

## **KIMBROUGH, SPEARS, AND CATEGORICAL REJECTION: THE LATEST ADDITIONS TO THE FAMILY OF FEDERAL SENTENCING POLICY CASES**

In the past three decades, the federal sentencing system has been in a state of flux.<sup>1</sup> At the core of the debate, and at issue in a great deal of modern cases, is how much discretion federal judges ought to have when sentencing defendants.<sup>2</sup> The amount of discretion committed to judges depends largely on how the United States Sentencing Guidelines (“Sentencing Guidelines” or “the Guidelines”) are construed. In *Spears v. United States*,<sup>3</sup> the Supreme Court sought to clarify the role of the Sentencing Guidelines under the post-*United States v. Booker*<sup>4</sup> advisory sentencing scheme. *Spears* held that judges may categorically reject the Guidelines pertaining to powder-to-crack cocaine ratios. In the wake of this holding, significant questions about the role of the Sentencing Guidelines persist. Of particular importance are questions about when judges may categorically reject the Sentencing Guidelines outside of the crack cocaine context.<sup>5</sup>

In order to put the Supreme Court’s recent federal sentencing decisions and the modern debate from which they stem in proper context, this Note will begin, in Part I, with a discussion of the history of federal sentencing, including the pre-Sentencing Guideline era and the origination of the Sentencing Guidelines. This section will also address the various criticisms the Sentencing Guidelines have attracted and how their role has evolved accordingly. Part II will analyze the *Spears* decision and the associated case law. Part III will examine the way federal district courts are currently construing *Spears*, with an eye for the meaningful constructive uncertainties such courts are grappling with and on which they are diverging. Finally, in Part IV, this Note will seek to suggest the most fruitful treatment of *Spears*, concluding that judges should practice

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1. See *infra* notes 5, 6, 14, 23, 42, 43 and accompanying text.

2. See, e.g., *Spears v. United States*, 129 S. Ct. 840, 843 (2009); *Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007); *United States v. Booker*, 543 U.S. 220, 233 (2005).

3. *Spears*, 129 S. Ct. at 842.

4. *Booker*, 543 U.S. at 227.

5. This is a question of great social and judicial import following the *Spears* decision. “The question we confront here is whether the authority recognized in *Spears* to reject on policy grounds an otherwise-applicable aspect of the Sentencing Guidelines is limited to the crack cocaine context.” *United States v. Herrera-Zuniga*, 571 F.3d 568, 583–84 (6th Cir. 2009).

categorical rejection only in limited circumstances and that sentencing opinions should accompany all instances of categorical rejection.

## I. THE HISTORY OF FEDERAL SENTENCING POLICY

### A. *Origin of the United States Sentencing Commission and the Birth of the Guidelines*

Congressional creation of the United States Sentencing Commission<sup>6</sup> (“the Commission”) and the subsequent implementation of the Sentencing Guidelines<sup>7</sup> reflected a belief that federal sentencing was misaligned with national values.<sup>8</sup> By enacting the Guidelines, Congress sought to express modern national sentencing values and mandate their application in the federal courts.<sup>9</sup>

The undesirable condition of federal sentencing preceding the 1980s prompted Congress to take action in the realm of federal sentencing.<sup>10</sup> At this juncture, the federal system was an “indeterminate sentencing

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The United States Sentencing Commission is an independent agency in the judicial branch of government. Its principle purposes are: (1) to establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes; (2) to advise and assist Congress and the executive branch in the development of effective and efficient crime policy; and (3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues . . . .

OFFICE OF PUBL’G & PUB. AFFAIRS, U.S. SENTENCING COMM’N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1 (2009) [hereinafter U.S. SENTENCING COMM’N OVERVIEW].

7. U.S. SENTENCING GUIDELINES MANUAL (2009).

8. Author Frank O. Bowman illustrated:

In the 1970s and 1980s, [the indeterminate model of sentencing that relied on the discretion of district court judges] fell into increasing disfavor in state and federal courts . . . . Critics doubted the claims of both judges and parole boards to special sentencing expertise, and many called for ‘truth in sentencing,’ by which they meant assurance that defendants would really serve all or most of the sentence imposed . . . . [This] produced the SRA, and three years later, the federal sentencing guidelines.

Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1322–23 (2005).

9. The U.S. Sentencing Commission explained:

After more than a decade of research and debate, Congress decided that (1) the previously unfettered sentencing discretion afforded federal trial judges needed to be structured; (2) the administration of punishment needed to be more certain; and (3) specific offenders . . . needed to be targeted for more serious penalties. Consequently, Congress created a permanent commission charged with formulating national sentencing guidelines . . . .

U.S. SENTENCING COMM’N OVERVIEW, *supra* note 6, at 1–2.

10. Lindsay C. Harrison, *Appellate Discretion and Sentencing After Booker*, 62 U. MIAMI L. REV. 1115, 1120 (2008).

regime,” supplemented by the parole system.<sup>11</sup> Under this dual system, judges and parole officers alike made individualized assessments of a given offender’s blameworthiness and potential for rehabilitation.<sup>12</sup> Such assessments, in all of their broad discretion, were practically invulnerable to appellate review because appellate courts pledged great deference to the sentencing judge’s relatively superior familiarity with the facts in a given case.<sup>13</sup> Consequently, district court judges possessed nearly limitless discretion to sentence federal offenders,<sup>14</sup> with their unilateral sentencing judgments curtailed only by the occasional presence of an applicable statutory minimum or maximum.<sup>15</sup> These judges applied the lowest standard of proof known to the criminal justice system in sentencing hearings, and evidentiary safeguards were conspicuously absent.<sup>16</sup> As a result, similarly situated perpetrators received highly disparate sentences for the same or similar crimes.<sup>17</sup> These troubling inconsistencies turned out to be one of the fatal flaws of the indeterminate sentencing scheme;

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11. Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL’Y REV. 261, 263 (2009); *see also* *Zerbst v. Kidwell*, 304 U.S. 359, 363 (1938).

12. *See* *Mistretta v. United States*, 488 U.S. 361, 363 (1989).

13. *Mistretta* explained:

This [indeterminate sentencing regime] led almost inevitably to the conclusion on the part of a reviewing court that the sentencing judge ‘sees more and senses more’ than the appellate court; thus, the judge enjoyed the ‘superiority of his nether position,’ for that court’s determination as to what sentence was appropriate met with virtually unconditional deference on appeal.

*Id.* at 364; *see also* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1445 (1997):

[T]rial judges were given discretion to fix any penalty within the ceiling provided by the statutory maximum. . . . [J]udges were instructed to consult any and all factors having to do with the crime itself or the offender . . . . With such a free-form thought process in gear, there were effectively no legal principles against which a sentence could be tested on review.

14. *See* U.S. SENTENCING COMM’N OVERVIEW, *supra* note 6, at 1 (“Before guidelines were developed, judges could give a defendant a sentence that ranged anywhere from probation to the maximum penalty for the offense.”).

15. Harrison, *supra* note 10, at 1120; *see also* Gertner, *supra* note 11, at 261 (volume and severity of statutory minimums and maximums were on the rise by the 1980s largely due to widespread political pressure to crack down on crime, which Congress responded to, in part, by arbitrarily increasing sentences via statute).

16. Gertner, *supra* note 11, at 263 (“Trials safeguarded rights with strict evidentiary rules and the demanding standard of proof of beyond a reasonable doubt. In contrast, sentencing hearings were conducted without regard to the rules of evidence and with the lowest standard of proof in the criminal justice system, a fair preponderance of the evidence.”).

17. Under the pre-Guidelines’ “indeterminate sentencing system, the judge sentences a defendant . . . but the number of years the defendant actually serves is determined later by an administrative body like a parole board.” Bowman, *supra* note 8, at 1321–22. Having both a judge and an administrative body participate in sentencing exacerbated the problem of inconsistency in the sentences of those convicted of federal crimes.

they were key factors prompting the passage of the Sentencing Reform Act of 1984 (SRA).<sup>18</sup>

Congress passed the SRA as a component of the Comprehensive Crime Control Act.<sup>19</sup> In turn, the SRA created the Sentencing Commission to serve as an independent judicial agency<sup>20</sup> charged with the tasks of first promulgating and then providing oversight for the new system of federal Sentencing Guidelines.<sup>21</sup> The expectation was that the role played by the Commission, and the Guidelines they would promulgate, would together remedy the problems that had plagued the historically indeterminate sentencing regime.<sup>22</sup> Supporters hoped that the Commission might prove successful at this task by virtue of the fact that it was independent from the political process and could therefore review and contemplate sentencing from a dispassionate and autonomous vantage point.<sup>23</sup> Hope for the Commission's success was also pinned upon the fact that they would employ empirical data and expertise about sentencing that judges often lacked.<sup>24</sup>

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18. Act of Oct. 12, 1984, Pub. L. No. 98-473, 98 Stat. 1837; see Gertner, *supra* note 11, at 264; see also S. REP. NO. 98-225, at 41-46 (1983) (Conf. Rep.) (noting that indeterminate sentencing had disturbing consequences, namely, variations in judicial sentences and uncertainty as to the amount of time a given offender would spend in prison); Daniel A. Chatham, *Playing with Post-Booker Fire: The Danger of Increased Judicial Discretion in Federal White Collar Sentencing*, 32 J. CORP. L. 619, 621 (2007) ("This judicial discretion led to disparity in the sentences of similarly situated offenders, a problem decried by both Democrats and Republicans in Congress . . ."); Harrison, *supra* note 10, at 1120.

19. Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1976; see also Chatham, *supra* note 18, at 621.

20. See U.S. SENTENCING COMM'N, *supra* note 6, at 3. The commission consists of seven voting members who serve six-year terms. *Id.* The commissioners must be appointed by the President and confirmed by the Senate. *Id.* The rules mandate that at least three of the seven commissioners must be federal judges. Bipartisanship is ensured by the fact that no more than four commissioners may belong to the same political party. *Id.*

21. See Chatham, *supra* note 18, at 621; see also 28 U.S.C. § 991 (2006) (explaining that Congress established "an independent commission in the judicial branch" to develop "sentencing policies and practices for the Federal criminal justice system").

22. "The sentencing guidelines were intended most importantly to curtail judicial and Parole Commission discretion, which was viewed as 'arbitrary and capricious' and an ineffective deterrent to crime." U.S. SENTENCING COMM'N, INTRODUCTION TO THE SENTENCING REFORM ACT 2 (2004) (citing S. REP. NO. 98-225, at 65 (1984)).

23. See Gertner, *supra* note 11, at 265 ("Congressmen from both sides of the aisle hoped that the Commission would be more successful than Congress had been in appropriately punishing the 'crime du jour,' by dispassionately reviewing sentences rather than responding impulsively.").

24. *Id.*; see also 28 U.S.C. § 991(b)(1)(C) (2006) (charging the Commission with the task of developing Guidelines that will "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process"); 28 U.S.C. § 994(o) (2006) (requiring the Commission to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system").

In 1987, the Commission issued the first version of the mandatory federal Sentencing Guidelines.<sup>25</sup> But significant legal obstacles followed on the heels of this achievement, for suspicion about the legal legitimacy of the Guidelines was afoot from the time of their inception.

In *Mistretta v. United States*,<sup>26</sup> the Supreme Court confronted its first opportunity to consider the constitutionality of the SRA and the Sentencing Guidelines. The petitioner contended that the SRA was an unconstitutional delegation of legislative power to another branch of government in violation of the constitutional principle of separation of powers and the related nondelegation doctrine.<sup>27</sup> Ultimately, the Supreme Court stood in support of the SRA, finding Congress's delegation of power through the SRA sufficiently specific and therefore within Congress's permissible ambit of delegation.<sup>28</sup> Fortified by the Court's rejection of the constitutional challenges to the SRA and the Commission, Congress enacted the Guidelines nationally in January of 1989.<sup>29</sup> Under the new Guidelines-based regime, federal sentencing was a transformed concept. The Guidelines shifted the power balance in sentencing, significantly scaling back judicial discretion. Furthermore, individual sentences became largely the product of mathematical calculations<sup>30</sup> devoid of the personal judgment and instinct that had characterized the old system.<sup>31</sup>

The new power distribution was cemented by § 3553(b)(1) of the United States Code, which explicitly affirmed the mandatory quality of the

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25. See U.S. SENTENCING COMM'N, U.S. SENTENCING COMMISSION 2008 ANNUAL REPORT, CHAPTER I: COMMISSION OVERVIEW I, available at [www.ussc.gov/ANNRPT/2008/ar08toc.htm](http://www.ussc.gov/ANNRPT/2008/ar08toc.htm).

26. *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

27. *Id.* at 370. "The Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.'" *Id.* at 371 (citing U.S. CONST., art. I, § 1). This provision has historically been read to mean that Congress generally cannot delegate its legislative powers. However, as the Court explained in *Mistretta*, "the nondelegation doctrine . . . do[es] not prevent Congress from obtaining the assistance of its coordinate Branches." *Id.* at 372.

28. *Id.* at 374–76 (noting that "we harbor no doubt that Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements" and citing the litany of goals, purposes, and requirements that Congress imposed on the Commission via the SRA).

29. Timothy B. McGrath, *A Fraud is a Fraud, but Bankruptcy Fraud is Inherently Bad: Enhanced Sentencing*, 28-4 AM. BANKR. INST. J 1, 58 (May 2009).

30. The two primary factors in calculating a given sentence are (1) seriousness of the offense and (2) the defendant's previous criminal history, or lack thereof. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2004).

31. Harrison, *supra* note 10, at 1120; see also Chatham, *supra* note 18, at 623 ("Many federal judges abhorred the new strictures on their sentencing discretion and expressed outrage with the Guidelines . . .").

Guidelines.<sup>32</sup> While the Guidelines allowed judges to grant downward departures<sup>33</sup> for a defendant's mere "substantial assistance"<sup>34</sup> or "an aggravating or mitigating circumstance . . . of a kind, or to a degree, not adequately taken into consideration . . . in formulating the Guidelines,"<sup>35</sup> the appellate review provisions of the Guidelines discouraged judges from doing so.<sup>36</sup> The appellate review provisions permitted a dissatisfied prosecutor<sup>37</sup> to appeal a judge's application of the Guidelines, which often resulted in reversal of downward departures by the appellate courts<sup>38</sup>—something all judges seek to avoid.

### *B. The Unique Institutional Role of the Guidelines*

From the time of their origin, the Guidelines were designed to, and did in fact, serve a unique institutional role. Because the Commission was intended to remedy the flaws in the previous sentencing regime and not just codify existing sentencing trends, it was apparent that it must adopt a

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Except as provided in paragraph (2), the court *shall* impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

18 U.S.C. § 3553(b)(1) (2006) (emphasis added).

33. A "downward departure" is a sentence that departs from the prescribed Guidelines range, offering a lesser sentence instead. A downward departure may be granted in the case of a plea agreement or when the defendant offers substantial assistance to the government with another investigation or prosecution. 21 AM. JUR. 2D *Criminal Law* § 829 (2009).

34. See *Peguero v. United States*, 526 U.S. 23, 24–25 (1999) (explaining that if a defendant offers his assistance in the investigation or prosecution of another criminal, this may constitute substantial assistance; upon government's request, the court may reduce such defendant's sentence on the basis of substantial assistance); see also U.S. SENTENCING GUIDELINE MANUAL § 5K1.1 (2010) (allowing Government to move for downward departure based on defendant's "substantial assistance").

35. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2010). This provision permits judicial discretion to adjust a sentence when extrastatutory factors had a role in the crime or the defendant's life. To illustrate, the court in *United States v. Stewart* found that the defendant's "obstruction of justice, her abuse of trust, and her false statements to the government" were "aggravating circumstances." 590 F.3d 93, 185 (2d Cir. 2009).

36. 18 U.S.C. § 3553(b) (2006); see also Susan R. Klein & Sandra Guerra Thompson, *DOJ's Attack on Federal Judicial "Leniency," the Supreme Court's Response, and the Future of Criminal Sentencing*, 44 TULSA L. REV. 519, 525 (2009).

37. I specify the prosecutor because the access to review was not symmetrical. Defendants could not appeal a sentencing judge's refusal to grant them a downward departure that they thought was warranted under their circumstances because appellate courts did not have jurisdiction to review the discretionary decision *not* to grant a downward departure. See *United States v. Gendraw*, 337 F.3d 70, 71 (1st Cir. 2003) (holding that the court of appeals had no authority to review the district court's denial of downward departure).

38. See Klein & Thompson, *supra* note 36, at 525.

different approach to sentencing than that previously employed by judges.<sup>39</sup> Hence, in its development of the Guidelines, the Commission used an empirical approach to sentencing, informed by data and past sentencing practices.<sup>40</sup> To ensure that the Guidelines maintain an empirical approach, the SRA required the Commission to conduct ongoing crime policy research, consult commentary from participants and experts in the field, and periodically adapt the Guidelines to reflect changing data.<sup>41</sup> The Commission also distinguished the new Guidelines by explicitly setting forth four purposes of sentencing: just punishment, deterrence, incapacitation, and rehabilitation.<sup>42</sup> The Guidelines were committed to implementing these purposes of sentencing in a dispassionate and reasoned fashion.<sup>43</sup> Accordingly, the unique empirical approach and the commitment to effectuating the various purposes of punishment allow the Guidelines to be characterized as having a distinct institutional role.

All of the Guidelines promulgated by the Commission are intended to be a product of this distinct institutional role, but, unfortunately, some Guidelines are not. At times, the Commission has deviated from its intended role and implemented Guidelines that were influenced by social pressure, popular politics, or other nonempirical factors.<sup>44</sup> The 100:1 powder-to-crack cocaine drug quantity ratio established by Guideline 2D1.1 is one illustration of this problematic phenomenon.<sup>45</sup> Not only does this shirk the empirical approach, but it corrupts the principle that the

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39. See Gertner, *supra* note 11, at 265.

40. See *United States v. Gully*, 619 F. Supp. 2d 633, 638 (N.D. Iowa 2009). The data about past sentencing practices that the Commission would use included 10,000 presentence investigation reports. See also *Kimbrough v. United States*, 128 S. Ct. 558, 566–68 (2007). The Commission was charged with “modifying and adjusting past practice in the interests of greater rationality, avoiding inconsistency, [and] complying with congressional instructions.” *Rita v. United States*, 127 S. Ct. 2456, 2464 (2007).

41. See 28 U.S.C. § 995(a)(8), (9), (12)(A), (13)–(16), (20), (21) (2006); see also *Rita*, 127 S. Ct. at 2464; *Bowman*, *supra* note 8, at 1319 (“[T]he Sentencing Commission was intended to gather feedback about how the system worked and serve[d] as an authoritative (though not final) body of neutral experts who would translate the feedback into sensible revisions of the rules.”); Gertner, *supra* note 11, at 265.

42. See U.S. SENTENCING COMM’N OVERVIEW, *supra* note 6.

43. See Gertner, *supra* note 11, at 265 (“The sentencing guidelines were supposed . . . to implement all the purposes of punishment, including deterrence and rehabilitation. In addition, the Commission was to rationalize punishments across offense categories, using the philosophy of limited retribution.” (footnote omitted)).

44. See *Kimbrough*, 128 S. Ct. at 566–68 (explaining that the Commission deviated from its prior empirical approach when formulating the Sentencing Guidelines for “drug-trafficking offenses”).

45. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2004).

identified purposes of punishment should be effected in a dispassionate way.<sup>46</sup>

*C. The 100:1 Powder-to-Crack Cocaine Ratio: A Guideline Enacted Outside of the Commission's Unique Institutional Role*

There is a broad consensus that in developing the Guidelines related to drug-trafficking offenses, the Commission acted outside the scope of its characteristic institutional role.<sup>47</sup> Instead of utilizing data about past sentencing practices and considering the purposes of punishment as intended, the Commission relied on the 1986 Anti-Drug Abuse Act's weight, or quantity-driven, scheme to promulgate the drug-trafficking Guidelines.<sup>48</sup> By relying exclusively on this scheme, the Commission neglected to accord the proper weight to empirical factors and the purposes of punishment.

Borrowing from the Anti-Drug Abuse Act, the Commission implemented a 100:1 powder-to-crack cocaine ratio under which courts would sentence drug offenders.<sup>49</sup> Practically speaking, the adoption of this ratio meant that possession of one unit of crack cocaine received the same treatment as possession of one hundred units of powder cocaine for the

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46. Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence on the Purposes of Punishment*, 6 BUFF. CRIM. L. REV. 1043, 1045 (2003) (developing "an independent and dispassionate approach to sentencing policy" was a primary goal espoused in the SRA).

47. See *Kimbrough*, 128 S. Ct. at 566–68; see also U.S. SENTENCING COMM'N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 91 (2002) (stating that the crack guideline "fails to meet the sentencing objectives set forth by Congress . . .").

48. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. This is the origin of the federal criminal law distinction of crack cocaine as a substance to be treated more severely by the law than powder cocaine. The Sentencing Guidelines derived the 100:1 ratio from this Act's treatment of 500 grams of powder cocaine and 5 grams of crack cocaine as triggering the same five-year penalty.

Congress's conclusions about the dangerousness of crack cocaine relative to powder cocaine flowed from specific assumptions. First, crack cocaine was viewed as extraordinarily addictive. . . . Second, the correlation between crack cocaine use and the commission of other serious crimes was considered greater than that with other drugs. Floor statements focused on psychopharmacologically driven, economically compulsive, as well as systemic crime . . . . Third, the physiological effects of crack cocaine were considered especially perilous, leading to psychosis and death.

U.S. Sentencing Comm'n, Report on Cocaine and Federal Sentencing Policy 118 (2005) [hereinafter Report on Cocaine].

49. See John G. Wheatley, Note, *United States v. Pho: Defining the Limits of Discretionary Sentencing*, 59 ME. L. REV. 213, 217 (2007). The Anti-Drug Abuse Act originated the federal criminal law distinction between "cocaine base" and other forms of the drug. The legislative distinction between crack and powder cocaine was deliberate, not accidental. See REPORT ON COCAINE, *supra* note 48.



purposes of calculating a federal sentence.<sup>50</sup> The assumptions inherent in the ratio about the relative harmfulness of crack versus powder cocaine are plainly refuted by modern research and scientific data, representing a frustration of the empirical component of the Commission's institutional role.<sup>51</sup> The 100:1 ratio also fails to serve the Commission's institutional purpose because it punishes low-level crack traffickers more harshly than major powder cocaine traffickers and has a disproportionate impact on black offenders.<sup>52</sup> As the district court noted in *United States v. Gully*, "that ratio is the result of congressional mandates that interfere with and undermine the work of the Sentencing Commission."<sup>53</sup> The historical record indicates that this wildly lopsided ratio can be attributed to the popular hysteria stemming from fear and ignorance about crack cocaine in the 1980s.<sup>54</sup>

By the mid-1980s, Congress perceived the American drug problem to be of great proportions, even deeming it an epidemic.<sup>55</sup> Crack cocaine was at the forefront of that epidemic.<sup>56</sup> During this era, the public viewed crack as extraordinarily dangerous and particularly addictive.<sup>57</sup> In 1986, when the Anti-Drug Abuse Act was passed, the public and media concern about crack cocaine was fervent, thereby fueling Congress's inclination to come down hard on crack offenders.<sup>58</sup> The unfortunate result of this climate was that the Commission stepped out of its characteristic institutional role for the promulgation of the crack cocaine offender Guideline, leaving courts with an unfounded and racially charged ratio that has been the subject of grave criticism, even from the Commission itself.<sup>59</sup>

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50. See Wheatley, *supra* note 49, at 217.

51. *Id.*

52. *Id.*; see also U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 102-03 (2002) (reporting that approximately 85% of federal court defendants who are convicted of crack offenses are black, resulting in the disturbing fact that the severe crack sentences mandated by the 100:1 ratio are suffered almost entirely by black defendants).

53. *United States v. Gully*, 619 F. Supp. 2d 633, 641 (N.D. Iowa 2009).

54. See *infra* notes 56-58 and accompanying text.

55. The legislative history of the 1986 Anti-Drug Abuse Act indicates, mainly via statements from individual legislators, that Congress viewed the drug problem as a national "epidemic" during this era. See REPORT ON COCAINE, *supra* note 48, at 117.

56. *Id.*

57. *Id.* at 118.

58. See *Kimbrough v. United States*, 128 S. Ct. 558, 567 (2007) ("Crack cocaine was a relatively new drug when the 1986 Act was signed into law, but it was already a matter of great public concern . . .").

59. See Steven L. Chanenson, *Statement of Steven L. Chanenson Before the United States Sentencing Commission Regarding Retroactivity of Crack Guidelines Amendments*, 20 FED. SENT'G REP. 75, 146 (2007). The Commission issued reports about crack cocaine sentencing in 1995, 1997, 2002, and 2007. In each report, the Commission repeated its finding that the 100:1 quantity ratio is

*D. The Booker Era and its Blow to the Mandatory Sentencing Scheme*

The Supreme Court's 2005 decision in *United States v. Booker* effectively tore down the mandatory sentencing scheme that had taken root with the initiation of the Sentencing Guidelines in the late 1980s.<sup>60</sup> Following *Booker*, little was clear in the realm of federal sentencing, for the contours of the new sentencing framework had not sufficiently emerged. Conflicting views developed among judges about how to negotiate their newfound leeway and how to define the relationship between the Guidelines and judicial discretion post-*Booker*.<sup>61</sup>

*Booker* came to the Supreme Court on the coattails of an earlier sentencing decision, *Apprendi v. New Jersey*.<sup>62</sup> *Apprendi* held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."<sup>63</sup> *Blakely v. Washington*,<sup>64</sup> an intermediary of *Apprendi* and *Booker*, further raised the question: how, if at all, could the Sixth Amendment right to a jury trial interact with the Sentencing Guidelines?<sup>65</sup> *Booker* sought to resolve this problem.

The *Booker* controversy stemmed from a factual scenario in which the defendant, Freddie Booker, was charged with possession with intent to distribute a minimum of 50 grams of crack.<sup>66</sup> Under the Sentencing

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inappropriate in light of scientific data about the relative harms associated with crack-versus-powder cocaine. All four reports have emphasized that adherence to the principles set forth in the SRA require amendment of the sentencing rules affecting crack offenders. See U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 153-54 (1995); U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 9-10 (1997); U. S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 91 (2002); U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 6-9 (2007).

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

61. "Conflicting lower court opinions document that few judges or practitioners are sure whether *Booker* significantly changed or only slightly altered the operational realities of the federal sentencing system." Douglas A. Berman, *How Should the Courts of Appeals Judge Whether a Federal Sentence Outside the Sentencing Guidelines is "Reasonable"?*, 35 PREVIEW U.S. SUP. CT. CASES 24, 25 (2007).

62. 530 U.S. 466 (2000).

63. *Id.* at 490 (noting that the fact of a prior conviction was excepted from the requirement that facts increasing the penalty for a crime must be submitted to a jury).

64. 542 U.S. 296 (2004). *Blakely* was decided just one year before *Booker*. The Court held that the government's failure to "prove to a jury all facts legally essential to the punishment" was a violation of defendant's Sixth Amendment right to trial by jury. *Id.* at 313.

65. "[W]e are not, as the State would have it, 'find[ing] determinate sentencing schemes unconstitutional.' This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." *Id.* at 308 (citations omitted).

66. *United States v. Booker*, 543 U.S. 220, 227 (2005).

Guidelines, the defendant's criminal history and the quantity of drugs found by the jury mandated the imposition of a sentence not less than 201 nor greater than 262 months' incarceration.<sup>67</sup> Yet in the posttrial sentencing hearing, the district court judge concluded by the applicable preponderance-of-the-evidence standard that the defendant had actually been in possession of an additional 566 grams of crack, far more than the jury had found, and that he was also guilty of obstruction of justice.<sup>68</sup> Based on these findings at sentencing, the Guidelines required a sentence of no less than 360 months' and no greater than life imprisonment.<sup>69</sup>

It was not until *Booker* that the Supreme Court condemned this brand of judicial fact finding. But Freddie Booker's experience in the federal court system was not unique; many other federal defendants suffered a similar experience with judicial fact finding.<sup>70</sup> Beginning in the mid-1980s, legislative regulation of federal sentencing encouraged factual determinations that had the effect of increasing the range of sentencing to be imposed for a given crime.<sup>71</sup> The consequence of this trend was the augmentation of judicial sentencing power at the cost of the power historically and constitutionally allocated to the jury.<sup>72</sup> This trend had problematic implications for the substantive—though not procedural—guarantee of a jury trial under the Sixth Amendment, for in pre-*Booker* cases, the fact finding pertinent to sentencing often functionally ceased to be the purview of the jury.<sup>73</sup>

In *Booker*, the Supreme Court responded forcefully to the divisive Sixth Amendment problems that developed under the mandatory

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67. The jury heard evidence that Booker actually possessed 92.5 grams of crack in his duffel bag and therefore found him guilty of violating 21 U.S.C. § 841(a)(1) (2006). *Id.*; see also U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(c)(4), 4A1.1 (2004).

68. *Booker*, 543 U.S. at 227.

69. *Id.* The outcome for the defendant was that “instead of the sentence of 21 years and 10 months that the judge could have imposed on the basis of the facts proved to the jury beyond a reasonable doubt, Booker received a 30-year sentence.” *Id.*

70. *Booker*, 543 U.S. at 236 (“American judges commonly determined facts justifying a choice of a heavier sentence on account of the manner in which particular defendants acted.”).

71. Legislative sentencing enhancements of this nature were an outgrowth of the legislature's concern about the increase of drug crimes during the 1980s, many of which were associated with violent crimes. *Id.* at 236.

72. The *Booker* opinion explained:

The effect of the increasing emphasis on facts that enhanced sentencing ranges . . . was to increase the judge's power and diminish that of the jury. It became the judge, not the jury, who determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance.

*Id.*

73. *Id.* at 237.

Guidelines scheme.<sup>74</sup> The Court held that the imposition of an enhanced sentence under the Guidelines based on findings of fact made by the sentencing judge and not the jury was a violation of the Sixth Amendment.<sup>75</sup> Having arrived at this conclusion, the Court next considered the appropriate remedy for the situation. The Court answered this question by “finding the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp. IV), incompatible with today’s constitutional holding.”<sup>76</sup> Ultimately, the Court concluded that this provision must be “severed and excised” from the Guidelines.<sup>77</sup>

Pursuant to the *Booker* decision, the SRA suddenly made the Guidelines “effectively advisory,” instead of mandatory.<sup>78</sup> The Court’s decision to make the Guidelines advisory necessarily forced them to address the related issue of appellate review of sentencing conducted under the new scheme. On this question, the Court concluded that reviewing courts should henceforth apply a standard of reasonableness.<sup>79</sup> Practically, this has translated into varying grades of proportionality review among circuit courts reviewing sentences.<sup>80</sup> Having established what courts constitutionally could not do in terms of sentencing, the Court

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74. The Court’s opinion was divided into two primary parts. The first was authored by Justice Stevens, who discussed the merits of the constitutional arguments at play and found the Guidelines unconstitutional as written. The second portion of the opinion was written by Justice Breyer. He addressed the remedial issues by severing the problematic portions of the Guidelines but retaining the rest. Klein & Thompson, *supra* note 36, at 542–43. Justice Breyer’s stance in the opinion may have been influenced by his professional history: he was one of the original members of the Sentencing Commission that devised the first Guidelines. *Id.* Perhaps this explains, at least partially, Justice Breyer’s track record of voting to preserve the Guidelines. *Id.* at 537.

75. *Booker*, 543 U.S. at 244.

76. *Id.* at 245. The Court also excised one other statutory provision, 18 U.S.C. § 3742(e) (2000 & Supp. IV), because it necessarily depended on the mandatory status of the Guidelines. This statute set forth the standard of appellate review requiring courts of appeals to determine whether a sentence was “a result of an incorrect application of the sentencing guidelines” or was “outside the applicable guideline range.” 18 U.S.C. § 3742(e) (2000).

77. *Booker*, 543 U.S. at 245.

78. *Id.*

79. The *Booker* Court opined:

[A] statute that does not *explicitly* set forth a standard of review may nonetheless do so *implicitly*. . . . We infer appropriate review standards from related statutory language, the structure of the statute, and the “sound administration of justice.” And in this instance those factors . . . imply a practical standard of review already familiar to the appellate courts: review for unreasonable[ness].

*Booker*, 543 U.S. at 260–61 (citations omitted); *see also* Crosby v. United States, 397 F.3d 103, 114–16 (2d Cir. 2005) (discussing the content of reasonableness review); Harrison, *supra* note 10, at 1124 (noting that appellate courts have applied a reasonableness standard of review in past sentencing cases involving review of departures and sentences imposed in the absence of an applicable Guideline).

80. *See* Berman, *supra* note 61, at 25.

briefly addressed the lingering question of how, in fact, judges *should* conduct sentencing. The Court stated that “[w]ithout the ‘mandatory’ provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals.”<sup>81</sup> Despite this vague statement that might fairly be termed a hint to district courts about how they should approach future sentencing, *Booker* can be understood as a what-not-to-do case. The opinion left a great deal of questions open and relegated the task of developing a coherent advisory sentencing regime to the lower federal courts.<sup>82</sup>

Under the newly instituted system in which the Guidelines are merely advisory, it was inevitable, and permissible, that a significant degree of judicial discretion would reemerge in sentencing. From this discretion, circuits split about how to apply the advisory Guidelines, and sentencing disparities across courts and regions naturally followed. These consequences were unavoidable under the new regime in which judges were only tethered to the Guidelines by a mandate to “consider” them and remain loyal to the broad policy considerations espoused in § 3553(a).<sup>83</sup>

Notably, the circuits came to differing answers regarding the question of whether sentences within the Guidelines deserved a presumption of reasonableness.<sup>84</sup> The Supreme Court stepped in to resolve this split in *Rita v. United States*,<sup>85</sup> holding that the law allows, but does not require, a presumption of reasonableness to be applied on appeal to a within-Guidelines sentence.<sup>86</sup> The circuits also split on the issue of whether post-

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81. *Booker*, 543 U.S. at 259. The Court indicated what constitute the other sentencing goals when it noted that judges should take account of: the pertinent Guideline sentencing range, the policy statements of the Commission, the need to avoid unjustified sentencing disparities, the interest in supplying restitution to victims of crime, promotion of respect for the law, and deterrence. *Id.* at 259–60.

82. See Berman, *supra* note 61, at 25. “Federal judges have struggled to comprehend the meaning and impact of . . . *United States v. Booker* . . . . Conflicting lower court opinions document that few judges or practitioners are sure whether *Booker* significantly changed or only slightly altered the operational realities of the federal sentencing system.” *Id.*

83. “After *Booker* made the Guidelines advisory . . . sentencing disparities were inevitable. District courts were made free to vary from the Guidelines or sentence within the Guidelines range, so long as the sentence itself was reasonable and grounded in the sentencing factors set forth in 18 U.S.C. § 3553(a).” Harrison, *supra* note 10, at 1116.

84. See Harrison, *supra* note 10, at 1129 (“The D.C., Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits all have elected to presume a sentence within the Guidelines range to be reasonable, while the First, Second, Third, and Eleventh Circuits have chosen not to apply such a presumption.”).

85. 127 S. Ct. 2456 (2007).

86. *Id.* at 2462. The petitioner was convicted of perjury, obstruction of justice, and making false statements. He sought a sentence lower than the recommended Guidelines range based on his likely vulnerability in prison, “poor physical condition,” and past military service, but the judge sentenced him at the low end of the Guidelines range. *Id.* at 2461–62. Affirming, the Fourth Circuit held that a

*Booker* review required the application of heightened scrutiny to substantial variances from the Guidelines.<sup>87</sup> Again, the Supreme Court stepped in to offer its guidance to the divided circuits. The Court held that the proportionality test was unlawful and that all sentences should be reviewed under an “abuse of discretion standard” that deferred to the superior institutional capacity of the district courts.<sup>88</sup>

Some judges utilized their newfound freedom under the advisory regime to express, via sentencing, their political and social criticisms of particular Guidelines.<sup>89</sup> This conduct was particularly pronounced within the crack cocaine context, which was an obvious target for application of judicial discretion because it had long been a subject of popular and judicial unrest.<sup>90</sup> Critics of the powder-versus-crack cocaine sentencing disparity hoped this moment would provide an opportunity to erode the judicial commitment to the 100:1 ratio.<sup>91</sup> Critics thought that, perhaps, now sentencing judges would have the autonomy to reconsider and deviate from the 100:1 formula they found to be so misguided. And this is what some district courts did in the crack cases that came before them—they began issuing sentences below the range prescribed by the Guidelines,

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sentence that falls within a properly calculated Guidelines range is presumptively reasonable. *Id.* at 2462. Ultimately, the Supreme Court permitted this presumption of reasonableness. *Id.* at 2462.

87. Most circuits applied a “proportionality test” premised on the notion that the further a sentencing court deviated from the Guidelines range, the greater the circumstantial justification they must have. Harrison, *supra* note 10, at 1131–32. The Second Circuit, however, abstained from application of this test. *Id.* at 1132.

88. See *Gall v. United States*, 128 S. Ct. 586, 596 (2007). Petitioner, Gall, pled guilty to participating in a conspiracy to distribute ecstasy, an enterprise he admitted to being involved with for seven months during college. *Id.* at 592. The Eighth Circuit reversed the district court’s lenient sentence because they found it was not sufficiently supported by extraordinary circumstances. *Id.* at 594. The Supreme Court held that courts of appeals must review all sentences for abuse of discretion, reasoning that because the Guidelines are now advisory, appellate review of sentencing decisions should be limited. *Id.* at 594, 596.

89. “After *Booker*, some district courts began to filter some of these criticisms [of the crack cocaine 100:1 quantity sentencing ratio] into their sentencing decisions because they were suddenly free to vary from the crack Guidelines when the Guidelines conflicted with § 3553’s call for sentences no greater than necessary to effect fair punishment.” Harrison, *supra* note 10, at 1134; see also Wheatley, *supra* note 49, at 219 (“With the Federal Sentencing Guidelines labeled advisory, district courts have taken advantage of their new freedom to go outside the once mandatory sentencing ranges. Their judicial discretion no longer shackled to the Guidelines, many federal judges have gone as far as rejecting the Guidelines’ sentencing range outright.”).

90. See *supra* note 59 and accompanying text; see also Wheatley, *supra* note 49, at 219 (“Particularly under attack, once again, is the harsh treatment of crack offenses in relation to offenses involving its sister drug, cocaine.”).

91. See Recent Case, *Criminal Law—Federal Sentencing Guidelines—Eighth Circuit Holds That District Court Cannot Reduce Sentence Based on Categorical Disagreement with 100:1 Powder/Crack Cocaine Quantity Ratio*, 120 HARV. L. REV. 2004, 2004–05 (2007).

based on disagreement with the Guidelines rather than the presence of mitigating facts.<sup>92</sup>

But on this issue, too, a circuit split occurred; the courts were in contention about whether judges could rightfully vary from the Guidelines based solely on personal disagreement with the 100:1 ratio.<sup>93</sup> The majority of the circuits took the view that at sentencing, variation from the prescribed Guidelines range based solely on disagreement with the 100:1 ratio was an impermissible usurpation of legislative power.<sup>94</sup> As the Fourth Circuit explained in *United States v. Eura*, “Congress has made a decision to treat crack cocaine dealers more severely than powder cocaine dealers. Congress has also decided to instruct sentencing courts to avoid disparate sentences for crack cocaine dealers.”<sup>95</sup> The circuits adopting this rhetoric considered their appellate role to be one of policing district courts that exceeded their power by denying Congress’s chosen “sentencing policy embedded in the Guidelines.”<sup>96</sup> But not all of the circuits agreed that the courts were bound by Congress’s imposition of the 100:1 ratio. The D.C. Circuit and the Third Circuit were aligned in the view that it was within the proper discretion of district courts to consider the disparity between powder and crack cocaine offenders under the Guidelines.<sup>97</sup> One scholar explained that “these circuits saw *Booker* as expanding district court discretion to permit deviation from the Guidelines based on policy rationales. . . . [B]y implication, it would be improper for a court of appeals to reverse the district court for so deviating.”<sup>98</sup> Given this

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92. See Harrison, *supra* note 10, at 1134.

93. *Id.* at 1135.

94. See *United States v. Castillo*, 460 F.3d 337 (2d Cir. 2006), where the Second Circuit held:

[W]hen sentencing a defendant for a crack-related crime—as with any other crime—a district court judge may consider “the judge’s own sense of what is a fair and just sentence under all the circumstances.” . . . But nothing in *Booker* suggests that it is the task of district court judges to pronounce broad policy choices rather than specific sentences based on the specific facts . . . .

*Id.* at 356–57. See also *United States v. Leatch*, 482 F.3d 790, 791 (5th Cir. 2007); *United States v. Johnson*, 474 F.3d 515, 522 (8th Cir. 2007); *United States v. Williams*, 456 F.3d 1353, 1369 (11th Cir. 2006); *United States v. Miller*, 450 F.3d 270, 275 (7th Cir. 2006); *United States v. Eura*, 440 F.3d 625, 633 (4th Cir. 2006); *United States v. Pho*, 433 F.3d 53, 63 (1st Cir. 2006).

95. 440 F.3d 625, 633 (4th Cir. 2006).

96. See Harrison, *supra* note 10, at 1135 (citing *United States v. Williams*, 472 F.3d 835, 839 (11th Cir. 2006) (Black, J., concurring)).

97. See, e.g., *United States v. Pickett*, 475 F.3d 1347, 1355–56 (D.C. Cir. 2007); *United States v. Gunter*, 462 F.3d 237, 248–49 (3d Cir. 2006) (“Post-*Booker* a sentencing court errs when it believes that it has no discretion to consider the crack/powder cocaine differential incorporated in the Guidelines . . . as simply advisory . . . . [D]istrict courts may consider the crack/powder cocaine differential in the Guidelines as a factor, but not a mandate . . . .”).

98. Harrison, *supra* note 10, at 1136.

meaningful split about the role of district courts in the sentencing of crack offenders, the Supreme Court would have to step in and clarify the implications of *Booker* once again.

## II. FEDERAL SENTENCING DOCTRINE REFINED BY *KIMBROUGH* AND *SPEARS*

With the circuits in dispute about the extent of discretion afforded to sentencing judges and the proper role of the Guidelines following *Booker*, the Supreme Court had little choice but to grant certiorari and give further clarity to the confused state of federal sentencing. This is what the Court did in *Kimbrough v. United States*<sup>99</sup> and *Spears v. United States*,<sup>100</sup> two cases that addressed the same divisive issue,<sup>101</sup> *Spears* merely serving to clarify and reiterate the Court's important holding in *Kimbrough*.<sup>102</sup>

The Supreme Court granted certiorari in *Kimbrough* in order to resolve the circuit split regarding whether categorical judicial rejection of the crack offender Guidelines was permissible.<sup>103</sup> In doing so, it affirmed the minority position espoused by the D.C. and Third Circuits, which allowed district courts to consider policy disagreements with the Guidelines in their sentencing determinations.<sup>104</sup> This holding reaffirmed the Court's previously expressed intention that the Guidelines be purely advisory.<sup>105</sup>

In *Kimbrough*, the defendant was charged with possession with intent to distribute more than fifty grams of crack cocaine, among other offenses.<sup>106</sup> Based on his criminal history level and calculated offense

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99. 128 S. Ct. 558, 575 (2007).

100. 129 S. Ct. 840, 843 (2009).

101. "*Kimbrough* and *Spears* both involved offenders convicted of crack cocaine offenses . . . ." Gertner, *supra* note 11, at 272.

102. In *Spears*, the Court explained:

To the extent the above quoted language [a portion of the *Kimbrough* decision that the Eighth Circuit construed to mean that district courts may not categorically disagree with the Guidelines] has obscured *Kimbrough's* holding, we now clarify that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines.

*Spears*, 129 S. Ct. at 843–44.

103. See Harrison, *supra* note 10, at 1136.

104. "[T]he judge may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses." *Kimbrough*, 128 S. Ct. at 564.

105. "[T]he cocaine Guidelines, like all other Guidelines, are advisory only . . ." *Id.*; see also *United States v. Booker*, 543 U.S. 220, 245 (2005) (making the Guidelines advisory).

106. His offenses included conspiracy to distribute crack and powder cocaine; possession with intent to distribute more the 50 grams of crack cocaine; possession with intent to distribute powder cocaine; and possession of a firearm in furtherance of a drug trafficking offense. *United States v. Kimbrough*, 174 Fed. Appx. 798, 798 (4th Cir. 2006).



level, the Guidelines prescribed a sentence ranging between 228 and 270 months of incarceration.<sup>107</sup> The sentencing judge rejected this prescription as inappropriate, specifically because he found the case to represent the “disproportionate and unjust” nature of the crack cocaine Guidelines.<sup>108</sup> Based at least in part on his social disapproval of the Guidelines, the judge sentenced the defendant to only 180 months of imprisonment.<sup>109</sup> The government appealed and the Fourth Circuit rejected the district court’s sentence, holding that “a sentence that is outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses.”<sup>110</sup>

Ultimately, the Supreme Court sided with the district court.<sup>111</sup> The Court’s opinion relied primarily on an examination of the historical treatment of crack-versus-powder cocaine, the characteristic institutional role of the Commission, and the way that these two concepts were at odds.<sup>112</sup> After expounding on the Sentencing Commission’s modern denunciation of its own Guideline and reiterating the discretion afforded by *Booker*, the Court professed:

The crack cocaine . . . Guidelines do not exemplify the Commission’s exercise of its characteristic institutional role . . . . 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.<sup>113</sup>

The Court intended to dispose of this issue via the *Kimbrough* decision. But the lower courts did not read the case as ending the debate, and they

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107. *Id.* at 798–99.

108. *Kimbrough*, 128 S. Ct. at 565 (citing district court decision). Defendant, Derrick Kimbrough, was an African American male, and as such he represented the demographic that historically suffered disproportionate prosecution and incarceration under the crack offense Guidelines. *See Berman, supra* note 61, at 26.

109. Berman, *supra* note 61, at 25. The judge also based his variance on the “nature and circumstances” surrounding the crime and the defendant’s “history and characteristics,” concluding that all of these factors converged to indicate that the prescribed sentence range was not necessary to achieve the objectives listed in § 3553(a). *Id.*

110. *Kimbrough*, 174 Fed. Appx. at 799.

111. *Kimbrough*, 128 S. Ct. at 576 (reversing the judgment of the Fourth Circuit and remanding).

112. “We begin with some background on the different treatment of crack and powder cocaine under the federal sentencing laws.” *Id.* at 566. “The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses.” *Id.* at 567. “Although the Commission immediately used the 100-to-1 ratio to define base offense levels for all crack and powder offenses, it later determined that the crack/powder sentencing disparity is generally unwarranted.” *Id.* at 568.

113. *Id.* at 575.

failed to reach the proper consensus that categorical rejection is permitted.<sup>114</sup> It became apparent that another decision was required to reinforce the rule the Court had attempted to set forth in *Kimbrough*.<sup>115</sup> The Eighth Circuit was one court that failed to properly comprehend the *Kimbrough* holding.<sup>116</sup> In *Spears*, the defendant, Stephen Spears, was found guilty of conspiracy to distribute both crack and powder cocaine.<sup>117</sup> The district court judge found the 100:1 sentencing ratio excessive and decided to substitute a 20:1 ratio for the purpose of calculating Spears's sentence.<sup>118</sup> On cross appeal, the Eighth Circuit reversed and remanded under the theory that the district court lacked the authority to use a substitute ratio in sentencing.<sup>119</sup> The Supreme Court subsequently vacated the Eighth Circuit's holding and remanded the case for consideration in light of the recently descended *Kimbrough* decision.<sup>120</sup> Yet on remand, the Eighth Circuit again held that the district court could not "categorically reject" the Guidelines ratio.<sup>121</sup> The Eighth Circuit based this holding on a very conservative construction of *Kimbrough*, reading the opinion to mean that a sentencing judge may not substitute his or her own ratio for the one

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114. See *United States v. Spears*, 533 F.3d 715, 717 (8th Cir. 2008) (en banc); see also *United States v. Sevilla*, 541 F.3d 226, 232 n.5 (2008) (noting that in light of *Kimbrough*, district courts may not practice categorical rejection).

115. "[T]he Spears court joined other circuits in their reasoning as well as their results. These courts have avoided questioning the 100:1 ratio by asserting that the disparity embodies a congressional policy determination that sentencing judges are in no position to challenge." Recent Case, *supra* note 91, at 2007.

116. See *United States v. Spears*, 533 F.3d 715, 717 (8th Cir. 2008) (en banc) ("[A] district court may not categorically reject the ratio set forth by the Guidelines.>").

117. "Spears was found guilty of conspiracy to distribute at least 50 grams of cocaine base and at least 500 grams of powder cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), (b)(1)(B)." *Spears v. United States*, 129 S. Ct. 840, 841 (2009).

118. See *United States v. Spears*, 469 F.3d 1166, 1173–74 (8th Cir. 2006). The total offense level based on the drug quantities involved together with Spears's criminal history level of IV amounted to a Guideline range of 324–405 months' incarceration. Under the 20:1 ratio substituted by the sentencing judge, the Guideline range was 210 to 262 months' incarceration. Ultimately, the judge determined that a 240-month sentence was appropriate to impose on Spears. *Id.* at 1174. In rejecting the 100:1 ratio and substituting a 20:1 ratio, the court relied on and mimicked *United States v. Perry*, 389 F. Supp. 2d 278 (D.R.I. 2005), which rejected the legality of the 100:1 ratio in light of § 3553 considerations. *Id.* at 1173–74.

119.

Just as with any statute, the role of the judiciary is to determine what Congress meant by this statutory phrase. . . . A judge's personal views regarding the Sentencing Commission's recommendations cannot supplant Congress's refusal to adopt [the Commission's repeated recommendations to amend the ratio]. . . . The district court erred . . . by granting a downward variance based solely on its rejection of the 100:1 . . . ratio.

*Spears*, 469 F.3d at 1177–78 (internal quotations omitted).

120. *Spears*, 129 S. Ct. at 842.

121. *Spears*, 533 F.3d at 717.

prescribed by the Guidelines, but that “a sentencing approach based on the ‘particular circumstances’ of the defendant’s case” was permitted.<sup>122</sup> The Supreme Court granted certiorari to correct the Eighth Circuit’s holding, which was plainly inconsistent with the Court’s intended rule in *Kimbrough*.<sup>123</sup>

The Supreme Court’s opinion in *Spears* was succinct,<sup>124</sup> saying just enough to chastise the Eighth Circuit and others who had resisted the natural reading of *Kimbrough* and make clear what the Court thought it had already established two years prior. The Court explained, “*Kimbrough* thus holds that with respect to the crack cocaine Guidelines, a categorical disagreement with and variance from the Guidelines is not suspect. That was indeed the point of *Kimbrough*: a recognition of district courts’ authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them . . . .”<sup>125</sup> After the Court broke down and emphasized *Kimbrough*’s holding, it went on to explain the dysfunction of the alternative outcome under the Eighth Circuit’s analysis:

Either district courts would treat the Guidelines’ policy embodied in the crack-to-powder ratio as mandatory, believing that they are not entitled to vary based on “categorical” policy disagreements with the Guidelines, or they would continue to vary, masking their categorical policy disagreements as “individualized determinations.” The latter is institutionalized subterfuge. The former contradicts our holding in *Kimbrough*. Neither is an acceptable sentencing practice.<sup>126</sup>

The Supreme Court hoped to align the circuits on the issue of sentencing discretion, an issue it considered of enough importance that it essentially resolved the same question twice, first in *Kimbrough* and then again in *Spears*.<sup>127</sup> As it turned out, however, the influence of the *Spears* decision was not of sufficient firmness and finality to put these questions to rest.

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122. *Id.* at 718 (citing *Kimbrough v. United States*, 128 S. Ct. 558, 576 (2007)).

123. *Spears*, 129 S. Ct. at 842 (“Because the Eighth Circuit’s decision on remand conflicts with our decision in *Kimbrough*, we grant the petition for certiorari and reverse.”).

124. The opinion is just eleven pages, including a three-page dissent.

125. *Spears*, 129 S. Ct. at 843.

126. *Id.* at 844.

127. The *Spears* Court explained, “[b]ecause the Eighth Circuit’s decision on remand conflicts with our decision in *Kimbrough*, we grant the petition . . . and reverse.” 129 S. Ct. at 842. It went on to reiterate the holding in *Kimbrough*, which would be the holding in *Spears* as well.

### III. UNRESOLVED QUESTIONS ABOUT SENTENCING DISCRETION AND THE SCOPE OF *KIMBROUGH* AND *SPEARS*

Despite the Court's efforts to institute clear parameters and direct the circuits via *Kimbrough* and *Spears*, the consequences of these decisions are far from obvious, and the circuits continue to split on the meaning of these cases.<sup>128</sup> Significant questions remain that will have meaningful consequences for defendants in the federal court system, as well as for the future of the Guidelines.

One of the most important questions left open after *Spears* is whether that holding was driven by, and therefore limited to, the specific, controversial factual context of *Spears*,<sup>129</sup> or whether it is widely applicable. Thus far, the courts remain divided over whether the rule derived from *Kimbrough* and *Spears* applies outside of the crack cocaine context. Initially, the Sixth Circuit declined to put forth a firm holding on the issue but suggested that when a controversy required it to do so, it would construe the case broadly and furnish wide discretion to district court judges to categorically reject the Guidelines.<sup>130</sup> Later, when forced to decide the issue, the Sixth Circuit held, "our case law makes clear that the authority recognized in *Kimbrough* and *Spears* applies to all aspects of the Guidelines."<sup>131</sup> The Sixth Circuit seems to base this interpretation on the Supreme Court's line of cases (perhaps constituting a trend) that repeatedly insist on discretion for the district courts and the reduction of any remaining pressure the Guidelines may exert.<sup>132</sup> The Sixth Circuit concluded that discretion of this nature is the inherent and inevitable consequence of the *Booker* decision.<sup>133</sup> Thus far, a handful of other circuits that have answered this question have held similarly.<sup>134</sup>

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128. See *supra* Part II and *infra* notes 129–31, 135–36, 138, 141, 143 and accompanying text.

129. See *supra* notes 52, 59 and accompanying text.

130.

[W]e express no opinion on whether the principles articulated in *Spears* may apply outside of the crack-cocaine context to allow district courts to develop categorical alternatives to other sentencing enhancements . . . . We note, however, that this Court has generally heeded the Supreme Court's repeated instructions to afford sentencing judges wide latitude in imposing sentences outside the Guidelines . . . .

United States v. Johnson, 553 F.3d 990, 996 (6th Cir. 2009).

131. United States v. Cole, 343 Fed. Appx. 109, 115 (6th Cir. 2009); see also United States v. Herrera-Zuniga, 571 F.3d 568 (6th Cir. 2009).

132. See *supra* note 107.

133. See *Herrera-Zuniga*, 571 F.3d at 585.

134. See United States v. Lente, 323 Fed. Appx. 698, 712–13 (10th Cir. 2009) (finding no principled basis for limiting the holding of *Kimbrough* to the crack cocaine context); see also United States v. Cavera, 550 F.3d 180, 194–95 (2d Cir. 2008) (holding that recent Supreme Court cases teach

Yet, there is not a clear consensus that this is the right result, as some judges have construed *Kimbrough* and *Spears* to the opposite end. In *United States v. Vandewege*, while concurring in the judgment, Circuit Judge Julia Smith Gibbons argued that “[n]either *Kimbrough* or *Spears* authorized district courts to categorically reject the policy judgments of the Sentencing Commission in areas outside the crack-cocaine offenses . . . .”<sup>135</sup> Others, too, have read the language of these cases narrowly and literally, to the effect of limiting the privilege to categorically reject the Guidelines to the crack cocaine context.<sup>136</sup> Proponents of various Guidelines-driven enhancements or prescriptions are concerned, but uncertain, about whether *Kimbrough* and *Spears* will permit judicial deviation from a particular Guideline because of the judge’s personal disagreement with the policy.<sup>137</sup>

Another possible construction of *Kimbrough* and *Spears* that the opinions neither directly endorse nor preclude is that categorical rejection of a Guideline is permissible only if it was not enacted within the characteristic institutional role of the Commission.<sup>138</sup> Alternatively, perhaps this consideration merely dictates the level of appellate deference to a district court’s decision to categorically reject the Guidelines. This interpretation would encompass the crack cocaine context, but would also leave room in the law for the permissible rejection of any other Guidelines<sup>139</sup> that were enacted outside of the Commission’s distinct institutional role.<sup>140</sup>

In *Herrera-Zuniga*, the Sixth Circuit held that “a categorical, policy-based rejection of the Guidelines, even though entitled to ‘less respect,’

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that categorical rejection does not render a sentence unreasonable; sentences based on categorical factors are permitted).

135. *United States v. Vandewege*, 561 F.3d 608, 610 (6th Cir. 2009) (Gibbons, J., concurring).

136. *See United States v. Crawford*, 520 F.3d 1072, 1075 (9th Cir. 2008) (suggesting that when powder and crack cocaine Guideline disparity does not directly affect the calculation of defendant’s sentence, *Kimbrough* is inapplicable).

137. Timothy McGrath is concerned that the bankruptcy fraud enhancement found in the Sentencing Guidelines § 2B1.1(b)(8)(B) may now be subject to categorical rejection and hence neutralization under the post-*Spears* sentencing regime. He argues that this would be unfortunate since this Guideline is socially desirable and was enacted within the ambit of the Commission’s characteristic institutional role. McGrath, *supra* note 29, at 59.

138. *See United States v. Beiermann*, 599 F. Supp. 2d 1087, 1100 (N.D. Iowa 2009) (“Even before *Spears*, numerous district courts had read *Kimbrough* to permit a sentencing court to give little deference to the guideline for child pornography cases on the ground that the guideline did not exemplify the Sentencing Commission’s exercise of its characteristic institutional role and empirical analysis, but was the result of congressional mandates . . . .”).

139. Consider, for example, the child pornography Guideline mentioned *supra* note 138; see also *infra* note 145 for greater explanation.

140. *See supra* notes 47, 48 and accompanying text.

nevertheless is permissible where the guidelines in question ‘do not exemplify the Commission’s exercise of its characteristic institutional role.’”<sup>141</sup> Yet the court refused to fully commit to this interpretation of *Kimbrough* and *Spears*, leaving itself a loophole when it went on to say, “this may not be the only circumstance in which sentencing courts are authorized to reject the Guidelines on policy grounds . . . .”<sup>142</sup> The Eighth Circuit has been similarly noncommittal, observing that “[t]he Court has been equivocal about whether a sentencing court owes greater deference to guidelines that do exemplify this ‘characteristic institutional role,’ and whether closer appellate review is warranted with respect to variances from such guidelines.”<sup>143</sup>

In a case before the Third Circuit in which a defendant was convicted for a child pornography offense, the defendant argued for the application of this line of reasoning.<sup>144</sup> The defendant analogized the child pornography Guideline to the crack cocaine Guideline, contending that because it was not established pursuant to the Commission’s institutional role,<sup>145</sup> reliance on the Guideline was an abuse of district court discretion.<sup>146</sup> The Court dismissed this claim, simply stating that “[c]ase law does not support [defendant’s] argument . . . .”<sup>147</sup> But it is not obvious what the court meant by this unelaborated comment. Perhaps the court was merely rejecting the suggestion that district courts abuse their discretion by relying on noncharacteristic Guidelines,<sup>148</sup> for this is a bold reading of

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141. 571 F.3d 568, 586 (6th Cir. 2009) (citing *United States v. Kimbrough*, 128 S. Ct. 558, 575 (2007)); *see also* *United States v. Rodriguez*, 527 F.3d 221, 227 (1st Cir. 2008) (finding that a Guideline which failed to represent the Commission’s characteristic institutional role deserved less deference than a Guideline that did represent the characteristic role).

142. *Herrera-Zuniga*, 571 F.3d at 586.

143. *United States v. Barron*, 557 F.3d 866, 871 (8th Cir. 2009).

144. *United States v. Velazquez*, 329 Fed. Appx. 365, 367 (3d Cir. 2009). The *Velazquez* defendant argued that the child pornography guidelines “deserve little or no deference because they are not empirically based.” *Id.* The defendant was the target of an FBI child pornography investigation and was convicted for using interstate commerce to attempt to persuade, entice, and induce a minor to engage in illegal sexual acts, as well as for the receipt of child pornography. *Id.* The defendant had targeted the “girl” in a Yahoo! chat room, transmitted nude photographs of himself and children to her, and arranged for her to travel from Pennsylvania to Mississippi to have sex with him. *Id.*

145. The Guideline relating to child pornography was not enacted pursuant to empirical research. Instead it was established by Congress through the PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003), which targeted child pornographers for more severe punishment by augmenting mandatory minimums and maximums, increasing base offense levels under the Guidelines and adding enhancements for particular exacerbating facts. *Velazquez*, 329 Fed. Appx. at 369.

146. *Id.*

147. *Id.*

148. Most courts would agree with the Eighth Circuit, which stated, “*Kimbrough* and *Spears* do not hold that a district court *must* disagree with any sentencing guideline, whether it reflects a policy

the case law indeed. The Third Circuit did not divulge, however, whether it believed that a district court *may* choose to reject a noncharacteristic Guideline.

Scholars, too, have pointed to “the characteristic institutional role” as a potential distinguishing factor for Guidelines that may be categorically rejected.<sup>149</sup> One scholar from the Bankruptcy Institute pondered, “When the Commission crafted the bankruptcy fraud enhancement . . . it was exercising its ‘characteristic institutional role.’ . . . Is the district judge’s decision reasonable, or is it entitled to ‘less respect’ since it infringes on the Commission’s characteristic institutional role?”<sup>150</sup> Perhaps a judge’s discretion to categorically reject a Guideline hinges on whether such Guideline was enacted pursuant to the Commission’s characteristic institutional role.<sup>151</sup>

Some courts have taken an alternative approach to distinguishing which Guidelines may be categorically rejected, finding certain Guidelines ineligible for categorical rejection under *Kimbrough* and *Spears* because they originated from a statute instead of the Sentencing Commission. In *United States v. Harris*, the Seventh Circuit held that “a sentence entered under the career offender guideline, § 4B1.1, raises no *Kimbrough* problem because to the extent it treats crack cocaine differently from powder cocaine, the disparity arises from a statute, not from the advisory guidelines.”<sup>152</sup> The court arrived at this conclusion by reasoning that § 4B1.1 was statutorily conceived<sup>153</sup> and that “[w]hile the sentencing guidelines may be only advisory for district judges, congressional legislation is not.”<sup>154</sup> Other courts have subscribed to this reasoning as well, effectively curtailing the reach of *Kimbrough* and *Spears*. For example, when faced with its own career offender Guideline case, the First Circuit explained, “*Kimbrough*—though doubtless important for some cases—is of only academic interest here.”<sup>155</sup>

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judgment of Congress or the Commission’s ‘characteristic’ empirical approach.” *Barron*, 557 F.3d at 871.

149. McGrath, *supra* note 29, at 59.

150. *Id.*

151. See *supra* note 137 and accompanying text for case law that offers a basis for arguing that the right to categorically reject hinges upon whether a guideline was enacted within the characteristic role of the Commission.

152. 536 F.3d 798, 813 (7th Cir. 2008).

153. “[Section] 4B1.1 correlates offense levels and sentencing ranges with the gravity of the crime by incorporating the statutory maximum sentence for the underlying offense.” *Id.* at 812.

154. *Id.* at 813.

155. *United States v. Jimenez*, 512 F.3d 1, 9 (1st Cir. 2007).

The Sixth Circuit stands in contradiction of the Seventh and First Circuits. In *United States v. Cole*, the Sixth Circuit acknowledged the split but firmly held that “our case law makes clear that the authority recognized in *Kimbrough* and *Spears* applies to all aspects of the Guidelines.”<sup>156</sup> Given this broad construction of the cases, the Sixth Circuit held that district courts have the discretion to reject the career-offender enhancement under USSG § 4B1.1, despite its statutory origination.<sup>157</sup> To the Sixth Circuit, all Guidelines are rightfully vulnerable to rejection in the wake of *Kimbrough* and *Spears*,<sup>158</sup> and the searching distinctions implemented by its sister circuits are unwarranted given this basic fact.

#### IV. POLICY RECOMMENDATIONS

As this Note has discussed, during the last few decades, the ideological pendulum has vacillated on the very sensitive and important issue of federal sentencing policy.<sup>159</sup> First, it swung away from the indeterminate sentencing regime in place prior to the birth of the Sentencing Guidelines and toward a more predictable and uniform mandatory sentencing regime.<sup>160</sup> Now the pendulum is in the process of swinging back, this time away from the mandatory regime and toward a more unpredictable, discretion-driven system.<sup>161</sup> Ideally, the pendulum should settle somewhere in the middle of these two camps and remain there. When the issue is no longer in flux, a federal sentencing regime can finally establish longevity and stability, thereby providing desirable systemic predictability and consistency.

The spirit of the *Kimbrough* and *Spears* opinions,<sup>162</sup> as well as a broader view of the recent case law in this area,<sup>163</sup> suggests that the Sixth Circuit got the Supreme Court’s intent correct when it held that categorical

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156. *United States v. Cole*, 343 Fed. Appx. 109, 115 (6th Cir. 2009).

157. *Id.* at 115–16.

158. *Id.*

159. “The last three decades witnessed a revolution in sentencing and corrections practice. . . . During this same period, the federal government and many states embarked on a course of procedural innovation.” Bowman, *supra* note 8, at 1317.

160. *See supra* notes 8, 9 and accompanying text.

161. *See supra* notes 102, 104, 105.

162. *See Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007) (“[T]he cocaine Guidelines, like all other Guidelines, are advisory only . . . .”) (emphasis added). The *Spears* opinion reemphasizes this broad language in affirming *Kimbrough*. *Spears v. United States*, 129 S. Ct. 840, 842 (2009).

163. Since 2000, the Supreme Court has addressed issues of federal sentencing in *Apprendi*, *Booker*, *Rita*, *Gall*, *Kimbrough*, and *Spears*, each time deciding in favor of judicial discretion in sentencing.



rejection of the Guidelines is not to be strictly limited to the crack cocaine context.<sup>164</sup> As the Sixth Circuit observed, the Supreme Court seems to intend that the potentiality of categorical rejection be widely applicable.<sup>165</sup> The Supreme Court's wisdom in detecting a legal problem with purely mandatory sentencing is sound.<sup>166</sup> Its solution, however, to free judges from all meaningful ties to the Guidelines in favor of broad discretionary power, is less well founded.

*A. Categorical Rejections Should Only Be Permissible For Guidelines Enacted Outside of the Commission's Institutional Role*

The Commission and the Guidelines derive their legitimacy from their characteristic institutional role.<sup>167</sup> This role is what distinguishes Guideline prescriptions from the inclinations of various judges, and it is what entitles the Guidelines to their powerful place in the sentencing process. Thus, Guidelines that were enacted pursuant to this role should not be eligible for categorical rejection.<sup>168</sup> Guidelines that have not been instituted pursuant to the Commission's characteristic institutional role, however, should be vulnerable to categorical rejection.<sup>169</sup> For these Guidelines can claim no greater wisdom or superior status than the individually designed sentences that are produced by federal judges daily.

The structure of the Guidelines already permits deviations from the prescribed ranges for nearly all imaginable mitigating factors.<sup>170</sup> Consequently, any categorical rejection is bound to be based on the

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164. *United States v. Cole*, 343 Fed. Appx. 109, 115 (6th Cir. 2009).

165. *See supra* notes 131, 132 and accompanying text.

166. In *Booker*, the Court held that the Sixth Amendment right to a jury determination of all facts relevant to sentencing was unconstitutionally contravened by mandatory sentencing. *See United States v. Booker*, 543 U.S. 220, 245 (2005).

167. *See supra* notes 23, 24.

168. This is the obvious inverse of the Court's holding in *Kimbrough* that the district court's rejection of the guideline was permissible "because those Guidelines do not exemplify the Commission's exercise of its characteristic institutional role." *Kimrough v. United States*, 128 S. Ct. 558, 575 (2007); *see United States v. Rodriguez*, 527 F.3d 221, 227 (1st Cir. 2008) (Guidelines schemes that do not "exemplify the [Sentencing] Commission's exercise of its characteristic institutional role" . . . deserve less deference . . . ." (citation omitted)).

169. *See supra* note 141 and accompanying text.

170. 18 U.S.C. § 3553(a) (2008) ("The court, in determining the particular sentence to be imposed, shall consider—(1) the nature and circumstances of the offense and the history and characteristics of the defendant"); *see also United States v. Dean*, 414 F.3d 725, 730 (7th Cir. 2005) (courts are required to provide defendants "opportunity to draw the judge's attention to any factor listed in section 3553(a) that might warrant a sentence different from the guidelines sentence"). "The Guidelines address, in one way or another virtually all of the factors that lawyers and sentencing judges have thought relevant to imposing sentences." *Bowman, supra* note 8, at 1346.

political or moral sensibilities of the individual sentencing judge. But when a Guideline has been properly promulgated, the political sensibilities of an individual judge should not trump the institutionally established and agreed-upon prescription. This limitation on categorical rejection is particularly salient when one considers the heavy cost that such rejection will have on the criminal justice system by way of creating serious disparities and concentrating excessive power in the hands of unelected federal judges.<sup>171</sup>

On the other hand, when a Guideline lacks an empirical, institutional underpinning, it is much more likely to be ill founded.<sup>172</sup> In this scenario, the risk of sentencing disparities and judicial overreach is justified by the good that may come of permitting judges to categorically reject Guidelines.<sup>173</sup> Through categorical rejection in this scenario only, judges may serve individual justice better and remedy the injustices of bad Guidelines. Additionally, they may attract necessary social and political attention to individual Guidelines that are unjust or socially undesirable.<sup>174</sup>

Even if categorical rejection were to be contained to the limited realm of non-empirically originated Guidelines, a still greater level of systemic judicial discipline must be instituted in order to ensure judicial accountability. This is necessary in order to minimize judges' inclinations to categorically reject and instead reserve this occurrence for only the most necessary instances. Encouraging judges to practice categorical rejection sparingly will have the desirable effect of minimizing problematic disparities in sentences between courts and regions.<sup>175</sup> The implementation

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171. A system with prevalent categorical rejection could be likened to the pre-Guidelines era in which trial court judges had nearly limitless discretion. This scheme "came under scrutiny because it produced widespread disparity, with similarly situated defendants often sentenced by different district courts to widely varying terms of imprisonment." Harrison, *supra* note 10, at 1120. The flaws of this system were so troublesome that Congress was prompted to pass the Sentencing Reform Act to curtail extreme judicial power and reduce unfair disparities. *Id.*

172. This is illustrated by the improper enactment of the crack cocaine Guideline. See *supra* notes 56–59 and accompanying text.

173. Perhaps we have seen the crack cocaine Guideline rejections illustrate this principle.

174. "The Commission is . . . obsessed with monitoring judicial compliance with the Guidelines." Gertner, *supra* note 11, at 279.

175. For an example of how problematic such disparities can be, consider the situation created by *Kimbrough* and *Spears*. Pursuant to these cases, federal judges have the green light to substitute their own powder-to-crack cocaine ratios upon rejection of the Guidelines ratio. The practical consequence is that some defendants are now arbitrarily sentenced under a 20:1 ratio, whereas other defendants who come before a different court are sentenced for the same crime under the orthodox 100:1 ratio. Klein & Thompson, *supra* note 36, at 548; see also *United States v. Gully*, 619 F. Supp. 2d 633, 644 (N.D. Iowa 2009) (applying a 1:1 ratio).

of systemic safeguards could also encourage the potential positive effects of categorical rejection,<sup>176</sup> not just mitigate the negative effects.

*B. Judges Should Be Required to Write Sentencing Opinions When They Categorically Reject a Guideline and Materially Change a Defendant's Sentence*

The legitimacy of the sentencing system would be advanced if judges were required to write sentencing opinions any time they categorically rejected a Guideline and a material change in a defendant's sentence resulted.<sup>177</sup> Currently, judges rarely write any form of sentencing opinion.<sup>178</sup> Judges are only subject to § 3553(c)'s "statement of reasons" provision,<sup>179</sup> which requires a minimal verbal statement of how the judge arrived at the sentence<sup>180</sup> and the completion of a sparse, perfunctory form.<sup>181</sup> A sentencing opinion requirement would discourage judges from rejecting Guidelines except in the most compelling cases, due to the increased burden on their time and energy that would necessarily accompany rejection.

Such a requirement would also ensure that a judge's ideological stance was documented in a publicly accessible way so that the judge could be held accountable for his or her views and chosen course of activism. The public could consider how and when judges are applying their discretion, perhaps exerting the influence of popular opinion on either the judges themselves or those involved in appointing future federal judges.<sup>182</sup> In

176. The positive effects of categorical rejection include focusing public attention on poorly conceived Guidelines and prompting debate that might precipitate reform of such Guidelines.

177. "Full written opinions . . . may provide the best source of commentary on the sentencing rules selected by a commission, and offer the best hope for further refinement, revision and reform." Marc Miller, *Guidelines Are Not Enough: The Need for Written Sentencing Opinions*, 7 BEHAV. SCI. & L. 3, 4 (1989).

178. See Gertner, *supra* note 11, at 278.

179. 18 U.S.C. § 3553(c) (2006) ("The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence . . .").

180. See *United States v. Rodriguez-Alvarez*, 425 F.3d 1041, 1047 (7th Cir. 2005) (construing § 3553(c) loosely to find that it does not require a judge to discuss sentencing factors in detail or make explicit findings on or assign weight to the mitigating factors a defendant put forth).

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The Administrative Office of the U.S. Courts ("AO") has created an anemic form ostensibly in an effort to comply with [the statement of reason] requirement . . . . [T]his document contains a parade of nearly meaningless check boxes . . . . Compounding the injury, the AO prevents the public from seeing . . . these insipid documents, just as it refuses to release all judge-specific information about sentences.

Steven L. Chanenson, *Write On!*, 115 Yale L.J. Pocket Part 146, 147 (2006).

182. "Congress and the public might have a better understanding of and respect for the judicial role if they were able to read an opinion describing *why* a judge imposed a sentence . . ." *Id.*

addition to giving the public a window into the courtroom, sentencing opinions would apprise fellow judges of their colleagues' sentencing activities. As one author said, "in order to avoid inter-judge disparities, judges must be able to see the decisions made in the courtroom next door."<sup>183</sup> Sentencing opinions would surely increase awareness of how fellow judges conduct sentencing and might even elevate the general quality of sentencing practice by encouraging greater debate and camaraderie within the judicial field.<sup>184</sup>

Currently, sentencing materials are rarely accessible to judges, not to mention the American public.<sup>185</sup> But with the recent growth in judicial power stemming from the *Booker* and *Spears* line of cases, increased judicial accountability should be required as well. Accountability could be achieved by requiring judges to produce publicly accessible sentencing opinions each time they choose to categorically reject a Guideline in the process of sentencing a defendant.

Sentencing opinions would also be instrumental in maintaining an appearance of fairness for both defendants and the community at large.<sup>186</sup> Amid the sentencing disparities that are introduced into the system by categorical rejection, defendants, particularly those who are unfamiliar with the constitutional underpinnings of the current level of judicial discretion, might feel that they are victims of an arbitrary system or the whims of a particular judge.<sup>187</sup> Requiring sentencing opinions would make the sentencing process more transparent. It would provide defendants with an explanation of why their sentence did not conform with what they might consider to be criminal justice norms. And as the Supreme Court has acknowledged, a "defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process."<sup>188</sup> Thus, sentencing opinions will help satisfy defendants and the general

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(emphasis added).

183. Gertner, *supra* note 11, at 279.

184. "[W]ell-reasoned sentencing opinions and judicial transparency concerning sentencing are two of the best weapons judges have to bolster their legitimacy and preserve their decisional independence." Chanenson, *supra* note 181, at 148.

185. See Gertner, *supra* note 11, at 278. "[S]entencing decisions . . . are rarely publicly available, searchable, or otherwise accessible to judges and advocates." *Id.*

186. See Chanenson, *supra* note 181, at 147.

187. Case law shows a plethora of evidence that defendants have often felt this way, even when they were sentenced within the Guidelines. See, e.g., *United States v. Rodriguez-Alvarez*, 425 F.3d 1041, 1047 (7th Cir. 2005) (defendant claimed his sentence was unfair because the court did not make clear to him its findings on the mitigating factors he had presented at sentencing).

188. *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

public that deviations from the Sentencing Guidelines are well founded and not arbitrary or a result of bias. Ultimately, this will protect the perceived legitimacy of the criminal justice system.<sup>189</sup>

### *C. Reform Should be Instituted Within the Sentencing Commission*

While requiring sentencing opinions would be a positive step in counteracting the sentencing problems growing out of the *Spears* and *Kimbrough* rulings, it is not enough. Reform must also take place within the Sentencing Commission itself. The Commission has historically spent a great deal of resources tracking compliance with the Guidelines.<sup>190</sup> Now that mere compliance is not essential because sentencing is no longer mandatory, the Commission should turn its attention and resources to which Guidelines are categorically rejected and why.<sup>191</sup>

A congressional directive would be the most direct way to restructure the Commission and review which Guidelines are categorically rejected by judges.<sup>192</sup> Such review would allow the Commission to identify the consensus about which Guidelines have been improperly enacted outside of the Commission's institutional role. Having identified these Guidelines, the Commission could revisit them, with the end goal of eradicating or replacing those Guidelines that lack an empirical justification.<sup>193</sup> The Commission is in the best position to offer such redress if judges are properly rejecting uncharacteristic Guidelines.

By tracking categorical rejections and exploring their underpinnings, the Commission can also draw attention to the Guidelines that are improperly rejected. They can do so by publishing reports that raise awareness about improper rejections,<sup>194</sup> explaining why the disputed

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189. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id.* This principle can surely be applied more broadly to a wide range of criminal penalties or loss of liberty.

190. "The United States Sentencing Commission has extraordinary resources. . . . Aside from congressional directives, the Commission is also obsessed with monitoring judicial compliance with the Guidelines. It closely tracks whether judges are following the Guidelines . . ." Gertner, *supra* note 11, at 279.

191. "Today, the Commission should be focused on *why* judges depart . . . . In so doing, the Commission will uncover patterns in departures and be able to better guide judges in the use of their *Booker* discretion." *Id.* at 280.

192. Congress frequently suggests action to the Commission via directive. Orrin 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).

193. *See supra* note 24.

194. As a matter of business, the Commission frequently publishes reports on different subjects relevant to federal crime and sentencing. To view the Commission's myriad reports, visit UNITED

Guideline is, in fact, legitimate. Hopefully this would exert enough pressure to curtail improper rejections. If the Commission takes up these new tasks, it will make the sentencing system stronger, both by guiding judges to better results<sup>195</sup> and by eliminating a major source of criticism from which the Sentencing Guidelines suffer.

Taken together, the suggested reforms would ultimately eliminate reasons for categorical rejection,<sup>196</sup> thereby reducing the need for unfettered discretion and the consequent disparities it causes. This kind of evaluation, reflection, and reform is central to the Commission's designed role.<sup>197</sup> Its originators intended that the Commission would engage in an ongoing process of data gathering and reevaluation of the Guidelines.<sup>198</sup> Appropriately, in making the suggested reforms now, the Commission will satisfy Congress's original vision, while adapting to the demands of contemporary times—the hallmarks of a lasting institution.

#### *D. Feasibility of Policy Recommendations*

The first prong of the policy recommendation, that categorical rejection be limited to those Guidelines that were not enacted pursuant to the Commission's institutional role,<sup>199</sup> is unlikely to come to fruition. While this Note has argued that this limitation would be ideal due to its likelihood of producing optimal social outcomes, the Supreme Court has tended toward an alternative, more broad construction of the law.<sup>200</sup> If the circuits cannot come to a proper consensus, another Supreme Court opinion may be required to establish a final answer to the questions concerning the scope of judges' rights to categorically reject Guidelines. Although another Supreme Court opinion may explicitly limit the practice of categorical rejection to Guidelines that were enacted outside the characteristic institutional role, this seems unlikely.

The second suggestion, that judges should be required to publish widely accessible sentencing opinions,<sup>201</sup> is possible regardless of how the Supreme Court might decide the scope of categorical rejection. This rule

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STATES SENTENCING COMMISSION, <http://www.ussc.gov> (last visited Dec. 30, 2010).

195. See Gertner, *supra* note 11, at 280.

196. The need for categorical rejection would be eradicated by the Commission reforming or eliminating those Guidelines that were enacted outside of the characteristic institutional role. Once all improperly enacted Guidelines are eliminated, judges should no longer engage in categorical rejection.

197. See *supra* note 24.

198. See *supra* note 24.

199. See *supra* Part IV.A.

200. See *supra* notes 155–58 and accompanying text.

201. See *supra* Part IV.B.

might meet resistance from some members of the judicial community due to the increased burden it would generate and the publicity it is bound to bring to the judicial realm. But if enough political support could be rallied, Congress, or even the Commission, could mandate that judges write sentencing opinions in the case of categorical rejections. If the Commission sought to enact a rule of this nature, however, questions might arise as to whether it is mandatory, or merely advisory, like the rest of the Guidelines post-*Booker*.

The final suggestion, that the Commission should assume responsibility for gathering and analyzing data about which Guidelines are suffering categorical rejection, is the most likely suggestion to be implemented.<sup>202</sup> This action would require little real reform within the Commission, for the Commission was intended from its inception to frequently adapt to emerging data and revise the Guidelines.<sup>203</sup> For the Commission to allot time and resources to the study of categorically rejected Guidelines will, at this juncture, merely preserve the Commission's proper role. What is more, this action would strengthen the Commission's institutional legitimacy by remedying past errors for which it has suffered criticism and by eradicating or modifying Guidelines that were improper from inception.

## V. CONCLUSION

*Kimbrough* and *Spears* are the latest developments in the Court's longstanding struggle to institute a federal sentencing scheme that achieves a harmony of individual justice, systemic predictability, and efficiency. The Court's decision to permit categorical rejection of the Sentencing Guidelines, while currently unclear in its scope, certainly perpetuates the trend toward greater judicial discretion. Judicial discretion, while sometimes essential to achieve individual justice, comes at the cost of sentencing disparities and general unpredictability in sentencing. Disparities and unpredictability are bound to encourage a public perception of unfairness in federal sentencing, and in so doing, they undermine the perceived legitimacy of the federal criminal justice system. In the worst-case scenario, that perception of unfairness will not be a misunderstanding, but a functional reality.

The suggested institutional safeguards would be time consuming and costly to administer. Simply disallowing categorical rejection of all

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202. See *supra* Part IV.C.

203. See *supra* notes 6, 37, 38 and accompanying text.

Guidelines would be a more efficient sentencing policy. Likewise, allowing categorical rejection of all Guidelines would raise fewer questions about reform within the Sentencing Commission and would generate less friction with federal judges. But our federal justice system is not one that prioritizes ease. To the contrary, the system frequently negotiates fine boundaries and complex analyses in order to achieve the competing values of systemic efficiency and individual justice. Limiting categorical rejection of the Sentencing Guidelines to improperly enacted Guidelines and requiring that judges compose public sentencing opinions in the case of categorical rejection would achieve the ideal balance between judicial discretion and the goal of systemic predictability. Meanwhile, the Sentencing Commission should seek to improve the integrity of the Guidelines so that such discretion is not necessary to arrive at a just result.

*Sophia A. Vandergrift\**

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\* J.D. Candidate (2011), Washington University in St. Louis School of Law; B.A. (2004), Wake Forest University. I would like to express gratitude to my family, friends, and colleagues on the *Law Review* for their guidance and support in the development of this Note.