Criminal Law and Procedure

From *Apprendi* to *Booker* to *Gall* and *Kimbrough*: The Supreme Court Blunders its Way Back to Luck-of-the-Draw Sentencing

*By William G. Otis**

A quarter-century ago, bipartisan majorities in Congress had come to understand that the federal sentencing system was, in today's parlance, "broken." Sentencing was rife with irrational disparity, principally because each judge could sentence as he saw fit—through the prism of his own temperament, experience, or even mood. Judges did not have to follow any uniform sentencing standards, or even proceed under any established theory as to what sentencing was supposed to accomplish. Appellate review of sentencing was virtually non-existent.

To fix the problem, Congress adopted the Sentencing Reform Act of 1984. The Act created a system of mandatory sentencing guidelines, developed largely from existing sentencing patterns, and appellate review to enforce them.

Although the guidelines were often criticized as "sentencing by the numbers," those very numbers succeeded in making the system more transparent, predictable, and accountable than the scattershot, subjective, and sphinx-like "system" they replaced. Mandatory guidelines also succeeded by the most important measure that can be applied to sentencing—to wit, they accompanied, even if they cannot be said exclusively to have produced, a consistent and long-term decrease in the crime rate. The deterrent and incapacitating effects of serious prison time that even a sympathetic judge would, under mandatory guidelines, find it difficult to avoid, did indeed, so it appeared, have their effect.

But sentencing reform carved from the hide of unfettered judicial power was not to last. In a series of opinions starting with *Apprendi v. New Jersey*[1] and ending in *Gall v. United States*[22] and *Kimbrough v. United States*,[3] the Supreme Court killed off determinate sentencing. These decisions rendered the guidelines "advisory only,"[4] and made clear that appellate review of district court sentencing decisions was to be deferential, if not, for practical purposes, empty.

The brief and promising life of determinate sentencing had come to an end. Luck-of-the-draw sentencing was back. So, too, is the invitation for "rehabilitation"-based, defendant-friendly sentencing, all dressed in the soothing if not particularly law-oriented terminology of "judicial discretion." Criminals facing jail—and especially those who speak for them—are likely to welcome this development, knowing from years of experience that "judicial discretion" is code for "lower than guidelines sentences." Whether the rest of us should be equally welcoming it is a different matter.

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In The Beginning...

The 1983 Senate Report accompanying the Sentencing Reform Act aptly stated the problem. It observed:[5]

> In the federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. The judge is supposed to set the maximum term of imprisonment and the parole commission is to determine when to release the prisoner because he is 'rehabilitated.' Yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting.... Since the sentencing laws have not been revised to take this into account, each judge is left to apply his own notions of the purposes of sentencing. As a result, every day federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One offender may receive a sentence of probation, while another—convicted of the very same crime and possessing a comparable criminal history—may be sentenced to a lengthy term of imprisonment. Even two such offenders who are sentenced to terms of imprisonment for similar offenses may receive widely differing prison release dates; one may be sentenced to a relatively short term and be released after serving most of the sentence, while the other may be sentenced to a relatively long term but be denied parole indefinitely.

Congress noted that both the prevalence and the degree of unwarranted disparity—meaning disparity unrelated to relevant offense or offender characteristics—was little short of scandalous:[6]

> [Disparity] occurs in sentences handed down by judges in the same district and by judges from different districts and circuits in the federal system. One judge may impose a relatively long prison term to rehabilitate or incapacitate the offender. Another judge, under similar circumstances, may sentence the defendant to a shorter prison term simply to punish him, or the judge may opt for the imposition of a term of probation in order to rehabilitate him. For example, in 1974, the average federal sentence for bank robbery was eleven years, but in the Northern District of Illinois it was only [half that]... Further probative evidence may be derived from [a] 1974 study in which fifty federal district court judges from the Second Circuit were given twenty identical files drawn from actual cases and were asked to indicate what sentence they would impose on each defendant. The variations in the judges' proposed sentences in each case were astounding.

To remedy the problem of luck-of-the-draw disparity, Congress embraced an entirely new concept: sentencing was henceforth to be governed by the rule of law.

Congress thus established the Sentencing Commission to draw up mandatory sentencing guidelines. Judges, while still having considerable discretion to tailor sentences to the individual circumstances of each case—and, in truly

exceptional cases, to sentence outside the guidelines entirely—would ordinarily be required to sentence within the guidelines range.

Despite the fact that three of the seven voting members of the Sentencing Commission were, under the Act, to be federal judges, not all their colleagues were enthusiastic about the reining-in of what had been virtually unfettered sentencing authority. Some went so far as to find the guidelines unconstitutional, an intrusion on the separation of powers. (The Supreme Court, in an 8-1 decision, would later reject every significant separation of powers objection.[7])

Congress was well aware that a considerable portion of the federal judiciary, not to mention the criminal defense bar, believed that, if guidelines were inevitable, at least they should be voluntary rather than mandatory. Guidelines opponents noted that voluntary systems had been adopted by several states. Congress addressed the question explicitly and concluded that only a mandatory system could work. Voluntary or "advisory" guidelines simply could not be counted on to establish the overall uniformity, transparency, and accountability that had been so sorely lacking, and merely "suggested" sentences could scarcely be a basis for appellate enforcement. The Senate Report noted, for example:[8]

> The Committee rejected an amendment by Senator Mathias which would have expanded significantly the circumstances under which judges could depart from the sentencing guidelines in a particular case. The Mathias amendment would have permitted deviations from the guidelines whenever a judge determined that the characteristics of the offender or the circumstances of the offense warranted deviation, whether or not the Sentencing Commission had considered such offense and offender characteristics in the development of the sentencing guidelines.
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> The Committee resisted this attempt to make the sentencing guidelines more voluntary than mandatory, because of the poor record of states [noted] in the National Academy of Science report which have experimented with 'voluntary 'guidelines. In his testimony before the committee on the comprehensive crime control act of 1983 (s. 829), [one] district attorney... noted that the voluntary guidelines in Massachusetts were completely ineffective in reducing sentencing disparities and imposing a rational order on criminal sentencing in the state, because judges generally did not follow them.

Mandatory federal sentencing guidelines became effective on November 1, 1987. It took a few years for the sentences they required to begin to take hold. Once fully in place, the guidelines (along with statutory minimum sentencing) did indeed produce, as critics pointed out, a significant increase in the prison population. What the critics mentioned less frequently was that, with criminals incarcerated instead of out on the street, there was a concomitant significant decrease in the crime rate. This was true for both violent and property crime. Between 1991 and 2005, the property crime rate dropped by more than half, from roughly 354 victimizations per 1000 households to 154.[9] Violent crime saw a similar trend, dropping almost every year from roughly forty-nine victimizations per household in 1993 to twenty-one in 2005—a decrease of close to 60%.[10] While no serious person maintains that mandatory federal sentencing guidelines deserve all the credit for this startling improvement in the crime picture, no one can plausibly deny that they played a significant role.

Success Proves Too Much To Abide

The destruction of determinate sentencing started quietly enough, with *Apprendi v. New Jersey*.[11] There, the defendant fired several shots into the home of a black family that had recently moved in nearby. In a statement to the police shortly afterwards (later retracted), Apprendi admitted that he committed the crime because the victim's family was African-American and he "did not want them in the neighborhood." He was promptly charged in a twenty-three-count indictment. Nothing in the indictment referred to New Jersey's hate crimes statute, however, and there was no count alleging that Apprendi acted with a racial purpose.

Apprendi entered an agreement in which he pleaded guilty to three counts and the state dismissed the others. In doing so, the state reserved the right to request that the court impose an "enhanced sentence" on one of the counts (Count 18) charging possession of a firearm for an unlawful purpose—a count which by its terms carried a maximum sentence of no more than ten years. Apprendi reserved the right to challenge any unindicted "hate crimes enhancement" on constitutional grounds.

The court accepted the plea agreement, and the prosecutor moved for an enhanced sentence exceeding ten years under the uncharged hate crimes statute. The court convened a hearing on the question of Apprendi's purpose in possessing and firing the gun at the victim's house. The sentencing judge concluded, by a preponderance of the evidence, that Apprendi's behavior was motivated by racial bias, and sentenced him to twelve years' imprisonment on Count 18.

A divided New Jersey Supreme Court rejected Apprendi's argument that the two-year enhancement violated his right under the Due Process Clause to a jury determination, beyond a reasonable doubt, of the facts upon which it was based. The U.S. Supreme Court reversed in an opinion by Justice Stevens, joined by Justices Scalia, Souter, Thomas, and Ginsburg. The Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be admitted by the defendant or submitted to a jury and proved beyond a reasonable doubt.

One may take as well-reasoned the Court's holding, subscribed as it was by the Court's most liberal and conservative members, while still noting that it was broader than needed to vindicate the principle at its base. The Court could have held simply that a defendant cannot be sentenced under the provisions of a statute he was never indicted for violating. (Indeed, Justice Thomas said almost exactly that in his concurring opinion, quoting the long-honored rule that "[t]he indictment must allege whatever is in law essential to the punishment sought to be inflicted."[12]) By casting its holding less precisely in terms of what is allowed under the "statutory maximum," the *Apprendi* majority paved the way for a critical breach in the guidelines.

The breach opened four years later, in *Blakely v. Washington*.[13] In that case, the defendant, "evidently a difficult man to live with,"[14] bound his wife in construction tape and abducted her at knifepoint from their home in Grant County, Washington. He drove her to Montana, where he was arrested.

Blakely was charged by the State of Washington with first degree kidnapping. Pursuant to a plea agreement, that count was replaced with a charge of second degree kidnapping, a Class B felony which carries a statutory maximum of ten years imprisonment. At the same time, the Washington Legislature had adopted a guidelines system roughly similar to that of the United States. Under Washington's guidelines, the "standard range" for second-degree kidnapping was forty-nine to fifty-three months. The Washington Sentencing Reform Act provided that a standard range sentence may be enhanced if the sentencing judge finds "substantial and compelling reasons" for doing so.[15]

The prosecutor recommended a sentence within the standard range, but the court did not agree. After a hearing in which the unpleasant details of the kidnapping were adduced, the court concluded that Blakely acted with "deliberate cruelty," a statutorily enumerated ground for an exceptional sentence (or upward departure, as it would be called in federal law). The court thus imposed a ninety-month sentence, thirty-seven months above the maximum of the standard range—but thirty months below the general statutory maximum for a Washington Class B felony.

Blakely made unsuccessful appeals to the state, but met with better luck in the U.S. Supreme Court. With Justice Scalia writing for the same five-justice majority that decided *Apprendi*, the Court concluded that Washington had violated Blakely's right to have a jury determine every fact upon which his sentence was based.

Although little noticed in the aftermath of the *Blakely* opinion, it hinged—as one would expect, in light of the way *Apprendi* had cast its holding—on the Court's interpretation of what the term "statutory maximum" means. The Court thought it was the Washington *guidelines* maximum range—that having been embraced, after all, by a statute, to wit, the Washington Sentencing Reform Act. Washington, by contrast, argued that the statutory maximum was the maximum designated by the statute Blakely pleaded guilty to violating—i.e., the Class B felony statute of second degree kidnapping, which carries a maximum of ten years.

The Court said that the "'statutory maximum' for *Apprendi* purposes is the maximum a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant [in his guilty plea]."[16] Thus, the *Blakely* Court continued, the statutory maximum sentence "is no more 10 years here than it was 20 years in *Apprendi*..." What the Court overlooked, however, was that while Apprendi had never been charged with a hate crime, with its twenty year maximum, Blakely *had* been charged with, and had admitted in the plea proceedings, the Class B felony kidnapping of which he was convicted, with its ten year maximum.

What had been slightly imprecise language in *Apprendi* was thus transformed into the time bomb that would detonate under federal sentencing law. Once "statutory maximum" was understood to mean not the maximum designated by statute defining the offense of conviction but the "standard guidelines maximum," the end was in sight. Justice O'Connor's *Blakely* dissent saw the handwriting on the wall: "What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy."[17]

Ironically, seven months later, Justice O'Connor and her fellow dissenters would cast the decisive votes to seal the fate she correctly foresaw.

Booker and its Remedy

In *United States v. Booker*, the five-justice *Apprendi* and *Blakely* majorities held the day and declared the federal sentencing guidelines unconstitutional as inconsistent with the Sixth Amendment.[18] While the most serious—indeed the terminal—damage done by *Booker* lay in the remedy it commanded, it is worth a moment's pause to observe that the analytical underpinning of *Booker*'s constitutional holding was even more dubious than the *Blakely* analysis upon which it purported to rest.

In *Blakely*, the Court arguably had at least some basis for believing that the "statutory maximum" which could not be exceeded without a jury determination beyond a reasonable doubt was the standard *guidelines* maximum. That was because in Washington State the legislature's Sentencing Reform Act *itself* specified a standard guidelines sentencing range of forty-nine to fifty-three months for the second degree kidnapping of which Blakely had been convicted. There was, accordingly, at least an argument for regarding fifty-three months as the "statutory" maximum, notwithstanding the longer ten-year maximum provided under the general Class B felony statute Blakely had been convicted of violating. But there is no corresponding statutory designation of a particular sentencing range under federal law: the Sentencing Reform Act of 1984, unlike its counterpart in Washington, does not (and did not) specify particular numerical sentencing ranges. Still less does it specify a particular sentencing range in any given case or class of cases different from the maximum provided by statute defining the offense of conviction. Thus, whatever justification existed in *Blakely* for defining the standard *guidelines* maximum as the *statutory* maximum was significantly weakened, if not absent, in *Booker*.

The true death knell for the federal guidelines lay in *Booker*'s remedy, though. Two remedies were on the table. One was to require the government to prove beyond a reasonable doubt to a jury (or to have the defendant admit in the plea agreement) all the facts the government would seek to have the court consider in determining the sentencing range. The remedial majority in *Booker* (Justice Breyer, with Chief Justice Rehnquist and Justices O'Connor, Kennedy and Ginsburg) rejected that option, largely, it said, because it could not be counted upon to carry forward the "real offense" sentencing regime Congress wanted to establish with the SRA.

Instead, the remedial majority decided that Congress would have preferred to continue "real offense" sentencing via a voluntary or "advisory" system of guidelines. The Court created that system by excising two provisions of the SRA—the provision requiring judges to sentence within the guidelines absent exceptional circumstances, and the provision for *de novo* review in the courts of appeals. It is only a modest oversimplification to say that the new, voluntary regime amounted to "apply-them-when-you-think-best" guidelines, with light-handed appellate review for understandably undefined "reasonableness."

As Justice Scalia noted in partial dissent, "[t]his is rather like deleting the ingredients portion of a recipe and telling the cook to proceed with the preparation portion."[19] It was Justice Stevens, however, who most meticulously exposed the remedial majority's error. Justice Stevens's dissent on that point is worth reading in its entirety, but a few passages give the flavor:[20]

> In order to justify excising [the mandatory and de novo review portions of the SRA], the Court has the burden of showing that Congress would have preferred the remaining system of discretionary Sentencing Guidelines to not just the remedy I would favor, but also to any available alternative, including the alternative of total invalidation, which would give Congress a clean slate on which to write an entirely new law. The Court cannot meet this burden *because Congress has already considered and overwhelmingly rejected the system it enacts today. In doing so, Congress revealed both an unmistakable preference for the certainty of a binding regime and a deep suspicion of judges' ability to reduce disparities in federal sentencing.* A brief examination of the SRA's history reveals the gross impropriety of the remedy the Court has selected.
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> The text of the law that actually passed Congress… should be more than sufficient to demonstrate Congress' unmistakable commitment to a binding Guidelines system. That text requires the sentencing judge to impose the sentence dictated by the Guidelines ("the court shall impose a sentence of the kind, and within the range" provided in the Guidelines unless there is a circumstance "not adequately taken into consideration by the" Guidelines), and [the de novo appeal provision gives] teeth [to the mandatory provision] by instructing judges that any sentence outside of the Guidelines range without adequate explanation will be overturned on appeal. Congress' chosen regime was carefully designed to produce uniform compliance with the Guidelines. Congress surely would not have taken the pains to create such a regime had it found the Court's system of discretionary guidelines acceptable in any way.

The End of Determinate Sentencing

There was momentary hope that the Supreme Court's creation of advisory guidelines might not lead to a wholesale return to luck-of-the-draw sentencing. In *Rita v. United States*, the Court held that a court of appeals, although not required to do so, may apply a presumption of reasonableness to a sentence within the guidelines (while being at pains to note that it was by no means implying that a sentence *outside* the guidelines could be presumed *unreasonable*).[21]

Rita proved a tepid and fleeting gesture. Less than six months later, in *Gall* and *Kimbrough*, the Court made clear how completely the guidelines had been swept away.

1. In *Kimbrough*, the defendant had been convicted of selling crack cocaine. His guidelines sentencing range was 228 to 270 months. The district court, viewing that sentence as more than necessary and, in particular, as a reflection of little more than an overwrought concern with the dangers of crack cocaine, as opposed to the powdered form of the drug, sentenced Kimbrough to 180 months' imprisonment, four years less than the minimum of the range. The Fourth Circuit reversed, holding that a sentence outside the guidelines range is per se unreasonable when it is based simply on the district judge's disagreement with the disparate treatment of crack and powder cocaine.

2. In *Gall*, the defendant, while a college student, spent seven months in a conspiracy selling ecstasy. He sold roughly 10,000 ecstasy pills, netting himself more than $30,000. Prudently apprehensive that one of his co-conspirators talked too loosely, Gall withdrew from the conspiracy, graduated from college, began a productive life and—so the Court stated—became drug-free. More than three years later, he was indicted for his role in the conspiracy. He self-surrendered and, while free on his own recognizance, started a successful business.

Gall entered a guilty plea admitting that he was responsible for distributing at least 2,500 grams of ecstasy. The government, for its part, agreed inter alia that recent changes in the guidelines that enhanced the punishment for ecstasy would not apply.

Gall's sentencing range was thirty to thirty-seven months' imprisonment. The district court imposed no prison time, however, and sentenced Gall to thirty-six months' probation. The Eighth Circuit reversed, holding that the extent of a departure from the guidelines—in this case considerable—must be "proportional" to the reasons justifying it. The court of appeals thought that the reasons offered by the district court came up short, and remanded for re-sentencing.

3. The Supreme Court reversed in both cases, each time by a vote of seven to two. In *Kimbrough*, the majority, speaking through Justice Ginsburg, held that the guidelines for crack cocaine, like all others after *Booker*, are "advisory only," and that advisory guidelines sentences may be overturned on appeal only for abuse of discretion. While the majority opinion discussed at length the supposed residual importance of a sentencing court's careful and respectful consideration of the guidelines, its language was precatory, and the district court was applauded for its invocation of what was called the SRA's "overarching instruction" to impose a sentence "sufficient, but not greater than necessary," to accomplish Congress's stated sentencing goals.[22]

The majority, like the district court did not define how a sentence of 180 months is determined to be "necessary" (but a sentence of 181 months presumably "unnecessary"). Likewise, the majority made no mention of the first three specific factors listed after the "overarching" principle of the SRA, those being the need for the sentence imposed (1) to reflect the seriousness of the offense, to promote respect for the law, and provide just punishment; (2) to afford adequate deterrence to criminal conduct; and (3) to protect the public from further crimes of the defendant.[23]

Gall was of a piece with *Kimbrough*. The Court, per Justice Stevens, held that the Eighth Circuit erred in requiring the district court to identify "extraordinary" circumstances in

order to justify its departure. The majority believed that such a requirement would come too close to creating a presumption of unreasonableness for sentences outside the guidelines, in derogation of *Booker*'s rule that the guidelines are no more than advisory. The majority also criticized the court of appeals for adopting a wooden "mathematical approach" to departure analysis, even though the existence of such an approach in the language of the Eighth Circuit's opinion is difficult to discover. The Court acknowledged that the extent of a departure is relevant to an appellate court's analysis of reasonableness, but emphasized that the reviewing court must give "due deference" to the district court's assessment of the myriad of factors that properly may inform a sentencing decision. In the case before it, the majority scolded the Eighth Circuit for having failed to give sufficient deference to the district court's "reasoned and reasonable" analysis.[24]

4. One need not search through post-*Gall* and post-*Kimbrough* cases in order to understand what is left of determinate sentencing or of the Sentencing Reform Act's central goal of reducing idiosyncratic disparity. *Gall* and *Kimbrough* themselves show all that is needed.

In *Kimbrough*, the Court acknowledged that "uniformity remains an important goal of sentencing"[25]—but not so important that it could not be set aside two sentences later with the observation that "our opinion in *Booker* recognized that some departures from uniformity were a necessary cost of the remedy we adopted."

The phrase, "some departures from uniformity" is a modest assessment of the outright chaos in crack sentencing that is certain to follow in *Kimbrough*'s wake. Some district judges will continue to see crack as the menace it has proven to be and will follow the guidelines. Others will see the guidelines as still in the thrall of "hysteria" about the crack wars of the 1980s and allow breathtaking departures. Under *Rita*, the former cannot be constrained, and under *Kimbrough* neither can the latter. The upshot is less likely to be "some departures from uniformity" than helter-skelter sentencing in wholesale lots, in a major area of federal criminal law—all justified by nothing more than hundreds of individual district judges formulating their own widely divergent versions of the dangers of crack, one chambers at a time. If the Sentencing Reform Act was adopted to put an end to anything, that was it.

The upshot of *Gall* is potentially even more troubling. Most reasonable people would probably agree that there were exceptional circumstances in that case justifying a significant downward departure. But to depart to *no prison time whatever* for a defendant who considerably enriched himself by selling thousands of pills of a dangerous drug, and to depart to that extent when the guidelines called for a sentencing range exceeding three years' incarceration—to take that path, and have a majority of the Supreme Court embrace it as a "reasoned and reasonable" result, sends an unmistakable message. That message was spelled out in the dissent by Justice Alito, who said that the interpretation given *Booker* by the *Gall* majority "means that district judges, after giving the Guidelines a polite nod, may then proceed as if the Sentencing Reform Act had never been enacted."

What We Have Now

Beneath the successful attack on the centerpiece of the Sentencing Reform Act—mandatory guidelines with meaningful appellate enforcement—there has always been an agenda, namely, lighter sentences for criminals. The organized defense bar knew from experience that the way to get to lighter sentencing was to replace mandatory guidelines with the previous regime of "judicial discretion." It knew in particular that when "discretion" is exercised, it is virtually always in only one direction—in the convicted defendant's favor.

The Sentencing Commission's statistics show how right the defense bar was. The single most telling indicator of the imbalance in "judicial discretion" is the incidence and direction of departures allowed. From the time guideline sentencing began up to the present day, the incidence of downward departures has dwarfed the incidence of upward departures by roughly twenty-five to one. It is true that part of this is due to government-sponsored downward departures to reward a defendant's assistance (typically information or testimony about co-conspirators). Also in the mix are a smaller number of government-sponsored downward departures resulting from the "fast track" program for illegal entrants into the United States, mostly in border districts. But even discounting those categories, the number of downward departures vastly outstrips the number of upward departures. Overall, a defendant facing sentencing today has a negligible 1.5% chance of receiving a sentence above the guidelines and a 38% chance of receiving one below. It has come to the point that, in the lexicon of those who deal regularly with sentencing issues, the phrase "downward departure" is regarded as a redundancy.

It thus turns out that "judicial discretion" in the context of the debate about sentencing is a very misleading phrase. If there were anything approaching the even-handedness implied by the phrase, there would be at least roughly equal numbers of upward and downward departures. But that has never been the case. "Judicial discretion" in this area is not discretion at all as commonly understood. It is a one-way street to lower sentences. Indeed, whatever else may be said of them, *Gall* and *Kimbrough* are apt representatives of future sentencing outcomes. In a nutshell, the principal real-world effect of the end of determinate sentencing will be thousands of criminals back on the street before they otherwise would have been.

It would be troubling enough, and dangerous, if that were the end of it, since it is impossible to believe that putting criminals back on the street will have no effect on crime. And it is dishonest to conduct the sentencing debate without acknowledging this fact. But, even with all that, there is yet a greater cost in the end of determinate sentencing, and that is its cost to the rule of law.

Like every other statute, the Sentencing Reform Act was not perfect, and neither were the guidelines it brought into being. But it was a serious and mostly successful effort to bring defined standards into an enormously important area of criminal practice previously left to chance. If the law of evidence had been as arbitrary as the law of sentencing was in the pre-SRA era, it would have been a national scandal. The end of the rule of law in federal sentencing and the return of what *Gall* and

Kimbrough tell us will be effectively unfettered discretion is also a scandal, but the outrage is nowhere to be seen.

If the Court were bent on eviscerating the SRA to this extent, the better approach would have been, as Justice Souter has suggested,[26] to overturn the Act in its entirety and allow Congress to start over, with the mandatory guidelines it knew were the only hope for consistency, together with the jury determination of sentencing facts that *Apprendi* demands.

Instead, we now have something worse, and less honest, than the pre-SRA regime of standardless sentencing. We have standardless sentencing pretending to have standards. The shrewdly opaque message to the public is that we still have sentencing guidelines, only that they are more "flexible" than before. Sentencing Commissioners continue to draw hefty salaries to write guidelines (that can be ignored at will). Probation officers continue to calculate ranges on worksheets (that may count for something or may not). District judges go through the window dressing rehearsed for them in *Gall* and *Kimbrough* (assured by those decisions that if the litany is elaborate enough, it need not be given any weight). A person employing impolite language might call this a charade.

Because the hollowed-out guidelines are still twitching in the land of the un-dead, further depredations to the rule of law, and the proper role of the judicial branch, are sure to follow. Justice Thomas made the point in his dissenting opinion in *Kimbrough*:

> As a result of the [*Booker*] Court's remedial approach, we are now called upon to decide a multiplicity of questions that have no discernibly legal answers….
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> The outcome [today and those in *Rita* and *Gall*] may be perfectly reasonable as a matter of policy, but they have no basis in law. Congress did not mandate a reasonableness standard of appellate review—that was a standard the remedial majority in *Booker* fashioned out of whole cloth. See 543 U. S., at 307–312 (Scalia, J., dissenting in part). The Court must now give content to that standard, but in so doing it does not and cannot rely on any statutory language or congressional intent. We are asked here to determine whether, under the new advisory Guidelines regime, district courts may impose sentences based in part on their disagreement with a… policy judgment reflected in the Guidelines. But the Court's answer to that question necessarily derives from something other than the statutory language or congressional intent because Congress, by making the Guidelines mandatory, quite clearly intended to bind district courts to the Sentencing Commission's categorical policy judgments. See 18 U. S. C. §3553(b) (2000 ed. and Supp. V) (excised by *Booker*). By rejecting this statutory approach, the *Booker* remedial majority has left the Court with no law to apply and forced it to assume the legislative role of devising a new sentencing scheme.

The road from *Apprendi* to *Booker* to *Gall* and *Kimbrough* is strewn with damage that has been all but ignored—damage to future public safety, to uniformity and honesty in sentencing, and to the proper authority of Congress. In the 1980s, there was a bipartisan consensus strong enough to make federal sentencing conform for the first time to the rule of law. Whether such a consensus exits today is an open question. But the first step toward building one is to understand, as it was understood twenty-five years ago, how urgently it is needed.

Endnotes

1 530 U.S. 466 (2000).

2 128 S. Ct. 586 (2007).

3 128 S. Ct. 558 (2007).

4 *Id.* at 465.

5 S. Rep. 98-225 (1983) at 33.

6 *Id.* at 35 (footnotes omitted).

7 Mistretta v. United States, 488 U.S. 361 (1989).

8 *Id.* at 64.

9 Bureau of Justice Statistics, National Crime Victimization Survey, Property Crime Trends, 1973-2005.

10 *Id.*

11 *Supra*, note 1.

12 1 J. Bishop, Law of Criminal Procedure 50 (2d ed. 1872))

13 542 U.S. 296 (2004).

14 *Id.* at 298.

15 Wash. Rev. Code Ann. § 9A.40.020(1)(2000).

16 *Blakely*, 542 U.S. at 303 (italics omitted).

17 *Id.* at 326 (O'Connor, J., dissenting).

18 543 U.S. 220 (2005).

19 *Id.* at 307 (Scalia, J., dissenting).

20 *Id.* at 292, 294-95 (Stevens, J., dissenting in part) (emphasis added, footnotes deleted).

21 127 S. Ct. 2456 (2007).

22 *Kimbrough*, slip op. at 22, citing 18 USC 3553(a).

23 18 USC 3553(a)(2)(A),(B) and (C).

24 Slip op. at 21.

25 Slip op. at 19.

26 *See Gall*, slip op. at ___ (Souter, J., concurring).