A Good Sentencing Precedent is Hard to Find

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In federal sentencing proceedings, federal law requires that district courts consider the sentences other courts have imposed in factually similar cases. Parties facing sentencing thus have an incentive to present to the court any relevant sentencing precedents. In practice, however, courts and parties face significant challenges in finding applicable precedents, because the publicly available records of federal sentencings are uniquely limited in multiple ways.

Unlike important judicial decisions in civil cases—which are typically reduced to written opinions and available in searchable databases such as Westlaw and LexisNexis—district courts do not typically issue written opinions regarding sentencing decisions. Instead, district courts usually memorialize sentencings only in the transcripts of the sentencing proceedings themselves. Further, unlike written opinions, sentencing transcripts are not readily available in electronic databases capable of handling advanced searches, and also often do not adequately explain the facts of the case.

For the period when the U.S. Sentencing Guidelines ("guidelines") were mandatory—prior to the Supreme Court's 2005 decision in *United States v. Booker*[1]—the lack of readily available sentencing precedent was arguably somewhat less problematic: in most cases, the ultimate sentence had to fall within a narrow range of months dictated by the guidelines. Post-*Booker*, however, discussions of precedent can take a larger role.

By way of example, this article discusses two recent areas where parties have argued and courts have weighed the impact of sentencing precedents: cases involving gambling addictions and cases involving college admissions or testing fraud. As seen in these cases, even with the limitations on the ways sentencing precedent is kept, parties at sentencings still rely heavily on the sentencing precedents that they are able to find, and courts give those precedents significant weight in imposing sentence. Given the importance of sentencing precedent, as exemplified by these cases, a more readily accessible body of sentencing law would benefit parties and courts alike.

This article proceeds in three parts. The first part discusses what happens at federal sentencing proceedings and how the decisions courts make at those proceedings get preserved. The second part discusses cases involving gambling addiction and college admissions and testing fraud, and the role sentencing precedent has played in those proceedings. Finally, the third part discusses potential reforms that could make sentencing precedents easier to find and the resulting benefits.[2]

I. The Inadequate Ways Federal Sentencing Decisions Get Preserved

Federal sentencing proceedings generally unfold in the following way. After a defendant's guilty plea or trial conviction, per the Federal Rules of Criminal Procedure, the U.S. Probation Office prepares a pre-sentence investigation report (PSR) and must make the report available to the parties at least thirty-five days before sentencing unless the defendant waives that rule.[3] The PSR calculates the applicable sentencing range under the guidelines and also reflects other relevant sentencing factors.[4] In addition, the PSR contains information about the defendant's history and characteristics.[5]

After the parties receive the PSR, the parties can make objections.[6] Then, at least seven days before sentencing, the Probation Office gives the PSR to the district court.[7] Importantly, the applicable case law treats PSRs as confidential materials, and courts generally do not make PSRs available to anyone other than the parties.[8] Following the receipt of the PSR and the resolution of any objections, parties often submit sentencing memoranda to the district court arguing in favor of a particular sentence prior to appearing for sentencing.

At sentencing proceedings, which are typically transcribed by court reporters, federal district judges are required to make sentencing decisions in accordance with Rule 32 of the Federal Rules of Criminal Procedure as well as with the multistep process set forth by the Supreme Court in *United States v. Gall*.[9] Among other things, the court must verify that the defendant and the defendant's attorney have read and discussed the PSR; may accept undisputed portions of the PSR as findings of fact; must give the defendant, the defendant's attorney, and an attorney for the government an opportunity to speak; and must reasonably hear from any victim who is present.[10] The court must also calculate the applicable guidelines range, hear and resolve disputes regarding the application of the guidelines, and consider the guidelines range.[11] Then the court must consider and weigh the factors enumerated in 18 U.S.C. § 3553(a) (hereinafter "Section 3553(a) factors") to determine what sentence they support.[12] *Gall* further requires sentencing courts to "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing."[13]

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Sentencing proceedings can give rise to any number of disputes. The parties may disagree on a given fact, a particular provision of the guidelines, the application of the Section 3553(a) factors, and usually the appropriate sentence itself, among other things. Thus, every single federal sentencing proceeding requires the district court to make at least one decision (regarding the appropriate sentence) and sometimes many (regarding other disputed issues). Yet, unlike in civil cases where written opinions are the norm for difficult judicial decisions, decisions about sentencing issues are typically delivered orally and memorialized only in the transcript of the sentencing proceeding, where judges must "state in open court the reasons for [the] imposition of the particular sentence."[14] As discussed further below, although sentencing judges will at times issue written sentencing opinions, that practice has not become the norm.

The American case system, as Second Circuit Judge John M. Walker, Jr., recently wrote, "is based on the principle of *stare decisis* and the idea that like cases should be decided alike."[15] In the context of sentencing, federal law codifies the importance of deciding like cases alike in 18 U.S.C. § 3553(a)(6), which instructs district courts to consider, in imposing sentence, "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[16]

Notwithstanding this dictate, however, the bulk of federal sentencing decisions are not readily available to litigants or courts. Sentencing opinions and appellate decisions are issued in only a small fraction of federal criminal cases. A Westlaw search of opinions published between October 2017 and September 30, 2018 (the U.S. Sentencing Commission's last fiscal year), referencing 18 U.S.C. § 3553(a)—which should capture most if not all decisions related to sentencing during that one-year period—resulted in approximately 600 federal district court opinions and 1,300 appellate decisions. By contrast, in the same twelve-month period ending September 30, 2018, the Administrative Office of the U.S. Courts reported that 71,550 (about 90%) of the 79,704 defendants whose cases were disposed of in federal courts entered guilty pleas, and another 1,559 were convicted at trial.[17] As a result, in just this single one-year period, there were approximately 70,000 federal criminal cases in which a district court made a sentencing decision.[18] Even if a couple thousand of these decisions are reflected in some way in district court or appellate court opinions, the courts' reasons underlying the overwhelming majority of these 70,000 decisions (for this one-year period) are likely reflected only in the transcripts of the sentencing proceedings.

Transcripts of sentencings, in theory, are public documents that could be collected in legal research databases, just like judicial opinions. In practice, however, sentencing transcripts are primarily available through the federal courts' PACER system.[19] PACER maintains a docket for every case with a link to every public filing, including sentencing transcripts (where the court reporter has prepared one), which users can click to download the document for a fee. Although this system makes it possible for litigants and courts to obtain the transcripts for just about any federal sentencing they want, they need to know what they want. A defense attorney preparing for a sentencing, for example, may be aware of a recent relevant sentencing decision that he or she would like to flag for the district court's attention; that attorney can usually use PACER to obtain the transcript of that sentencing.

Things get more complicated, however, when attorneys or courts need to research a sentencing issue—whether regarding the guidelines, the Section 3553(a) factors, the ultimate appropriate sentence for a given fact pattern, or something else—and do not know precisely where to look. PACER does not enable the sort of advanced searches that are possible on Westlaw or LexisNexis. PACER also does not allow for searches of the text of posted documents, and there is no other way presently available to perform such a search in a comprehensive way. Nevertheless, there are ways for parties to use PACER. For example, as described in more detail below, a defendant with sufficient financial resources can, with substantial effort and expense, pull and review all the sentencings that have taken place before one particular judge, or in one particular multi-defendant case, or that have been handled by one particular prosecutor. But such a search, even if it provides useful precedent for a sentencing proceeding, still merely scratches the surface of potentially relevant decisions, in addition to being cumbersome and expensive.

Transcripts have their limitations, as well. Even if a party finds a pertinent sentencing transcript, the transcript may not adequately summarize the relevant facts or adequately reflect the reasons for the court's decision. As Professor Marc Miller argued thirty years ago, in an article emphasizing the need for written sentencing opinions in appropriate cases: "The problem with transcripts is that they rarely have the organization or completeness of either written opinions or sentencing forms. . . . Transcripts are enormously difficult to read and often include irrelevant material."[20]

Beyond the limited number of sentencing opinions and the transcripts available on PACER, there is one other primary source of sentencing data worth noting. Courts are required by 28 U.S.C. § 994(w) to submit, within thirty days after entry of a judgment in a criminal case, a written report of the sentence to the U.S. Sentencing Commission that includes (1) the offense for which the sentence is imposed; (2) the age, race, and sex of the offender; (3) information regarding factors made relevant by the Sentencing Guidelines; (4) the judgment and commitment order; (5) the written statement of reasons; (6) any plea agreement; (7) the indictment or other charging document; (8) the PSR; and (9) other information that the Sentencing Commission finds appropriate.[21]

The Sentencing Commission compiles the information from these reports in comprehensive raw data files that are available to the public, and also uses the data to produce its

Annual Report and *Sourcebook of Federal Sentencing Statistics*.[22] The data is easy to download but difficult to interpret. In order to analyze the data, one must use statistical analysis software such as SPSS. This raw data has made possible some useful academic studies,[23] and, as described below, can help parties find useful precedent, but it has a serious limitation, in that unlike an opinion or even a transcript, the data does not include the facts of the case and the court's particular reasons for deciding an issue in a particular way.

As far back as *Federalist No. 78*, Alexander Hamilton argued that lifetime appointment was necessary for federal judges in order to attract those with sufficient skill to the bench because, among other reasons, in our system "precedents must unavoidably swell to a very considerable bulk and must demand long and laborious study to acquire a competent knowledge of them."[24] In our current sentencing system, however, even an attorney's "long and laborious study" will not be sufficient to acquire "competent knowledge" of the vast number of federal sentencing decisions because of the way those decisions are recorded. For any given future sentencing, there may be thousands of relevant past sentencings, but no practical way for counsel or the court to find them.

II. Current Sentencing Practice: How Parties and Courts Use Sentencing Precedent

Current federal sentencing practice illustrates the great importance sentencing precedents have within our system, how courts have relied on precedent, the challenges parties face in finding precedent, and the ways in which parties have confronted those challenges and presented their findings to courts. Two areas in particular have recently given rise to some helpful examples of these issues: cases involving gambling addictions and cases involving college admissions or testing fraud.

Starting with a line of cases involving gambling addiction, in *United States v. Dikiara*, a careful, published sentencing opinion by Judge Lynn Adelman (E.D. Wisc.), Judge Adelman explains at length, based on a number of sources from medical and scientific publications, how "addiction can mitigate a defendant's culpability."[25] In particular, quoting from a case about drug addiction, Judge Adelman wrote that addiction "physically hijack[s] the brain," and thus "diminishes the addict's capacity to evaluate and control his or her behaviors."[26] Ultimately, Judge Adelman sentenced the defendant to just fifteen months' imprisonment, well below the guidelines range of forty-one to fifty-one months.[27]

Subsequently, in *United States v. Caspersen*, Judge Jed S. Rakoff[28] in the Southern District of New York conducted an extensive sentencing proceeding aimed at determining the degree to which defendant Andrew Caspersen's gambling addiction mitigated his culpability.[29] Mr. Caspersen, a former private equity executive, pled guilty to securities fraud and wire fraud in connection with his involvement in a series of schemes to obtain money to fund a gambling addiction, including a Ponzi-like scheme through which he offered investors—primarily family and friends—a riskless investment in debt instruments that guaranteed a 15–20% rate of return. Mr. Caspersen's sentencing submission relied heavily on *Dikiara*, which it described as "a leading post-*Booker* compulsive gambling case."[30]

At Mr. Caspersen's sentencing hearing, Judge Rakoff heard testimony from a psychiatrist specializing in gambling addiction who testified that Mr. Caspersen had a severe gambling disorder, which he characterized as a mental illness that impacted his conduct. Judge Rakoff agreed, stating that he was "quite convinced" that Mr. Caspersen's "very real gambling disorder," in language reminiscent of Judge Adelman's in *Dikiara*, "very seriously impacted his exercise of rational control and rational decision making," and that "no purpose will be served by letting him rot in prison for years on end."[31] Judge Rakoff sentenced Mr. Caspersen to forty-eight months' imprisonment, well below the guidelines range of 151–188 months.[32] Several news articles reported that Mr. Caspersen received leniency from the court because of his addiction to gambling.[33]

In cases since *Caspersen*, defense counsel have attempted to rely on *Caspersen* itself to argue for leniency based on addiction. In *United States v. Carton*, for example, sports radio host Craig Carton was convicted by a jury of conspiracy, wire fraud, and securities fraud for a ticket reselling scheme. Mr. Carton argued at sentencing that his gambling addiction should be a mitigating factor because it "reflect[ed] a diminished self-control which in turn bears on Mr. Carton's culpability for sentencing purposes."[34] At Mr. Carton's sentencing hearing, his lawyers referred repeatedly to *Caspersen* and provided the transcript of the hearing before Judge Rakoff to the sentencing judge, Chief Judge Colleen McMahon (S.D.N.Y.).[35] Judge McMahon sentenced Mr. Carton to forty-two months' imprisonment rather than the seventy months sought by the government, but it is unclear from the transcript the degree to which *Caspersen* influenced the sentence.

Similarly, in *United States v. D'Alessio*, the defendant also submitted to the sentencing judge, Judge Jesse M. Furman (S.D.N.Y.), the transcript of the *Caspersen* sentencing hearing and asked Judge Furman to follow Judge Rakoff in imposing a below-guidelines prison sentence because his conduct was due in part to his addiction to gambling.[36] Mr. D'Alessio's sentencing submission also referred to a non-incarceratory sentence imposed on a defendant by Judge Naomi Rice Buchwald, who considered the defendant's gambling addiction as a mitigating factor at sentencing.[37]

At Mr. D'Alessio's sentencing hearing, defense counsel and the government argued extensively, with reference to *Caspersen*, about whether Mr. D'Alessio's gambling addiction should be a mitigating factor. The government also argued for a lengthy sentence partly on the basis of sentences in other Ponzi scheme cases, further illustrating the importance of sentencing precedent.[38] Judge Furman

sentenced Mr. D'Alessio to seventy-two months' imprisonment, below the guidelines range of 121–151 months. In language that echoed Judge Rakoff's, Judge Furman attributed the departure, in part, to the addiction issues raised in *Caspersen*:

> I have no doubt, and I don't think it's disputed, that Mr. D'Alessio was in the grasp of serious mental health issues, and I agree with Judge Rakoff that is a relevant consideration, but it's certainly not exculpating altogether. It's not an excuse . . . but I do think it does mitigate his culpability in the sense that he wasn't fully in control of his actions, and I do see the fraud as an extension of that condition in many respects.[39]

Altogether, these sentencings illustrate the importance of precedent in federal sentencing proceedings: had Judge Adelman not published an opinion in *Dikiara*, had defense counsel in *Caspersen* not found that decision, and had subsequent defense counsel not found *Caspersen* itself, it is possible the results in these cases would have been different. At the same time, these cases illustrate the limitations of the current ways in which sentencing precedents are preserved. Issues of addiction and the degree to which addiction contributes to offense conduct likely surface at many, many federal sentencings. There may well be dozens or even hundreds of cases—out of some 70,000 each year—where district courts have grappled with these concerns. Putting aside what happened in the isolated examples above, what happens in the mine run of cases? Do courts routinely show leniency toward defendants with gambling or other addictions? Do courts routinely impose below-guidelines sentences? Do courts discount addiction issues or give them serious weight? Are there decisions all over the map? There is no practical way to develop rigorous answers to these questions, as there is no reasonable way for parties to find this complete body of precedent.

Another group of recent cases illustrates the same points about the importance of precedent at sentencings and the limitations of our current system. In an investigation nicknamed Operation Varsity Blues, federal prosecutors recently charged a number of individuals, including several celebrities, with committing bribery and fraud to get their children into particular colleges. One of the defendants charged in this case was the Hollywood actress Felicity Huffman.

On May 13, 2019, Ms. Huffman pled guilty to an Information charging her with conspiracy to commit mail fraud and honest services mail fraud, in connection with her payment of $15,000 to California college counselor William Rick Singer to falsify her daughter's SAT scores. In advance of sentencing, Ms. Huffman submitted to the court a statistical analysis by MCM Data Consulting, experts in analyzing sentencing data, concluding that between 2002 and 2018, judges in the District of Massachusetts imposed prison time for only five of the 127 defendants similarly situated to Ms. Huffman.[40] Although the Sentencing Commission does not include defendants' names or docket information with the data it publishes, Ms. Huffman's lawyers appear to have been able to use the data they obtained to identify three of the five defendants sentenced to prison, and were then able to obtain case records from PACER, which they used to distinguish those defendants' circumstances from Ms. Huffman's.[41] Ms. Huffman's counsel also appear to have used press reports and PACER dockets to identify testing fraud cases in New Jersey, Pennsylvania, and Massachusetts in which defendants were sentenced to probation, and argued that those sentences supported probation for her crime.

Ms. Huffman's lawyers, in their submission, focused particular attention on a New Jersey case that involved charges against approximately fifty defendants who participated in a scheme to cheat on the Test of English as a Foreign Language. Ms. Huffman argued that only the ringleader in the scheme received prison time, while forty-six defendants received probationary sentences, one received a fine, one case was dismissed, and two defendants were sentenced to time served.[42]

The government in Ms. Huffman's case countered her arguments by invoking its own precedent. In its sentencing submissions, the government highlighted some twenty-five cases that it claimed were comparable, all of which resulted in jail time.[43] In a reply submission, Ms. Huffman's lawyers argued that the facts in each of those cases were sufficiently different from Ms. Huffman's, and that all the cases involved higher guidelines ranges.[44]

At the sentencing proceeding, the government focused primarily on a single precedent that it had described briefly in one of its submissions: the sentence given to defendant Kelley Williams-Bolar, a mother from Ohio who used her father's address in a neighboring suburb to register her daughters for school.[45] Ms. Williams-Bolar, who was prosecuted in state court in Ohio, was sentenced to ten days' imprisonment with three years of probation and community service. In Ms. Huffman's case, at sentencing, the government argued that "[i]f a poor single mom from Akron who is actually trying to provide a better education for her kids goes to jail, there is no reason that a wealthy, privileged mother with all the legal means available to her should avoid that same fate," and that "if we believe in just punishment, we should not put the Williams-Bolars in jail while letting the Huffmans go free."[46] (Just as it had omitted the higher guidelines ranges from the cases cited in its submissions, the government made a key omission when citing Ms. Williams-Bolar's case: the government neglected to mention that following her conviction, Ms. Williams-Bolar asked Ohio Governor John Kasich to grant her clemency, and Governor Kasich agreed, reducing her felony convictions to first-degree misdemeanors, in order to give her a "second chance.")[47]

Facing these conflicting precedents, Judge Indira Talwani sentenced Ms. Huffman principally to fourteen days' imprisonment, which was shorter than the month sought by the government, but longer than the sentence of

probation Ms. Huffman requested. In reaching this decision, Judge Talwani explained that "[t]he government says the question isn't how much time in prison but that there is some period of incarceration that should be imposed. And in this case"—perhaps with Ms. Williams-Bolar in mind—"I am agreeing that there should be incarceration imposed."[48]

Judge Talwani reached a similar compromise position in her sentencing of Gordon Caplan, a co-defendant of Ms. Huffman's. Mr. Caplan's sentencing memorandum, like Ms. Huffman's, discussed the same Massachusetts and New Jersey testing-fraud cases Ms. Huffman covered, and argued that the defendants in those cases received noncustodial sentences, so that at most he should receive the same two-week sentence that Judge Talwani imposed on Ms. Huffman.[49] On October 3, 2019, Judge Talwani sentenced Mr. Caplan to one month in prison, shorter than the eight months' imprisonment that the government sought, but more than the two-week sentence Ms. Huffman received.[50]

As with the cases involving gambling addiction described above, Ms. Huffman's and Mr. Caplan's cases are as notable for what the parties did not present as for what they did. The case that the government ultimately presented as its leading authority in Ms. Huffman's case—Ms. Williams-Bolar's case from an Ohio state court—is not reflected in any published opinion memorializing the court's decision. Rather, in all likelihood, the government found it because the press happened to cover that case, and the press reports are available online. Had the government conducted more systematic research, what would it have found? Among the tens of thousands of sentencing decisions federal judges make every year, at least some, beyond those the government cited, must have confronted frauds that were actually similar to those in Ms. Williams-Bolar's and Ms. Huffman's cases. Is Ms. Williams-Bolar's Ohio case an extreme outlier, in that the court imposed prison time? Have any federal courts ever reached a similar decision? How have the vast majority of federal courts confronting similar issues ruled? Our current system makes it impossible to answer these questions effectively.

III. How Better to Preserve Sentencing Precedent

The problems discussed in this article have multiple solutions. First, and most obviously, district courts can and should make efforts to issue sentencing opinions in a broader range of cases. Others, including Professor Miller and Professor Chanenson, have made this same call in the past, and some district judges already make significant efforts in this regard.[51] Most recently, citing an earlier iteration of this article, Judge Rakoff issued a written opinion in *United States v. Sayoc*, noting by way of explanation that "since the transcripts of sentencing hearings are not readily searchable for particular terms, the result is that the law of sentencing does not develop as fully as it might if the reasons for particular sentences were also set forth in written opinions."[52] But written opinions are far from the norm. In the past five years, for example, most federal judges in the Southern and Eastern Districts of New York published just a few sentencing opinions each.

The roadblock to more robust opinion practice, as Professor Miller observed, seems to be that "[i]n a world of overburdened courts, one essential concern must be addressed: How much work will sentencing opinions add . . . ?"[53] Writing in 1989, Professor Miller responded to his own question that "[t]he answer to the workload concern is threefold: Sentencing opinions should not be difficult to write; early practice in the federal courts suggests that opinions can be short and yet complete in many cases; and, not every case will require an opinion."[54] These reasons remain true today, and to that list, one might add that technological advancements over the past thirty years should make the process of researching and writing an opinion all the faster.

Second, even in cases where a district court does not prepare an opinion, district courts should make efforts, in sentencing transcripts, to explain not only the legal reasoning, but also the relevant facts behind the particular sentences imposed. As discussed above, the document that generally serves as the best source of sentencing facts—the PSR—is confidential and thus not available to parties in future cases. When courts simply adopt the PSR at sentencing without providing any additional discussion of its contents, they effectively limit the ability of future parties to understand fully the facts underlying the sentence imposed.

Third, legal research databases need to make more substantial efforts to include comprehensive sets of federal sentencing transcripts, together with the parties' sentencing submissions, in a readily searchable format. The technology exists today to develop a database of sentencing transcripts that would function just as existing databases of case law do.

The combination of these reforms would ultimately aid the development of sentencing law and enhance the fairness of federal sentencing for all involved. As Professor Miller wrote at the inception of the Sentencing Guidelines, trial judges, appellate judges, the Sentencing Commission, the public, and each offender would all gain something from a system in which judges provide sentencing opinions, because without an "opinion practice" sentencing "remains hidden."[55] Developing a more robust body of readily accessible federal sentencing law—including opinions and transcripts—would serve the same goal of pulling sentencing practice out of hiding.

Notes

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1 543 U.S. 220 (2005).

2 This article expands upon a topic the author first wrote about in a column, *The Vanishing of Federal Sentencing Decisions*, The Insider Blog, July 19, 2019, https://www.forbes.com/sites/insider/2019/07/19/the-vanishing-of-federal-sentencing-decisions/#3c4e937d4c44.

3 Fed. R. Crim. P. 32(e)(2).

4 Fed. R. Crim. P. 32(d)(1).

5 Fed. R. Crim. P. 32(d)(2).

6 Fed. R. Crim. P. 32(f).

7 Fed. R. Crim. P. 32(g).

8 *See, e.g.,* United States Dep't of Justice v. Julian, 486 U.S. 1, 12 (1988); In re Siler, 571 F.3d 604, 610 (6th Cir. 2009); United States v. Huckaby, 43 F.3d 135, 138 (5th Cir. 1995).

9 United States v. Gall, 552 U.S. 38 (2007) ("[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range . . . [T]he Guidelines should be the starting point and the initial benchmark"); see also U.S. Sentencing Guidelines Manual § 1B1.1(a)–(c).

10 Fed. R. Crim. P. 32(i).

11 Gall, 552 U.S. at 49–50.

12 The Section 3553(a) factors include the "nature and circumstances of the offense and the history and characteristics of the defendant"; the need for the sentence imposed to "reflect the seriousness of the offense," "afford adequate deterrence," and "protect the public"; the "kinds of sentences available"; the sentencing range established by the U.S. Sentencing Guidelines; the need "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"; and the need "to provide restitution to any victims." 18 U.S.C. § 3553(c).

13 Gall, 552 U.S. at 590.

14 *See* 18 U.S.C. § 3553(c). Judges also are required to complete the form entitled "Statement of Reasons." *See* https://www.uscourts.gov/sites/default/files/ao245sor.pdf. But this "anemic form," as Professor Steven L. Chanenson has argued, lacks space for a factual justification and thus "almost seems designed to encourage the kind of mechanical—and arguably unreasoned—approach to sentencing *Booker* tried to extinguish." Steven L. Chanenson, *Write On*!, 115 Yale L.J. Pocket Part 146 (2006), http://yalelawjournal.org/forum/write-on.

15 Hon. John M. Walker, Jr., *The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effect?*, Stanford Law School China Guiding Cases Project, Feb. 29, 2016, http://cgc.law.stanford.edu/commentaries/15-John-Walker.

16 18 U.S.C. § 3553(a)(6).

17 *See* Table 5.4, U.S. District Courts, Criminal Defendants Disposed of, by Method of Disposition, during the 12-Month Periods Ending June 30, 1990, and September 30, 1995 through 2018, https://www.uscourts.gov/sites/default/files/data_tables/jff_5.4_0930.2018.pdf.

18 *See* Fiscal Year 2018 Overview of Federal Criminal Cases, U.S. Sentencing Commission (June 2019), https://www.ussc.gov/research/data-reports/overview-federal-criminal-cases-fiscal-year-2018.

19 Public Access to Court Electronic Records (PACER) is an electronic public access service that allows users to locate cases and obtain records from federal courts. Transcripts of federal court proceedings are available through PACER for 10¢ per page. *See* https://www.pacer.gov.

20 Marc Miller, *Guidelines Are Not Enough: The Need for Written Sentencing Opinions*, 7 Behav. Sci. & L. 3, 7 (1989).

21 28 U.S.C. § 994(w)(1).

22 The Sentencing Commission's data files are available at https://www.ussc.gov/research/datafiles/commission-datafiles and also may be accessed through the University of Michigan's Inter-University Consortium for Political and Social Research and the Federal Justice Statistics Resource Center. In "Research Notes," the Sentencing Commission explains how it collects and analyzes sentencing information. *See* Christine Kitchens, *Commission Collection of Individual Offender Data*, Research Notes, Issue 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-notes/20190719_Research-Notes-Issue1.pdf.

23 *See, e.g.,* Jillian Hewitt, *Fifty Shades of Gray: Sentencing Trends in Major White-Collar Cases*, 125 Yale L.J. (2016), https://digitalcommons.law.yale.edu/ylj/vol125/iss4/4.

24 Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vand. L. Rev. 647, 663 (1999) (quoting Federalist No. 78).

25 *See* United States v. Dikiara, 50 F. Supp. 3d 1029, 1032-33 (E.D. Wisc. 2014).

26 *Id.* at 1032.

27 *Id.* at 1031–32, 33.

28 The author served as a law clerk for Judge Rakoff from August 2006 through August 2007.

29 Transcript of Sentencing Hearing, United States v. Caspersen, No. 16-CR-414 (JSR) (S.D.N.Y. Nov. 4, 2016), ECF No. 37. Section 5H1.4 of the Sentencing Guidelines prohibits courts from departing downward based solely on a defendant's addiction to gambling. *See* U.S. Sentencing Guidelines Manual § 5H1.4 ("Addiction to gambling is not a reason for a downward departure."). The policy statement set forth in Section 5H1.4 of the Sentencing Guidelines was issued in 2003 in response to the PROTECT Act, in which Congress directed the Sentencing Commission to promulgate guidelines "to ensure that the incidence of downward departures is substantially reduced." *See* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (the "PROTECT Act"), Public Law 108–21. Still, since the Supreme Court rendered the guidelines advisory in *United States v. Booker*, the Section 5H1.4 policy statement is not binding on sentencing judges and courts have considered defendants' gambling addiction in crafting appropriate sentences under Section 3553(a) and under Section 5K2.13 of the Sentencing Guidelines, which permits a downward departure if "(1) the defendant committed the offense while suffering from a significantly reduced mental capacity, and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense." *See* U.S. Sentencing Guidelines Manual § 5K2.13.

30 *See* Sentencing Submission on Behalf of Andrew Caspersen at 6, United States v. Caspersen, 16-CR-414 (JSR) (Oct. 21, 2016), ECF No. 29 (citing Dikiara, 50 F. Supp. 3d 1029).

31 Transcript of Caspersen Sentencing Hearing, *supra* note 29 at 81–82.

32 *Id.* at 82.

33 *See, e.g.,* Christopher M. Matthews, *Andrew Caspersen Sentenced to Four Years in Prison for Bilking Investors*, Wall St. J. (Nov. 4, 2016), https://www.wsj.com/articles/andrew-caspersen-sentenced-to-four-years-in-prison-1478296465; Barbara Ross, *Gambling Addict Financier Andrew Caspersen Gets Four Years after Pleading Guilty in $38M Fraud Case*, N.Y. Daily News (Nov. 4, 2016), https://www.nydailynews.com/new-york/manhattan/gambling-addict-financier-caspersen-years-38m-fraud-article-1.2858919.

34 Transcript of Sentencing Hearing at 19–20, United States v. Carton, No. 17-CR-680 (CM) (S.D.N.Y. Apr. 5, 2019), ECF No. 191.

35 *Id.* at 4, 15–16, 20.

36 Transcript of Sentencing Hearing at 3, United States v. D'Alessio, No. 18-617 (JMF) (S.D.N.Y. April 5, 2019); Sentencing Memorandum on Behalf of Michael D'Alessio, United States v.

D'Alessio, No. 18-CR-617 (JMF) (S.D.N.Y. Mar. 8, 2019), ECF No. 34.

[37] D'Alessio Sentencing Memorandum, *supra* note 36 at 32 (citing United States v. Rosenblum, 11-CR-675 (NRB) (S.D.N.Y.)).

[38] Transcript of D'Alessio Sentencing Hearing, *supra* note 36 at 15–16.

[39] *Id.* at 51–52.

[40] Defendant Felicity Huffman's Sentencing Submission, United States v. Huffman, No. 19-CR-10117 (D. Mass. Sept. 6, 2019), ECF No. 425, attach. 4. Devin Sloane, another defendant in the College Admission Bribery Scandal who was sentenced shortly after Ms. Huffman, cited to Ms. Huffman's Sentencing Submission to support his argument that in his guidelines range "statistical evidence is clear that the overwhelming majority of such defendants nationally and in this district are sentenced to non-incarceration sentences." Defendant Devin Sloane's Sentencing Memorandum at 7, United States v. Sloane, No. 19-CR-10117 (D. Mass. Sept. 19, 2019), ECF No. 462.

[41] Huffman's Sentencing Submission, *supra* note 40 at 12–13.

[42] *Id.* at 14–15.

[43] Government's Consolidated Sentencing Memorandum at 10–15, United States v. Abbott et al., 09-cr-10117 (IT) (D. Mass. Sept. 6, 2019), ECF 423.

[44] Defendant Felicity Huffman's Reply to Government's Sentencing Memorandum, United States v. Huffman, No. 19-10117 (D. Mass. Sept. 12, 2019), ECF No. 442.

[45] Government's Consolidated Sentencing Memorandum, *supra* note 43 at 13; Transcript of Huffman Sentencing Hearing at 16–17, United States v. Huffman, No. 19-cr-10117 (IT) (D. Mass. Sept. 13, 2019), ECF No. 474.

[46] *Id.* at 17.

[47] Jo Ingles, *Ohio Reduces Convictions in Closely Watched School-Choice Case*, Reuters (Sept. 7, 2011), https://www.reuters.com/article/us-ohio-school-clemency/ohio-reduces-convictions-in-closely-watched-school-choice-case-idUSTRE7867QD20110907.

[48] Transcript of Huffman Sentencing Hearing, *supra* note 45 at 40.

[49] Gordon Caplan's Sentencing Memorandum at 31–32, United States v. Caplan, No. 19-10117 (D. Mass. Sept. 26, 2019), ECF No. 490.

[50] *See* Chris Villani, *Ex-Wilkie Farr Chair Gets 1 Month for 'Varsity Blues' Bribe*, Law360 (Oct. 3, 2019), https://www.law360.com/sports-and-betting/articles/1205649/breaking-ex-willkie-farr-chair-gets-1-month-for-varsity-blues-bribe; Transcript of Sentencing Hearing at 47, United States v. Caplan, No. 19-10117 (D. Mass. Oct. 3, 2019), ECF No. 515.

[51] *See* Chanenson, *supra* note 14 (providing list of judges "across the ideological spectrum" who "have all taken their responsibility to document their reasoned sentencing judgment seriously").

[52] United States v. Sayoc, 388 F. Supp. 3d 300, 301 n.1 (S.D.N.Y. 2019).

[53] *See* Miller, *supra* note 20, at 17.

[54] *Id.* at 18.

[55] *Id.* at 21.