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Parole: Corpse or Phoenix?

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INTRODUCTION

Remember parole? It was a fixture in the criminal justice system of every state and the federal government for most of the twentieth century. What happened to it?
Congress and the states adopted parole in the nineteenth and twentieth centuries as a means of releasing inmates who had been deemed “rehabilitated.” Over time, the federal and state governments became disenchanted with parole, later using it (or so the story goes) just as a means of relieving prison overcrowding and, in many cases, eventually eliminated it altogether in favor of one or another determinate sentencing regimes. For those jurisdictions, parole is just another artifact in a criminal justice museum.

The federal government was a leader in this movement. Almost three decades ago Congress passed the Sentencing Reform Act of 1984. The SRA created the United States Sentencing Commission and chartered it to devise, and revise as necessary over time, a mandatory, determinate Sentencing Guidelines regime that would replace the indeterminate sentencing regime traditionally used in the federal system. As part of that reform, Congress sought to abolish parole. Parole would be available for prisoners who committed their crimes before the Sentencing Guidelines went into effect, but from that day forward, like the white-hatted cowboy in old west movies, parole gradually would fade away into the west. Five years later the Supreme Court gave its blessing to the new determinate sentencing system and upheld the constitutionality of the Sentencing Guidelines in *Mistretta v. United States.*

How did that mandatory Sentencing Guidelines system work? Not so well, it turned out. The Supreme Court upheld the constitutionality of that system in 1989 in *Mistretta,* but only 16 years later reversed course and held the system unconstitutional in *United States v. Booker.* Does that mean parole is back in use in the federal system? Of course not. It is accepted wisdom that once the Sentencing Reform Act of 1984 became law, and certainly once the Supreme Court decided *Mistretta,* the abolition of parole was a done deal. Everyone—e.g., the federal judiciary, the Parole Commission, the Sentencing Commission, the Justice Department, the defense bar, the academy, and the community of prisoners—agrees. As far as the legal and political communities go, parole is history.

3. There were some limited, peculiar exceptions in 1987 because parole was abolished only for a person sentenced under the Sentencing Guidelines, and they did not apply to every sentence imposed by a federal district court. See infra notes 102, 181–83. Moreover, parole remained available for some inmates confined in a federal institution, such as military prisoners convicted and sentenced under the Uniform Code of Military Justice, for whom Guidelines sentencing was not available. See infra notes 181–83. The number of such offenders and inmates, however, was trivial compared to the number of Guidelines-sentenced prisoners.
6. See, e.g., *Mistretta,* 488 U.S. at 363–70; *Walden v. U.S. Parole Comm’n,* 114 F.3d 1136, 1138 (11th Cir. 1997) (“Inasmuch as there will be no parole for those convicted after the effective date of the SRA, the Act abolishes the Parole Commission, and repeals most of the pre-existing statutory framework governing parole of federal prisoners.”); *United States ex rel. D’Agostino v. Keohane,* 877 F.2d 1167, 1169 n.2 (3d Cir. 1989) (“It is
But is it? The Justice Department argued in *Mistretta* that Congress’ decision to abolish parole in favor of Sentencing Guidelines was contingent on the operation of a *mandatory* Guidelines system, one that cabined the discretion district courts had enjoyed at sentencing for more than 200 years.\(^7\) Congress did not want only advisory Sentencing Guidelines; in fact, Congress expressly rejected that option. The reason was advisory Sentencing Guidelines are, well, advisory, not mandatory, obligatory, or binding on the judges who would need to implement them, and Congress concluded advisory Sentencing Guidelines would not eliminate the nationwide sentencing disparities that embarrassed the system and put the lie to the notion that ours is a government of laws, not men.\(^8\) Accordingly, the Justice Department argued, if the *mandatory* Sentencing Guidelines system were held unconstitutional, the SRA provisions abolishing parole should be treated as null and void.\(^9\) Otherwise, there would be no legal mechanism, as well as no legal institution, that could do something about nationwide sentencing disparities. The Supreme Court upheld the mandatory Sentencing Guidelines in *Mistretta*, so the Court did not need to address the federal government’s fallback position. The question remained a purely academic one as long as a mandatory Sentencing Guidelines system was valid.


\(^8\) See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

\(^9\) See infra note 141.

eventually did arise, just sixteen years later and dressed in different garb. Ironically, then, the Supreme Court’s decision in *Booker* raises the question whether its recent Sixth Amendment case law has breathed new life into parole.

I must confess it is a daunting task to ask whether parole has risen like the phoenix by operation of law and serves as an available option for federal prisoners today. The Department of Justice, the U.S. Sentencing Commission, the U.S. Parole Commission, and the federal judiciary, including the Supreme Court of the United States, each have considered sentencing issues on numerous occasions since the Court’s 2005 decision in *Booker*—which itself never considered the renewed availability of parole—and that unanimity is quite intimidating. It is difficult to believe so many learned, experienced criminal justice decision makers all had amnesia about one of the hallmarks of twentieth century American criminal justice.

But the question is no longer just an academic one. For nearly eight decades parole served valuable functions. Parole softened the rigors of onerous sentences. It ameliorated the nationwide disparities that inevitably resulted from the sentencing decisions of hundreds of federal judges spread across all 50 states. And it offered inmates the opportunity for a second chance by granting them early release if they showed remorse, rehabilitation, or perhaps just that their sentences were unjust. To be sure, parole was a flawed institution—what isn’t?—but it did lessen the pain the criminal justice system inflicts on inmates, their families, and whoever else cares about them. If parole has not “gone to a better place,” it could once again serve those legitimate, useful purposes. And if parole truly has flatlined, at least we can say we took a good, hard, last look at the matter.

With that introduction, let me lay out the route. Part I describes the birth, maturation, and senescence of parole. Part II discusses why and how the criminal justice system decided to bury parole. Part III examines whether the Supreme Court’s decision in *Booker* has given parole new life. Part IV closes out by asking whether there are any lessons that we can learn from this potential rebirth.

I. THE BIRTH, MATURATION, AND SENESCENCE OF PAROLE

**A. The Birth of Parole**

The origin of the term “parole” is the French word *parol*, meaning “word.” The implication was that the state would release a prisoner before the expiration of his term of confinement only if he gave his word that he would walk the straight and narrow.11 As the Supreme Court put it, “[t]he essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence.”12 Parole was a conditional

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11. *Petersilia, supra* note 6, at 129.
form of clemency, a second chance with strings attached, “a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency—under guidance and control of the [Parole] Board.”

Parole did not exist at common law. It is a relatively modern invention that came into being in the nineteenth century along with use of a discretionary sentencing system to promote the rehabilitation of offenders. In 1877, New York became the first state to adopt parole when Zebulon Brockway instituted the system at the Elmira Reformatory in upstate New York. The other states

13. The parole power bears a family resemblance to the President’s pardon power. See U.S. Const. art. II, § 2, cl. 1 (“The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”); United States v. Wilson, 32 U.S. 150, 160 (1833) (“A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.”). But see Biddle v. Perovich, 274 U.S. 480, 486 (1926) (Holmes, J.) (“A pardon in our days is not a private act of grace individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.”).


16. See Lawrence M. Friedman, A History of American Law 219–20 (3d ed. 2005) (explaining the modern prison); David J. Rothman, The Discovery of the Asylum: Social Order and Disorder in the New Republic, ch. 4 (rev. ed. 1990) (discussing the invention and evolution of different penitentiary systems and concepts of punishment). Some scholars trace the origins of the parole system to rehabilitative efforts championed in Ireland by Sir Walter Crofton and in the South Pacific by Alexander Maconochie. E.g., Petersilia, supra note 6, at 129–30; Jeremy Travis, But They All Come Back: Facing the Challenges of Prison Reentry 9–10 (2005). Others maintain parole began as an ancient military practice in which the victors freed captured soldiers on condition that they forego any further combat. Parole later was used to populate the British colonies in America. Prisoners were paroled in exchange for agreeing to indentured servitude for a fixed period. That practice later morphed into a “ticket of leave”—viz., a conditional pardon that the governor could issue for good behavior as long as an offender maintained lawful employment. Goldfarb & Singer, supra note 14, at 257–58.

eventually followed suit. Every state but three had adopted parole by 1927, and fifteen years later every state had a parole process in place.

Throughout the eighteenth and nineteenth centuries federal prisoners were not eligible for release on parole under federal law. In fact, there were no federal prisons. Federal courts would sentence convicted defendants to confinement in any state prison in the state of conviction that was willing to accept them. In other states, the First Congress and later Congresses permitted the federal marshal, under the direction of the federal district judge, to “hire a convenient place to serve as a temporary jail” until permanent arrangements could be made. Congress did not adopt any special rules governing incarceration of federal prisoners in state institutions. Congress directed receiving states to confine federal prisoners for the exact length of their sentences, no more and no less.

By the turn of the twentieth century, most federal inmates were concentrated in a few state facilities, leading to overcrowding. Some states stopped accepting federal prisoners not convicted in their own state, and one state refused to accept any new federal prisoners at all. To deal with that problem, Congress finally authorized construction of the first federal facilities in 1891, and construction of Leavenworth prison in Kansas began in 1896.

It was not long before the federal government followed New York’s lead and adopted a federal parole release system. Congress passed the first federal parole law in 1910. In the federal system, parole became available to any

18. Petersilsia, supra note 6, at 131 (Florida, Mississippi, and Virginia were the three).

19. Id.


23. See Act of June 30, 1834, ch. 163, (4 Stat.) 739 (federal prisoners must be treated the same as state prisoners); Mackin v. United States, 117 U.S. 348, 352 (1886) (discussing 1834 Act); Ex parte Karstendick, 93 U.S. 396, 398–99 (1876); McNutt, 43 U.S. (2 How.) at 9; Randolph, 13 U.S. (9 Cranch) at 84.


25. Id.


27. Id.

28. Federal Parole Act of 1910, ch. 387, 36 Stat. 819 (1910); see Cosgrove, 697 F.2d at 1137 (Bork, J., concurring in part and dissenting in part); Hoffman, supra note 6, at 1, 5–34.
prisoner serving a term of one year or longer after he had completed one-third of his sentence.29 The federal government now belonged to the club.

B. The Maturation of Parole

By 1948, parole had become a settled feature of American criminal justice.30 Parole was so common that, in 1972, the Supreme Court of the United States said “[r]ather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals” and had become “an integral part of the penological system.”31 By 1977, the number of prisoners nationwide released via parole had reached its twentieth century height of 72 percent, with the number in California being even higher, 95 percent.32 Parole was an integral component of the rehabilitative model that the American criminal justice system endorsed from the end of the nineteenth century until well into the twentieth.33 The theory was that new medical, sociological, and psychological theories and techniques could transform a prison from “the black flower of civilized society”34 into the equivalent of a hospital where prisoners would be treated and reformed, rather than punished.35 During the Progressive Era, rehabilitation, not retribution, incapacitation, or deterrence, became the paramount goal of the criminal process, and each agency played its part.36 Congress would authorize a range of imprisonment.37 The trial judge, the first expert in the process, would

30. See generally Petersilia, supra note 6.
32. Petersilia, supra note 6, at 132.
33. See, e.g., David Garland, The Culture of Control: Crime and Social Order in Contemporary Society 55–60, 92 (2002); Transactions of the National Congress on Penitentiary and Reformatory Discipline 18 (1871) (“[T]he protection of society against criminal spoliatio through the reformation of the transgresso . . . is the primary aim of public punishment.”); cf. Charlton T. Lewis, The Indeterminate Sentence, 9 Yale L.J. 17 (1899).
36. See Williams v. New York, 337 U.S. 241, 248 (1949) (“Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.”) (footnote omitted); Garland, supra note 33, at 34–35; Gottschalk, supra note 35, at 37.
37. In the federal system, only Congress can create a crime and define its punishment; federal courts can do neither. See United States v. Hudson, 11 U.S. (7 Cranch) 32, 33 (1812). State courts can create common law crimes if they are authorized to do so under state law, but the Constitution limits how far state courts can go in criminal lawmaking. The Ex Post Facto Clauses, U.S. Const. art. I, § 9, cl. 3 and art. I, § 10, cl. 1, keep federal and state legislators from passing a new criminal statute to ban past conduct or to enhance the penalties already on the books, but those provisions do not apply to the courts. See, e.g., Rogers v. Tennessee, 532 U.S. 451, 456 (2001).
impose the actual sentence after considering the circumstances of each case.\textsuperscript{38} Prisons—now often called “penitentiaries,” because they would serve to transform offenders morally, rather than merely be vehicles for imposing punishment\textsuperscript{39}—would teach an inmate to reform his ways during his time in custody.\textsuperscript{40} And parole officials would decide exactly how much time a prisoner would serve by considering his entire record, in and out of prison.\textsuperscript{41} Moreover, parole enabled correctional officials “to correct for inequities in sentencing.”\textsuperscript{42} Only by granting discretion to judges and parole officials (particularly the latter\textsuperscript{43}), the theory went, could the correct decision be made whether and for how long a particular offender should be incarcerated,\textsuperscript{44} and whether and when a particular inmate had been rehabilitated.\textsuperscript{45}


\textsuperscript{38} See Sheldon Glueck, Principles of a Rational Penal Code, 41 Harv. L. Rev. 453, 463 (1928). Because the judge needed the full range of symptoms, no evidence was out of bounds. See, e.g., 18 U.S.C. § 3661 (2006) (“No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”); Wasman v. United States, 468 U.S. 559, 564 (1984); Dorszynski v. United States, 418 U.S. 424, 434 (1974) (discussing youth sentencing under the Federal Youth Corrections Act); United States v. Tucker, 404 U.S. 443, 446 (1972); Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937); Williams, 337 U.S. at 247 (stating a sentence should be determined based on a defendant’s circumstances and characteristics. Not only should the sentence fit the crime, but it should fit the individual as well).

\textsuperscript{39} There was a decidedly religious bent to rehabilitative theory.

“[F]rom the inception of the penitentiary, prisons and rehabilitation were seen as inextricably mixed. Again, an important reason for this link was the religious nature of the penitentiary. For reformers, Christianity fostered the dual views that offenders both can and should be saved from a life in crime. To relinquish this optimism would be tantamount to condemning offenders to damnation on earth and in the afterlife . . . . The dangerous classes—the poor, the immigrant, the uneducated—were not to be warehoused or portrayed as beyond redemption. Rather, they were all God’s children, and the mandate was to save them from a life in crime.”


\textsuperscript{40} See id. at 27.

\textsuperscript{41} Parole boards enjoyed almost absolute discretion over release decisions. See, e.g., Mistretta v. United States, 488 U.S. 361, 363–64 (1989); Morrissey v. Brewer, 408 U.S. 471, 477–78 (1972). The theory was that the ability to earn an early release via parole would encourage inmates to reform themselves, and the absolute discretion granted to parole boards was necessary to make the scientific decision when a prisoner had been rehabilitated and to maintain institutional control and discipline. See PETERSILIA, supra note 13, at 60.

\textsuperscript{42} FRIEDMAN, supra note 13, at 162.

\textsuperscript{43} “Advocates of the rehabilitative ideal would have preferred less judicial authority over sentences and even greater authority conferred on parole officials.” STITH & CABRANES, supra note 6, at 20.

\textsuperscript{44} See, e.g., Koon v. United States, 518 U.S. 81, 113 (1996) (“It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”); United States v. Grayson, 438 U.S. 41, 47–48 (1978).

\textsuperscript{45} See, e.g., Mistretta, 488 U.S. at 363–64; United States v. Addonizio, 442 U.S. 178, 188–89 (1979); Rotman, supra note 20, at 178 (“Just as no legislature would tell a doctor when to discharge a patient from a hospital as cured, so no legislature should tell a warden or any other prison official when to discharge an inmate as
As a practical matter, the term “parole” generally came to be used in three closely related contexts. Technically, parole referred to the form of “custody” applicable to an offender who would be released before completing his term of imprisonment into a modified form of state control. A parolee could live outside the prison walls, but he would remain subject to the authority and control of the state until he completed his sentence. A parole board, an executive branch entity, had the responsibility to decide whether and when to release an inmate. The board would have seemingly unfettered discretion to grant or deny parole, although legislation often enjoined the board to consider factors such as the severity of the crime and the inmate’s contrition and rehabilitation. Because the release would occur before the prisoner had completed his sentence, however, his freedom would be only conditional. Parole officers, law enforcement officials

cured.”). In fact, it could be argued every state actor in the criminal process plays a role in punishment. See Chanenson, supra note 6, at 175 (“Criminal sentencing does not just happen in the courtroom. Some key sentencing decisions happen long before court convenes, while other critical sentencing decisions take place long after court adjourns. Although the public focuses primarily on the black-robed figure wielding the gavel, sentencing reflects decisions by a veritable parade of actors, including legislators, sentencing commissioners, police officers, prosecutors, juries, trial judges, appellate judges, and executive branch officials.”) (footnote omitted).

46. The U.S. Parole Commission has explained the purpose of parole as follows:

Parole has a three-fold purpose: (1) through the assistance of the United States Probation Officer, a parolee may obtain help with problems concerning employment, residence, finances, or other personal problems which often trouble a person trying to adjust to life upon release from prison; (2) parole protects society because it helps former prisoners get established in the community and thus prevents many situations in which they might commit a new offense; and (3) parole prevents needless imprisonment of those who are not likely to commit further crime and who meet the criteria for parole. While in the community, supervision will be oriented toward reintegrating the offender as a productive member of society.


47. See, e.g., Mistretta v. United States, 488 U.S. 361, 363 (1989); Grayson, 438 U.S. at 46–48. The U.S. Parole Commission has described the federal release decisionmaking process as follows: “The law says that the U.S. Parole Commission may grant parole if (a) the inmate has substantially observed the rules of the institution; (b) release would not depreciate the seriousness of the offense or promote disrespect for the law; and (c) release would not jeopardize the public welfare.” Frequently Asked Questions, U.S. Dep’t of Justice, Parole Comm’n, http://www.justice.gov/uspc/faqs.html#q2 (last visited March 11, 2013).

48. Release decisions were “predictive and discretionary,” Mistretta, 488 U.S. at 364, with parole boards enjoying almost absolute discretion over the parole-release decision, see, e.g., id. Early in the 20th century, parole boards primarily considered the seriousness of the offense in making release decisions. There was no standard or consensus regarding “seriousness,” however, with the result that release decisions displayed no common pattern. See Petersilia, supra note 6, at 134; Rothman, supra note 35, at 173. Disparities among parole boards later feed the claims that parole decisions were arbitrary and discriminatory. See infra pages 14, 17–18. To deal with that problem, beginning in 1972, the U.S. Parole Commission used a Salience Factor Score, which gave objective weight to various criteria in order to reduce subjectivity and disparity. Petersilia, supra note 6, at 124; see U.S. Parole Comm’n v. Geraghty, 445 U.S. 388, 391 (1980); Addonizio, 442 U.S. at 182 n.4; 28 C.F.R. § 2.2 (1973). Many states adopted similar risk assessment tools. Petersilia, supra note 6, at 140.

49. Release on parole was restrictive. Traditional government-imposed conditions on an inmate included regularly visiting an assigned parole officer, maintaining employment, supporting family and dependants, not committing any additional crimes, abstaining from drug or alcohol use, not travelling out of state, not associating
whose job is at the back end of the criminal justice process, would supervise parolees and, if necessary, remit them to custody for committing a new crime or for violating a condition of their release.\textsuperscript{50}

Over time, the public and other participants in the criminal justice system came to have mixed feelings about parole.\textsuperscript{51} On the one hand, the public thought parole was too lenient and was granted too often. Judges were upset that parole boards interfered with their sentencing prerogative. Law enforcement officials were miffed that parole boards did not notify them when prisoners were returned to the community. On the other hand, wardens endorsed parole because it served as a carrot encouraging good in-prison behavior. Prosecutors liked parole because it encouraged defendants to enter into plea-bargaining. And legislators backed parole because it alleviated prison overcrowding, which avoided the need to appropriate additional funds for construction of new prisons. “It was an evenly balanced match, but more often than not, the proponents of parole had their way.”\textsuperscript{52}

\textbf{C. The Senescence of Parole}

Public and political attitudes changed in the 1960s.\textsuperscript{53} With an escalating crime rate, the birth of the war on drugs, and the presence of an increasingly hostile and punitive public attitude toward offenders, features of the criminal justice system deemed “soft on crime” came under attack. Parole was one of them. Despite its longstanding, widespread, and settled position, late in the twentieth century parole came under challenge from several directions.\textsuperscript{54}
Critics on the right said parole was unjust and ineffective.\textsuperscript{55} Parole coddled criminals and victimized law-abiding citizens, because an offender would be released after serving only a portion of his sentence, which left “a gap between ‘bark’ and ‘bite’.”\textsuperscript{56} A correctional program supplying “treatment,” rather than punishment, critics on the right argued, was “yet another social welfare program that undermined individual responsibility and that separated bad behavioral choices (in this case, criminal acts) from unpleasant consequences (in this case, punishment).”\textsuperscript{57} The criminal law should focus on the offense, these critics argued, not the offender.\textsuperscript{58}

Critics on the left said parole was inherently an instrument of coercion, oppression, and injustice.\textsuperscript{59} Parole boards would release only those inmates who promised to conform to majoritarian standards. Critics on the left also argued the discretionary and standardless nature of release decisions permitted (some might say encouraged) arbitrary decisions. Those rebukes, moreover, were not limited to parole, but went to the very rehabilitative ideal on which the correctional process rested. “Rehabilitation justified individualized sentences, individualized sentences justified discretion, and discretion resulted in enormous disparities between sentences for similar crimes.”\textsuperscript{60}

Critics on both sides also joined in some fundamental challenges to parole.\textsuperscript{61} Parole led to dishonesty in sentencing, many argued, because the judge would not know what portion of his term an offender actually would serve, forcing the judge to predict when the parole board might release an offender in order to fix the

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\textsuperscript{55} See, e.g., \textsc{President’s Task Force on Victims of Crime, Final Report} 83 (1982); \textsc{David Fogel, “. . . We Are the Living Proof. . .”: The Justice Model for Corrections} 280 (1975) (rehabilitative services should be optional); \textsc{Andrew von Hirsch, Doing Justice: The Choice of Punishments} 66–76 (1976) (advocating a “just deserts” theory instead of rehabilitation); \textsc{James Q. Wilson, Thinking About Crime} 162–67 (1983). See generally \textsc{Cullen & Jonson, supra note 39, at 33–34; Petersilia, supra note 13, at 64–65.}

\textsuperscript{56} \textsc{Garland, supra note 35, at 35. Participants in the so-called “victims’ rights movement” were particularly effective campaigners for parole abolition or reform. See Petersilia, supra note 6, at 155.}

\textsuperscript{57} \textsc{Cullen, in Wilson & Petersilia, supra note 53, at 254.}

\textsuperscript{58} \textsc{Friedman, supra note 13, at 305–06 (“In periods of high crime, at times when the articulate public is scared to death of crime, the American system tends to shift its emphasis from the offender to the offense.”) (emphasis in original).}


\textsuperscript{60} \textsc{Kathleen Dean Moore, Pardons: Justice, Mercy, and the Public Interest} 71 (1989).

\textsuperscript{61} See, e.g., \textsc{Cullen & Jonson, supra note 39, at 33–34; Garland, supra note 33, at 35; Petersilia, supra note 6, at 135.}
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possible length of his confinement.\textsuperscript{62} The result was to make sentencing less the first stage of treatment in a dynamic therapeutic regimen than an opening gambit in a game of chess. Parole also encouraged dishonesty at parole release hearings, which became an exercise in off-Broadway theater.\textsuperscript{63} Prisoners would say whatever the parole board wanted to hear in order to be released, and the board members would allow themselves to believe whatever was necessary to parole an inmate. Everyone knew what was happening and played along like performers in a badly-acted Kabuki play.

A different criticism challenged the trustworthiness of parole officials to make release decisions. The downward spiral of the Vietnam War and the revelations of Watergate lead to a general distrust of government. Many observers believed those events showed the “better angels of our nature”\textsuperscript{64} had flown the coop. Critics argued that, even if rehabilitation were a legitimate penological theory, public officials could not be trusted to implement the parole system responsibly. What is more, critics maintained, the government no longer should be allowed to make the life-changing judgments required by the entire indeterminate sentencing system.\textsuperscript{65} The result of trusting the government with that power, critics concluded, was “a system that usually neglected the offender, except when it disciplined in capricious fashion.”\textsuperscript{66}

There were also challenges that went to the heart of the rehabilitative ideal. One was that parole and rehabilitation had proved to be an utter failure, that precious few inmates were being or could be rehabilitated, that it was utterly unrealistic to attempt to rehabilitate inmates in a prison chock full of society’s most flagrant, violent, and repeat offenders.\textsuperscript{67} Trying to predict someone’s success in society by observing him in a prison is like trying to predict his success as an aviator by

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\item \textsuperscript{62} See, e.g., S. REP. NO. 98-225, at 113 (1983).
\item \textsuperscript{64} Abraham Lincoln, First Inaugural Address, BARTLEBY.COM (Mar. 4, 1861), http://www.bartleby.com/124/pres31.html (last visited March 11, 2013).
\item \textsuperscript{65} See, e.g., CULLEN & JONSON, supra note 39, at 33.
\item \textsuperscript{66} Rotman, supra note 20, at 182.
\item \textsuperscript{67} See, e.g., DOUGLAS LIPTON ET AL., THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES (1975); Robert Martinson, What Works?—Questions and Answers About Prison Reform, 35 PUBLIC INTEREST 22 (1974) (concluding that there was no reliable evidence that rehabilitation had worked or could work); The Rehabilitation of Criminal Offenders: Problems and Prospects (Lee Sechrest et al. eds., 1979) (agreeing with Martinson); Wilson, supra note 55, at 189–90, 247 nn.18–20 (citing studies concluding that rehabilitative efforts had been unsuccessful); \textit{id.} at 193 (arguing the purpose of the correctional system should be “to isolate and to punish, not to reform,” because we do “not know how to do much else”). See generally Mistretta v. United States, 488 U.S. 361, 363–64, 366–67 (1989); S. REP. NO. 98-225, at 38–40 & n.16 (1983); CULLEN & JONSON, supra note 39, at 33. Martinson backpedaled somewhat a few years later, see Robert Martinson, New Findings, New Views: A Note of Caution Regarding Sentencing Reform, 7 Hofstra L. REV. 243 (1979), but his initial views continued to hold sway over public opinion, see CULLEN & JONSON, supra note 39, at 33. Other nations, such as Great Britain, Canada, and Australia, however, also questioned the effectiveness of rehabilitation. See GOTTSCALK, supra note 35, at 39.
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watching him in a submarine.68 Indeed, not only was prison the worst possible environment for moral or social reform,69 the argument went, but the system besmirched any pretense of the moral high ground by hypocritically claiming to be using parole as a reward for inmates who reformed themselves, while in fact using it merely as a safety valve to ease prison overcrowding.70 Other critics went so far as to argue the notion of state-imposed rehabilitation was illegitimate, and government lacked the moral authority to refashion someone’s life or to decide when he or she has become a model citizen. “[T]he idea that state employees could ‘correct’ deviants came to seem authoritarian and inappropriate rather than self-evidently humane.”71

Together, those assaults grievously wounded the rehabilitation-centered criminal justice system. Once there no longer was a belief in the possibility or legitimacy of rehabilitation, “all the virtues of indeterminacy could be recast as vices.”72 By the 1980s, parole had far more enemies than friends.

II. THE DEATH OF PAROLE

States began to treat parole like it was castor oil—viz., an archaic, foul-tasting medicament no longer effective at treating disease. Punitive sentencing became the order of the day.73 By the end of 2002, sixteen states had abolished discretionary parole altogether or for nearly all offenses; 21 states had sunset provisions for their parole laws; and nineteen states had limited parole release authority.74 Only sixteen states still left discretionary parole authority in the hands of parole boards.75 Twenty-seven states and the District of Columbia adopted truth-in-sentencing laws. Such provisions required an offender serve at least 85 percent of his sentence, with the remaining 15 percent reducible only by earning “good time”

68. I am indebted to Professor Albert Alschuler for that line.
69. Life in many institutions is at best barren and futile, at worst unspeakably brutal and degrading. To be sure, the offenders in such institutions are incapacitated from committing further crimes while serving their sentences, but the conditions in which they live are the poorest possible preparation for their successful reentry into society, and often merely reinforce in them a pattern of manipulation or destructiveness.


70. See, e.g., Cullen & Jonson, supra note 39, at 33; Petersilia, supra note 13, at 60 (“[R]elease on parole, as a ‘back end’ solution to prison crowding, was important from the beginning.”); Norman Holt, The Current State of Parole in America, in Petersilia, supra note 15, at 28–41 (“Parole boards have always served as ‘back door’ population managers in times of crisis.”).
71. Garland, supra note 33, at 55–60, 92.
73. See, e.g., Cullen & Jonson, supra note 39, at 33, Garland, supra note 33, at 35; Petersilia, supra note 6, at 68.
74. See, e.g., Petersilia, supra note 6, at 65, 66–67 tbl. 3.1 (status of parole release laws in the states in 2002).
75. See id.
credits while incarcerated. 76 Twenty-four states and the federal government had some form of a “three strikes” habitual criminal law authorizing (or requiring) life imprisonment on the third conviction, 77 and every state and the federal government had one or more statutes imposing mandatory minimum sentences, often for drug offenses. 78

The federal government was an important part of this backlash. Congress had been troubled for some time by nationwide federal sentencing disparities. 79 At first, in 1958 Congress tried to remedy those disparities by authorizing judicial sentencing institutes and joint councils “to formulate standards and criteria for sentencing.” 80 But that effort came a cropper. “[F]ew districts implemented sentencing councils, and the verdict on both councils and institutes was mixed: Some judges criticized the practicality of such tribunals, while sentencing reform advocates questioned their effectiveness in reducing sentencing disparity.” 81

76. See, e.g., id. at 68; Aimee’s Law, 42 U.S.C. § 13713 (2006) (potentially reducing federal law enforcement funding for states without truth in sentencing laws—i.e., laws requiring offenders to serve at least 85% of their sentence).
77. See Petersilja, supra note 6, at 68.
81. Stith & Koh, supra note 54, at 252 (footnote omitted). Efforts to implement appellate review of sentences also went nowhere, id. at 252–53, largely because the federal judiciary cannot pay the admission fee in a political logrolling contest.

[T]he federal judiciary was unable to develop and institute on its own new structures or procedures to address the question of variations in criminal sentences; nor did it invite scholars and congressional staff to consider the judicial perspective on the purposes and functions of criminal sentencing. If judges thought that attempting to codify sentencing factors in the form of complex, presumptive “guidelines” was unnecessary and unwise, they failed to make the effort to persuade those who disagreed with them. Perhaps the judges realized the futility of any such effort. Compared to other political actors, judges are almost uniquely ill-suited to the task of influencing the legislative branch, due to obvious separation of powers concerns. Put more directly, judges lack a key ingredient for successful legislative lobbying and negotiation: they can promise nothing in return.
Then, Congress tried to remedy this problem at the back end of the criminal justice process by revising the federal parole laws. In 1976, Congress passed the Parole Commission and Reorganization Act (PCRA). That law eliminated use of separate parole boards at each federal prison, consolidated parole release decision-making authority in the newly-created Parole Commission, and directed that Commission to use parole guidelines when making release decisions in order to achieve “equity between individual cases and a uniform measure of justice.” Congress hoped to eliminate or moderate sentencing disparities by vesting in one body the authority to make all parole release decisions under objective standards. But the problem of sentencing disparities refused to go away, and the PCRA “proved to be no more than a way station.” Ultimately, Congress revisited this issue and came up with yet another new approach.

After considering sentencing and parole reform for more than a decade,

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Id. at 288 (footnote omitted).
82. The Federal Parole Commission tried to head Congress off by revising its own procedure. The Commission responded to criticisms of its case-by-case decisionmaking process by adopting general parole policies and release criteria that guided decisionmaking while leaving room for flexibility if the facts of a particular case warranted it. The parole guidelines established a presumptive or “customary” range of incarceration for various classes of offenders by using a matrix that reflects the severity of the offense and a prognosis for parole of an offender based on his characteristics. See U.S. Parole Comm’n, Parole, Statement of General Policy (Parole Release Guidelines), 38 Fed. Reg. 31,942–31,945 (1973).
85. See United States v. Addonizio, 442 U.S. 179, 188–89 (1979) (“The decision as to when a lawfully sentenced defendant shall actually be released has been committed by Congress, with certain limitations, to the discretion of the Parole Commission. Whether wisely or not, Congress has decided that the Commission is in the best position to determine when release is appropriate, and in doing so, to moderate the disparities in the sentencing practices of individual judges.”) (footnotes omitted).

In 1984, after studying the rehabilitation model of punishment and its characteristic feature of indeterminate sentencing for nearly a decade, Congress concluded that the entire system was outmoded and in need of reform. The system lacked the certainty necessary to inspire public confidence and operate as a meaningful deterrent to crime. These deficiencies were the product of unwarranted disparity and inconsistency in sentencing application. The discretion that Congress had conferred for so long upon the judiciary and the parole authorities was at the heart of sentencing disparity. An unjustifiable variation existed in the sentences imposed by judges on similarly situated defendants. The Parole Commission compounded the problem by releasing prisoners according to its own view of the appropriate term of imprisonment. In response, judges began to factor into sentences the anticipated actions of the Parole Commission. Despite this conflicting process and its harmful effects on the system, the judiciary, as an institution, did little to utilize its power to effect positive change. When Congress chose to act to correct a faltering sentencing system, the judiciary failed to take a leadership role in determining the course of reform legislation.

Hatch, supra note 80, at 187–88 (footnotes omitted).
Congress passed the Sentencing Reform Act of 1984 (SRA). The SRA completely changed the federal imprisonment decision-making process and abandoned the “romantic” notion that the parole system could prevent sentencing disparities at the back end of the process by the exercise of expert, predictive judgment about a person’s future path. Congress decided, instead, to address punishment disparities at the front end of the process, at sentencing in district court.

Congress acknowledged the Parole Commission had attempted to resolve sentencing disparities, but concluded the Commission had been unable to do so effectively. The federal criminal code divided authority between district courts and the commission, which meant judges and commissioners “second-guess[ed] each other, often working at cross-purposes.” The Parole Commission’s release guidelines did not take into account various factors such as the amount of harm done by an offender, his degree of sophistication, or his role in the crime, all features Congress deemed particularly important. Finally, the jurisdiction and authority of the Commission did not match that of sentencing courts. The Commission had no authority over defendants not given a custodial sentence or who were ordered confined for less than one year; the Commission could not increase a sentence it found unjustifiably lenient; and the Commission could not


91. See Chanenson, supra note 6, at 187.

The romantic vision of discretionary parole release involves a wise parole board divining, based in large part on assessments of an inmate’s rehabilitative progress, when an inmate should be released, and thus producing a just result. The reality can be quite different. Parole release has historically been an unstructured and wildly discretionary power, subject to the same kinds of irrationalities and abuses that afflict old-style, fully discretionary judicial sentencing on the front end. It is also questionable at best whether parole boards are able to make meaningful predictions about inmates’ future criminal behavior. Traditional discretionary parole release often comes at a significant cost in terms of deterrence, perceived fairness, sentence predictability, and resource allocation. Indeed, these are some of the reasons why Congress abolished discretionary parole release as part of the Sentencing Reform Act of 1984.

Id. at 187 (footnotes omitted).


advance an inmate’s release date to a point earlier than one-third of his sentence. Congress decided the only way to avoid all of the harms that it had seen was to consolidate all sentencing authority in the district courts (except for minor adjustments known as “good time” credit for positive in-prison behavior) under a regime that was universal, objective, and mandatory.

Toward that end, Congress created a new agency, the Sentencing Commission, to promulgate Sentencing Guidelines that would apply in every case and would bind the district courts unless they found some aspect of the case or defendant to be extraordinary. Congress deliberately chose to use a mandatory system, because it believed advisory Sentencing Guidelines would prove only precatory. Congress left district courts with discretion to depart from the Sentencing Guidelines range if the court found present an aggravating or mitigating factor the Sentencing Commission did not adequately consider. To ensure district courts did not freely and regularly depart from that range, Congress, for the first time, also created a limited appellate review of sentences. Congress authorized a defendant to appeal a sentence in excess of the range, and the government to appeal a sentence below it. The SRA also provided that, once the Sentencing Guidelines went into effect, parole would disappear after a short transition period.

94. Id. at 47.
95. Id. at 46.
97. Mistretta, 488 U.S. at 366 & n.3; United States v. Booker, 543 U.S. 220, 292 (2005) (Stevens, J., dissenting); S. REP. NO. 98-225, at 52 n.193 (1983) (quoting Nat’l Acad. of Sci., Panel on Sentencing Research, Research on Sentencing: The Search for Reform 29 (Alfred Blumstein, et al., eds., 1983)) (“With voluntary guidelines, studies have found no evidence of systematic judicial compliance . . . .”); id. at 79. See generally Hatch, supra note 80, at 189 (“Although Congress had considered and rejected strict determinate sentencing as an option, the Commission viewed its mission as developing a system that would ensure that similar offenders, committing similar offenses, would be sentenced in a similar fashion. To ensure adherence to this new sentencing philosophy, Congress made the guidelines compulsory and abolished parole. In ensuing years, Congress would maintain its adherence to the concept of binding guidelines by consistently rejecting efforts to make the guidelines more discretionary.”) (footnotes omitted); Stith & Koh, supra note 54, at 261–66.
99. For all intents and purposes there was no appellate review of federal sentences prior to the SRA. See Dorszynski v. United States, 418 U.S. 424, 431 (1974) (“We begin with the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.”) (footnote omitted); Frankel, supra note 59, at 49; Gertner, supra note 7, at 695–96.
100. 18 U.S.C. § 3742(a)–(c) (2006).
102. See 18 U.S.C. 3624(a) (2006); Pub. L. No. 98-473, § 218(a)(5), 98 Stat. 2027, § 235(b), 98 Stat. 2032; Walden, 114 F.3d at 1138 (“Section 235 of the Act, however, ‘saves’ the Parole Commission and the federal parole statutes for a period of time during which the transition to the new system will occur. Section 235(b)(1) provides that 18 U.S.C. Chapter 311, §§ 4201–4218, which creates the Parole Commission and contains the parole law, ‘remains in effect for five years after the effective date of the Act’.”). The Parole Commission and all laws relating to parole in existence on October 31, 1987, therefore, were to continue in effect until November 1, 1992. We have previously held that, ‘Congress explicitly provided that the parole system was to remain in effect for those
The SRA raised a handful of novel constitutional issues under the separation of powers doctrine. In 1989, the Supreme Court, however, rejected those challenges in *Mistretta v. United States*. Over the ensuing decade, the Court continued to uphold the SRA against every new constitutional claim. Defendants eventually gave up trying to torpedo the SRA and tried to find ways to use the Guidelines in their favor. The Sentencing Guidelines had become the law at sentencing in the thousands of cases prosecuted in the federal courts each year. Parole still was available for defendants who had committed offenses before the effective date of the SRA, but for the offenders who committed crimes after that date, parole was as dead as a doornail.

Numerous states made the same choices. By 2001, 16 states had abolished parole altogether, and many had opted for mandatory, fixed-term sentences or truth-in-sentencing systems in which a prisoner would serve at least 85% of his sentence, with the remainder subject to “good time” laws. *Petersilia*, supra note 6, at 137–40.

103. The statute situated the Sentencing Commission in the Judicial Branch of Article III, not the Executive Branch created by Article II, as is the case with other regulatory agencies. That location raised the issue whether such an agency could exist outside the Executive Branch. Congress delegated authority to the Sentencing Commission to promulgate binding Guidelines for use by district courts at sentencing. That aspect of the Sentencing Reform Act posed a question under the so-called “delegation doctrine.” The statute required three commissioners be Article III judges, which lead to the claim that federal judges could not be given such additional responsibilities. Finally, although the Sentencing Commission was in the Judicial Branch, the President was empowered to remove commissioners who were federal judges. See *Mistretta* v. United States, 488 U.S. 361, 371–412 (rejecting each claim).


107. See, e.g., *Walden v. U.S. Parole Comm’n*, 114 F.3d 1136, 1138 (11th Cir. 1997) (“Inasmuch as there will be no parole for those convicted after the effective date of the SRA, the Act abolishes the Parole Commission, and repeals most of the pre-existing statutory framework governing parole of federal prisoners.”); *United States ex rel. D’Agostino v. Keohane*, 877 F.2d 1167, 1169 n.2 (3d Cir. 1989); *Stange v. U.S. Parole Comm’n*, 875 F.2d 760, 761 (9th Cir. 1989).
Then, the Supreme Court decided Apprendi v. New Jersey.\textsuperscript{108} Apprendi was a landmark decision. For the first time the Court gave a defendant a right under the Sixth Amendment to have the jury involved in sentencing, a practice that, in the federal system at least, historically had been the prerogative of the trial court. But Apprendi was important for another reason, too. It started the Court down a path that led it five years later in United States v. Booker\textsuperscript{109} to jettison the mandatory Sentencing Guidelines system that Congress had spent years devising.

III. THE POSSIBLE RESURRECTION OF PAROLE

A. The Apprendi and Booker Cases

A few days before Christmas 1994, Charles C. Apprendi, Jr., fired a series of rounds into the home of a black family in Vineland, New Jersey, because he did not want them to live in an otherwise white neighborhood. A local grand jury returned a twenty-three-count indictment charging Apprendi with various crimes under New Jersey law. Apprendi plead guilty to the unlawful possession of a firearm, an offense with a ten-year maximum term of imprisonment unless the offense amounted to what is colloquially known as a “hate crime,” in which case the maximum was twenty years. The judge found Apprendi had acted with a racially discriminatory intent and upped his sentence to twelve years’ imprisonment. Apprendi argued the enhanced sentence was unlawful because he had the right to demand a jury make any findings beyond a reasonable doubt necessary to increase his sentence. The New Jersey courts rejected his argument, but the Supreme Court of the United States agreed with him.

The Supreme Court set the state court judgment aside on the ground that Apprendi had a right under the Due Process and Jury Trial Clauses to have the jury make any finding that would increase a sentence above the statutory maximum.\textsuperscript{110} “Other than the fact of a prior conviction, 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.”\textsuperscript{111} The Apprendi decision, for the first time, granted a defendant a right to have the jury involved in sentencing, a claim the Supreme Court previously had repeatedly rejected, sometimes dismissively.\textsuperscript{112} The Court reiterated that point two years later in Ring v. Arizona in the context of capital sentencing, stating “[i]f a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that

\begin{itemize}
\item \textsuperscript{108} 530 U.S. 466 (2000).
\item \textsuperscript{109} 543 U.S. 220 (2005).
\item \textsuperscript{110} Apprendi, 530 U.S. at 490.
\item \textsuperscript{111} Id.
fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.”

Following *Apprendi*, the Supreme Court decided a series of cases that defined the contours of this new Sixth Amendment right. The most important cases were *Blakely v. Washington* and *United States v. Booker.* *Blakely* involved the Washington state sentencing guidelines system. Like the federal system, Washington law defined a sentencing range that served as the starting point, but allowed a judge to depart upwards if he found an aggravating factor present based on the facts of the case. *Blakely* pleaded guilty to kidnapping, which had a presumptive sentence of 49–53 months’ imprisonment, but could be enhanced if, for example, the judge found he committed the crime with “deliberate cruelty.” The trial judge made that finding in Blakely’s case (based only on a preponderance of the evidence) and sentenced him to 90 months’ imprisonment. Relying on *Apprendi*, the Supreme Court reversed.

The problem with the Washington state sentencing system, the Court explained, was that it authorized the trial court to increase the defendant’s sentence based on facts that Blakely did not admit when pleading guilty. The facts underlying that plea—viz., that Blakely committed kidnapping—permitted the trial judge to impose only the presumptive sentence, not the enhanced one—viz., that he acted with “deliberate cruelty.” The court could increase Blakely’s sentence only if it made that additional finding, one that was not an element of the offense. It was irrelevant, the Court concluded, that the guilty verdict rendered Blakely eligible for the statutory maximum ten-year term of imprisonment that Washington state law authorized for his crime. As the Court put it, “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”

The Washington state sentencing guidelines system, accordingly, could not pass muster under *Apprendi*.

*Booker* was just a short step from *Blakely.* The issue in *Booker* was whether the mandatory nature of the federal Sentencing Guidelines survived *Apprendi* and *Blakely.* The Court split into two different majorities, one addressing that issue,
and a different majority dealing with the appropriate remedy. The bottom line was the mandatory federal Sentencing Guidelines suffered the same fate as the Washington state guidelines in \textit{Blakely}, but the bulk of the SRA nonetheless survived.\footnote{121}

Writing for one majority, Justice Stevens, relying on \textit{Blakely}, concluded the mandatory nature of the federal Sentencing Guidelines\footnote{122} was unconstitutional under \textit{Apprendi}.\footnote{123} The SRA required district courts to sentence under the Guidelines,\footnote{124} which required them to calculate the sentence by making new factual findings that did not underlie a jury’s verdict or defendant’s guilty plea. In that regard, Justice Stevens explained, “there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures” in \textit{Blakely}.

\textit{Apprendi} would not limit a judge’s reliance on \textit{advisory} Sentencing Guidelines, Justice Stevens noted, but the federal Sentencing Guidelines were anything but. The SRA deliberately chose to create a mandatory Sentencing Guidelines system, as evidenced by the text of that law\footnote{126} and as the Court in \textit{Mistretta} previously had described the act.\footnote{127}

The SRA told a sentencing court it “shall impose a sentence of the kind, and within the range” defined by the Sentencing Guidelines.\footnote{128} True, the Guidelines permitted departures if the judge found “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.”\footnote{129} But “[i]n most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible,” even if the sentencing court believed a different sentence, more or less severe, was appropriate.\footnote{130} Given that feature of the Sentencing Guidelines and the lack of any reasonable way to distinguish \textit{Blakely},\footnote{131} the Court

\begin{itemize}
\item \textit{Id}. at 233–34 (quoting 18 U.S.C. § 3553(b) (2006)); see id. at 233 n.2 (“In \textit{Mistretta} v. \textit{United States}, we pointed out that Congress chose explicitly to adopt a ‘mandatory-guideline system’ rather than a system that would have been ‘only advisory,’ and that the statute ‘makes the Sentencing Commission’s guidelines binding on the courts.’”) (quoting Mistretta v. United States, 488 U.S. 361, 367 (1989)) (citation omitted).
\item \textit{Booker}, 543 U.S. at 226–44 (Stevens, J.).
\item \textit{Id}. at 233–34 (quoting 18 U.S.C. § 3553(b) (2006)).
\item \textit{Booker}, 543 U.S. at 233.
\item \textit{See Mistretta}, 488 U.S. at 367.
\item \textit{Booker}, 543 U.S. at 234.
\item \textit{Booker}, 543 U.S. at 234.
\item \textit{Booker}, 543 U.S. at 234.
\item \textit{Booker}, 543 U.S. at 234.
\item \textit{Booker}, 543 U.S. at 234.
\end{itemize}
ruled the mandatory federal Sentencing Guidelines were unconstitutional under *Apprendi*. To leave no doubt about the matter, the Court reiterated that holding in a series of cases decided after *Booker*, stating not only were the federal Sentencing Guidelines no longer mandatory, they should not even be deemed presumptively reasonable.\(^{132}\)

Justice Breyer would have upheld the federal Sentencing Guidelines, but he was in the minority on that position.\(^{133}\) Writing for a different majority, however, Justice Breyer concluded the appropriate remedy under *Apprendi* was to strike down only two provisions of the SRA: one that rendered the Sentencing Guidelines mandatory, and one that established standards of appellate review of Guidelines sentences.\(^{134}\) The remainder of the SRA could continue to operate without those provisions,\(^{135}\) he explained, but invalidating those sections had a very serious consequence: It “makes the Sentencing Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well.”\(^{136}\)

What is curious about the opinions in *Booker* is that no one contemplated that parole would be available to iron out sentencing disparities now that the Sentencing Guidelines are only advisory. Justice Breyer’s majority opinion did not mention the issue at all, and Justice Stevens’ dissent on the remedial issue assumed parole had been repealed and was unavailable.\(^{137}\) Perhaps, the Court’s failure to

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Guidelines against other types of constitutional challenges; and (3) *Blakely* conflicted with the separation-of-powers principles reflected in *Mistretta*—and missed each time. *Id.* at 237–43.


\(^{134}\) *Booker*, 543 U.S. at 259. To him, the Court had to decide “whether we would deviate less radically from Congress’ intended system (1) by superimposing the constitutional requirement announced today or (2) through elimination of some provisions of the statute.” *Id.* at 247. The issue, he explained was a matter of discerning Congress’ intent, which could be gauged “by evaluating the consequences of the Court’s constitutional requirement in light of the Act’s language, its history, and its basic purposes.” *Id.* at 248.

\(^{135}\) *Id.* at 259–65.

\(^{136}\) *Id.* at 245–46 (citations omitted). Justice Stevens dissented from the remedial scheme set forth in Justice Breyer’s majority opinion. He believed the recission option chosen by the majority was not required by *Apprendi* and was not faithful to congressional intent. *Id.* at 302 (Stevens, J. dissenting).

\(^{137}\) As Justice Stevens put it:

> [T]he Court has neglected to provide a critical procedural protection that existed prior to the enactment of a binding Guidelines system. Before the [Sentencing Reform Act], the sentencing judge had the discretion to impose a sentence that designated a minimum term ‘at the expiration of which the prisoner shall become eligible for parole.’ Sentencing judges had the discretion to reduce a minimum term of imprisonment upon the recommendation of the Bureau of Prisons. Through these provisions and others, all of which were effectively repealed in 1984, it was the Parole Commission—not the sentencing judge—who was ultimately responsible for determining the length of each defendant’s real sentence. Prior to the Guidelines regime, the Parole Commission was designed to reduce sentencing disparities and to provide a check for defendants who had
address the issue is due to the fact the parties, particularly the federal government, did not argue that invalidating mandatory Sentencing Guidelines would resurrect parole. Others, however, had adumbrated that point. More important, however, is the fact that that precise issue had been before the Court in Mistretta.

As noted above, the mandatory federal Sentencing Guidelines system was controversial. There were numerous district court decisions on the constitutionality of the SRA, most had held it unconstitutional, and the Supreme Court took the extraordinary step of granting certiorari before judgment in order to resolve whether the Act and Sentencing Guidelines were valid. Before the Court both John Mistretta and the federal government addressed the issue whether the provision in the SRA abolishing parole could survive if the act was held unconstitutional. Mistretta and the government agreed that parole should not be deemed abolished in that event. The parties concurred that, as evidenced by the text, structure, legislative history, and purposes of the SRA, Congress would not have intended to abolish parole if the Sentencing Guidelines were not mandatory, because the result would be to leave in place the very sentencing disparity that Congress passed the SRA to eliminate. The Supreme Court did not reach the severability issue in Mistretta, because the Court upheld the SRA. But since the Court in Booker has rendered the Sentencing Guidelines only advisory, that issue clearly is present now.

If the parties were correct in Mistretta that Congress would not both have adopted an advisory Sentencing Guidelines system and abolished parole, wouldn’t the conclusion be the same now? Wouldn’t the appropriate remedy after Booker be the same remedy that would have been appropriate had Mistretta held the mandatory Sentencing Guidelines system unconstitutional in 1989—namely, to sever from the SRA the section abolishing parole? Or are there differences, whether due to the passage of intervening legislation or the elapse of time since the Court decided Mistretta, that make it impossible to resurrect parole today by operation of law, without a new act of Congress, regardless of whether that result would have been appropriate in 1989?

To answer those questions, one needs to answer today the question the Court

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received excessive sentences. Today, the Court reenacts the discretionary Guidelines system that once existed without providing this crucial safety net.

*Id.* at 300–01 (Stevens, J., dissenting) (citations omitted).


139. See supra Section II.


141. See Brief for Respondent at 54–61, Mistretta v. United States, 488 U.S. 361 (1989) (No. 87-1904, 87-7028); Brief for the United States at 60, Mistretta v. United States, 488 U.S. 361 (1989) (No. 87-1904, 87-7028). As the federal government put it, “[t]he abolition of parole was inseparably linked to the promulgation of the Sentencing Guidelines.” *Id.*
avoided in *Mistretta* and then decide whether the world is too different today for the same answer to make sense now. The first step down that road is to identify the severability analysis that the Court uses to decide what to do when one section of a federal law is unconstitutional.

**B. Severability**

People make mistakes, and Congress consists of people, so Congress makes mistakes too. Sometimes those mistakes involve a misjudgment as to what the Constitution permits. Since *Marbury*, that is where the courts come in. Whenever a court concludes a portion of a statute is unconstitutional, the court next must decide how to deal with the problem that the entire statute cannot be enforced as Congress wrote it. Here is where the law of severability comes into play.

The approach to severability is well settled. The basic rule is the same in law as it is in medicine. Just as a surgeon must excise a tumor, but leave as much healthy tissue as possible, a court should not invalidate more of a statute than is necessary. “[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.”

144 Courts must try to save

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142 See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).


144 *Regan*, 468 U.S. at 652 (quoting *El Paso & Northeastern Rwy. Co. v. Gutierrez*, 215 U.S. 87, 96 (1909)). The test articulated in *Regan* has both recent approval, see *Sebelius*, 132 S. Ct. at 2607, and a long pedigree, see, e.g., *Champlin Refining*, 286 U.S. at 234 (“Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.”); *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 565 (1902) (“The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may stand, while that which is unconstitutional will be rejected.”) (internal quotation marks omitted).
whatever portions of the statute are constitutional, but not every effort can be successful. At some point, salvaging the lawful remains of a statute is tantamount to writing the law in the first place, and a federal court may not engage in that quintessentially legislative function. Ultimately, therefore, the courts must answer two questions: Can the remainder of the statute operate independently of what must be struck down? And would Congress have passed the statute if the entire law could not operate as it was passed? As the Court put it in *Champlin Refining Co. v. Corporation Commission of Oklahoma*:

> The unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

The analysis here is straightforward. *Booker* held unconstitutional only the mandatory nature of the Sentencing Guidelines and the SRA provisions governing appellate review. The Court invalidated no other part of the SRA, including those sections that repealed parole. The severability issue is whether the loss of a mandatory Sentencing Guidelines system so disrupts the operation of federal sentencing that other portions of the SRA must be held invalid as well, or so changes the scheme Congress sought to implement that Congress would have preferred to start over, rather than allow the new, judicially-modified system to

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145. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006) (“We try not to nullify more of a legislature’s work than is necessary, for we know that ‘[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.’”) (second brackets in original) (quoting *Regan v. Time*, Inc., 468 U.S. 641, 652 (1984) (plurality opinion)). “[T]he ‘normal rule,’” therefore, “is that ‘partial, rather than facial, invalidation is the required course’ such that a ‘statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.’” *Id.* (citation omitted).

146. *See Free Enter. Fund*, 130 S. Ct. at 3162 (“It is true that the language providing for good-cause removal is only one of a number of statutory provisions that, working together, produce a constitutional violation. In theory, perhaps, the Court might blue-pencil a sufficient number of the Board’s responsibilities so that its members would no longer be ‘Officers of the United States.’ Or we could restrict the Board’s enforcement powers, so that it would be a purely recommendatory panel. Or the Board members could in future be made removable by the President, for good cause or at will. But such editorial freedom—far more extensive than our holding today—belongs to the Legislature, not the Judiciary. Congress of course remains free to pursue any of these options going forward.”).


148. 286 U.S. 210, 234 (1932); *accord Sebelius*, 132 S. Ct. at 2607; *Chadha*, 462 U.S. at 931–32 (quoting *Champlin Refining*); *Buckley*, 424 U.S. at 108. Sometimes Congress includes a severability provision in a statute. “[T]he inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision.” *Alaska Brock*, 480 U.S. at 686. Where there is a severability provision, “unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute.” *Id.* A severability clause, however, is not indispensable. “In the absence of a severability clause, however, Congress’ silence is just that—silence—and does not raise a presumption against severability.” *Id.*
continue in operation.\textsuperscript{149} In particular did Congress make the repeal of parole contingent on the operation of \textit{mandatory} Sentencing Guidelines? To draw an analogy to contract law: Was imposition of a mandatory Sentencing Guidelines system a lawful “condition subsequent” for the repeal of parole? If the answer is, “Yes,” then the pre-SRA parole provisions should go back into effect by operation of law. This case, however, adds another wrinkle: Does it matter that this issue has surfaced in 2013, rather than in 1989? The ultimate question is whether \textit{Booker} brought parole back to life while strangling the mandatory Sentencing Guidelines. There are several subsidiary issues that must be addressed in order to answer that question.

1. \textit{Can the Remainder of the SRA Operate Independently of the Provision That Made the Sentencing Guidelines Mandatory?}

The answer clearly is “Yes.” Justice Breyer’s opinion in \textit{Booker} explains why.\textsuperscript{150} According to Justice Breyer, even if you take away the mandatory nature of the Sentencing Guidelines, the SRA still can function: The purposes of sentencing set forth in the SRA remain legitimate; district courts still can take the Act’s goals into account at sentencing; district courts still can consider the same evidence they could before \textit{Booker}; and appellate courts still can review sentences for reasonableness.\textsuperscript{151} For those reasons, a majority of the Court in \textit{Booker} concluded the SRA and the Sentencing Guidelines continue to play an important role at sentencing, even if the Guidelines no longer bind a district court in the same way a statute would.\textsuperscript{152} Justice Breyer’s opinion for one majority in \textit{Booker} is the

\textsuperscript{149} See Ayotte, 546 U.S. at 330 (“Would the legislature have preferred what is left of its statute to no statute at all?”).

\textsuperscript{150} The remainder of the Act functions independently. Without the mandatory provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals. The Act nonetheless requires judges to consider the Guidelines sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant, the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims. And the Act nonetheless requires judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care.


\textsuperscript{151} See Chanenson, supra note 6, at 178–79 (arguing in favor of a strong form of “reasonableness” review).

\textsuperscript{152} Before \textit{Booker}, Congress always could decide what punishment must be imposed at sentencing by mandating that a particular penalty be imposed. \textit{See} Chapman v. United States, 500 U.S. 453, 465–66 n.5 (1991) (collecting cases). Even after \textit{Booker}, Congress still has the authority to fix a mandatory sentence because it has the power to define the specific punishment that must be imposed under the factual findings made by the jury. \textit{See} Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). \textit{Apprendi} did not alter a legislature’s authority to define the sentence to be imposed for conviction. It merely limited a judge’s ability to impose a sentence in excess of the one authorized by the jury’s guilty verdict. \textit{See} Kate Stith & Karen Dunn, \textit{A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch}, 58 STAN. L. REV. 217, 223 (2005) (“The fundamental
short answer to the first question.

2. Would Congress Have Passed the SRA if the Sentencing Guidelines Were Merely Advisory?

The answer clearly is “No.” The Supreme Court was quite fractured in *Booker*—it’s not often that there are two separate and different majority opinions for the Court in one case—but there was one point of unanimity: Congress passed the SRA in order to eliminate sentencing disparity in the federal system. Justice Breyer—who, by the way, not only worked on the staff of Senator Kennedy when he promoted sentencing reform, but also was an original member of the Sentencing Commission—explained “Congress’ basic statutory goal” was to adopt “a system that diminishes sentencing disparity,”\(^{153}\) “to move the sentencing system in the direction of increased uniformity,”\(^{154}\) and “to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.”\(^{155}\) “Congress’ basic objective [was] promoting uniformity in sentencing.”\(^{156}\) Even the dissenting opinions in *Booker* by Justices Stevens and Scalia agreed with Justice Breyer’s opinion on this point.\(^{157}\) The Supreme Court’s decision in *Booker* is sufficient to establish this proposition.

If more support were necessary, however, it exists. The text of the SRA abolished parole only for sentences imposed under the Sentencing Guidelines; parole would remain available for all other defendants.\(^{158}\) The structure of the SRA makes that point, too. There were two central features of the SRA: mandatory, determinate Sentencing Guidelines, and appellate review of sentences to ensure

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message of *Apprendi*, *Blakely*, and *Booker I* is that while the legislative branch has near-plenary authority to determine what conduct warrants punishment, and how severe that punishment should be, the defendant must be constitutionally convicted of that specified conduct before he can be punished for it. Before *Booker*, Congress could evade the constitutional requirements relating to criminal prosecution and conviction by the expedient of directing the Commission to provide for increased sentences for specified acts or circumstances. But now the Guidelines are no longer a complete alternative to statutory criminal prohibitions.”) (footnotes omitted).

154. Id. at 253; see also id. at 256.
155. Id. at 264–65.
156. Id. at 267.
157. See id. at 292 (Stevens, J., dissenting) (“The elimination of sentencing disparity, which Congress determined was chiefly the result of a discretionary sentencing regime, was unquestionably Congress’ principal aim.”); id. at 304 & n.2, 306 (Scalia, J., dissenting) (“[T]he Act’s purpose of uniform sentencing . . . .”); see also, e.g., *Dorsey v. United States*, 132 S. Ct. 2321, 2326 (2012) (“[In the SRA,] Congress thereby sought to increase transparency, uniformity, and proportionality in sentencing.”); *Burns v. United States*, 501 U.S. 129, 133 (1991) (“The purpose of this reform was to eliminate the ‘unwarranted disparit[ies] and . . . uncertainty’ associated with indeterminate sentencing.”) (quoting *S. Rep. No. 98-225, at 9* (1983)).
the district court applied the Guidelines correctly and to create guidance for appropriate departures. With those elements in place, parole would be unnecessary. Sentencing disparity would be eliminated at the front end of the system by requiring district court judges to use the new Sentencing Guidelines. Parole, which sought to reduce sentencing disparity at the back end of the process, would become superfluous. By contrast, elimination of both the mandatory nature of the Sentencing Guidelines and parole would mean there would be no mechanism in place to even out sentences on a nationwide basis. Even the limited appellate review Justice Breyer found to have survived Booker would be insufficient. No one federal circuit court has jurisdiction to review all sentences, so the circuit courts cannot ensure nationwide uniformity in sentencing. Accordingly, leaving parole in the grave would mean the SRA, whose primary goal was to reduce disparity, had increased it.159

The legislative history of the SRA, which the Supreme Court has often found illuminating,160 confirms the evident meaning of the text. The committee reports and floor remarks of sponsors make it clear that “[a] primary goal of sentencing reform is the elimination of unwarranted sentencing disparity.”161 The Sentencing Commission, the agency tasked with creating and revising the Sentencing Guidelines over time, agreed.162 So, too, did other people who helped birth the SRA or

159. For the argument that the Guidelines failed because they increased disparity in sentencing, see Albert W. Alschuler, Disparity: The Normative and Empirical Failure of the Federal Guidelines, 58 Stan. L. Rev. 85 (2005).


161. S. REP. NO. 98-225, at 52 (1983) (footnote omitted); see id. at 38 (explaining the need for reform because of sentencing disparities caused “directly [by] the unfettered discretion the law confers on [sentencing] judges and parole authorities responsible for imposing and implementing the sentence”); id. at 39–45 (cataloging the “astounding” variations in federal sentencing and criticizing the unfairness of sentencing disparities); id. at 79 (the Senate Judiciary Committee “resisted [the] attempt to make the sentencing guidelines more voluntary than mandatory, because of the poor record of States reported in the National Academy of Science Report which have experimented with ‘voluntary’ guidelines”); 133 Cong. Rec. 33,109 (1987) (remarks of Sen. Hatch) (“[T]he core function of the guidelines and the underlying statute . . . is to reduce disparity in sentencing and restore fairness and predictability to the sentencing process. Adherence to the guidelines is therefore properly required under the law except in . . . rare and particularly unusual instances . . . .”); id. at 33,110 (remarks of Sen. Biden) (“That notion of allowing the courts to, in effect, second-guess the wisdom of any sentencing guideline is plainly contrary to the act’s purpose of having a sentencing guidelines system that is mandatory, except when the court finds a circumstance meeting the standard articulated in § 3553(b). It is also contrary to the purpose of having Congress, rather than the courts, review the sentencing guidelines for the appropriateness of authorized levels of punishment.”).

162. See Booker Final Report, supra note 6, at 2 (“The SRA was the culmination of lengthy bipartisan efforts. It sought to eliminate unwarranted disparity in sentencing and to address the inequalities created by sentencing indeterminacy.”); U.S. Sentencing Comm’n, Fifteen Years of Guidelines Sentencing, at xvi
who were in a senior position in the federal government and were well situated to know the SRA's purpose.\textsuperscript{163}

Even more valuable, however, is the choice Congress made when adopting the SRA. Congress had mandatory and advisory Sentencing Guidelines options before it. The House proposed advisory Guidelines, while the Senate wanted a mandatory version. Congress rejected the House's approach in favor of the Senate's.\textsuperscript{164} That fact should prove the point that Congress would not have adopted an advisory Sentencing Guidelines system.\textsuperscript{165}
The limited appellate review of sentences now available also does not offer a satisfactory substitute for the type of nationwide standardization the Sentencing Guidelines sought to provide or that the revitalization of the Parole Commission now could bring to bear on sentencing disparity. Justice Breyer’s opinion in *Booker* contemplated that appellate courts still could review sentences for “reasonableness.” Reasonableness, however, is a term with a broad, uncertain meaning, one not easily applied even when a court has available the full panoply of sentencing decisions, so that it can compare one defendant’s punishment with every other. Even if that were true, it would still be difficult to ensure there was a rational explanation for different results. But no federal appellate court can review every sentencing decision within its own circuit, let alone across the nation, and the Supreme Court is not about to take on that chore.

Moreover, the Supreme Court has effectively made any such hope at horizontal uniformity a thing of the past. Since *Booker* the Supreme Court has made it clear that district courts may impose sentences outside the Sentencing Guidelines ranges based on factors such as the court’s disagreement with that range, and also that the circuit courts must review district court sentences under a “deferential abuse-of-discretion standard.” The consequence is that the appellate sentencing review available after *Booker* cannot hope to achieve the nationwide uniformity Congress wanted in 1984.

In sum, two points stand out clearly: Congress sought to eliminate the widespread prevalence of sentencing disparities resulting from the unfettered discretion a judge historically enjoyed at sentencing, and Congress expressly rejected resort to an advisory Sentencing Guidelines system to accomplish that task because it believed an advisory system would prove ineffectual. The mandatory nature of the Sentencing Guidelines was an indispensable component of the reform enacted by the SRA. Without it, there would have been no guarantee that someone could ascribe “intent” to a legislature. See, e.g., Conroy v. Aniskoff, 507 U.S. 511, 519, 520 n.2 (1993) (Scalia, J., concurring in the judgment). But what legislatures have in common with individuals is that they use language, and using language is a purposive activity. “Legislative intent” is a fiction, but it is a useful and appropriate fiction. It’s sensible (and indeed unavoidable) to anthropomorphize the legislature and to ask what an individual lawmaker would have “intended” if he had used the same language in the same social context. Moreover, “[s]ome recent psychology scholarship on what is called ‘group entity’ and philosophy scholarship on ‘plural subject theory’ do suggest that it is possible—indeed, some argue that it is natural and perhaps routine—to assign ‘intent’ or other such notions of unitary agency to groups as well as to individuals.” PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE 192–93 (2006) (footnotes omitted). In fact, the Supreme Court on occasion has done just that. See, e.g., Hunter v. Underwood, 471 U.S. 222 (1985) (holding unconstitutional a state constitutional provision excluding misdemeanants from the franchise, on the ground that the provision was intended to discriminate against African Americans). The Court’s SRA decisions clearly state that the Senate Report reflects what Congress sought to achieve and avoid in the SRA. See, e.g., *Booker*, 543 U.S. at 292 (Stevens, J., dissenting); *Mistretta*, 488 U.S. at 366 & n.3; *supra* note 162. If the Court is willing to take that step, so am I.


reduce sentencing disparities, and it was to accomplish that goal that Congress enacted the SRA.

3. Does It Matter That No One Asked This Question Until 2013?

Maybe—maybe not.

Death, not space, is the final frontier. Laws, like people, do not come back once they have expired. But this case could be different. In the SRA, Congress added new laws and eliminated old ones, but intended to make repeal of the latter hinge on the validity of the former. Another way to consider the SRA is to draw a parallel to contract law. The repeal of parole was contingent on the constitutionality of mandatory Sentencing Guidelines, which served as a “condition subsequent” for the repeal of parole. If the SRA were upheld as constitutional, the parole laws would disappear. But if the SRA were held unconstitutional, the parole laws would remain in effect because there would be no valid replacement. Simple in its statement, this proposed lawmaking process, if correct, would have the effect of restoring life to the parole statutes that Congress sought to replace with the mandatory Sentencing Guidelines system.

Is that where we now are? I think so.

Congress passed the SRA in order to eliminate sentencing disparity in the federal system. Congress believed mandatory Sentencing Guidelines would achieve that goal and directed the U.S. Sentencing Commission to promulgate such rules. Congress refused to use advisory Sentencing Guidelines because it believed they would not eliminate the disparities that had plagued federal sentencing. Congress repealed the parole laws prospectively because they no longer would be necessary to avoid those disparities.

As the result, it follows that Congress would not have wanted to repeal the federal parole laws if the new Sentencing Guidelines did not limit the sentencing discretion federal district courts had enjoyed. Congress clearly did not want to see the criminal process use an advisory Sentencing Guidelines system at the front end without parole functioning at the back end. Congress did not adopt such a system; the federal courts never came up with a workable set of guidelines on their own; and Congress never ordered them to do so. An advisory Sentencing Guidelines system without parole would have resulted in a far worse punishment mechanism, one with no check on system-wide sentencing disparities, than existed before the SRA became law. Congress would have wanted the failsafe device parole offered to remain in effect even today so it could perform that function.

The Senate Report noted “parole should be abolished in the context of a


169. Consider this road map: “Start at A (old law) and go to B (new law). But if B is C (unconstitutional), then return to A (old law).” This road map essentially describes the discussion in the text.

170. See supra Section III.A.; supra note 97.
completely restructured guidelines sentencing system.”171 Without that new system, Congress would have left parole in place; at a minimum, Congress would not have repealed it without revising the system in some other way. Accordingly, if Congress would not have repealed the federal parole laws were the mandatory Sentencing Guidelines held unconstitutional in Mistretta, it follows that Congress would have wanted the parole laws to have come back into effect once Booker held the same mandatory Sentencing Guidelines system unconstitutional.

It certainly makes no difference that Mistretta rejected separation of powers challenges, while Booker accepted a claim based on the Jury Trial Clause. Indeed, Booker itself made that point. The government pleaded with the Court in Booker not to reject the same Sentencing Guidelines system it already had upheld against several other challenges resting on Articles I and II, the Due Process Clause, and the Self-Incrimination Clause. Booker correctly reasoned that those decisions were irrelevant to the task at hand. It would make no sense to conclude that an unsuccessful challenge to the SRA based on the Title of Nobility Clause172 means the game is over. Each provision of the Constitution has its own text, history, purposes, and case law, and stands on its own. Mistretta and Booker involved different sections of the Constitution and came out different ways. The latter difference is significant; the former, not.

The final consideration is one of time. Once any legal rule is in operation, expectations develop that it will continue to operate in the same manner that it has done up to the present. Reliance interests develop based on those expectations. Changing the governing rule can injure innocent parties who have acted in good faith and trusted the state of the law at the time of their actions. True, no one reasonably expects the law to become fossilized, but it is fair to plan life based on the expectation that major changes will occur infrequently and, even when they occur, developments will work only prospectively and will not disrupt settled expectations. That factor is entitled to considerable weight in some circumstances, such as with regard to the interpretation of contracts, deeds, and substantive criminal law.

To be sure, this problem involves public, not private, law, and that distinction perhaps could be decisive in some instances. But not here. There is no reliance factor that could trump the requirement to consider federal prisoners for parole.

The government cannot claim it has a reliance interest in not making parole release decisions simply because it has not done so for years. Article VI requires every federal official to obey federal law,173 so if the parole laws are back in effect,
the Parole Commission must recommence the parole release process. True, the federal government has made budgeting and staffing decisions since 1984 based on the premise that parole has been abolished. But that reliance only allows the government to schedule parole hearings in a reasonable manner, not to skip them altogether. District courts also have sentenced offenders based on the assumption that they cannot be released on parole, which may have resulted in a shorter sentence than the prisoner would have received if the court knew at sentencing that parole was an option. After all, that is how the trial courts calculated a sentence before the SRA became law, by guessing when a defendant might be eligible for parole.\textsuperscript{174} But the Supreme Court has told us a district court’s expectations when a defendant will be released lack any independent weight in a release decision.\textsuperscript{175} Besides it cannot be the law that thousands of prisoners may be unlawfully confined because a few receive an undeserved early release. Finally, reviving the parole laws could not injure prisoners. Allowing them to apply for parole is an unexpected benefit, not a burden.\textsuperscript{176} The passage of time may make it too difficult to unravel other legal systems without upsetting settled expectations, but that is not the case here. In sum, if parole is an option for prisoners, the government must consider them for release.

\textbf{C. It’s Alive! It’s Alive!}\textsuperscript{177}

Congress wanted the Parole Commission to go the way of the Interstate Commerce Commission and ride off into the sunset as it gradually ran out of prisoners who committed crimes before the Sentencing Guidelines went into effect.\textsuperscript{178} But life did not turn out that way. The problem of dealing with those prisoners has proved more durable than Congress originally imagined, regardless of whether parole still is generally available.\textsuperscript{179} As a result, Congress has extended the life of the Parole Commission on several occasions so that it could continue to consider for parole inmates to whom the SRA does not apply.\textsuperscript{180}

\begin{footnotesize}
\textsuperscript{174} See, e.g., S. REP. No. 98-225, at 113 (1983); supra text accompanying note 62.
\textsuperscript{176} In theory a prisoner might argue that he would not have committed an in-prison offense that lengthened his confinement if he had known that he might be eligible for parole. That claim—which bears more than a passing resemblance to the defendant’s plea for mercy that he became an orphan by murdering his parents—is difficult to take seriously as a matter of fact and is not legitimate as a matter of morality.
\textsuperscript{177} FRANKENSTEIN (Universal Pictures 1931), available at http://www.youtube.com/watch?v=8H3dFh6GA-A (last viewed March 16, 2013).
\textsuperscript{178} See S. REP. No. 98-225, at 184 (1983).
\textsuperscript{179} See, e.g., H.R. REP. No. 104-789, at 3 (1996) (“At the end of fiscal year 1996, there will still be approximately 6,700 parole-eligible, ‘old law’ defendants in the federal system.”).
Moreover, Congress also has given the Parole Commission additional responsibilities, such as making parole release decisions for state offenders in the U.S. Marshals Service Witness Security Program and for offenders sentenced under the District of Columbia indeterminate sentencing system. The Parole Commission also has responsibility for inmates convicted under the Uniform Code of Military Justice incarcerated in Bureau of Prisons institutions.\(^{181}\) Finally, Congress has continued to fund the work of the Parole Commission, which shows it believes the commission still has a legitimate mission to carry out.\(^{182}\) The result is that the Parole Commission is in place and is performing parole release decisions, just fewer of them and under nontraditional federal criminal laws.

There is no reason why the Parole Commission could not resume its old responsibilities under pre-SRA law. To be sure, like an old car that has been garaged for some time, the Commission may need some gas in its tank and oil in its gears in order to get back into the flow of making parole release decisions for federal prisoners. But Congress does not need to create an entirely new body to perform this task. The Parole Commission is capable of taking on this reassignment.

IV. A POSTSCRIPT

Parole may still be with us. The Parole Commission, the Justice Department, and the federal courts will decide. Once federal prisoners get wind of the possibility they could be eligible for parole, they will flood the Parole Commission with applications. One recent study concluded that more than half of the federal prison population might be eligible for parole if it still were in effect.\(^{183}\) Once those inmates apply for parole, the game will be afoot. The Parole Commission will have

\(^{181}\) See HOFFMAN, supra note 6, at 3.


to decide if parole has survived *Mistretta* and *Booker*. If the decision is “No,” any inmate denied parole surely will file a petition for a writ of habeas corpus relief, and the ball will be in the Article III courts.184 Until then, we can only speculate about the outcome. In the meantime, it is worth asking whether there are any lessons to be learned from this series of events. It turns out there is at least one worth noting: Law often follows unusual, unpredictable paths. Sometimes the law moves in a straight line, other times it resembles a wave or a sine curve, and occasionally it goes in a circle.

A good example of straight-line movement has been the Anglo-American attitude toward capital punishment. At common law numerous felonies were punishable by death.185 Today by and large the only remaining capital offenses are murder and certain crimes against the national government, such as treason, espionage, and terrorism.186 Similarly, a good example of law and public policy moving like a sine curve187 is Congress’ regulatory authority under the Commerce

184. Filing a habeas corpus petition challenging the Parole Commission’s decision to deny parole is a long way from obtaining release. If the Parole Commission agrees that parole is back in force and considers a prisoner for parole, the prisoner is left to challenge the Commission’s fact-based judgment that he should not be released. That is no easy task, because the Commission “possess[e] almost absolute discretion over the parole decision.” *Mistretta* v. United States, 488 U.S. 361, 364 (1989); see, e.g., *Rifai* v. U.S. Parole Comm’n, 586 F.2d 695 (9th Cir. 1978); *Brest* v. *Ciccone*, 371 F.2d 981, 982–83 (8th Cir. 1967). If, by contrast, the Commission refuses to consider a prisoner for parole, the prisoner still may have a difficult time obtaining release. He may have to show that the district court would not have imposed a longer sentence had the court known that he could be paroled. *Cf*. *Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012). Finally, some prisoners may have entered into a plea bargain that precludes them from challenging their sentences altogether. Of course, some prisoners who entered into such plea agreements will argue that their lawyers provided ineffective assistance of counsel under the Sixth Amendment by failing to realize that they would be available for parole. *See Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012) (holding that recommendation to reject plea and stand trial can be ineffective assistance when defendant receives a longer prison sentence); *Padilla* v. *Kentucky*, 559 U.S. 356 (2010) (finding failure to advise defendant of immigration consequences of pleading guilty can be ineffective assistance of counsel). But since the Supreme Court did not notice that possibility in *Booker*, an attorney cannot be deemed ineffective for having missed it, too. *See Hill* v. *Lockhart*, 474 U.S. 52, 56 (1985) (“We have never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant’s plea of guilty to be voluntary, and indeed such a constitutional requirement would be inconsistent with the current rules of procedure governing the entry of guilty pleas in the federal courts.”).


187. Another example is the availability of habeas corpus relief for suspected enemies found within our nation during a time of war. After the Civil War the Supreme Court held in *Ex parte Milligan*, 71 U.S. 2 (1866), that a civilian could not be tried before a military tribunal even in a time of war as long as civilian courts were open and operating. (For different views on the reach and application of *Milligan*, compare *William H. Rehnquist, All the Laws but One: Civil Liberties in Wartime* (2000), with *Geoffrey R. Stone, Perilous Times: Free Speech
Congress’ power has waxed, 188 waned, 189 waxed, 190 and waned 191 for the last 100 years. And as for the last category: if the Supreme Court’s Booker decision leads to the resurrection of parole, we will have witnessed that mechanism go full circle, from life, to death, to rebirth.

What does this mean? It means that not only parole, but also rehabilitation as a penological theory, could make a comeback. Parole played an important role in implementation of the rehabilitative ideal, and reemergence of former could

188. U.S. CONST. art. I, § 8, cl. 3. ("The Congress shall have Power... among the several States... ").

189. At the outset of the 20th century the Supreme Court upheld Congress’ decision to prevent interstate commerce from being used to circulate items deemed dangerous or immoral. See, e.g., Hoke v. United States, 227 U.S. 308 (1913) (discussing prostitution); Hipolite Egg Co. v. United States, 220 U.S. 45 (1911) (discussing impure food and drugs); Champion v. Ames (The Lottery Case), 188 U.S. 321 (1901) (discussing lottery tickets and prize lists).

190. Beginning in the World War I period, the Court ruled in a series of cases that Congress lacked authority under the Commerce Clause to regulate an activity, such as manufacturing, which occurs entirely within one state, because it is not a part of interstate commerce. See, e.g., Hammer v. Dagenhart, 247 U.S. 251 (1918) (holding unauthorized by the Commerce Clause federal legislation regulating child factory labor).

191. During the New Deal, the Court later overruled or abandoned earlier precedents, ruling that Congress may regulate any activity that affects interstate commerce, whether considered individually or in gross, even if it is not in interstate commerce. See, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Congress can regulate activity that collectively affects interstate commerce. Wickard v. Filburn, 317 U.S. 111 (1942) (holding Congress can regulate a small-scale activity—there, home grown wheat—if the totality of that activity nationwide can affect interstate commerce); United States v. Darby, 312 U.S. 100 (1941) (same, overruling Hammer). That expansive interpretation of the Commerce Clause generally has proved enduring. Gonzales v. Raich, 545 U.S. 1 (2005) (same result for home-grown cannabis). But see cases cited infra note 192.

192. More recently, the Court has cut back on those decisions, recognizing limits on Congress’ power to outlaw noncommercial activity not shown to be part of or have a direct effect on interstate commerce. See, e.g., Morrison v. United States, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995). The Court revisited this issue in NFIB v. Sebelius, 132 S. Ct. 2566 (2012), which involved the constitutionality of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), but there was no majority opinion for the Court. Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito concluded that Congress lacked authority under the Commerce Clause to adopt that law, Sebelius, 132 S. Ct. at 2577–2609 (Roberts, C.J.); id. at 2642–76 (Scalia, Kennedy, Thomas, & Alito, J.J., dissenting), but they were not all on the same side of the result. Justices Ginsburg, Breyer, Sotomayor, and Kagan concluded that the law was a lawful exercise of Congress’ Commerce Clause power. Id. at 2609–42 (Ginsburg, J.). Five justices therefore continue to believe that the Commerce Clause limits Congress’s power.
"rehabilitate" the latter. It would be a mistake to believe that society has buried the rehabilitative ideal. Criticisms advanced against rehabilitation were voiced widely, but not universally. Defenders, then and now, argued critics of the efficacy of rehabilitation had overstated their case, that rehabilitation had never been given a fair chance to succeed because of insufficient funding for personnel (e.g., parole officers) and programs (e.g., job training), and that flaws in the system could and should be fixed before the entire rehabilitative ideal is tossed overboard.

As evidence that belief in rehabilitation has not yet flattened, in 2007 Congress enacted the Second Chance Act in order to authorize grant programs for reentry of offenders into the community. Underlying that position is a fundamental, longstanding belief in the possibility of redemption and desire to give everyone a second chance. Even Casey had another at-bat. Perhaps, rehabilitation will, too.
CONCLUSION

Parole, once praised for its contribution to the rehabilitative ideal and later vilified for its close association with the same goal, no longer plays a major role in the twenty-first century federal criminal justice system, having been replaced by fixed mandatory sentences and sentencing guidelines. Congress believed a mandatory Sentencing Guidelines system was the ideal means of ending or ameliorating the nationwide sentencing disparities that had plagued the federal criminal justice process for most of the twentieth century. Unfortunately, after initially and repeatedly upholding that mandatory Sentencing Guidelines system, the Supreme Court ultimately kicked that approach to the curb as being unconstitutional.

Ironically, the fact that the Court scotched the mandatory Sentencing Guidelines system on constitutional grounds creates the question whether the parole system that Congress sought to replace with mandatory Sentencing Guidelines automatically should come back into effect in order to implement the fundamental purpose of the SRA. Although much maligned and certainly never perfected, parole sought to play legitimate and important roles in the twentieth century criminal justice system: It afforded prisoners a second chance at freedom and attempted to make sure that sentences imposed in New York City and Salt Lake City were, if not identical, at least roughly comparable. An unforeseen result of the Supreme Court’s decisions in Apprendi and Booker is that parole can and should continue to serve those goals until Congress finds another way to improve sentencing in the federal criminal justice system.

“expensive,” and “stupid.” Former U.S. Supreme Court Chief Justice Warren Burger, quoted in Petersilia, supra, note 6, at 93 (“We must accept the reality that to confine offenders behind walls without trying to change them is an expensive folly with short-term benefits—winning battles while losing the war. It is wrong. It is expensive. It is stupid.”).