world. An argument could be made that, without legislation, the new guidelines would be the product of an unconstitutional delegation to the Commission.[84]

A second reason for requiring Congress to enact aggravating factors into law is that it would likely deter increases in severity and complexity. Of course, Congress could change minutiae in the guidelines—especially by adding aggravating factors—but the cumbersome, bicameral legislative process would make change more difficult than when the authority is delegated to a seven-member commission. And Congress would have to account for the fact that prosecutors would have to prove any new aggravators to a jury beyond a reasonable doubt.

The Commission could still amend the presumptive guidelines (without action by Congress) in three ways. First, the Commission could amend the commentary recommending higher or lower sentences *within* the wider ranges. Second, the Commission could amend the provisions for departures. And third, the Commission could amend

the provisions about an offender's prior convictions. The Commission also could continue to recommend statutory changes to Congress and to collect and analyze data. That data analysis has been instrumental in amending the guidelines for the better in recent years.[85]

Before I conclude, let me say a brief word about mandatory penalties enacted by Congress. Since the beginning of the guidelines era, the Commission[86] and many others, including Justices Breyer and Kennedy,[87] have noted the disconnection between the blunt instrument of mandatory minimums and a finely tuned guideline system. Congress enacts mandatory minimums because it wants to make sure federal judges don't impose unduly lenient sentences for certain types of aggravated offenses or for offenders with serious criminal records. The presumptive system that I propose—which Congress would, in part, enact into law and in which downward departures would require substantial and compelling reasons—arguably would render mandatory minimums unnecessary, except for perhaps egregious offenses.

There is no such thing as "perfect justice" in sentencing. The Sentencing Reform Act of 1984 and the original guidelines both were good-faith efforts to achieve something close to perfect justice. As the past three decades have proved, Congress and the Commission were wrong to pursue that elusive goal.[88] They should have adhered more to Judge Frankel's vision.

The perfect should not be the enemy of the good. The Commission should work with Congress for a bipartisan reform of federal sentencing that leads to a simpler presumptive guideline system.

Thank you. (*Applause*)

President Ramo: I think that the ALI rejects the idea that the perfect is the enemy of the good. That was a wonderful and important address.

The judge said that he will take questions. Why don't we take two and then get back to our other work.

Judge A. James Robertson II (CA): So I have a question about the—an historic question.

So historically, when the mandatory guidelines were in effect, the question was about judicial discretion. How much judicial discretion was there exercised that might have been called failure to obey the guidelines?

So we have a similar situation in California. We have three strikes, you're out. What happened was many of the state-court judges simply didn't enforce the mandatory-sentence provisions, and that ultimately changed.

So my question is directed to the mandatory period and judicial discretion.

Judge Pryor: Federal judges followed the guidelines. I think that's the history. They followed the guidelines.

There was, you know, essentially *de novo* appellate review in many respects, and the guidelines were enforced and followed.

There was—I meant to call on you, yes?

Professor Ruth Wedgwood (DC): Thank you very much for an extraordinarily thoughtful address. And Marvin Frankel is a friend of my family, and he meant well. I don't think he realized what—

Judge Pryor: Well— (*Laughter*) The good news is that at the state level, where most sentencing occurs, I think Kevin Reitz would tell you he achieved a lot.

Professor Wedgwood: But here's my question, which is a very urgent matter now. It doesn't quite follow (*inaudible*), but maybe it does because judges can do a lot by saying things in dicta. There is an absolute stasis, a paralytic condition on the exercise of pardon now.

And what happens in DOJ now—I know the people, I used to work there—is that they just do not process it. And the White House, I'm surprised the President didn't think to do this, has not pushed them to try to actually examine and form an opinion upon the pending pardon files.

So do you think, as I guess I do, that the judiciary may have some role in pressing the executive branch to exercise what is the deep complement to the initial act of—

Judge Pryor: Well, one thing I have done, as a circuit judge, particularly in the collateral review of criminal convictions is when we've had big fights about it on our court—and I have said no collateral review is available in these circumstances, I have nevertheless pointed out that there is a place where that mercy can occur.

And in fact, in a pretty big case, big fight that we had had on our own court, the President ended up pardoning this individual; the clemency power is there for a reason. I think part of what maybe contributed to the problem is the Commission has this power to retroactively amend the guidelines and provide sometimes for the mercy that you're talking about. And it lets perhaps the executive, to a degree, off the hook.

We've met, as the Commission, recently with the pardon attorney for the White House. And as you know, there have been a substantial number, an increasing number very recently, grant you, of commutations by the President.

Professor Wedgwood: (*Inaudible*)

Judge Pryor: No, but that pace is picking up, and I'm going to be surprised if, by the end of the year, there aren't a fairly significant number by this President.

Professor Wedgwood: Just one last thought. You all might want to look at how DOJ has staffed or failed to staff the work of the Pardon—

Judge Pryor: I can promise you this. Not a meeting of the Commission goes by when we don't talk about this and don't have some report from DOJ or from the executive branch in some manner.

President Ramo: Thank you. I think that's all we have time for.

Judge Pryor: Thank you. (*Applause*)

[1] See Irene Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 916, 918, 921 & n.21 (1990).

[2] See "Proposed Sentencing Guidelines Manual" (April 17, 1986) (on file with the author).

[3] For discussion of the concept of "perfect justice" see MACKLIN FLEMING, THE PRICE OF PERFECT JUSTICE 3 (1974) and RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 38-39 (1995).

[4] Nagel, supra note 1, at 919 n.202 (quoting from Judge Newman's letter to the Commission).

[5] Shortly after the original guidelines went into effect in 1987, Professor Robinson—who was the sole dissenting Commissioner from the Commission's decision to promulgate the guidelines—stated that he believed they should be more complex and should account for many more aggravating and mitigating factors. See Paul Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1 (1987).

[6] See U.S. SENT. COMM'N, GUIDELINES MANUAL (Nov. 1, 1987).

[7] See, e.g., United States v. Davern, 970 F.2d 1490, 1505 & n.11 (6th Cir. 1992) (en banc) (Merritt, C.J., dissenting) ("[T]he New York Bar Association's Committee on the Federal Courts and practically every other commentator have urged Congress to overrule the Sentencing Commission and transform the Guidelines from compulsory prescriptions to general standards[.]") (citing numerous critics of the guidelines).

[8] See Nagel, supra note 1, at 906 (noting over 200 courts held that the guidelines were unconstitutional, while 120 courts upheld their constitutionality, before the Supreme Court decided the issue in *Mistretta*).

[9] Mistretta v. United States, 488 U.S. 361, 364 (1989).

[10] United States v. Booker, 543 U.S. 220 (2005).

[11] Id. at 265 ("Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.") (opinion of Breyer, J.).

[12] See U.S. Sent. Comm'n, 2005-2015 Datafiles (USSCFY2005 – USSCFY2015).

[13] Model Penal Code: Sentencing §§ 6A.04 and 6B.02 (AM. LAW INST., Tentative Draft No. 1, 2007).

[14] See William H. Pryor, Jr., *Lessons of a Sentencing Reformer from the Deep South*, 105 COLUM. L. REV. 943 (2005).

[15] See U.S. Sent. Comm'n, USSG, App. C, Amends. 782 & 788 (2014). The amendment reduced the Drug Quantity Table in the guidelines for the vast majority of drug-trafficking cases by two offense levels. See id. A two-level reduction in the applicable range typically reduces the guideline sentencing range by 20 to 30 percent. U.S. Sent. Comm'n, REPORT TO CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES 124 (2012) (discussing how offense levels relate to sentencing ranges).

[16] See U.S. Sent. Comm'n, Amendment to the Sentencing Guidelines (Preliminary) (Jan. 2016) http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160108_RF.pdf.

[17] See USSG §2L1.2; see also U.S. Sent. Comm'n, *Illegal Reentry Offenses* (2015).

[18] CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

[19] See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 234-235, 258-259, 271-272 (1993).

[20] CRIMINAL SENTENCES, at 105-108; see also 28 U.S.C. § 991(b)(1)(A); see also 18 U.S.C. § 3553(a)(2).

[21] CRIMINAL SENTENCES, at 113-114; see also 28 U.S.C. § 994(c) & (d).

[22] CRIMINAL SENTENCES, at 7-8, 11, 17-25, 43; see also 28 U.S.C. § 991(b)(1)(B).

[23] CRIMINAL SENTENCES, at 3-6; see also 28 U.S.C. § 991(b)(1)(B).

[24] CRIMINAL SENTENCES, at 86-102; see also 18 U.S.C. § 3624.

[25] CRIMINAL SENTENCES, at 31, 38-43; see also 18 U.S.C. § 3553(c).

[26] CRIMINAL SENTENCES, at 111-115.

[27] Id. at 122-123.

[28] Id. at 118-124.

[29] Id. at 75-85.

[30] Id. at 58-59; see also Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2047 (1992).

[31] CRIMINAL SENTENCES, at 114.

[32] Id.; see also James R. Thompson, *Book Review: Criminal Sentences: Law Without Order*, 74 COLUM. L. REV. 152, 158 (1973) ("While Judge Frankel recognizes that many sentencing factors are largely non-quantifiable and that a 'perfect' sentence cannot be reached by plugging one independent variable into a set formula, a substantial degree of agreement on concrete factors would promote rationality in the sentencing process.").

[33] His address was later published at 101 YALE L.J. 2043 (1992).

[34] It was not until January 1989 that the Supreme Court upheld the constitutionality of both the Commission and the guidelines. See Mistretta v. United States, 488 U.S. 361, 361 (1989); see also U.S. Sent. Comm'n, ANNUAL REPORT 11-12 (1989) ("The Supreme Court's *Mistretta* decision cleared the way for nationwide application of the sentencing guidelines.").

[35] Frankel, *Sentencing Guidelines*, 101 YALE L.J. at 2046-2050.

[36] See Jon O. Newman, *Remembering Judge Frankel: Sentencing Reform But Not These Guidelines*, 14 FED. SENT'G RPTR. 319 (2002).

[37] U.S. SENT. COMM'N, GUIDELINES MANUAL (1987).

[38] U.S. SENT. COMM'N, GUIDELINES MANUAL (1992).

[39] U.S. SENT. COMM'N, GUIDELINES MANUAL (2005).

[40] U.S. SENT. COMM'N, GUIDELINES MANUAL (2015).

[41] See USSG §§2B1.1 & 2D1.1 (2015). In FY2015, those two offenses types accounted for 43.6 percent of all federal cases. See U.S. SENT. COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Fig. A (2015).

[42] Compare USSG §2D1.1 (1987), with §2D1.1 (2015).

[43] See USSC, App. C (797 amendments as of Nov. 1, 2015).

[44] See, e.g., Senator Orin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 196 (1993) (noting that Congress made increased use of "specific statutory directives to the Commission to set

forth desired guidelines amendments" sometimes in lieu of enacting mandatory-minimum statutory penalties).

[45] See Frank O. Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1340 (2005) (referring to the Commission's amendments as being "a one-way upward ratchet").

[46] USSG, App. B, at 83 (2015) (setting forth Pub. L. No. 110-384).

[47] USSG §5K2.0 (1987).

[48] See USSG §§5H1.1, 5H1.3, 5H1.4, and 5H1.6 (1987).

[49] REPORT OF THE COMMITTEE OF THE JUDICIARY, UNITED STATES SENATE, on S. 1872, No. 98-225, at 168-169 (Sept. 14, 1983).

[50] See 28 U.S.C. § 994(d) ("The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.") & (e) ("The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.").

[51] 28 U.S.C. § 994(b)(2).

[52] See U.S. SENT. COMM'N, ANNUAL REPORT 63 (1992) (Tab. 21).

[53] ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 282 (1987) (Tab. D-5).

[54] See Christopher Stokes, *Sixteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1985-86 (IV. Sentencing, Probation, and Parole)*, 75 GEO. L.J. 1195, 1198 (1987) (discussing the federal parole laws in effect before the guidelines went into effect and noting that federal prisoners typically were eligible for release on parole after serving one-third of their prison sentences and sometimes even less).

[55] U.S. SENT. COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2015) (Tab. 14).

[56] See Sean Rosenmerkel, Matthew Durose & Donald Farole, Jr., U.S. Dep't of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006* 6 (2009) (Table 1.3) (38-month average sentence of incarceration), http://www.bjs.gov/content/pub/pdf/fssc06st.pdf; see also Stefan J. Bing, *Reconsidering State Parole Board Membership Requirements in Light of Model Penal Code Sentencing Revisions*, 100 KY. L.J. 871, 872 (2011) (noting that 34 of the 50 states still have parole boards that release prison inmates early on parole).

[57] See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 268 (1993) ("In addition to the general provisions inviting the commission to set guidelines that would result in more persons being imprisoned for longer prison terms, several other provisions of the Sentencing Reform Act of 1984 encourage imprisonment of particular categories of offenders."); see also id. at 284 ("[O]ur examination of the statute and its legislative history demonstrates, we believe, that, by and large, the Commission has implemented the Sentencing Reform Act in a manner consistent with legislative intent."); Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 296 (1992) ("Many of the decisions of the U.S. Sentencing Commission that

determined the current contours of federal sentencing hearings were preordained by Congress. Under the Sentencing Reform Act of 1984, the Commission was instructed to effect a dramatic change in sentencing philosophy. Congress had already decided to abandon rehabilitation as a major goal of sentencing, to abolish parole, and to minimize the use of probation.").

[58] U.S. Sent. Comm'n, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 81 (2011) ("Combined Commission and BOP data demonstrate that an increasing number of inmates in the federal prison population were convicted of violating statutes carrying mandatory minimum penalties. As of September 30, 1995, combined Commission and BOP data identify 40,104 offenders in BOP custody who were convicted of violating a statute carrying a mandatory minimum penalty. . . . As of September 30, 2010, combined Commission and BOP data identify 111,545 offenders in BOP custody who were convicted of an offense carrying a mandatory minimum penalty, a 178.1 percent increase.").

[59] *Booker*, 543 U.S. at 243-244 (majority opinion of Stevens, J.).

[60] Id. at 258-268 (separate majority opinion of Breyer, J.).

[61] See Gall v. United States, 552 U.S. 38 (2007); see generally 18 U.S.C. § 3553(a)(1).

[62] U.S. Sent. Comm'n, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING, PART E (*Demographic Differences in Sentencing*) (2012), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_E.pdf#page=1; see also William Rhodes et al., *Federal Sentencing Disparity: 2005–2012*, at 40-41 (Bureau of Justice Statistics 2015) ("[E]xamining the estimated changes over the 8-year period [from *Booker* to 2012], it appears that white males and females received sentences that decreased in severity."), http://www.bjs.gov/content/pub/pdf/fsd0512.pdf.

[63] U.S. Sent. Comm'n, *Demographic Differences in Sentencing, supra* note 62, at 9 (Fig. E-3) (multiple regression analysis of FY2011 federal sentencing data showed black males received sentences that, on average, were 19.5% higher than white males; white females received sentences that were 31.1% lower than white males).

[64] 18 U.S.C. § 3553(a)(1).

[65] See United States v. Wilson, 355 F. Supp. 2d 1269, 1276-1277 (D. Utah 2005) (Cassell, J.).

[66] See 18 U.S.C. § 3553(a)(1) (judges ultimately sentence based on "the nature and circumstances of the offense and the history and characteristics of the defendant").

[67] Letter from Senators Charles E. Grassley and Dianne Feinstein to Judge Patti B. Saris (Mar. 23, 2015), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150318/Senate.pdf.

[68] Frankel, *Sentencing Guidelines*, 101 YALE L.J. at 2049 ("I am prepared to accept the position [of those critics who contended] that the guidelines do indeed produce some outlandish results. . . . Nevertheless, I think [these critics] are mistaken in their proposal that the . . . guidelines should be scrapped and that we should return to the older days."); see also id. at 2050 ("[I]f we are to have meaningful rules of law to measure sentences, . . . they ought to be *rules*, not merely advice.").

[69] Id. at 2047-2048; see also Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 284 (1993) ("[O]ur examination of the statute and its legislative history demonstrates, we believe, that, by and large, the Commission has implemented the Sentencing Reform Act in a manner consistent with legislative intent.").

[70] The Court in Apprendi v. New Jersey stated any fact that raises the statutory maximum is an "element" that must be pleaded in an indictment, at least in federal cases. See Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) ("[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."). In Blakely v. Washington, 542 U.S. 296 (2004), and later in *Booker*, the Court applied the *Apprendi* principle to mandatory guidelines. See *Booker*, 543 U.S. at 230-233.

[71] See Michael Vitiello, *Introduction: Symposium Sentencing Guideline Law and Practice in a Post-Booker World*, 37 MCGEORGE L. REV. 487, 502 (2006) ("*Crawford* [v. Washington, 541 U.S. 36 (2004),] rejected longstanding precedent regarding the Confrontation Clause and *Booker* held that the mandatory application of the Guidelines violated the Sixth Amendment of the Constitution. Read together, they suggest that the Court should reconsider the traditional view that the Confrontation Clause does not apply at sentencing [in mandatory-guidelines systems].").

[72] See USSG §1B1.3.

[73] See Frank O. Bowman, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 461-462 ("Among the nine [states] that altered their sentencing regimes, the real world effects on jury participation seem to be de minimis. Where statistics are available, they show no observable effect on jury-trial rate in these states from the enactment of measures making sentencing *Blakely*-compliant.").

[74] See Powers v. Ohio, 499 U.S. 400, 407 (1991) ("'[T]he institution of the jury raises the people itself . . . to the bench of judicial authority [and] invests the people . . . with the direction of society.' . . . Jury service preserves the democratic element of the law.") (quoting Alexis de Tocqueville, 1 DEMOCRACY IN AMERICA 334-337 (Schocken 1st ed. 1961)).

[75] See, e.g., Daniel Nagin & Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 CRIMINOLOGY 865 (2001); Anthony Doob & Cheryl Webster, *Sentence Severity and Crime: Accepting the Null Hypotheses*, 30 CRIME & JUSTICE 143 (2003); see generally Cesare Beccaria, *On Crimes and Punishments* (1764), in READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 346, 349 (Morris R. Cohen & Felix S. Cohen eds., 1951).

[76] Rita v. United States, 551 U.S. 338, 370 (2007) (Scalia, J., concurring in part and concurring in the judgment, joined by Thomas, J.).

[77] Gall v. United States, 552 U.S. 38, 51 (2007).

[78] See, e.g., United States v. Feemster, 572 F.3d 455, 467 (8th Cir. 2009) (en banc) (Colloton, J., concurring).

[79] See, e.g., United States v. Rigas, 583 F.3d 108, 122-123 (2d Cir. 2009) ("The manifest-injustice, shocks-the-conscience, and substantive unreasonableness standards

in appellate review share several common factors. . . . [T]hey are deferential to district courts and provide relief only in the proverbial 'rare case'").

[80] Cf. Jackson v. Virginia, 443 U.S. 307 (1979).

[81] William K. Sessions, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & POL. 305 (2010).

[82] Edwin Meese III et al., *The Constitution Project Sentencing Initiative Recommendations for Federal Criminal Sentencing in a Post* Booker *World* (2006), in 18 FED. SENT'G REP. 310, 314-315 (2006).

[83] See 28 U.S.C. § 994(p).

[84] Cf. Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. PA. L. REV. 1631, 1726-1727 (2012).

[85] See, e.g., Amendments to the Sentencing Guidelines, "Reason for Amendment [to USSG §2B1.1]" (Apr. 30, 2015) ("This amendment is a result of the Commission's multi-year study of §2B1.1 and related guidelines, and follows extensive data collection and analysis relating to economic offenses and offenders. Using this Commission data, combined with legal analysis and public comment, the Commission identified a number of specific areas where changes were appropriate."), http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20150430_RF_Amendments.pdf.

[86] See U.S. Sent. Comm'n, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991) & REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2011).

[87] Harris v. United States, 536 U.S. 545, 570-571 (2002) (Breyer, J., concurring in part and concurring in the judgment); Anthony M. Kennedy, Assoc. Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting, San Francisco (Aug. 9, 2003), available at www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

[88] See United States v. Kuhl, 816 F. Supp. 623, 626 n.4 (S.D. Cal. 1993) ("After sentencing several hundred defendants under the sentencing guidelines and after diligent, repeated, and thoughtful study of the [*Guidelines*] *Manual*, I am afraid that the government, in the hope that disparity would be eliminated, has attempted more than it ought and has ended up doing less than it should.") (citing Macklin Fleming, THE PRICE OF PERFECT JUSTICE 3 (1974)).