
ESSAY

ON COMPETENCE, LEGITIMACY, AND PROPORTIONALITY

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I asked Justice Aharon Barak, then president of the Israeli Supreme Court, why he considered himself competent to decide where the wall between Israel and the Palestinian territories should be located and further, why it was legitimate for him, a judge, to do so. The Israelis claimed that the wall was critical for the country's security. The Palestinians insisted that the barrier violated international law by severely restricting the ability of Palestinians to travel freely and to access work in Israel. Justice Barak answered, "As a judge, I don't pretend to know anything about security. But I know about proportionality. I know how to balance the security interests of the state against the rights of the Palestinians."¹ His response was not unusual for justices of

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¹ In *Mara'abe v. Prime Minister*, Justice Barak held that Israel, in balancing its security against the harm to the Palestinians, must adhere to a standard of proportionality, consisting of three elements: (1) "a rational link between the means employed and the goal," (2) a demonstration that Israel has chosen the "least harmful means" to achieve its security objective, and (3) a showing that "the damage caused to the individual by the means employed . . . be of appropriate proportion to the benefit stemming from it." HCJ 7957/04 *Mara'abe v. Prime Minister* 60(2) PD 477 para. 30 [2005] (Isr.), available at http://elyon1.court.gov.il/files_eng/04/570/079/A14/04079570.a14.pdf; see also Geoffrey R. Watson, *International Decisions*, *Mara'abe v. Prime Minister of Israel*, 100 AM. J. INT'L L. 895, 898 (2006) ("[T]he Court reiterated its holding . . . that Israel must balance its own security against the harm to Palestinians and that Israel must, in particular, adhere to a standard of 'proportionality.'").

The Court concluded that the routing of a portion of Israel's "security fence" in the northern West Bank violated international humanitarian law. *Mara'abe*, 60(2) PD 477 paras. 110-16. Justice Barak has elaborated on his theory of judicial legitimacy in Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 100-04 (2002).

constitutional high courts in common law countries—except in the United States. No other common law judge is likely to doubt his competence to use proportionality analysis in any number of areas or the legitimacy of the approach. Indeed, proportionality analysis has become a critical part of international human rights adjudication.²

While the use of proportionality analysis is widespread in constitutional courts throughout the world, sentencing is an area in which it is perhaps the most critical and has the oldest pedigree. Retributive theories of punishment use the proportionality principle to assign criminal blame; no offender should be punished more harshly than the crime deserves.³ Prior to mandatory sentencing guidelines and mandatory minimum sentencing, proportionality analysis was part of the sentencing judge's toolkit in an individual case.⁴ In most common law countries with appellate review of sentencing, it was also the means by which appellate courts reviewed lower court sentences.⁵ To be sure, it was not a perfect approach and was hardly capable of mathematical precision, but it was accepted.

Except in the United States. Let me make a preliminary observation: a common theme links the Supreme Court's Eighth Amendment jurisprudence in which some Justices debate whether there is a constitutional proportionality principle in noncapital sentencing at all; the federal appeals courts' inability to give meaning to substantive reasonableness sentencing review even after *United States v. Booker* freed them to do so;⁶ and the United States Sentencing Commission's inability to

² See Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 147-48 (2008) (detailing the European Court of Human Rights's turn to proportionality).

³ ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 66 (1976). To be sure, there is a range of retribution theories. See Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 16-23 (2006) (discussing the normative functions of sentencing systems).

⁴ KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 14 (1998); see also *Ewing v. California*, 538 U.S. 11, 35 (2003) (Stevens, J., dissenting) ("In exercising their discretion, sentencing judges wisely employed a proportionality principle that took into account all of the justifications for punishment—namely, deterrence, incapacitation, retribution, and rehabilitation." (citing STITH & CABRANES, *supra*, at 14)).

⁵ See Richard G. Fox, Case Note, *Ryan v. The Queen: Paradox and Principle in Sentencing a Paedophilic Priest: Ryan's Case in the High Court*, 26 MELB. U. L. REV. 178, 188 (2002) (discussing the application of proportionality to the sentencing of pedophiles); Arie Freiberg, *Australia: Exercising Discretion in Sentencing Policy and Practice*, 22 FED. SENT'G REP. 204, 208, 211 & nn.49-50 (2010) (noting that courts in most parts of Australia are required by statute to consider proportionality).

⁶ 543 U.S. 220 (2005).

rank offenses based on any coherent proportionality principle. The theme (which I find quite troubling) is that proportionality analysis is simply not within the competence of the American judiciary. Worse yet, it is not even within their legitimate role; it is somehow too policy-centered, too “activist.” It is a task best left to the legislature, or in the case of the federal sentencing guidelines, to an “independent” agency in the judicial branch the United States Sentencing Commission—but at all costs, not to the courts.

The problem is that Congress has never applied a proportionality principle in enacting the substantive criminal laws; all efforts to enact a rational and proportional federal criminal code (along the lines of the American Law Institute’s Model Penal Code, for example) have failed. Congress largely targets the “crime du jour,” increasing punishments not on the basis of proportionality analysis, but largely on the basis of public pressure.⁷ And, as I describe below, the “expert” agency, the Sentencing Commission, which had the resources and even the charge to apply such a principle, simply threw up its hands.

It is no surprise, then, that over the course of my seventeen years on the federal bench the government regularly urged me to sentence a nonviolent crack offender to the same sentence as I would defendants convicted of crimes like attempted sedition, solicitation to commit murder, kidnapping, abduction, and unlawful restraint.⁸ Or that the Court of Appeals overturned a decision in which I used empirical analysis to try to make the punishment of a drug offender proportional to the punishment of other similarly situated dealers within Massachusetts.⁹

⁷ See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 966 (2009) (stating that legislators respond to the “crime du jour” to gain political credit even if the new legislation is redundant); Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 570, 571, 573 (2005) (mentioning Congress’s attention to the “crime du jour” and failure to enact legislation that would provide consistency among sentences); Robert H. Joost, *Federal Criminal Code Reform: Is It Possible?*, 1 BUFF. CRIM. L. REV. 195, 202 (1997) (“The federal government has never enacted a true criminal code.”); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512-19, 529-33 (2001) (discussing redundancies in criminal codes that exist, in part, because of legislators’ incentives to pass criminal laws in response to public fear).

⁸ E.g., *United States v. Lacy*, 99 F. Supp. 2d 108, 111-12 (D. Mass. 2000).

⁹ See *United States v. Thompson*, 234 F.3d 74, 77 (1st Cir. 2000) (finding that the proper approach in downward departure decisions is to compare any given defendant, regardless of the offense of which he has been convicted, to all defendants, and not those similarly situated with respect to the offense of conviction), *vacating as moot* 74 F. Supp. 2d 69, 71 (D. Mass. 1999) (using the presentence reports of fifty-four individuals sentenced for crack offenses in the same district and during the same time period as

Or that it finally took *Booker* to permit judges to implement a de minimus proportionality principle—that the sentences of one defendant should be proportional to that of codefendants in the same case.¹⁰

It is beyond the scope of this Essay to understand in any depth what it is about the American judiciary or American judicial traditions that makes proportionality analysis so much more problematic here than in other countries. My purpose is descriptive. I describe how the same problems that afflict constitutional proportionality analysis spill over into other arenas, to the appellate courts in ordinary sentencing appeals, and ultimately to the Sentencing Commission. It is like an old comic strip, *Alphonse and Gaston*: “After you, Alphonse,” says Gaston. Alphonse replies, “No, Gaston after *you*.” Since neither will proceed before the other, they fail to get anything done.¹¹

While the Supreme Court has addressed the constitutional implications of sentencing issues when the issue is a binary one—life or death and life with or without parole—it has been unwilling to impose constitutional limits on scalable punishments—the length of time an individual may be constitutionally imprisoned for a crime. The Court has concluded that the death penalty is disproportionately harsh for rape,¹² for a crime committed when the defendant was under eighteen,¹³ or for a mentally retarded individual.¹⁴ But where imprisonment is concerned, as Youngjae Lee noted, the Court’s decisions reflect a “meaningless muddle,” a “conceptual confusion” of “incoherent” rationales.¹⁵ According to a plurality of the Court in *Ewing v. California*, a sentence is not unconstitutionally excessive so long as it can be justified under any one of the traditional justifications of punishment¹⁶—

the defendant as a reference point to determine whether downward departure was appropriate).

¹⁰ See Ryan Scott Reynolds, *Equal Justice Under Law: Post-Booker, Should Federal Judges Be Able to Depart from the Federal Sentencing Guidelines to Remedy Disparity Between Codefendants’ Sentences?*, 109 COLUM. L. REV. 538, 552-55 (2009) (finding that most circuits allow judges to consider codefendant disparity in sentencing).

¹¹ See, e.g., Frederick Burr Opper, *You First, My Dear*, WIKIMEDIA, <http://upload.wikimedia.org/wikipedia/commons/4/4b/Alphonsegaston.jpg> (last visited Mar. 15, 2012).

¹² *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

¹³ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

¹⁴ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

¹⁵ Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 681, 684 (2005).

¹⁶ 538 U.S. 11 (2003) (plurality opinion). It should be noted that in *Ewing*, no position had a majority other than the general holding that the punishment was constitutionally valid. The plurality opinion of Justice O’Connor was joined by Chief Justice Rehnquist and Justice Kennedy. *Id.* at 14.

not a particularly high bar. The plurality could find no overarching theory by which it could set limits on a legislature's determination of imprisonment¹⁷ (although it had no such problem evaluating the excessiveness of punitive damages¹⁸). Since the Constitution is not clear regarding the metes and bounds of "cruel and unusual punishment" as applied to imprisonment, the plurality implies that the Court lacks either the competence or the legitimacy to make the decision in most cases. To choose one penological purpose and evaluate the sentence in reference to it would be to overstep the Court's role. Instead, the Court must defer to the legislature's choices of punishments and the justifications for them.¹⁹

In *Ewing*, for example, the Court held that a prison term of twenty-five years to life under California's three-strikes law was not excessive for the crime of shoplifting golf clubs worth \$1200 by a repeat offender.²⁰ General, ill-defined notions of deterrence and incapacitation were sufficient to justify the law. The Court noted that the recidivism statute "is nothing more than a *societal decision* that when such a person commits yet another felony, he should be subjected to the admittedly serious penalty of incarceration for life, subject only to the State's judgment as to whether to grant him parole."²¹ And the legislature is better suited to make "societal decisions" than the Court: "[F]ederal courts should be reluctant to review legislatively mandated terms of imprisonment, and . . . successful challenges to the proportionality of particular sentences should be exceedingly rare."²² Indeed, Justice

¹⁷ For this proposition, the Court cited *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment), which noted that the Constitution "does not mandate adoption of any one penological theory." *Ewing*, 538 U.S. at 25.

¹⁸ While the Court is reluctant to address Eighth Amendment proportionality analysis in the context of imprisonment, it has no such problem with respect to punitive damages. See A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085, 1152 (2006) ("Beyond the historical and doctrinal difficulties with the Court's excessiveness jurisprudence, one may marvel at how odd it is for the Court ardently to impose prohibitions against punitive dollar awards beyond a certain amount while it freely permits states to imprison petty repeat offenders to life imprisonment." (footnotes omitted)).

¹⁹ The *Ewing* plurality noted: "A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. Some or all of these justifications may play a role in a State's sentencing scheme. Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts." *Ewing*, 538 U.S. at 25 (citations omitted).

²⁰ *Id.* at 30.

²¹ *Id.* at 21 (emphasis added) (quoting *Rummell v. Estelle*, 445 U.S. 263, 278 (1980)).

²² *Id.* at 22 (quoting *Hutto v. Davis*, 454 U.S. 370, 374 (1982)).

Scalia, concurring in the judgment, was characteristically more emphatic: The proportionality principle, unmasked, raises policy questions, not issues of law, and policy questions do not belong in courts.²³

It is ironic, however, that the Court in *Ewing*, and earlier in *Solem v. Helm*,²⁴ did articulate an empirical, comparative approach that would have cabined the Court's analysis, like the Court's methodology in death penalty cases. The *Solem* approach looks to three factors to decide whether a sentence is so disproportionate that it violates the Eighth Amendment: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."²⁵ Factors (ii) and (iii) compose a comparative analysis that at the very least roots the Court's evaluation in concrete facts—how other jurisdictions punish the same crime and how the same jurisdiction punishes other crimes—much the same way an equal protection, rather than a substantive due process, approach does.²⁶ Nevertheless, the plurality in *Ewing* refused to insist on this approach in all Eighth Amendment cases. Rather, it held that the Eighth Amendment did not mandate a comparative analysis "within and between jurisdictions."²⁷

Justice Stevens, in dissent, noted that the "absence of a black-letter rule does not disable" courts from determining the "outer limits on

²³ Justice Scalia offered,

Perhaps the plurality should revise its terminology, so that what it reads into the Eighth Amendment is not the unstated proposition that all punishment should be reasonably proportionate to the gravity of the offense, but rather the unstated proposition that all punishment should reasonably pursue the multiple purposes of the criminal law. That formulation would make it clearer than ever, of course, that the plurality is not applying law but evaluating policy.

Id. at 32 (Scalia, J., concurring in the judgment).

²⁴ 463 U.S. 277 (1983).

²⁵ *Ewing*, 538 U.S. at 22 (quoting *Solem*, 463 U.S. at 292).

²⁶ See, e.g., Andrew Koppelman, *The Right to Privacy?*, 2002 U. CHI. LEGAL F. 105, 106-07 (noting that while there is some "indeterminacy" in equality claims that leaves room for judicial discretion, the degree of indeterminacy is greater in substantive due process doctrines such as the privacy doctrine because it "inappropriately requires judges to decide what is important in life"); see also *Watkins v. U.S. Army*, 837 F.2d 1428, 1440 (9th Cir. 1988) ("[T]he practical difficulties of defining the requirements imposed by equal protection, while not insignificant, do not involve the judiciary in the same degree of value-based line-drawing that the Supreme Court . . . found so troublesome in defining the contours of substantive due process."), *vacated and aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc).

²⁷ *Ewing*, 538 U.S. at 23-24 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

sentencing authority that the Eighth Amendment imposes.”²⁸ Determining the “outer limits,” to Justice Stevens, was no different from identifying the kinds of lines American courts must draw in other situations.²⁹ Indeed, what Justice Stevens did not say is that this kind of analysis is one in which high courts of other countries easily engage.

Justice Breyer’s dissent went one step further, demonstrating just how proportionality lines might be drawn. First, using a traditional common law, case-by-case analysis, Justice Breyer situated Ewing’s sentence relative to those imposed in other cases raising Eighth Amendment challenges, noting that it was shorter than the defendant’s in *Solem*,³⁰ but twice as long as that in an earlier case, *Rummel v. Estelle*.³¹ Yet, nothing in the record justified the differential treatment. Justice Breyer then turned to a comparative analysis, considering how this offense is treated in other state jurisdictions.³² Nevertheless, he could not persuade a majority of the Court that his approach was properly judicial—that is, grounded more in objective facts, than subjective policy preferences, well within the competence of the judiciary, and a legitimate exercise of the judicial role.

Apart from Eighth Amendment jurisprudence, the same “muddle” that Lee describes afflicting constitutional proportionality analysis³³ has also come to characterize American sentencing in the “ordinary” case. Michael Tonry, using almost identical words as Lee, noted that sentencing policy is “fragmented,” and a “muddle” without any “widely shared understandings about what sentencing can or should accomplish or about conceptions of justice it should incorporate or reflect.”³⁴

Prior to sentencing guidelines and mandatory sentencing rules, American judges navigated through this muddle during a sentencing

²⁸ *Id.* at 33 (Stevens, J., dissenting).

²⁹ *Id.* at 33-34.

³⁰ *Id.* at 39 (Breyer, J., dissenting) (citing *Solem*, 463 U.S. at 282). In *Solem*, the defendant received life for writing a bad check. 463 U.S. at 281-82.

³¹ *Ewing*, 538 U.S. at 39 (Breyer, J., dissenting) (citing *Rummel v. Estelle*, 445 U.S. 263, 266-68 (1980)). In *Rummel*, the defendant received life with eligibility for parole at twelve years for felony theft. 445 U.S. at 266-67.

³² *Ewing*, 538 U.S. at 42-47 (Breyer, J., dissenting). As Lee noted, “comparative desert” analysis is better suited for judicial enforcement than noncomparative desert. Lee, *supra* note 15, at 716. He outlines two kinds of “comparative desert” analysis. The first is a type of overbreadth analysis that asks “whether the sentencing scheme sufficiently distinguishes among offenders of different levels of seriousness.” *Id.* The second inquiry “asks whether the punishment in question stands in appropriate relation to punishment for crimes that are as serious as, or more serious than, the crime at issue.” *Id.*

³³ Lee, *supra* note 15, at 681.

³⁴ Tonry, *supra* note 3, at 1.

regime that has been described as the “indeterminate sentencing” period.³⁵ Judges were the acknowledged experts in sentencing, with considerable discretion that they zealously guarded.³⁶ “Indeed, judges believed that they were so skilled at sentencing that they resisted all efforts to restrict their discretion Sentencing discretion was central to their work, a pillar of judicial independence.”³⁷ Many judges were unalterably opposed to the Sentencing Guidelines and the Sentencing Reform Act of 1984,³⁸ testifying against it in Congress and even declaring the Act to be unconstitutional.³⁹

To be sure, as I have written elsewhere, there were substantial problems with the indeterminate sentencing regime and its emphasis on judicial “expertise.”⁴⁰ Judges did not receive training about how to exercise their discretion. Law schools did not offer courses on the subject. Professors taught criminal procedure as if there was nothing to study after the jury announced its verdict or the defendant pled guilty. And, unlike judges in other common law countries, federal judges successfully resisted appellate review of sentencing.⁴¹ Without appellate review, judges had little incentive to generate principles of sentencing for future cases. Few bothered to write sentencing opinions at

³⁵ Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 524 (2007).

³⁶ I have characterized this period in the following manner:

During the indeterminate sentencing period, the principle purpose of sentencing was rehabilitation. And from that purpose flowed a different idea of who was an expert and different procedures to serve that expertise. The judge was the “expert” in individualizing the sentence to reflect the goals of punishment, including rehabilitation. His or her role was essentially therapeutic, much like a physician. Fundamentally different standards evolved between the trial stage and the sentencing stage, as befitting the very different roles of judges and juries. The trial stage was the stage of rights, evidentiary rules, and high standards of proof. In the sentencing stage, in contrast, the rules of evidence did not apply; the standard of proof was the lowest in the criminal justice system, a fair preponderance of the evidence. The approach made sense. You would no more limit the kind of information that a judge should receive in order to exercise his or her “clinical” sentencing role than you would limit the information available to a medical doctor in determining a diagnosis.

Id. at 527 (footnote omitted).

³⁷ *Id.* at 524.

³⁸ Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (codified in scattered sections of 18 and 28 U.S.C.).

³⁹ See STITH & CABRANES, *supra* note 4, at 195-96 n.12 (noting that two hundred district court judges held the Sentencing Reform Act unconstitutional prior to the Supreme Court’s upholding it in 1989).

⁴⁰ Gertner, *supra* note 7, at 571.

⁴¹ *Id.* at 572.

all.⁴² As a result, while judges were supposed to be experts in sentencing and were certainly competent to assume that role with adequate support and training, their actual expertise was mythological.

Congress did not help. It proved incapable of rationalizing the federal criminal code, notwithstanding nearly twenty years of effort.⁴³ Whenever Congress added a new crime to the substantive criminal law, “there was little if any effort to reconcile new crimes and old ones or to order offenses according to their relative severity,”⁴⁴ as some states had done when enacting the Model Penal Code.⁴⁵

In effect, the Sentencing Reform Act ceded the responsibility to make decisions about proportionality to an independent agency in the judicial branch, the United States Sentencing Commission. The guidelines would be promulgated by an “expert” Commission, whose goal was to rationalize the sentencing rules, to bring to bear the latest scientific studies in effectuating all of the purposes of punishment, and to do the kind of legwork determining the appropriate sentencing practices that Congress had been unable or unwilling to do. And, in addition to its scientific studies about sentencing, the Commission would use the approach of “limited retribution” to set the maximum and minimum sentences for offenses and to rank punishments depending on the characteristics of the offenses and offenders.

While initially it was an open question whether the new experts would *supplement* or *supplant* the judges, over time, for reasons I have described elsewhere, the Sentencing Guidelines effectively became mandatory.⁴⁶ The job of a judge became like that of a “clerk”⁴⁷—to apply the Commission’s edicts, not to engage in a proportionality

⁴² *Id.*

⁴³ *Id.* at 573.

⁴⁴ *Id.*

⁴⁵ See Bibas, *supra* note 7, at 967 & n.26 (observing that the Model Penal Code was an effective force in motivating legislatures to rationalize their criminal codes).

⁴⁶ Gertner, *supra* note 35, at 529.

⁴⁷ In effect, American sentencing judges became the functional equivalent of civil code judges. As John Merryman noted of the civil code system,

The judge becomes a kind of expert clerk. . . . His function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union. The whole process of judicial decision is made to fit into the formal syllogism of scholastic logic. The major premise is in the statute, the facts of the case furnish the minor premise, and the conclusion inevitably follows.

JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 36 (2d ed. 1985).

analysis of her own. The task of appellate courts was to review whether the sentencing judge had correctly applied the Guidelines.⁴⁸

The Sentencing Commission, however, like Congress, failed to enact rational Guidelines and eschewed making any proportionality decisions. The Commission did not engage in the “profoundly difficult” task of identifying sentencing purposes, electing instead “an empirical approach that uses data estimating the existing sentencing system as a starting point,”⁴⁹ but then increasing sentences willy nilly. Indeed, the Guidelines mirrored the patchwork quilt that had characterized the federal substantive law. For example, guidelines for drug crimes were much harsher than those for violent crimes,⁵⁰ and guidelines for receiving child pornography could be higher than those for child abuse,⁵¹ violating proportionality norms and ultimately lacking consistency with the other purposes of sentencing.

Significantly, after the Supreme Court brought an end to twenty years of mandatory federal sentencing guidelines by declaring them advisory in *United States v. Booker*, it became apparent that American judges had changed their attitudes towards sentencing. Even in “ordinary” sentencing—quite apart from cases involving constitutional analysis—many judges no longer believed they had the competence to deal with sentencing issues (using language which resonated with Justice Scalia’s concerns in *Ewing*).⁵² Indeed, many judges came to

⁴⁸ See Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL’Y REV. 261, 265-67 (2009) (describing the initial ambiguity as to whether federal judges would critically evaluate the Guidelines or enforce them mechanically).

⁴⁹ U.S. SENTENCING GUIDELINES MANUAL ch.1, pt. A, intro. (“The Basic Approach”) policy statement) (1987).

⁵⁰ See *supra* note 8 and accompanying text.

⁵¹ See, e.g., *United States v. Dorvee*, 616 F.3d 174, 187 (2d Cir. 2010) (discussing the perverse result under the Guidelines that a first-time distributor of child pornography would receive a sentence of at least 168 to 210 months, while a person who had actually sexually assaulted a child would receive 151 to 188 months).

⁵² See, e.g., *United States v. Tabor*, 365 F. Supp. 2d 1052, 1054 (D. Neb. 2005) (“I now decide that the crack Guidelines, like all other Guidelines, should be given heavy weight after *Booker*.”), *aff’d*, 439 F.3d 826 (8th Cir. 2006), *vacated*, 128 S. Ct. 1060 (2008). In *Tabor*, in a section entitled, “We Are Likely to Muck Things Up Even More if We Do Our Own Thing,” *id.* at 1060, Judge Kopf noted:

Simply stated, unlike Congress or the Commission, we judges lack the institutional capacity (and frankly, the personal competence) to set and then enforce one new, well-chosen, theoretically coherent, national standard. As opposed to a uniform, albeit flawed, Guideline, it would make things far worse to have a bunch of different standards for crack sentencing. For that reason alone, we should sit on our collective hands and give the crack Guidelines substantial or heavy weight until Congress decides otherwise.

believe that they were not competent to sentence at all, absent explicit rules promulgated by Congress or the Sentencing Commission. Court after court insisted that the advisory Guidelines were entitled to considerable, even presumptive, weight.⁵³ As with the Eighth Amendment jurisprudence, the implication was clear: The political branches had greater expertise in this area than judges did. It took several cases in which the Supreme Court effectively said “As to advisory guidelines—we mean it!”⁵⁴ in order to make clear that individual judges may consider the Guidelines but are not bound by them.⁵⁵

After *Booker*, which charged the courts of appeals with reviewing sentencing decisions for procedural and substantive reasonableness, rather than only for compliance with the Guidelines,⁵⁶ it became clear that circuit judges were still wandering through the same muddle about purposes and proportionality as had existed before the Guidelines. For the most part, courts reviewed the guideline compliance and the procedural, not substantive, reasonableness of the decisions below.⁵⁷ Substantive reasonableness foundered on the same shoals as Eighth Amendment jurisprudence. Rarely did circuit judges overturn sentences within the Guideline ranges.

Id. at 1061.

⁵³ See, e.g., *United States v. Wilson*, 350 F. Supp. 2d 910, 912 (D. Utah 2005) (concluding that “considerable weight should be given to the Guidelines in determining what sentence to impose”).

⁵⁴ See *Nelson v. United States*, 555 U.S. 350, 352 (2009) (per curiam) (“The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable.”); *Spears v. United States*, 555 U.S. 261, 263-64 (2009) (per curiam) (stating that district courts can choose to depart from Guidelines “based on *policy* disagreement with them”); *Kimbrough v. United States*, 552 U.S. 85, 90 (2007) (“[T]he Guidelines, formerly mandatory, now serve as one factor among several”); *Gall v. United States*, 552 U.S. 38, 46 (2007) (observing that “the Guidelines are now advisory”); *Rita v. United States*, 551 U.S. 338, 354 (2007) (explaining that *Booker* held unconstitutional the aspects of the Guidelines that made them mandatory).

⁵⁵ See Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 YALE L.J. POCKET PART 137, 137 (2006), <http://yalelawjournal.org/images/pdfs/50.pdf> (noting that simply “announcing that the Guidelines are advisory does not make them so,” and urging the appellate courts to critically evaluate Guideline sentences (emphasis omitted)).

⁵⁶ *United States v. Booker*, 543 U.S. 220, 262-64 (2005).

⁵⁷ The courts’ approaches to sentencing appeals reflect the concerns raised by William Stuntz that our Constitution overprotects procedural rights and underprotects substantive rights. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011). But with “ordinary sentencing,” engaging with substantive concerns is unavoidable. Someone must make proportionality decisions, and after *Booker*, that “someone” is the judicial system.

The post-*Booker* world does not have to look like this. *Booker* encourages scholars, judges, lawyers, and students to participate in a new, multilayered discussion about federal sentencing. To make the Guidelines truly advisory, sentencing decisionmakers must identify alternative sentencing frameworks independent of the Guidelines and its policies. While applying an alternative sentencing regime in cases with Eighth Amendment or other constitutional or federalism concerns may be difficult, no comparable problems exist in “ordinary” sentencing.

I will close by noting that courts have a variety of tools at their disposal in making sentencing decisions, tools that are capable of being applied to like cases. Several of the lower courts have created a body of law that critically evaluates the Guidelines, exposing them to something akin to an administrative procedure review.⁵⁸ With respect to some of the purposes of sentencing, rehabilitation, or deterrence, for example, judges can consider scientific studies in creating sentencing standards. In addition to research concerning evidence-based practices, courts have the means to engage in meaningful comparative deserts analysis along the lines of Justice Breyer’s approach in *Ewing*. Today, judges can study data on local and national sentencing patterns to understand where a given offender fits in the larger regional or national picture.⁵⁹ The Sentencing Commission can become a repository of information about evidence-based practices and regional and national patterns, rather than simply the “Guideline police.”

The absence of a coherent theory at this moment in the development of sentencing law—Lee’s and Tonry’s muddle—could well lead to a more creative moment, when the “old” sentencing experts, judges, reexamine existing sentencing standards, and carve out common law

⁵⁸ See, e.g., *United States v. Dorvee*, 616 F.3d 174, 187 (2d Cir. 2010) (evaluating critically the child pornography Guidelines in the light of the statutory sentencing purposes). The court noted:

This deference to the Guidelines is not absolute or even controlling; rather, like our review of many agency determinations, “[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, all those factors which give it power to persuade, if lacking power to control.”

Id. at 188 (alterations in original) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); cf. Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217, 231 (2005) (recommending the creation of a new sentencing agency that would be subject to judicial review under the arbitrary and capricious standard).

⁵⁹ See, e.g., *United States v. Garrison*, 560 F. Supp. 2d 83, 89-91 (D. Mass. 2008) (comparing the case of one defendant to similarly situated defendants in the district).

rules alongside the Guidelines and the “new” experts, the Commission. The Commission did not do very well in clarifying and rationalizing sentencing; there is reason to believe that sentencing judges—with Guidelines, and sentencing opinions at both the appellate and district court levels—can do better. Alphonse-Gaston no more.