

ValpoScholar

Valparaiso University Law Review

Volume 39
Number 3 *Symposium: Shifting Powers in the
Federal Courts*

pp.693-740

Symposium: Shifting Powers in the Federal Courts

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Recommended Citation

Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 Val. U. L. Rev. 693 (2005).

Available at: <https://scholar.valpo.edu/vulr/vol39/iss3/4>

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THE RETURN OF FEDERAL JUDICIAL DISCRETION IN CRIMINAL SENTENCING

Susan R. Klein*

Federal judicial discretion in criminal sentencing has come full circle over the last two hundred years. The English practice in colonial times for felony offenses consisted of a determined, or fixed, sentence for every crime, depending upon a finding beyond a reasonable doubt by a jury of all of the “essential ingredients” of that crime.¹ The judicial role was largely a ministerial one—impose that sentence mandated by the jury verdict. America, on the other hand, soon switched to indeterminate sentencing, giving state and federal judges the authority to impose any sentence they chose within the very wide penalty range established by the legislature.² Each judge was master of his courtroom upon receiving a conviction by jury verdict or guilty plea. He held a sentencing hearing if he wanted one, he heard whatever evidence he felt relevant, and he made all of the moral, philosophical, medical, penological, and policy choices surrounding what particular sentence to impose upon a particular offender.³ There were no standards to assist or confine the judge in making his determination, he need not publicly state the reasons for his selection of a particular sentence, and his decision was virtually unreviewable by any higher court.⁴

Judges had ceded some of this enormous discretion by the early 1960s, as every state and the federal government permitted a parole board or probation agency to release a defendant after serving the minimum sentence imposed. Judges nonetheless, in the words of Judge Marvin Frankel, possessed discretion that was “terrifying and intolerable for a society that professes devotion to the rule of law.”⁵ This discretion was abruptly and almost completely terminated shortly after

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¹ 2 T. BISHOP, CRIMINAL PROCEDURE 200-01 (1866) (collecting cases).

² See *infra* notes 18-22 and accompanying text.

³ See generally Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972); see *infra* notes 22-26 and accompanying text.

⁴ The few exceptions were as follows: (1) a sentence imposed using unconstitutional criteria, such as race or political viewpoint, *Wayte v. United States*, 470 U.S. 598 (1985); (2) a vindictive sentence based upon a defendant’s assertion of his constitutional right to appeal his conviction, *North Carolina v. Pearce*, 395 U.S. 711 (1969); and (3) a term of years or fine so excessive compared to the crime that it offended the Eighth Amendment’s proportionality requirement, *Harmelin v. Michigan*, 501 U.S. 957 (1991); *United States v. Bajakajian*, 524 U.S. 321 (1998). I will not discuss capital sentencing, with its vast array of constitutional restrictions, in this article.

⁵ MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973). Judge Frankel is widely regarded among scholars as the father of the modern sentencing movement.

Congress enacted the Sentencing Reform Act of 1984, which transferred power over federal criminal sentencing from district judges to the newly created United States Sentencing Commission.⁶ Once the Commissioners crafted the first Federal Sentencing Guidelines Manual in 1987, the judge was demoted from policy-maker to fact-finder. Rather than deciding which crimes were most serious, and what aggravating and mitigating characteristics regarding offenders and offenses she believed warranted a higher or lower sentence in the cases before her, the Commissioners made all of those decisions in advance, for every conceivable case, and listed the outcomes in the Manual. The judge then determined whether those aggravating or mitigating facts that mattered to the Commissioners existed, and plugged these findings into the formula provided in the Manual to reveal the appropriate sentence.

Needless to say, most federal trial court judges were not overly fond of this new arrangement. After many false starts, a successful attack was finally launched last term in *United States v. Booker*.⁷ This was the latest of a line of cases, starting in 1999, that attempted to define the role of the Sixth Amendment jury trial right in criminal sentencing. The newly articulated right that emerged prior to *Booker* required jury fact-finding on all statutory matters mandating an increase in the penalty a defendant would otherwise receive for an offense. Federal judges really did not have a horse in that race, as they previously showed no inclination to jealously guard their fact-finding ability from outside incursion.⁸ If this Sixth Amendment rule was extended to mandatory sentencing guidelines, this would shift fact-finding as to offense and offender characteristics from the judge to the jury. While this would make trials more cumbersome and sentences slightly less uniform,⁹ it would not

⁶ The Sentencing Reform Act of Oct. 12, 1984, Pub. L. No. 98-473, §§ 211-38, 98 Stat. 1987 (1984) [hereinafter SRA], was part of the Comprehensive Crime Control Act of 1984.

⁷ 125 S. Ct. 738 (2005).

⁸ There was no negative judicial reaction to *United States v. Gaudin*, 515 U.S. 506 (1995) (holding that "materiality" is an element of the offense of tax fraud, and thus the Sixth Amendment requires that it be submitted to the jury for a beyond a reasonable doubt finding). Judges expect the jury to be the fact-finder unless the right is waived by both parties. Similarly, there was little judicial reaction to placing large portions of the fact-finding required under the Federal Sentencing Guidelines with the Probation Department. Judges did not look beyond the Presentence Investigative Report unless the defendant challenged a particular finding. In finding the challenged facts, judges relied upon lax procedures, refusing to apply the Federal Rules of Evidence or the Confrontation Clause to the proceedings. See *United States v. Petty*, 982 F.2d 1365 (9th Cir. 1993) (collecting cases from circuits holding the confrontation clause inapplicable to sentencing proceedings).

⁹ See Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 227-28 (2003) [hereinafter Klein & Steiker, *Search for Equality*].

affect real federal judicial discretion in sentencing—there was not much to protect.¹⁰

Amazingly, two different five-member majorities of the Booker Court managed to reaffirm the newly articulated jury right (in what I will call the “merits” majority), while at the same time greatly expanding true federal judicial discretion in sentencing matters (in what I will call the “remedial” majority). The Sixth Amendment sentencing revolution, as it turns out, provided perfect cover for a judicial revolt from the constraints of Congress and the Commission in criminal sentencing policy. In Part I of this article, I will briefly recount the history of American criminal sentencing and the line of Sixth Amendment cases leading to *Booker*. After analyzing the *Booker* and *Fanfan* cases, I will offer some educated speculation as to why Justice Ginsburg inexplicably joined both competing majority opinions in *Booker*, and what the five Justices writing for the remedial majority hoped to gain by their tortured interpretation of the Sentencing Reform Act. I suggest that this five justice block¹¹ hoped to revive judicial discretion in federal sentencing in the wake of what they considered the rude, disruptive, and unwise coup over criminal sentencing that Congress accomplished via the Sentencing Reform Act of 1984¹² and the Feeney Amendment of 2002.¹³ For Justice Breyer, the architect of the Federal Sentencing Guidelines, the fifth attempt to make them advisory was the charm.¹⁴

In Part II, I will predict, based upon sentences imposed post-*Booker* and the structure of the United States Code and the Federal Rules of Criminal Procedure, the actual effect that *Booker* will have on federal sentencing. We will see a sharp, perhaps temporary surge of judicial discretion at the trial level in sentencing, used primarily to decrease the

¹⁰ Judicial discretion in federal sentencing was reduced to departure authority for exceptional cases outside the Federal Sentencing Guidelines “heartland.” See U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2004) (authorizing departures); *United States v. Rivera*, 994 F.2d 942, 947 (1st Cir. 1993).

¹¹ This block composed of Justice Ginsburg plus the four dissenting Justices in the merits majority consisting of Justices Breyer, O’Connor, Kennedy, and Chief Justice Rehnquist, who also dissented in every other Sixth Amendment case leading up to *Booker*.

¹² SRA, *supra* note 6.

¹³ Prosecutorial Remedies and Tools Against the Exploitation of Children Today (“PROTECT Act”), PROTECT Act, Pub. L. No. 108-21, §§ 401(b), (g), (i), 117 Stat. 650, 668-69, 671-73 (2003) (amending guidelines to increase penalties for child pornography, curb judicial discretion in downward departures, and tighten appellate standard of review of criminal sentences).

¹⁴ I owe this count to Professor Kate Stith, in her e-mail to a Stanford Roundtable sentencing list-serve. E-mail from Kate Stith, Yale Law School, to Susan R. Klein, University of Texas Law School (Mar. 8, 2005) (on file with author). I had counted only three until receiving her greater insight.

length of sentences, before federal prosecutors regain some (but not all) of their dominance. While there will thus be a shift in the balance of power from the prosecutor to the judiciary (at least until Congress supplants *Booker* by new legislation), the jury will continue to play a relatively minor role.

In Part III, I will describe what I anticipate will be *Booker's* effect on plea bargaining. This section is based in large part upon the admittedly unscientific method of questioning my contacts in various U.S. Attorney's and Federal Public Defender's Offices and at federal judicial chambers throughout the country. Though the substantive terms of bargains will shift in favor of defendants, the overall percentage of guilty pleas will ultimately remain quite high, and a sufficient number of trump cards will remain in the prosecutor's deck (coupled with institutional pressures from Federal Public Defender's Offices and the federal judiciary) to convince defendants to accept pleas in the vast majority of cases. The shift of fact-finding responsibility that does occur will again flow in most cases from the prosecutor to the judge, not to the jury. I conclude with a few thoughts about the likely duration of this new federal sentencing scheme, and what measures would actually be required to truly either expand the jury's role in criminal trials or to more substantially shift sentencing discretion back to the judicial branch.

I. THE SIXTH AMENDMENT AND CRIMINAL SENTENCING

A brief history of federal criminal sentencing from the founding of our nation through the Court's decision in *Booker* will illustrate the strange path by which the interplay of political institutions, social reform movements, and judicial desire brought about the return of judicial discretion in federal criminal sentencing.

A. *Early History*

The English practice in colonial times for felony offenses consisted of a set or determined sentence for every offense, primarily the death penalty or a fine which varied according to the value of the property stolen.¹⁵ A defendant knew from the face of the charging instrument precisely what sentence she would receive if convicted.¹⁶ This regime soon gave way in America, as early as the 1780s, to the criticism that it did not allow for individuation of punishment, and the belief that death

¹⁵ See *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977); Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1472-77 (2001) [hereinafter King & Klein, *Essential Elements*]; Klein & Steiker, *Search for Equality*, *supra* note 9, at 227-28.

¹⁶ 2 BISHOP, *supra* note 1, at 200.

and corporal punishment were disproportionate penalties with little deterrent effect.¹⁷ Thus, of the twenty-two federal crimes enacted by the First Congress in 1790, only six required a determinate sentence of hanging.¹⁸ The majority of federal crimes provided a maximum period of imprisonment only, leaving the determination of what sentence to impose to the discretion of the district judge.¹⁹ The determinate sentence of death for felonies was likewise replaced in the states in the late eighteenth and early nineteenth century with incarceration in a penitentiary.²⁰ At roughly the same time as the decline of capital sentencing came the decline of mandatory penalties in favor of judicial discretion to impose any sentence within the range established by Congress or the state legislature.²¹

This regime granted judges enormous and essentially unbridled authority to impose a sentence anywhere within the legislatively prescribed range, as sentences could not be appealed.²² Federal and state judges (except in those few states still assigning some role to the jury) possessed full discretion to consider any information about the offender and offense that they thought relevant and helpful in determining the appropriate sentence.²³ Juries, on the other hand, played no role in federal sentencing²⁴ and a declining role even in those few states practicing some form of jury sentencing.²⁵ It is true that many

¹⁷ See, e.g., ADAM J. HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* 8-40 (1992); DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 49 (Little Brown 1971).

¹⁸ See An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112 (1790).

¹⁹ See *id.*

²⁰ Hirsch, *supra* note 17, 8-40 (noting that Massachusetts began to rely on the penitentiary in 1785); RONALD J. PESTRITTO, *FOUNDING THE CRIMINAL LAW: PUNISHMENT AND POLITICAL THOUGHT IN THE ORIGINS OF AMERICA* 52-53 (2000) (noting that Virginia shifted from death to imprisonment in 1796); Rothman, *supra* note 17.

²¹ See, e.g., 1 T. BISHOP, *CRIMINAL PROCEDURE* 606 (1866) (“[I]n some of our States the statutes fix only the maximum of punishment, leaving the court to go as low as it sees fit.”); George Fisher, *Plea Bargaining’s Triumph*, 109 *YALE L.J.* 857, 913-14 (2000) (noting the broad discretion given to judges in sentencing during this period).

²² See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989). *But see* exceptions listed *supra* note 4.

²³ *Williams v. New York*, 337 U.S. 241, 244 (1949) (holding that judge could overrule jury recommendation of life imprisonment and impose the death penalty based upon his conclusion from past uncharged conduct that the defendant possessed “a morbid sexuality” and was a “menace to society”).

²⁴ See Charles O. Betas, *Jury Sentencing*, 2 *NAT’L PAROLE AND PROBATION ASS’N J.* 369 (1956).

²⁵ The number of jurisdictions that permitted any jury role in non-capital sentencing shrank to thirteen by the middle of the twentieth century. See Comment, *Consideration of Punishment by Juries*, 17 *U. CHI. L. REV.* 400, 401 (1949) [hereinafter Comment, *Consideration of Punishment*]; Note, *Statutory Structures for Sentencing Felons to Prison*, 60 *COLUM. L. REV.* 1134, 1154-55 (1960) [hereinafter Note, *Statutory Structures*]. Even in those thirteen states, the jury frequently could

statutes during this time period designated a higher range of allowable penalties (raising the minimum and maximum potential sentence) upon proof of some aggravating fact, such as the value of the item stolen, that a burglary occurred at nighttime, or that the current offense was the defendant's second.²⁶ However, while that aggravating fact had to be pleaded in the charging instrument and proven to a jury beyond a reasonable doubt before triggering the higher statutory range, pure judicial discretion reigned supreme within the wide range authorized by the verdict.

The late nineteenth century brought the rehabilitation model of criminal sentencing to the fore—the public held the now quaint belief that experts in criminology and psychiatry could treat and correct offenders.²⁷ Overlaying judicial discretion in sentencing an offender to an indeterminate sentence between the statutory minimum and some greater number of years up to the maximum sentence, the parole board entered the fray.²⁸ These federal and state agencies considered the prisoner's behavior during incarceration in determining her actual release date.²⁹ This made the sentence a defendant might receive doubly indeterminate—she could predict neither what the judge nor what a later parole board might do.

sentence for only a few of the most serious crimes, could not sentence following a guilty plea, and a sentence could be modified by the judge. *See, e.g.,* Note, *Statutory Structures, supra* at 1154-55; *Blevins v. People*, 2 Ill. (1 Scam) 172 (1835) (recognizing that juries at common law were not granted the power to determine the punishment, and interpreting an 1833 statute to authorize jury sentencing following verdict but not following guilty pleas).

²⁶ *See, e.g.,* *State v. Kane*, 23 N.W. 488, 490-92 (Wis. 1885) (collecting cases); *Jones v. State*, 63 Ga. 141, 144 (1879) (holding that government had to aver whether a burglary took place during the night or day when the penalty range—both the minimum and the maximum, increased based upon that fact).

²⁷ *See, e.g.,* KATE SMITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS*, 18-21 (1998); Fisher, *supra* note 21, at 1055; King & Klein, *Essential Elements, supra* note 15, at 1505-13; Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1374 (1999); Comment, *Consideration of Punishment, supra* note 25, at 401 n.6 (noting that many states practicing jury sentencing in the early nineteenth century repealed or limited jury sentencing as inconsistent with the notion that correcting offenders “is a problem for specialists in criminology and psychiatry”).

²⁸ Fisher, *supra* note 21, at 1055 (noting that six states by the end of the nineteenth century deprived the judge of the authority to set the sentence within the statutory minimum and maximum and placed authority for release dates solely with the parole board); Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 473-74 (1961) (listing statutes from New York, Pennsylvania, and California that required judges to sentence offenders to indeterminate terms of between one year and life and allowed the parole board to set the release date after the minimum sentence was served).

²⁹ Parole hearings would consider such things as an offender's participation in educational opportunities and therapy, any restitution she may have made to her victims, drug and alcohol treatment, relationships with the guards and other prisoners, and showings of remorse.

The indeterminate sentencing model began to unravel in the early 1970s, in response to criticism that the rehabilitation model was a failure³⁰ and that indeterminate sentencing resulted in unwarranted disparities for similarly situated defendants based on such illegitimate considerations as geography, race, gender, socio-economic status, and judicial philosophy.³¹ The sentencing reform movement, utilizing guidelines drafted by a legislature or commission to tightly cabin judicial discretion, was thus born at the state and federal levels.³² Congress responded with the Sentencing Reform Act of 1984 ("SRA"), establishing the Federal Sentencing Commission, which in turn crafted the Federal Sentencing Guidelines ("Guidelines").³³ These Guidelines, contained in the Federal Sentencing Manual, established a determinate sentence (within a 25% discretionary range) for each offender according to the offense of conviction, offender characteristics, circumstances surrounding the offense, and relevant conduct not accounted for by the indictment.³⁴ While a federal sentence pursuant to the Guidelines was thus based in large measure on the offense of conviction and the defendant's prior criminal history, it could be halved or doubled based upon such factors as whether the defendant played a leadership or minor role in the offense, whether a victim was injured or a weapon was used, the quantity of controlled substances or amount of fraud, whether a defendant showed remorse or committed perjury during her trial, and

³⁰ See Klein & Steiker, *Search for Equality*, *supra* note 9, at 228, nn.14-15 (listing sources).

³¹ See, *eg.*, *id.* at 229, nn.16-25 (collecting sources); Brief of Amicus Curiae U.S. Senate at 1-7, *United States v. Mistretta*, 488 U.S. 361 (1999) (No. 87-7028 and No. 87-1904) (citing legislative history); ARTHUR W. CAMPBELL, *LAW OF SENTENCING* 1:3 at 9-10 (2d ed. 1991); AMERICAN LAW INSTITUTE, *MODEL PENAL CODE: SENTENCING REPORT* (2003); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 *HOFSTRA L. REV.* 1, 18-19 (1988) (citing to the legislative history of the SRA).

³² By the time *Blakely* invalidated the Washington Sentencing Reform Act in 2004, at least fourteen states had presumptive sentencing systems in place that were threatened by the Sixth Amendment ruling. See Jon Wool & Don Stemen, *Aggravated Sentencing: Blakely v. Washington Practical Implications for State Sentencing Systems*, 17 *FED. SENTENCING REP.* 60 (2004); Anne Skove, National Center for State Courts, *Blakely v. Washington: Implications for State Courts*, available at http://www.ncsconline.org/WC/Publications/KIS_SentenBlakely.pdf (July 16, 2004). Not all of these regimes were determinate sentencing regimes, as some still release offenders via parole before their full sentence is served. Where an offender cannot know after his sentencing hearing how much prison time he will actually serve, that sentence is by definition indeterminate.

³³ SRA, *supra* note 6. The Sentencing Commission is codified at 28 U.S.C. § 991-94 (2000) and 18 U.S.C. § 3553(a)(2) (2000).

³⁴ See, *e.g.*, U.S. SENTENCING GUIDELINES MANUAL (2004). Judicial factfinding determines the defendant's place on a 258-box sentencing grid. The defendant's place along the horizontal axis, which consists of forty-three offense level categories, is determined by selecting the appropriate offense level based on the offense of conviction and then adjusting upward or downward based upon aggravating and mitigating circumstances and relevant conduct. The defendant's place along the vertical axis, which consists of six criminal history categories, is determined by calculating the points from the defendant's prior state and federal criminal convictions.

what related misconduct she engaged in, regardless of whether that misconduct was noted in the indictment or found by the jury.³⁵ Unlike the determinate sentencing system in place in England and very early American colonial times, where all essential elements necessary to a particular determinate sentence were found beyond a reasonable doubt by a jury, all facts mandating a particular enhanced sentence under the Guidelines were found by the judge using a preponderance of the evidence standard.³⁶

In tandem with and even slightly prior to the advent of mandatory sentencing guidelines, Congress and state legislatures employed mandatory minimum sentences to cabin judicial discretion by limiting judicial opportunity to dispense leniency.³⁷ Unlike the mandatory minimum penalties of the early nineteenth century, where both the minimum and the maximum sentences were increased based upon proof of the aggravating fact beyond a reasonable doubt to a jury,³⁸ these statutes raised the mandatory minimum but not the statutory maximum and were triggered by proof of the aggravating fact by a preponderance of the evidence to the judge.³⁹ On the state level, these devices proliferated in the latter part of the twentieth century.⁴⁰ On the federal

³⁵ *Id.*

³⁶ See 18 U.S.C. § 3553(b) (2000) (providing that a court is to make factual findings pursuant to the guidelines issued by the Sentencing Commission); 28 U.S.C. § 994(a)(1) (2000) (providing that the Commissioners will promulgate guidelines for use by the sentencing court in determining the sentence).

³⁷ The overwhelming bipartisan support for the SRA had as much to do with Republican Senators and Representatives concerned over the perceived leniency of federal judges and the parole commission as it did with the Democratic senators' and representatives' desire to eliminate racial and other unwarranted disparities in sentencing. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227-66 (1993). This odd combination of interests aligned Republican Orrin G. Hatch with Democrat Edward M. Kennedy as co-sponsors of the SRA and co-authors of an amicus brief in *Booker*. See Brief for the Honorable Orrin G. Hatch, Honorable Edward M. Kennedy, and Honorable Dianne Feinstein as Amici Curiae, *United States v. Booker*, 125 S. Ct. 738 (2004) (Nos. 04-104, 04-105).

³⁸ See King & Klein, *Essential Elements*, *supra* note 15, at 1474-77 nn.21-28 and accompanying text (describing and collecting cases).

³⁹ *Id.*; see also *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (a five-four decision) (holding that due process is not offended by statute providing for five-year mandatory minimum penalty based upon a judicial finding by a preponderance of the evidence of visible possession of a firearm, as this did not exceed the ten-year statutory maximum penalty for the underlying felony of aggravated assault).

⁴⁰ See MICHAEL TONRY, SENTENCING MATTERS 146-47 (1996) (noting that since 1975 mandatory minimum sentencing statutes have been one of America's most popular innovations, and reporting that between 1975 and 1983, forty-nine states adopted mandatory sentencing laws for offenses other than murder or drunk driving); Fisher, *supra* note 21, at 1072-73 (establishing that mandatory minimum sentences were a primary catalyst in the rise of plea bargaining when they became popular in the twentieth century); Note, *Statutory Structures*, *supra* note 25, at 1140.

level, the SRA, in addition to generating the federal sentencing guidelines, added numerous mandatory minimum penalties to the United States Code.⁴¹ Some of these, like the amendments to the Controlled Substances Act, increased the statutory maximum and mandatory minimum based upon particular judicial findings (generally drug type and quantity).⁴² Others, such as the firearms provision, increased only the mandatory minimum based upon judicial findings (generally type and use of weapon).⁴³ While the Guidelines permitted a federal district judge, in the rare case, to depart downwards (below the presumptive guidelines sentence) based upon exceptional circumstances,⁴⁴ such statutory mandatory minima trumped the otherwise applicable Guidelines sentence and prevented a judge from departing downwards below the mandatory minimum sentence,⁴⁵ unless the prosecutor requested such a departure based upon “substantial assistance,” or the defendant fit into a very narrow “safety valve” provision.⁴⁶

The final nail in the coffin of federal indeterminate sentencing was the provision of the SRA that abolished the Federal Parole Commission. The elimination of parole (and concomitant limit of good time credit to 15% of a sentence) promoted “honesty in sentencing,” in that the

⁴¹ See 3 CHARLES ALAN WRIGHT ET. AL., FEDERAL PRACTICE AND PROCEDURE CRIMINAL §§ 521-39 (3d ed. 2004); see also TONRY, *supra* note 40, at 146-47 (noting that by 1991 the United States had enacted twenty new mandatory minimum sentencing provisions).

⁴² 21 U.S.C. § 941(b) (2000) (mandatory minimum sentence of ten years to statutory maximum of life based upon judicial finding of five kilograms or more of cocaine; mandatory minimum sentence of five years to statutory maximum of forty years based upon judicial finding of 500 grams or more of cocaine).

⁴³ 18 U.S.C. § 924(c) (2000) (providing for a five year mandatory minimum consecutive sentence for using or carrying a firearm during a crime of violence or drug trafficking crime, a seven year mandatory minimum if the firearm is brandished, a ten year mandatory minimum sentence if the firearm is discharged, and a fifty-year mandatory minimum sentence if the firearm is a machinegun or destructive device).

⁴⁴ U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2004) (authorizing downward departures where an aggravating or mitigating factor was not taken into account by the Sentencing Commission or was present to a degree not reflected in the Manual).

⁴⁵ *Neal v. United States*, 516 U.S. 284 (1996) (holding that mandatory minimum sentence for possession with intent to distribute LSD trumps the lower sentence provided for by the guidelines).

⁴⁶ While a judge could not sentence below the statutory minimum *sua sponte*, the prosecutor could move for a sentence below the mandatory minimum based upon substantial assistance by the defendant. See U.S. SENTENCING GUIDELINES MANUAL § 5K (2004). In 1994, Congress added a “safety valve” provision permitting a judge to sentence below the mandatory minimum in drug cases where a defendant is a first-time non-violent offender, without waiting for a motion by the government. 18 U.S.C. § 3553(f) (2004); *United States v. Carpenter* 142 F.3d 333, 334 (6th Cir. 1998).

judicially-imposed sentence was the true and determinate sentence.⁴⁷ Absent an appellate reversal or a presidential pardon, the fixed sentence imposed by the district judge pursuant to the guidelines would be served, in full, by the offender.

The SRA effectively eliminated judicial discretion in making the moral and policy choices regarding how a particular individual was to be sentenced. This was accomplished by substituting a system of determinate sentences for the prior broad range provided for by each substantive offense statute, providing judges with explicit direction in the form of binding guidelines that prescribed the kinds and lengths of sentences appropriate for every class of federal offender, and ensuring compliance with these guidelines through appellate review.⁴⁸ All authority that had previously been exercised by the sentencing judge and the parole commission was consolidated into the United States Sentencing Commission. That agency made binding decisions about what facts regarding the offender were off limits (age, socio-economic status, community ties, health, and substance abuse), which facts concerning the manner in which an offense was committed made it more or less serious (amount of loss, vulnerability, defendant's leadership or minimal role in the offense), which characteristics of an offender were relevant (prior offenses, diminished capacity), what additional uncharged or unconvicted acts by the defendant (obstruction of justice, additional drug sales) warranted an increased sentence and by what amount it would increase, the effect of multiple counts of conviction on the ultimate sentence, and whether to run sentences consecutively or concurrently. The judge could not substitute her own moral judgment on any of these crucial issues for that of the Commission, and once she made the factual findings required by the Commission, she was limited to the largely mechanical role of calculating the Guideline sentence. Her only discretion in dispensing a sentence she believes just, aside from her limited departure authority, was in selecting the sentence within the very narrow range offered by the defendant's place on the grid.

⁴⁷ Breyer, *supra* note 31, at 4-5 (noting that Congress' twin goals in enacting the SRA were to eliminate unwarranted disparity in criminal sentencing and to ensure that convicts served the entire term imposed by the district judge instead of being prematurely released by the Parole Commission).

⁴⁸ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 366 (1989); legislative history of SRA, such as H.R. REP. NO. 98-1030 at 75, 78, 79 (Sept. 25, 1984) reprinted in 1984 U.S.C.C.A.N. 3183, 3258, 3261-62; Rebecca S. Henry, *The Virtue in Discretion: Ethics, Justice, and Why Judges Must Be "Students of the Soul,"* 25 N.Y.U. REV. L. & SOC. CHANGE 65, 90-91 (1999).

Needless to say, most federal trial judges were less than enamored with this system.⁴⁹

B. Supreme Court Precedent from 1989 to 2003

The first direct constitutional challenge to the Guidelines was quickly dispatched in the 1989 case *Mistretta v. United States*.⁵⁰ Only Justice Scalia opined that allowing the Sentencing Commission to determine the relative seriousness of each federal offense and the relevance and weight to assign to each offender and offense characteristic violated the non-delegation doctrine and principles of separation of powers.⁵¹ An indirect challenge to mandatory sentencing guidelines came ten years later in *Jones v. United States*⁵² when the Court began to consider the Sixth Amendment's role⁵³ in limiting how legislatures could define substantive criminal offenses and how judges could sentence offenders for these crimes.⁵⁴ Justices Stevens, along with Justices Scalia, Thomas, Ginsburg, and Kennedy, held in the *Jones* majority opinion that provisions of the federal carjacking statute which established higher penalties for the offense when it resulted in serious bodily injury (raising the maximum penalty from fifteen to twenty-five years) or death (raising the maximum penalty from twenty-five years to life in prison) were elements of the offense rather than sentencing factors, and must be proven to the jury beyond a reasonable doubt. Though dividing 18 U.S.C. § 2119 into three separate offenses was

⁴⁹ See, e.g., SITH & CABRANES, *supra* note 27; MOLLY TREADWAY & SCOTT A. GILBERT, THE UNITED STATES SENTENCING GUIDELINES, RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY (1997) (1997 survey concluding that more than two-thirds of federal judges wish to scrap the Guidelines).

⁵⁰ 488 U.S. 361 (1989) (upholding the constitutionality of the Federal Sentencing Guidelines against challenges based on the non-delegation doctrine and principles of separation of powers).

⁵¹ *Id.* at 413-26 (Scalia, J., dissenting).

⁵² 526 U.S. 227 (1999).

⁵³ In this article, I focus on the Sixth Amendment jury right triggered by the recent line of cases concerning the elements of substantive criminal offenses. However, those cases equally protect a suspect's Fifth Amendment rights to proof beyond a reasonable doubt in criminal cases, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and to grand jury indictments in federal criminal matters, *United States v. Cotton*, 535 U.S. 625 (2002).

⁵⁴ The Court first overrode a legislative label of an action as "civil," a designation which would have allowed the government to circumvent constitutional criminal procedural guarantees entirely, in 1886. *Boyd v. United States*, 116 U.S. 616 (1886). In the 1970s, the Court permitted a state legislature to circumvent the Fifth and Fourteenth Amendments' due process right to proof beyond a reasonable doubt by labeling a fact an "affirmative defense." *Patterson v. New York*, 432 U.S. 197, 210 (1977). The application of the Sixth Amendment as a limit on legislative authority to define criminal offenses is more recent.

accomplished as a matter of statutory interpretation, this outcome was prodded by “constitutional doubt.”⁵⁵

This new constitutional rule crystallized the next year in *Apprendi v. New Jersey*,⁵⁶ a case which again concerned not mandatory sentencing guidelines but two state substantive criminal statutes, one which imposed a ten year statutory maximum penalty for felony weapons offenses, and the other, a separate “hate-crime” statute, which allowed the trial judge to potentially double the maximum sentence based upon his determination, by a preponderance of the evidence, that the defendant “acted with a purpose to intimidate an individual . . . because of race.”⁵⁷ Upon Mr. Apprendi’s plea to the weapons offense for firing shots into the home of an African-American family, the trial judge applied the enhancement and sentenced the defendant to twelve years. In vacating his sentence, the same five Justices that comprised the majority in *Jones* declared that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum [other than the fact of a prior conviction]⁵⁸ must be submitted to a jury and proved beyond a reasonable doubt.”⁵⁹ This significant new rule prohibited legislatures from “hiding” an element from a jury by labelling it a “penalty provision” and assigning its factual determination to a judge. Moreover, a narrow reading of the majority holding preserved the Guidelines and was consistent with earlier Supreme Court cases analyzing the application of the Guidelines, so long as the sentences dictated by the

⁵⁵ *Jones*, 526 U.S. at 243, n.6 (implicating the constitutional principle of whether “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt”).

⁵⁶ 530 U.S. 466 (2000) (Stevens, J., writing for majority, joined by Scalia, Souter, Thomas, and Ginsburg JJ.) (O’Connor, J., dissenting joined by Rehnquist, C.J., Breyer, J., and Kennedy, J.).

⁵⁷ *Id.* at 468-69 (quoting N.J. STAT. ANN. § 2C:44-3 (West Supp. 2000)).

⁵⁸ The recidivism exception stemmed from *United States v. Almendarez-Torres*, 523 U.S. 224 (1998) (a five-four split, consisting of the four *Apprendi* dissenters plus Justice Thomas) (upholding 8 U.S.C. § 1326(b)(2), authorizing a twenty year statutory maximum penalty for alien re-entry if the initial deportation was for the commission of an aggravated felony, despite an otherwise authorized two-year statutory maximum penalty). Though Justice Thomas has since renounced his decision in *Almendarez-Torres*, it now appears doubtful that there remains five Justices committed to reversing it. See *Shepard v. United States*, 125 S. Ct. 1254 (2005) (holding that whether a prior burglary conviction was a “violent felony” within the meaning of the Armed Career Criminal Act, increasing defendant’s sentence from thirty-seven months to fifteen years, is closer to the findings subject to *Apprendi* than the prior conviction exception subject to *Almendarez-Torres* and that the rule of constitutional doubt requires that the Court limit judicial fact-finding on this disputed issue). Only Justice Thomas, in a concurrence, opined that the government’s reading of the statute was unconstitutional and that *Almendarez-Torres* must be reversed. *Id.* at 1263-64.

⁵⁹ *Apprendi*, 530 U.S. at 490.

Guidelines were within the maximum sentence authorized by statute for the offense.⁶⁰

There was, however, much concern during oral argument in *Apprendi* that this rule might be applied to state and federal determinate sentencing guideline regimes. The majority punted on the issue of determining the constitutionality of these guidelines in a footnote.⁶¹ Justice Thomas, in his concurrence, supported a broader rule that would have designated as elements all factual findings that increase “the range of punishment to which the prosecution is by law entitled.”⁶² He acknowledged the potential this rule would have for turning all Guideline facts which enhance a penalty into elements of the offense, but purported to reserve the issue of whether judicial factfinding under the Federal Sentencing Guidelines was constitutional.⁶³ However, it is quite clear that guideline enhancements are, using Justice Thomas’ phrase, “by law the basis for imposing or increasing punishment”⁶⁴ and are therefore elements of a criminal offense which must be submitted to the jury.⁶⁵ Justice O’Connor, in a scathing dissent, accused the majority of undermining thirty years of sentencing reform.⁶⁶ She predicted that

⁶⁰ See, e.g., *Edwards v. United States*, 523 U.S. 511, 515 (1998) (holding that judge may determine drug type and quantity of drugs at sentencing hearing where the sentence imposed did not exceed “the maximum that the statutes permit[ted] for a cocaine—only conspiracy”); *United States v. Watts*, 519 U.S. 148 (1997) (per curiam) (providing for enhanced sentence for acquitted conduct after judicial finding where sentence was within the statutory range provided for by the crime of conviction); *Witte v. United States*, 515 U.S. 389 (1995) (providing an enhancement for uncharged drug conduct after judicial finding, where sentence is within the statutory sentence provided for by the crime of conviction); all cases were cited by the Court approvingly in *Apprendi*, and discussed in King & Klein, *Essential Elements*, *supra* note 15, at 1479.

⁶¹ “The Guidelines are, of course, not before the Court. We therefore express no view on the subject . . .”). *Apprendi*, 530 U.S. at 497, n.21 (2001).

⁶² *Id.* at 499 (Thomas, J., concurring).

⁶³ *Id.* at 522, n.11.

⁶⁴ *Id.* at 501. Justice Thomas attempted to avoid overruling *Patterson v. New York*, 432 U.S. 197 (1977) (holding that a state may constitutionally place on defendant the burden of proof of the affirmative defense of extreme emotional disturbance, which mitigates murder to manslaughter) by distinguishing aggravating from mitigating facts.

⁶⁵ As Nancy King and I argued in 2001, “under the analysis of the concurring opinion in *Apprendi*, each one of the myriad facts that the United States Sentencing Guidelines and other presumptive sentencing schemes require a judge to take into account becomes an element that must go to the jury.” King & Klein, *Essential Elements*, *supra* note 15, at 1488.

⁶⁶ *Apprendi*, 530 U.S. at 541 (O’Connor, J. dissenting). She further argued that *Apprendi* imposed a “meaningless and formalistic” rule because it could be easily circumvented by legislatures increasing statutory maximum sentences. *Id.* Nancy King and I have argued elsewhere that the democratic process will likely prevent such wholesale avoidance of the rule, just as it has in the past, and that the Court has clearly signaled its intent to step in should the clear statement rule combined with democratic constraints fail. See King & Klein, *Essential Elements*, *supra* note 15, at 1485-95 and Appendix A (examining legislative reaction to seven

Apprendi would invalidate the Federal Sentencing Guidelines and the presumptive sentencing schemes, leading to “colossal” upheaval for the criminal justice system.⁶⁷

While the mandatory Guidelines were retained, the *Apprendi* decision significantly affected state and federal criminal law practice in shifting fact-finding authority from judge to jury. Its rule affected charging, pleas, and trials in thousands of cases involving hundreds of similar state and federal statutes.⁶⁸ Two types of statutes were invalidated by the rule in *Apprendi*: “nested statutes,”⁶⁹ involving core conduct found by a jury with increasing levels of punishment depending on the presence of enhancing facts found by the judge;⁷⁰ and “add on” statutes, involving additional statutes authorizing an increased punishment for any crime depending on the presence of a fact found by the judge.⁷¹ States and Congress had enacted dozens of this first type, such as the primary federal controlled substance statute, which pegged enhanced penalties to drug quantity, and most states and the federal government had plenty of the second type, such as provisions authorizing increased penalties for any crime committed with a firearm or while on pretrial release.⁷² In either case, facts enhancing the maximum sentence must now be plead in the indictment and submitted to a jury for a finding beyond a reasonable doubt. Most state legislatures managed this by re-enacting these “penalty provisions” as substantive crimes, and thus codifying their constitutional status as element.⁷³

significant Supreme Court decisions allowing a change in substantive criminal law to effectuate a relaxation in criminal procedures).

⁶⁷ *Apprendi*, 530 U.S. at 551 (O’Connor, J., dissenting).

⁶⁸ See King & Klein, *Essential Elements*, *supra* note 15, at 1492-93 and 1547-1555 (Appendices B and C) (compiling list of selected state and federal criminal statutes subject to *Apprendi* challenge); King & Klein, *Après Apprendi*, 12 FED. SENTENCING REP. 331 (2002), revised version available at <http://www.fjc.gov/> (last visited Apr. 15, 2005) [hereinafter King & Klein, *Après Apprendi*] (suggesting that *Apprendi* has also thrown into doubt those decisions authorizing judges to make factual findings necessary for forfeiture and restitution awards).

⁶⁹ 2 T. BISHOP, *supra* note 1, at 327.

⁷⁰ An example of this is the carjacking statute in *Jones*, where the jury had only to find that the defendant engaged in carjacking, leaving for judicial determination the aggravating facts of victim injury or death. *Jones v. United States*, 526 U.S. 227 (1999).

⁷¹ *Apprendi* itself is an example of this type of statute.

⁷² See, e.g., 21 U.S.C. § 841(b) (2000) (increasing maximum sentence from twenty years to life based upon quantity of Schedule I or II substance or injury/death); 18 U.S.C. § 924(c) (2000) (increasing maximum sentence by an additional five to thirty years based upon type or use of firearm); 18 U.S.C. § 3147 (2000) (increasing maximum sentence by an additional one to ten years for commission of an offense while on release).

⁷³ The New Jersey legislature, in response to *Apprendi*, re-enacted the hate-crime provision as a substantive statute, where the element of racial animus would be submitted to the jury. H.R. 1897, 209th Leg., Reg. Sess. (N.J. 2000). Likewise the Kansas legislature amended its state

Congress did not respond, so federal prosecutors simply began acting as if these penalty provisions were elements of enhanced offenses (despite relatively clear congressional intent that they be penalty provisions passed on by the court),⁷⁴ charging these “elements” in indictments and submitting them to juries.⁷⁵ Similarly, federal judicial committees redrafted pattern jury instructions to include these “penalty provisions” as elements.⁷⁶

While this decision gave prosecutors and juries more work to do (or, in most cases, gave defendants an extra bargaining chip during plea negotiations),⁷⁷ it did not substantially affect judicial discretion at sentencing, if discretion is defined as the ability to make unconstrained choices regarding the appropriate penalties for the defendant’s criminal conduct. This is because legislatures had already pegged the enhancing fact as having a particular significance in terms of number of years in prison. The identity of the fact-finder may be important to the defendant (as she receives constitutional criminal procedural guarantees and is

mandatory sentencing guidelines to provide that all such facts “shall be presented to a jury and proved beyond a reasonable doubt.” KAN. STAT. ANN. § 21-4718(b)(2) (Supp. 2002).

⁷⁴ This is clear from the structure of the controlled substances act. 21 U.S.C. § 841(a), entitled “Unlawful acts,” prohibits possession with intent to distribute a controlled substance. 21 U.S.C. § 841(b), entitled “Penalties,” prescribes the sentence for violation of § 841(a) and pegs statutory minima and maxima upon drug type, drug quantity, prior convictions, and injury to persons. *See also* United States v. Nordby, 225 F.3d 1053, 1058 (9th Cir. 2000) (“Existing precedent in this circuit states plainly that Congress did not intend drug quantity to be an element of the crime under 21 U.S.C. §§ 841(a) and 846.”).

⁷⁵ The United States Supreme Court quickly began to reverse and remand sentences pursuant to the federal controlled substance act where quantity findings leading to penalty enhancements were found by the trial judge. *See* King & Klein, *Après Apprendi*, *supra* note 68, at n.8 (collecting United States Supreme Court “vacation and remand” orders on drug cases post-*Apprendi*). Circuit courts responded by requiring quantity to be treated as an element whenever type and quantity of the drug triggered a higher statutory sentence. *See, e.g.*, United States v. Doggett, 230 F.3d 160 (5th Cir. 2000); United States v. Aguayo-Delgado, 220 F.3d 926 (8th Cir. 2000); *Nordby*, 225 F.3d at 1058.

⁷⁶ *See, e.g.*, FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS, CRIMINAL (West 2002) (redrafting pattern jury instructions to include all enhancing facts previously found by the district court). The author served on the judicial committee that redrafted these instructions in the wake of *Apprendi*.

⁷⁷ Whether the *Apprendi* rule assists or injures criminal defendants is open to some debate. Criminal defense attorneys uniformly believe the rule favors their clients. *See* Brief of National Association of Criminal Defense Lawyers and Washington Association of Criminal Defense Lawyers, *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (No. 02-1632) (cited by majority in *Blakely*). Professor Stephanos Bibas argued that *Apprendi* actually harms criminal defendants. *See* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1131-32 (2001) (cited by Justice Breyer in his *Blakely* dissent). Nancy King and I are convinced of just the opposite. *See* Nancy J. King & Susan R. Klein, *Apprendi and Plea Bargaining*, 54 STAN. L. REV. 295, 296 (2001) (cited by Scalia in *Blakely* majority) [hereinafter King & Klein, *Apprendi and Plea Bargaining*].

protected by the Federal Rules of Evidence if they are elements decided by a jury), but the judge could not ignore that enhancing fact regardless of whether it is found by the jury or herself. Aggravating facts shifted from sentencing factors to elements by the *Apprendi* rule must be found by the jury (or the defendant must admit to that fact in her guilty plea), but the judge has no discretion once the factual decision is made by the fact-finder—she must increase the sentence by a certain amount, regardless of whether she believes that result is just. As previously mentioned, judges essentially had no discretion after the Sentencing Commission drafted the first Sentencing Manual in November of 1987—all policy decision were made *ex ante* by the Commissioners. The Guidelines eliminated all true judicial discretion and turned judges into fact-finders applying mechanical formulas created by others, and the *Apprendi* rule simply moved some fact-finding authority from judge to jury.

There was, in fact, some hope prior to *Blakely* and *Booker* that the Court might be willing to pretend that mandatory guidelines were not a series of statutory maximum penalties subject to *Apprendi*'s rule, because they were not listed as such in the substantive criminal code. A few years after *Apprendi* was rendered, a defendant again indirectly challenged the Federal Sentencing Guidelines in a case concerning judicial authority to find facts critical to imposing a statutorily defined mandatory minimum sentence.⁷⁸ Not surprisingly, *Apprendi* had generated a circuit split on the issue of whether facts triggering such mandatory minimum sentences were subject to its element rule.⁷⁹ In *Harris v. United States*, a plurality held that the fact that the defendant “brandished” a firearm in relation to a crime of violence or drug trafficking offense, triggering a seven year mandatory minimum sentence under 18 U.S.C. § 924(c), rather than the otherwise applicable five year mandatory minimum for “use” of the firearm, was not an element to be submitted to the jury for beyond a reasonable doubt finding under *Apprendi*.⁸⁰ Justice Thomas, in his concurrence in *Apprendi*, had openly called for the reversal of the similar *McMillan v. Pennsylvania*,⁸¹ an earlier five-four decision which permitted a judge to find the fact that triggered a mandatory minimum sentence within the

⁷⁸ *Harris v. United States*, 536 U.S. 545 (2002).

⁷⁹ See Klein & Steiker, *Search for Equality*, *supra* note 9, at n.124 (collecting cases).

⁸⁰ 18 U.S.C. § 924(c) is described *supra* note 43. Though the statute is drafted to contain an escalating series of mandatory minima penalties but no maximum term of imprisonment, every circuit interpreting this provision since *Apprendi* has held that the unstated statutory maximum is life. See Klein & Steiker, *Search for Equality*, *supra* note 9, at n.125 (collecting cases).

⁸¹ 477 U.S. 79 (1986).

statutory maximum penalty.⁸² Citing seventeenth century cases and treatises, the plurality opinion, comprised in part by the four *Apprendi* dissenters, noted the lack of historical evidence establishing that facts that increase a defendant's minimum sentence but do not effect the maximum sentence have been treated as elements.⁸³

Justice Breyer, whose concurrence supplied the fifth vote needed to affirm Mr. Harris' sentence, appeared to agree with the reasoning of Justice Thomas' dissent in *Harris*. As in his *Apprendi* dissent, Justice Thomas noted again that mandatory minimum statutes limit the jury's role in exactly the same fashion as did the increased statutory maximum in *Apprendi*, by imposing mandatory higher penalties based upon facts not submitted for their consideration.⁸⁴ That these mandatory minimum penalties do not also raise the statutory maximum sentence is irrelevant, as a defendant in the federal system actually receives the mandatory minimum, never higher or lower.⁸⁵ Justice Breyer did not attempt to dispute Justice Thomas' reasoning, noting "I cannot easily distinguish *Apprendi v. New Jersey* from this case in terms of logic."⁸⁶ However, because he believed "that extending *Apprendi* to mandatory minimums would have adverse practical, as well as legal, consequences" he could not "yet accept its rule."⁸⁷ Professor Jordan Steiker and I have argued elsewhere that Justice Breyer's refusal to join Justice Thomas' dissent stemmed from his realization that, if the *Harris* dissenters prevailed, there may be no plausible way to distinguish and therefore save the Guidelines.⁸⁸

Any hope that the Guidelines would survive were dashed two years later in *Blakely v. Washington*.⁸⁹ Mr. Blakely pled to second-degree

⁸² *Id.* In *McMillan*, the Supreme Court held that the imposition of a five year mandatory minimum penalty, based upon a judicial finding that the defendant visibly possessed a firearm during an aggravated assault, did not violate the Due Process Clause, at least where the penalty was within the ten year statutory maximum for the offense of conviction. The state court trial judge had ruled Pennsylvania's Mandatory Minimum Sentencing Act unconstitutional and imposed an eleven to twenty-three-month sentence.

⁸³ *Harris*, 536 U.S. at 560-61. While this is no doubt true, and in fact the Court cites our work in reaching this conclusion, we noted in *Essential Elements* that there is no historical evidence as to these types of statutes because they simply did not exist; a fact that increased the mandatory minimum also increased the statutory maximum. King & Klein, *Essential Elements*, *supra* note 15.

⁸⁴ *Harris*, 536 U.S. at 575-78 (Thomas, J., dissenting).

⁸⁵ *Id.* at 576 (citing to the U.S. Sentencing Commission, 2001 data file).

⁸⁶ *Id.* at 568-70 (Breyer, J., concurring in part, concurring in the judgment).

⁸⁷ *Id.*

⁸⁸ Klein & Steiker, *Search for Equality*, *supra* note 9, at 255-60.

⁸⁹ 124 S. Ct. 2531 (2004). An earlier, less controversial case protecting the Sixth Amendment jury right against judicial infringement was the Court's six-three holding, in *Ring v. Arizona*, that a defendant found guilty by a jury of first degree murder could not be sentenced to death based upon a judge's additional factual finding as to one of several legislatively mandated aggravating

kidnapping, a Class B felony which, pursuant to the statute setting the sentencing range for each class of felony offense in Washington, was punishable by no more than ten years confinement. Washington's Sentencing Reform Act, on the other hand, specified in a separate statutory provision a "standard range" of forty-nine to fifty-three months for Blakely's offense, a range that could not be exceeded absent a judicial finding of a "substantial and compelling reason" justifying the exceptional sentence.⁹⁰ This "dueling maximum sentencing statute"⁹¹ enumerated several potential (but not exclusive) factors that would support a judicial decision to depart from the presumptive range. Though the state recommended the presumptive sentence as part of the plea agreement, the trial judge, after a three day bench trial, imposed an exceptional sentence of ninety months based upon the statutorily enumerated ground of "deliberate cruelty."⁹²

Mr. Blakely argued that after *Apprendi v. New Jersey*, the aggravating fact increases the penalty for his offense beyond the prescribed statutory maximum and therefore must be submitted to a jury and proven beyond a reasonable doubt. The state countered that *Blakely* was controlled by *McMillan v. Pennsylvania*⁹³ and *Harris v. United States*,⁹⁴ both of which allow a judge to make a factual finding—in both cases that the defendant had a weapon—that triggers a mandatory minimum sentence within the statutory maximum sentence permitted by the jury verdict or guilty plea. Justice Scalia, however, writing for the same five justices that comprised the majority in *Apprendi*, held:

[T]he '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* In other words the relevant 'statutory maximum' is not the maximum sentence a judge may

factors. 536 U.S. 584, 587 (2002). In a "foreshadowing" of *Blakely*, the Court held that "if the state makes an increase in the defendant's authorized punishment contingent on a finding of fact, that fact—no matter how the state labels it—must be found by a jury beyond a reasonable doubt." *Id.* at 602.

⁹⁰ *Blakely*, 124 S. Ct. at 2535.

⁹¹ Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 FED. SENTENCING REP. 316, 413 (2004) [hereinafter King & Klein, *Beyond Blakely*].

⁹² *Blakely*, 124 S. Ct. at 2534.

⁹³ 477 U.S. 79 (1986).

⁹⁴ 536 U.S. 545 (2002) (plurality opinion). The *Harris* opinion was written by the four *Apprendi* dissenters plus Justice Scalia.

impose after finding additional facts, but the maximum he may impose *without* any additional findings.⁹⁵

The Sixth Amendment jury trial right is meant to ensure the people's "control in the judiciary,"⁹⁶ and thus a judge has no authority to impose any sentence other than that authorized by a jury finding. Just as the legislature could not "hide" an element from a jury finding beyond a reasonable doubt by placing it in a separate statutory penalty provision, so a legislature could not "hide" an element and assign its determination to a judge by placing it in a statutory sentencing guideline.

This case was a natural and expected outgrowth of the collision between the sentencing reform movement and the newly invigorated (but always present) Sixth Amendment right to have a jury determine all facts essential to imposing a particular sentence. While the sentencing reform movement's grant of additional fact-finding authority to judges did not usurp any particular fact-finding previously engaged in by juries (since juries were finding only the basic elements necessary to impose a penalty with a wide range, and judges were using their discretion to select the appropriate sentence within that range), it did usurp the juries' traditional pre-Guidelines *role* as fact-finders. If a fact is so important to a legislature that its existence always mandates a higher sentence, that fact is functionally an element of an offense, and would have been recognized as such from colonial times. There is simply no way, employing basic logic or a cursory knowledge of history, that the dissenters could have prevailed in *Blakely*. Justice O'Connor's prediction in her *Blakely* dissent that the "legacy of today's opinion, whether intended or not, will be the consolidation of sentencing power in the State and Federal Judiciaries"⁹⁷ may turn out, I believe, to have little truth in the states. This is because her criticism hinges on a particular expected response from legislatures—a rejection of mandatory sentencing guidelines as too costly and a return to the good old days of full judicial discretion, that appears unlikely. Instead, most states are responding just as they did to facts treated as elements by the Court after *Apprendi*⁹⁸—by sending such facts to the jury.⁹⁹ However, as we will see

⁹⁵ *Blakely*, 124 S. Ct. at 2537 (emphasis in original).

⁹⁶ *Id.* at 2539.

⁹⁷ *Id.* at 2543 (O'Connor, J., dissenting).

⁹⁸ *See supra* note 73.

⁹⁹ *See, e.g.,* *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005) (holding that Indiana mandatory sentencing guidelines allowing factual findings by a judge violates the Sixth Amendment right to jury trial set out in *Blakely*, and the remedy is not to make the guidelines advisory but to maintain determinate sentencing by treating aggravators as elements for submission to jury); the Alaska hybrid legislation expanding penalty ranges for judges and providing for jury consideration of certain sentencing enhancing aggravators; *see* Criminal Sentencing Bill Signed

in Part II below, her criticism finds at least a short-term accurate target in the federal system.

C. *United States v. Booker* and *United States v. Fanfan*

Not surprisingly, the circuit courts immediately split over the issue of whether *Blakely* applied to the Federal Sentencing Guidelines.¹⁰⁰ The Court reached this issue last term in the consolidated cases of *United States v. Booker* and *United States v. Fanfan*.¹⁰¹ When the Court was forced to select between protecting its newly articulated jury right and protecting Justice Breyer's primary legacy—the Federal Sentencing Guidelines—an irreconcilable pair of majority opinions were rendered that attempted to do both. Like the Washington sentencing scheme described in *Blakely*, the Federal Sentencing Guidelines provide for a presumptive sentencing range, and the court may not sentence above that range without making specific factual findings. Unlike the scheme in *Blakely*, where both penalty ranges were contained in statutes, these federal “dueling maxima” are contained first in a substantive criminal code and second in a Manual produced by an administrative agency. The Court accepted expedited certiorari at the request of the Department of Justice to answer two questions: (1) whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the Guidelines based upon the sentencing judge's determination of a fact; and (2) if “yes,” then whether the Guidelines as a whole is severable from the judicial fact-finding provisions.¹⁰²

Mr. Booker was convicted by a jury of possession with intent to distribute 92.5 grams of crack cocaine, which led to a 210-262 month sentence under the Guidelines. At the sentencing hearing, however, the judge found by a preponderance of the evidence that Mr. Booker

into Law, press release for Senate Bill 56 on March 22, 2005, available at <http://www.akrepublicans.org/therriault/24/news/ther2005032201p.php>; *State v. Shattuck*, 689 N.W.2d 785 (Minn. 2004) (per curiam) (imposition of an upward durational departure violated the appellant's right to a jury trial under *Blakely*); *State v. Dilts*, 103 P.3d 95 (Or. 2004) (imposition of upward departure sentence violated defendant's jury trial rights under *Blakely*); *State v. Lowery*, No. C-040157, 2005 WL 627778 (Ohio App. 2005) (holding that *Blakely* precludes judicial fact-finding necessary under Ohio's sentencing scheme to impose an enhanced penalty); *State v. Brown*, 99 P.3d 15 (Ariz. 2004) (holding that application of a statute which allowed a sentence of twelve and one-half years for a class two felony, rather than the presumptive maximum term of five years, based on the trial court's finding of two aggravating factors, would violate defendant's Sixth Amendment right to have jury decide factual issues that would increase his sentence).

¹⁰⁰ King & Klein, *Beyond Blakely*, *supra* note 91, at nn. 21-26 (describing circuit split and collecting cases).

¹⁰¹ 124 S. Ct. 2531 (2004).

¹⁰² See *United States v. Booker* and *United States v. Fanfan*, 125 S. Ct. 12 (2004).

actually possessed an additional 566 grams of crack, and he therefore imposed an enhanced 360 month sentence. The Seventh Circuit reversed the sentence after finding that it violated Mr. Booker's Sixth Amendment right to a jury trial on the aggravating fact. The facts authorized by the jury verdict in Mr. Fanfan's drug trafficking case led to a seventy-eight month sentence under the Guidelines. At sentencing, the district judge found additional facts (additional quantities of cocaine and crack and that the defendant had been a leader) authorizing a 188-235 month sentence. Like the Seventh Circuit, the trial judge found *Blakely* applicable to the Guidelines and therefore sentenced Fanfan only to the lower seventy-eight months, to avoid a Sixth Amendment violation.

It looked to many scholars at that point, myself included, that the writing was on the wall for the Guidelines.¹⁰³ In fact Justice Stevens, writing for the same five *Apprendi* and *Blakely* Justices, declared in the majority merits opinion that the Guidelines, implemented in this manner, violated Mr. Booker's Sixth Amendment right to have a jury determine the fact which increased his otherwise applicable statutory maximum penalty.¹⁰⁴ The Guidelines could not be distinguished from the Washington state scheme in *Blakely*—the Guidelines are mandatory and require judges to increase sentences based upon their own fact-finding.¹⁰⁵

The four *Apprendi* and *Blakely* dissenters, led by Justice Breyer and picking up Justice Ginsburg, held in a second majority opinion that the remedy was not to treat these Guideline facts as elements of the offense, which would require that the government charge them in indictments and submit them to juries, but rather to recast the Guidelines as advisory rather than mandatory.¹⁰⁶ Rather, the remedy was to sever 18 U.S.C. § 3553(b)(1) (the provision making the Guidelines mandatory) and § 3742(e) (the provision requiring appellate courts to review sentences compliance with the Guidelines) from the SRA, as well as sever any cross-references to those provisions. Without the dueling sentence

¹⁰³ King & Klein, *Beyond Blakely*, *supra* note 91, at 414 (arguing that the Department of Justice's distinction—that the Guidelines are not "legislatively enacted" but are rather a "unique product of a special delegation of authority" to an independent Commission in the judicial branch—is unsustainable). Regardless of whether a legislature designed the Guidelines itself (as in *Blakely*), or first delegated them to a Commission before specifically endorsing them (as done by Congress), they have the force of law.

¹⁰⁴ *United States v. Booker*, 125 S. Ct. 738, 746 (2005). Joining Justice Stevens in the majority merits opinion were Justices Souter, Thomas, Scalia, and Ginsburg.

¹⁰⁵ *Id.* (citing 18 U.S.C. § 3553(b), directing that the court "shall impose a sentence of a kind, and within the range," established by the Guidelines) (emphasis added).

¹⁰⁶ Justice Breyer wrote the remedial opinion for the Court joined in part by Rehnquist, C.J., O'Connor, Kennedy, and Ginsburg, JJ. *Booker*, 125 S. Ct. at 756.

maxima contained in the United States Code and the Guidelines Manual, Mr. Booker's statutory maximum penalty as authorized by the jury verdict is the life sentence provided by the substantive criminal offense.¹⁰⁷ By severing the provision of the SRA making it binding on federal district judges, and capturing Justice Ginsburg's vote for his remedial majority, it appeared that Justice Breyer managed to preserve the jury right and the Federal Sentencing Guidelines while at the same time greatly expanding federal judicial discretion in sentencing matters.

So modified, the Guidelines are now advisory, the facts contained in the Manual are not elements, and failure to submit them to juries does not violate the right to a jury trial protected by the Sixth Amendment. Now judges must "consider" guideline ranges under 18 U.S.C. § 3553(a)(4), but they can tailor sentences in light of the other statutory concerns listed in 18 U.S.C. § 3553(a). Because the majority has excised the appellate provision requiring review of sentences for conformity with the Guidelines, and there is thus no longer an explicit standard of review in the statute, the remedial majority insists that the Court infer the appropriate standard of review from related statutory language. From here on, circuit courts will review sentences for "reasonableness."¹⁰⁸

The two *Booker* majority decisions lack cohesion. Both majority Justices (Justice Stevens for the merits majority and Justice Breyer for the remedial majority) are also the authors of the two primary dissents! Only Justice Ginsburg signs onto both majority opinions, and she does not write separately to explain. Justice Stevens' merits majority result, finding mandatory guidelines with judicial fact-finding violate the Sixth Amendment, is required by *Apprendi/Blakely*. Moreover, his remedy—sending all aggravators to juries for beyond reasonable doubt findings—was the only logical one.¹⁰⁹ Though there is some chance that Congress would have reacted to Justice Stevens' dissenting remedial opinion (which scholars have termed "Blakelyizing" the Guidelines) by

¹⁰⁷ In this case the relevant statutory provision is 21 U.S.C. § 841(b) (2000) (possession of cocaine with intent to distribute).

¹⁰⁸ The majority argued that this was done for two decades with departures (see prior 18 U.S.C. § 3742(e)(3), before the 2003 amendment changing the standard to de novo review). They further argued that appellate courts review sentences for "reasonableness" on the issue of whether a departure is to an unreasonable degree under 18 U.S.C. § 3742(e)(3), and where there is no applicable Guidelines range they review for whether the sentence is "plainly unreasonable" under 18 U.S.C. § 3742(e)(4). As Justice Scalia noted in his dissent, this argument lacks merit. It is one thing to review for reasonableness against a backdrop of specific sentencing ranges established under mandatory Guidelines. Without these Guidelines, there is simply no baseline (besides the statutory minimum and maximum) for judging the reasonableness of any sentence.

¹⁰⁹ *Booker*, 125 S. Ct. at 771 (Stevens, J., dissenting).

returning to pure judicial discretion uncabined by any guidelines, it seems much more likely to me that Congress would have permitted the *Blakely* experiment to continue on the federal level (as did the Kansas, Indiana, and Washington legislatures in response to *Apprendi* and *Blakely*).¹¹⁰ As I have argued elsewhere, while not optimal, it would be possible to submit the majority of the Guidelines' aggravators to juries. Most of the problems resulting from Blakelyizing the Guidelines would be resolved by plea agreements (more favorable to defendants) and by the Commission simplifying the Guidelines.¹¹¹

The remedial majority, on the other hand, is inexplicable on its face. In the name of respecting Congress' wishes (the legal standard for determining severance)¹¹² and retaining mandatory guidelines, Justice Breyer rewrote the federal statute in a manner expressly rejected by Congress. Congress considered but rejected advisory guidelines in 1984 after determining that they had failed in the states that had tried them.¹¹³ No doubt Congress also intended that judges find facts, though there was no discussion on this point. "Blakelyizing" the Guidelines, however, best implements the twin goals of requiring transparency in sentencing and eliminating unwarranted disparity.¹¹⁴ While jury fact-finding is possible, without mandatory guidelines defendants and society again cannot know *ex ante* what characteristics about an offense and offender are particularly blameworthy and Congress cannot ensure that like defendants receive like sentences.

The rewritten standard of review on appeal made as much sense as selecting a remedy for which no party had asked. The purpose behind enacting the appellate review provision of the SRA was to enforce the

¹¹⁰ See *supra* notes 73 and 99.

¹¹¹ As per my Nov. 12, 2004, testimony before the U.S. Sentencing Commission (on file with author, the United States Sentencing Commission's website, and on Professor Doug Berman's blog, available at <http://sentencing.typepad.com>) (predicting that the Court would apply *Blakely* to the Federal Sentencing Guidelines and treat all aggravators as elements, and recommending that the Commissioners eliminate the forty-three offense levels in favor of selecting the five or ten most common aggravators, and permit judges to make finer gradations by increasing the discretionary range within each offense level from 25 to 40 percent).

¹¹² *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) ("[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.").

¹¹³ Brief for the United States, *United States v. Mistretta*, 488 U.S. 361 (1989) (Nos. 87-7028, 87-1904) (citing legislative history).

¹¹⁴ Relevant conduct, which Justice Breyer considers to be a linchpin of the Guidelines, could still constitute part of the defendant's sentence. However, prosecutors would have to charge relevant conduct in the indictment before a defendant could be sentenced for it. Enhancements for conduct occurring in the course of the trial, such as perjury, obstruction, or witness tampering, could be punished immediately via contempt orders or charged in a subsequent proceeding. See King & Klein, *Beyond Blakely*, *supra* note 91, at 416.

mandatory nature of the Guidelines—appellate courts were required to reverse all sentences imposed in contravention of those Guidelines.¹¹⁵ The standard of “reasonableness” will either considerably gut the Guidelines or transform them back into (unconstitutional) mandatory guidelines. There was no appellate review of sentences before the SRA, as there was no standard for determining the “right” sentence (assuming the sentence was within the statutory range and not selected for an unconstitutional reason). Likewise, without mandatory guidelines, there is presently no base line for determining whether a particular sentence is “reasonable.” I anticipate that all sentences within the statutory minima and maxima will be deemed reasonable, and so far case law proves me right.¹¹⁶ If judges attempt to give content to the standard, for example by determining that all sentences outside the Guideline range are presumptively unreasonable, or determining that certain facts should translate to a certain increased penalty, they risk the Court declaring these Guidelines “mandatory” again, transforming the content of the appellate review into elements of the offense that must be submitted to the jury.¹¹⁷

Why would five Justices hold this way? That the four-Justice *Apprendi* and *Blakely* minority block would wish to uphold the Guidelines (by dissenting from Justice Stevens merits opinion but joining Justice Breyer’s remedial opinion) is perfectly consistent with their earlier pronouncements. They believe that nothing about the Sixth Amendment requires jury fact-finding as to sentencing factors, so Blakelyizing the Federal Sentencing Guidelines is not only a terrible idea, but is one not required by the Constitution. That the four Justices comprising the *Booker* remedial dissent would want to Blakelyize the Federal Sentencing Guidelines is entirely consistent with their willingness to do the same thing to the Washington Sentencing Guidelines in *Blakely*. The \$64,000 question is “why did Justice Ginsburg defect?” She purports to believe that the Sixth Amendment requires jury fact-finding of elements (the jury is, after all, a bulwark against government oppression), as exhibited by her joining the *Apprendi*, *Blakely*, and *Booker* merits majorities. It may be the case that Justice Breyer convinced her that his enduring legacy—the Federal Sentencing

¹¹⁵ See 18 U.S.C. §3742(a) and (b), requiring an appellate court to reverse a sentence imposed as a result of an incorrect application of the sentencing guidelines, or that is greater or lesser than the sentence specified in the applicable guidelines range.

¹¹⁶ See *infra* notes 181-186.

¹¹⁷ There remains the fascinating issue of whether a judge-made common law of sentencing, even if mandatory, would be subject to the same Sixth Amendment constraints as legislatively-enacted sentencing law.

Guidelines, would not survive if Blakelyized.¹¹⁸ This scenario leaves sympathy and collegiality as the motive for Justice Ginsburg to switch sides on the remedial portion of the opinion. Perhaps hard cases (and good friends) make bad law. Equally plausible is that Justice Ginsburg believes that a federal judge with discretion engaging in meaningful adjudication can act as the fair and neutral point of recourse for a defendant in a dispute with the state. Under this due process vision of sentencing, mandatory guidelines contradict the core function of the judiciary. If writing on a clean slate, perhaps Justice Ginsburg would hold that judicial sentencing discretion is constitutionally required for reasons quite apart from the Sixth Amendment. Knowing that she could never get Justice Scalia to join such a movement, perhaps she abandoned her alliance-of-convenience with the Sixth Amendment camp in order to undo mandatory sentencing.

Whatever managed to persuade Justice Ginsburg, Justice Breyer's long allegiance to guidelines, particularly advisory guidelines, has been crystal clear. While a young attorney, then-Mr. Breyer worked for the Senate Judiciary Committee when Congress considered sentencing reform, and he worked as an author of the federal system in his role as chief counsel to the committee in the late 1970s.¹¹⁹ After becoming an appellate judge on the First Circuit, then-Judge Breyer was an original member of the United States Sentencing Commission.¹²⁰ During these years, Mr. Breyer attempted four times to establish advisory guidelines from which judges may depart if they state good reasons. The first time was when he assisted writing the initial draft of the Guidelines as chief counsel. When Congress rejected advisory guidelines, he tried a second time in his role on the first Sentencing Commission. Failing to obtain a majority of the seven Commissioners on this point, he tried a third time in a number of First Circuit decisions interpreting the Guidelines.¹²¹ His fourth try was joining the majority decision in *Koon v. United States*,

¹¹⁸ He argued quite strenuously (though I believe, erroneously) that the Guidelines could not survive if juries had to make the myriad of factual findings required. *Appendi v. New Jersey*, 530 U.S. 466 (2000) (Breyer, J. dissenting).

¹¹⁹ Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After Sarbanes-Oxley Act of 2002*, 34 LOY. U. CHI. L.J. 359, n.78 (2003); Christopher P. Carrington, *The Sky Is Not Falling – That Which You Feel Is Merely a No. 10 Earthquake*. *Blakely v. Washington: The Supreme Court Sentences the American Criminal Justice System to Disaster, Bedlam, and Reform*, 26 U. ARK. LITTLE ROCK L. REV. 719, n.64 (2004).

¹²⁰ Henry, *supra* note 48, at 90-91.

¹²¹ See, e.g., *United States v. Menez-Colon*, 15 F.3d 188, 191 (1st Cir. 1990); *United States v. Diaz-Fillafane*, 874 F.2d 43 (1st Cir. 1989); *United States v. Wright*, 873 F.2d 437 (1st Cir. 1989).

holding that district courts should be free to depart from the Guidelines, subject only to abuse of discretion review.¹²²

Congress roughly and immediately slapped down this last attempt by the Court to transform the Guidelines into “advice” that a judge could reject through upward and downward departure authority by enacting the Feeney Amendment in 2003.¹²³ This amendment was designed to remedy “the serious problem of downward departures from the Federal Sentencing Guidelines by judges across the country.”¹²⁴ It did this through various means. First, the amendment mandated higher sentences for child-victim, sexual abuse, and obscenity cases. More importantly, it permitted federal judges to depart upwards for these offenses, but effectively eliminated nine specified grounds for downward departure,¹²⁵ and prohibited judges from using their “residual” authority to depart downward on grounds not specified in the Guidelines.¹²⁶ Moreover, for all federal criminal cases (not just child-victim, sexual abuse, and obscenity cases), it conditioned the four level “early disposition” departure and three-level “acceptance of responsibility” adjustment on a motion from the government. Judges who depart downward in any class of case must state the reason for the lower sentence with “specificity in the written order of judgment and commitment.”¹²⁷ The amendment purported to overturn the Supreme Court decision in *Koon* by requiring circuit courts to review all departures in federal criminal law cases using a *de novo* standard, and limited the district court’s ability to downwardly depart on remand. Further, it included a mandate that the Sentencing Commission review all downward departures and promulgate amendments which would “substantially” reduce the number of downward departures, and it

¹²² *Koon v. United States*, 518 U.S. 81 (1996).

¹²³ Prosecutorial Remedies and Tools Against the Exploitation of Children Today, (“PROTECT Act”), Pub. L. No. 108-21, § 41(b)(g)(i), 117 Stat. 650, 668-69, 671-73 (popularly known as the Feeney Amendment). An excellent discussion of the legislative history and substance of the Act can be found in Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENT. REPTR. 310 (June 2003).

¹²⁴ 149 Cong. Rec. H3061 (daily ed. March 27, 2003) (statement of Rep. Feeney, the sponsor and author of the bill). The amendment “put strict limitations on departures by allowing sentences outside the guidelines range only upon grounds specifically enumerated in the guidelines as proper for departure. This would eliminate ad hoc departures based upon vague grounds, such as ‘general mitigating circumstances.’” *Id.* The Feeney amendment formally became law as part of the PROTECT Act in April of 2003.

¹²⁵ These grounds include aberrant behavior, family ties, military or charitable service, and employment related contributions.

¹²⁶ See U.S. SENTENCING MANUAL § 5K2.0 (2004) (providing for a downward departure if the judge finds any other mitigating factor “of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines”).

¹²⁷ 18 U.S.C. § 3553(c) (2000).

prohibited the Commission from creating new downward departure guidelines for the next two years. Finally and perhaps most offensively, it changed the composition of the Commission and imposed new reporting requirements. The amendment changed the then-current law requiring that “at least three” of the seven non-voting members of the Commission be federal judges, to “no more than three” federal judges (and thus, conceivably, there can be a Commission with no member judges). It required the Attorney General to report downward departures to Congress within fifteen days (including the district judge’s identity), or to submit a detailed report to the House and Senate Judiciary Committees within ninety days, setting forth the procedures by which the Department will ensure that all federal prosecutors oppose unsupported downward departure and ensure the vigorous pursuit of appeals.

With a Congress intent on constricting judicial discretion in any way possible, despite numerous protest against mandatory minimum sentences, the Federal Sentencing Guidelines, and the Feeney Amendment from jurists as high ranking as the Chief Justice of the United States Supreme Court,¹²⁸ it is no wonder that the Court accepted the opportunity presented by *Booker* to strike back.

II. FEDERAL CRIMINAL SENTENCING AFTER *BOOKER*

In the short term, judicial discretion is hugely increased as appellate courts reverse and remand all sentences still on direct appeal after *Booker* and trial judges impose post-*Booker* sentences in the absence of mandatory sentencing guidelines. I will first discuss what parts of the SRA and the Feeney Amendment survive *Booker*, then review how trial courts are presently reacting to their new grant of authority, and finally discuss the extent to which this discretion can be reigned in by appellate review.

¹²⁸ See, e.g., The American Bar Association, *Justice Kennedy’s Commission Final Report*, issued June 23, 2004, available at <http://www.abanet.org/index.cfm>; Rhonda McMillion, *ABA Supports Push to Restore Judicial Discretion in Sentencing*, 90 A.B.A.J. 62 (Jan. 2004) (noting speech by Justice Anthony M. Kennedy stating that “prison sentences are too long, mandatory minimum sentences should be repealed, and sentencing guidelines should be reconsidered”); Gina Holland, *Justice Applauds Bucking Sentencing Law*, at <http://news.findlaw.com> (last visited March 17, 2004) (quoting Justice Kennedy’s statement that courts should not have to “follow, blindly, these unjust guidelines”); Letters to Congress from Sentencing Commissioners, Judicial Conference, and Chief Justice William H. Rehnquist in opposition to Feeney Amendment, reprinted in 15 FED. SENTENCING REPORTER 471 (letter from Chief Justice Rehnquist to Senator Patrick Leahy warned that the amendment, “if enacted, would do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of courts to impose just and reasonable sentences”).

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The remedial majority held that 18 U.S.C. § 3553(b)(1), making the Guidelines mandatory,¹²⁹ and 18 U.S.C. § 3742(e), requiring appellate courts to review sentences for compliance with the Guidelines,¹³⁰ are severed and excised from the SRA as are all cross-references to the two severed provisions.¹³¹ So modified, the Guidelines are “effectively advisory” and thus judicial fact-finding and employment of the policy decisions contained in the guidelines do not violate a defendant’s Sixth Amendment right to a jury trial. Federal district judges must now “consider” the Commissioners’ preferences as set out in the guideline ranges pursuant to 18 U.S.C. § 3553(a)(4), but can tailor sentences in light of the other statutory concerns as well. These statutory concerns, listed in 18 U.S.C. § 3553(a), include imposing a sentence “*not greater than necessary*, to comply with the purposes set in [the Sentencing Reform Act.]”¹³² These purposes are:

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, to promote respect for the law, . . . to provide just punishment for the offense . . . to afford adequate deterrence to criminal conduct, . . . to protect the public from further crimes of the defendant; . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner, . . . to avoid unwarranted sentence disparities among defendants with similar records . . . and . . . to provide restitution to any victims of the offense.¹³³

This authority, coupled with the admonition in 18 U.S.C. § 3661 that “no limitations 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

¹²⁹ 18 U.S.C. § 3553(b)(1) (2000) (providing that the court “shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4)”). Subsection (a)(4) directs the judge to apply the guidelines in effect on the date the defendant is sentenced.

¹³⁰ 18 U.S.C.A. § 3742(e) (West Supp. 2004) (providing that the appellate court shall review the record to determine whether the sentence was “imposed as a result of an incorrect application of the sentencing guidelines”).

¹³¹ *United States v. Booker*, 125 S. Ct. 738, 746 (2005).

¹³² 18 U.S.C. § 3553(a) (2000) (emphasis added). Professor Berman argues that what he labels this “parsimony provision” requires the judge to impose a sentence below the guidelines range because guidelines sentences are not parsimonious. *See* Sentencing Law and Policy (Jan. 12, 2005), at http://sentencing.typepad.com/sentencing_law_and_policy.

¹³³ 18 U.S.C.A. §§ 3553(a)(1)-(7) (West Supp. 2004).

purposes of imposing an appropriate sentence,"¹³⁴ allow trial judges free reign in gathering information and making discretionary sentencing decisions.

A quick glance at the above list of appropriate statutory concerns in 18 U.S.C. § 3553(a), which includes a smorgasbord of deterrence, rehabilitative, and retributive theories of justice, should alert the reader to the possibility of adequately justifying any conceivable sentence the judge might wish to impose. While federal judges were theoretically considering all of these factors prior to *Booker*, in reality the range provided for by the Guidelines Manual trumped alternatives the judge might prefer. In fact, many of the Commissioners' wishes, as reflected in the Guidelines, directly contradicted statutory factors that judges were supposed to be considering. For example, much of the defendant's history and medical needs were expressly prohibited by the Guidelines as grounds for reaching a particular sentence.¹³⁵ The only mandatory sentences remaining after *Booker* are the mandatory minima enacted in the Crime Control Act that contained the SRA. So long as *Harris v. United States*¹³⁶ remains good law, judges cannot impose a sentence lower than a statutory minimum—everything else is fair game.

Though the remedial majority in *Booker* did not discuss the Feeney Amendment, its logic should apply to render all mandatory sentencing provisions either unconstitutional or advisory. For example, as part of the Feeney Amendment, Congress added § 3553(b)(2), limiting downward departures in child sex offense cases to those grounds specifically identified as permissible grounds of downward departures in the Sentencing Guidelines Manual. Will this prevent a judge from granting a downward departure based upon a defendant's age, his educational skills, substance abuse problems, aberrant behavior, family ties, or military service, all of which have been declared off-limits by the Commissioners?¹³⁷ If the Guidelines are now truly advisory, it seems to me that a judge in a child sex offense case should have the same authority to consider and then reject the Commissioner's policy choices regarding departures as in any other type of case. Similarly, the Feeney Amendment purports to restrict a judge from subtracting a third point from a defendant's base offense level for exceptional acceptance of responsibility (the ordinary award for pleading guilty and accepting

¹³⁴ 18 U.S.C. § 3661 (2000).

¹³⁵ See *infra* note 137.

¹³⁶ See *supra* note 78.

¹³⁷ See U.S. SENTENCING GUIDELINES MANUAL § 5K2.2 (aberrant behavior), § 5H1.6 (family ties and responsibilities), § 5H1.11 (military or charitable services), § 5H1.10 (socio-economic status), and § 5H1.12 (lack of guidance as a youth), all declared to generally be impermissible grounds for a downward departure.

responsibility for one's crime is a two-point deduction) except upon motion from the government. Likewise, the Guidelines allow a judge to grant a four level decrease for early dispositions program, again only upon motion from the government. If the Guidelines are advisory, then a judge could deduct the three points (or award any quantity of decrease she wishes) regardless of the government's request. Likewise, the judge could decide that the statutory sentencing factor in 18 U.S.C. §3553(a) advocating the elimination of disparity warrants granting a four-level decrease to all defendants, even if they are not lucky enough to be charged in a fast track jurisdiction.

The same argument flows regarding substantial assistance and relevant conduct, as well as collateral issue such as criminal forfeiture and mandatory restitution.¹³⁸ Prior to *Booker*, a judge could grant a

¹³⁸ While beyond the scope of this article, criminal forfeiture and mandatory restitution should also be subject to the *Apprendi/Booker* rule, despite Justice Breyer's unexplained declaration in *Booker* dicta that 18 U.S.C. § 3554, requiring criminal forfeiture in certain classes of cases, survives. Mandatory criminal forfeiture pursuant to the RICO statute, 18 U.S.C. § 1963, requires that the judge order forfeiture of any property constituting, or derived from, any proceeds obtained from racketeering activity. The factual finding that the property is proceeds is made by a judge, not a jury. Likewise, 21 U.S.C. § 853 requires forfeiture of proceeds and property used to facilitate a drug offense, and 18 U.S.C. § 982 requires forfeiture of money involved in money laundering. However, the mere inclusion of "forfeiture" as part of the penalty for a criminal offense does not authorize forfeiture of a defendant's estate as the penalty for committing his crime – the statutory maximum penalty is not everything the defendant owns. Rather, these statutes authorize the forfeiture only of those assets that meet certain criteria. This is similar to old larceny statutes that conditioned the amount of the fine on amount of loss sustained or value of property stolen. Since these facts must be established before the higher punishment is authorized, they should be elements after *Apprendi* and *Booker*. This especially true where forfeiture is mandatory, and the judge has no discretion to refuse to impose it. Nancy King and I first took this position in *Essential Elements*, *supra* note 15 at n.51, and expanded upon it in King & Klein, *Beyond Blakely*, *supra* note 91. However, case law thus far is primarily to the contrary. See, e.g., *United States v. Messino*, 382 F.3d 704 (7th Cir. 2004) (drug forfeiture findings of quantity and nexus are not elements of the offense after *Blakely* because there is no statutory maximum penalty); *United States v. Cianci*, 378 F.3d 71, 101 (1st Cir. 2004) (requesting additional briefing on whether *Blakely* disrupts RICO criminal forfeiture).

The Mandatory Victim's Restitution Act is likewise now rendered advisory, or the facts necessary to establish the appropriate imposition of restitution must be submitted to a jury beyond a reasonable doubt. In 1996, Congress enacted the Mandatory Victim's Restitution Act, which requires that the court order restitution to the victim of an offense, after making necessary factual findings as to the amount of loss, any medical expenses, and lost income resulting from the defendant's crime. 18 U.S.C. § 3663A (2000). It seems to me that these factual findings increase the statutory maximum penalty for the offense from no restitution to a higher amount, and that therefore these facts should be submitted to a jury for a beyond a reasonable doubt finding (or the restitution should be interpreted as discretionary). Again although there is a split over whether restitution constitutes punishment for purposes of the Ex Post Facto Clause, most Circuit cases have taken the position that the *Apprendi/Blakely/Booker* line of cases do not apply because first, restitution

defendant a downward adjustment to their sentence for substantial assistance to law enforcement only upon motion from the government.¹³⁹

If the guidelines are advisory, it seems to me that a judge could grant a downward departure for substantial assistance if doing so furthers any of the factors set out in 18 U.S.C. § 3553(a), regardless of whether the prosecutor moves for the departure. This gives judges much more discretion in sentencing, at least up to the point where they run into a mandatory minimum penalty. If the *Harris* holding that mandatory minimum penalties are not covered by *Apprendi/Blakely* remains good law, then the judge cannot go below such a statutory mandatory minimum sentence based upon substantial assistance. This is because of an independent statute providing that a judge can sentence below a mandatory minimum based upon substantial assistance only upon the government's motion.¹⁴⁰ This statute providing "get out of jail free" cards solely to prosecutors probably does not run afoul of the *Apprendi/Blakely* rule.

Prior to *Booker*, judges were compelled to impose increased sentences based upon their finding of "relevant conduct."¹⁴¹ Relevant conduct includes all foreseeable acts of co-conspirators and any other criminal conduct that was part of the same "course of conduct or common scheme or plan" as the offense of conviction.¹⁴² Under this scheme, prosecutors could force judges to sentence a defendant for conduct that was never charged, or even for conduct for which the defendant was acquitted.¹⁴³ Now that the guidelines are advisory,

is not punishment at all, and second, the restitution statute contains no maximum penalty. *See, e.g.,* *United States v. Wooten*, 377 F.3d 1134 (10th Cir. 2004) (restitution under 18 U.S.C. § 3663A did not violate *Blakely* as the defendant did not contend that the forfeiture order exceeded the value of the damaged property). *See also* *United States v. Syme*, 276 F.3d 131 (3d Cir. 2002) (*Apprendi* does not apply to the Mandatory Victim's Restitution Act because 18 U.S.C. § 3663A has no statutory maximum amount), cert. denied, 123 S.Ct. 619 (2002). *But see* *United States v. LaMere*, No. 03-30479, 2004 WL 1737916 (9th Cir. 2004) (affirming defendant's conviction but vacating restitution portion of his sentence and ordering mandate held until the resolution of the application of *Blakely*).

¹³⁹ U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2004).

¹⁴⁰ *See* 18 U.S.C. § 3553(e) (2000) (providing that the court "may impose a sentence below a level established by statute as a minimum sentence" only "upon motion of the Government").

¹⁴¹ U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2004) (providing that judges *shall* sentence for relevant conduct).

¹⁴² *Id.* § 1B1.3(a)(1)(B) provides that relevant conduct includes acts of co-conspirators, and § 1B1.3(a)(2) provides that relevant conduct includes counts that would group under § 3D1.3(d) and are part of the same course of conduct.

¹⁴³ *United States v. Watts*, 519 U.S. 148 (1997) (*per curiam*) (upholding guidelines provision for enhancement for acquitted conduct within the statutory maximum sentence for the crime of conviction); *Witte v. United States*, 515 U.S. 389 (1995) (Double Jeopardy Clause not offended by guideline requirement that judge impose enhancement for

judges can ignore relevant conduct if they choose, giving them one more means to sentence below a guidelines recommendation.¹⁴⁴

Federal judges have, for the most part, hated the Guidelines since the first Manual was published, in equal measure because the Guidelines effectively eliminated their discretion and because they were widely perceived as draconian. Trial judges appear to be taking their new-found authority to heart, and the majority of these cases favor defendants with lower sentences. Judges are now sentencing in two classes of cases:¹⁴⁵ “pipeline” cases that were still on direct appeal when *Booker* was rendered on January 25, 2005,¹⁴⁶ and new sentencing hearings occurring for the first time post-*Booker*. As to the first class of cases, almost all circuit courts are reversing and remanding the vast majority of pre-*Booker* sentences, finding harmful and plain error below.¹⁴⁷ Even the

uncharged drug conduct proven by a preponderance of the evidence at sentencing, as so long as the sentence was within the statutory maximum for the crime of conviction).

¹⁴⁴ See *United States v. Booker*, 125 S. Ct. 738, 771 (2005) (Stevens, J. dissenting).

¹⁴⁵ Sentences already final before *Booker* have no hope for reversals, as *Booker* will not be retroactive to cases on collateral review. See *Teague v. Lane*, 489 U.S. 288 (1989) (holding no relief available under § 2255 on basis of a “new” rule of criminal procedure announced after the prisoner’s conviction became final); *Schiro v. Summerlin*, 124 S. Ct. 2519 (2004) (holding that *Ring*’s rule requiring jury determination of aggravating factors was not retroactive because it was a new rule that did not fit into one of the exceptions for collateral review); *In re Anderson*, 396 F.3d. 1336 (11th Cir. 2005) (Judge Tjoflat) (denying second habeas petition because United States Supreme Court did not make *Blakely* or *Booker* retroactive on collateral review). But see Note, *Rethinking Retroactivity*, 118 HARV. L. REV. 1642 (2005) (arguing that the *Booker* line of cases should be retroactive to cases pending on collateral review).

Likewise, where a defendant has waived her *Apprendi* rights in her plea agreement, these waivers will be upheld on appeal. See, e.g., *United States v. Rubbo*, 396 F.3d. 1330 (11th Cir. 2005) (holding that appeal waiver is valid even where agreement contains exception for sentence above statutory maximum, as “statutory maximum” in plea agreement meant the highest penalty listed in the United States Code, not the new “statutory maximum” as defined by *Booker*).

¹⁴⁶ The *Booker* majority, citing *Griffith v. Kentucky*, 479 U.S. 314 (1987), held that the new Sixth Amendment rule would be applied to all cases pending on direct review. In the few months since *Booker* was rendered, the Supreme Court has granted certiorari, vacated the judgment, and remanded in light of *Booker* in over four-hundred cases. See Today’s SCOTUS action Sentencing Law & Policy, <http://sentency.typepad.com> (last visited April 21, 2005). The entry reports that nearly 450 cases were remanded to lower courts in light of the Court’s ruling in the *Booker* case.

¹⁴⁷ Pursuant to FED. R. CRIM. P. 52, when a defendant fails to object to an error, it is recognized only if plain. See *United States v. Cotton*, 535 U.S. 625, 631 (2002).

[B]efore an appellate court can correct an error not raised at trial, there must be (1) ‘error,’ (2) that is ‘plain,’ and (3) that ‘affect[s] substantial rights.’ If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.

Id. (citations omitted). Where a defendant does object to an error, it is recognized unless harmless beyond a reasonable doubt.

Fourth Circuit, one of our nation's most conservative, reversed a sentence under plain error review.¹⁴⁸ Judge Wilkins found that where the jury verdict supported a six to twelve month sentence for bankruptcy fraud but the judge imposed a forty-one to fifty-one month sentence based upon additional factual findings regarding amount of loss, more than minimal planning, abuse of a position of trust, and obstruction of justice, there was plain error that affected the defendant's substantial rights and that it would be a miscarriage of justice to fail to reverse and remand.¹⁴⁹

More importantly, those federal judges imposing criminal sentences post-*Booker* are almost uniformly employing their vast discretion in reaching their decisions. A few of the many available examples of judges calculating the Guidelines sentence¹⁵⁰ and then sentencing

¹⁴⁸ *United States v. Hughes*, 396 F.3d 374 (4th Cir. 2005). The author of this opinion, Chief Judge William W. Wilkins, was one of the original U.S. Sentencing Commissioners.

¹⁴⁹ See also *United States v. Antonakopoulos*, 399 F.3d. 68 (1st Cir. 2005); *United States v. Boone*, No. 04-2877, 2005 WL 290204 (2d Cir. Feb. 07, 2005); *United States v. Crosby*, 397 F.3d. 103 (2d Cir. 2005); *United States v. D'Oliveira*, No. 04-2736, 2005 WL 647658 (2d Cir. 2005); *United States v. Mortimer*, No. 03-4174, 2005 WL 318650 (3d Cir. 2005); *United States v. Washington*, 398 F.3d. 306 (4th Cir. 2005); *United States v. Hughes*, 396 F.3d 374 (4th Cir. 2005); *United States v. McDaniel*, 398 F.3d. 540 (6th Cir. 2005); *United States v. Barnett*, 398 F.3d. 516 (6th Cir. 2005); *United States v. Milan*, 398 F.3d. 445 (6th Cir. 2005); *United States v. Harris*, 397 F.3d. 404 (6th Cir. 2005); *United States v. Oliver*, 397 F.3d. 369 (6th Cir. 2005); *United States v. Davis*, 397 F.3d. 340 (6th Cir. 2005); *United States v. Re*, No. 03-2089, 2005 WL 647715 (7th Cir. 2005); *United States v. Fellers*, 397 F.3d. 1090 (8th Cir. 2005); *United States v. Fox*, 393 F.3d. 1018 (8th Cir. 2005); *United States v. Coffey*, 395 F.3d 856 (8th Cir. 2005); *United States v. Adams*, No. 03-2137, 2005 WL 646370 (8th Cir. 2005); *United States v. Ameline*, 400 F.3d. 646, (9th Cir. 2005); *United States v. Seibert*, No. 04-10171, 2005 WL 281469, (9th Cir. 2005); *United States v. Ruiz-Alonso*, 397 F.3d. 815 (9th Cir. 2005); *United States v. Lynch*, 397 F.3d. 1270 (10th Cir. 2005); *United States v. Rodriguez*, 398 F.3d. 1291 (11th Cir. 2005); *United States v. Garcia*, No. 03-10350, 2005 WL 646342 (11th Cir. 2005); *United States v. Reese*, 397 F.3d. 1337 (11th Cir. 2005).

A much smaller number of sentences in pipeline cases are being affirmed based upon plain error analysis. See *United States v. Bruce*, 396 F.3d. 697, 720 (6th Cir. 2005); *Rucker v. United States*, No. 2:04-CV-00914PGC, 2005 WL 331336 at *10 (D. Utah 2005); *United States v. Rodriguez*, 398 F.3d. 1291 (11th Cir. 2005). It is only the Fifth and D.C. Circuits that stringently require a defendant to establish prejudice before obtaining a remand for new sentencing. See *United States v. Infante*, No. 02-50665, 2005 U.S. App. LEXIS 4571 (5th Cir. 2005); *United States v. Smith*, No. 03-3087, 2005 WL 627077 (D.C. 2005) (per curiam).

¹⁵⁰ On January 21, 2005, Judge Ricardo H. Hinojosa, the chair of the U.S. Sentencing Commission, and Judge Sim Lake, the chair of the Criminal Law Committee of the Judicial Conference of the U.S., sent a memorandum to all U.S. judges reminding them of the "importance of continuing to submit sentencing documents to the Sentencing Commission in accordance with the requirements of 28 U.S.C. § 994(w)." See Memorandum from Judge Ricardo H. Hinojosa and Judge Sim Lake, to all Federal Judges, available at http://sentencing.typepad.com/sentencing_law_and_policy/files/ussc_documentation_request.pdf (concerning specific sentencing documents such as the Presentence Report, information about offender and offense made relevant by the guidelines). It further reminded

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otherwise shortly after *Booker* should suffice to make this point.¹⁵¹ Many judges, after “considering” the advisory federal sentencing guidelines as required by *Booker*, are then relying on 18 U.S.C. § 3553(a), the federal statute allowing broad latitude in selecting relevant sentencing criteria, even where that criteria directly contradicts a policy decision made by the Commissioners.

For example, some judges are lowering sentences based upon a defendant’s need for medical care, despite the Commissioners’ rejection of this factor. In *United States v. Jones*,¹⁵² Judge Brock Hornby sentenced a mentally impaired defendant to probation rather than the twelve to eighteen months “recommended” by the federal sentencing guideline for his weapon’s possession offense. In employing his discretion to reject this range, the judge pointed to 18 U.S.C. § 3553(a)(2)(D), which provides that one sentencing factor is “to provide the defendant with needed . . . medical care . . .”¹⁵³ For Mr. Jones, that was best done by allowing him to continue to live with his sister and take his various medications. Judge Hornby further noted that 18 U.S.C. § 3553(a)(2)(C) provides that another sentencing factor is to “protect the public from further crimes of the defendant,” which again was best accomplished by allowing the defendant to continue his treatment program, rather than by disrupting it by a prison term.¹⁵⁴ The judge pointedly noted that his sentence would have been impossible before *Booker* because neither mental and emotional conditions, diminished capacity, nor efforts toward

judges to comply with 18 U.S.C. § 3553(c) by giving specific reasons for sentences that vary from the guideline range. *Id.*

¹⁵¹ In addition to the cases discussed *infra* notes 152-172, instances of district judges sentencing quite differently from what the Federal Sentencing Guidelines Manual “advises” include *United States v. Myers*, 353 F. Supp. 2d. 1026, 1028 (S.D. Iowa 2005) (“[T]he Guidelines are not presumptive, but advisory, and should be treated as one factor to be considered in conjunction with other factors that Congress enumerated in section 3553(a.)”; see also *United States v. Kelley*, 355 F. Supp. 2d. 1031, 1034 (D. Neb., 2005) (“Post *Booker*, the Sentencing Reform Act (SRA) requires a sentencing court to regard the Guidelines ranges as one of many factors.”); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d. 1019, 1023 (D. Neb. 2005); *Feds Want Dearborn Heights Man to Be Imprisoned in Porn Case*, DETROIT NEWS, March 20, 2005, available at <http://www.detnews.com/metro/0503/20/B06-122080.htm> (reporting government’s appeals of District Judge Friedman’s post-*Booker* sentence of defendant LaFrank’s probation in pornography case, where guidelines called for sixty-three months prison time, and reporting that in about 10% of sentencings, federal judges in Detroit had given sentences lower than called for by the guidelines).

A very thorough and current list of all post-*Booker* federal decisions was prepared by Frances H. Pratt for the Office of the Federal Public Defender in Alexandria, VA, and can be found at <http://sentencing.typepad.com>.

¹⁵² 352 F. Supp. 2d 22 (D. Maine 2005).

¹⁵³ *Id.* at 26.

¹⁵⁴ *Id.*

rehabilitation would have entitled the defendant to a downward departure.¹⁵⁵

Other judges are decreasing sentences, as Judge Hornby did, in part based upon rehabilitation concerns. For example, Chief Judge Ezra of Hawaii used treatment concerns to justify a reduced sentence for a first time offender who had undergone sex-offender treatment after his conviction for downloading child pornography.¹⁵⁶ Similarly, Judge Arcara of New York reduced the sentence of a first-time non-violent offender based upon rehabilitation potential.¹⁵⁷

More than a few judges are using their discretion to close the 100:1 crack to powder cocaine disparity in sentencing. Congress enshrined a 100:1 ratio into law in the Anti-Drug Abuse Act of 1985, such that to trigger the Act's ten-year mandatory minimum sentence, the offense had to either involve five kilograms of powder cocaine or a mere fifty grams of crack.¹⁵⁸ Numerous state jurists and academics have decried the disparate racial impact this penalty scheme imposes, as African-Americans account for 90% of federal crack cocaine defendants.¹⁵⁹ The Commission, initially with the blessing of the Clinton Department of Justice, has thrice tried to modify this ratio, but Congress has rebuffed these attempts.¹⁶⁰ Thus, federal judges, who had their hands tied until

¹⁵⁵ *Id.* at 23-24 (discussing Guideline §5H1.3, providing that "mental and emotional conditions are not ordinarily relevant in determining whether a departure is warranted," §5K2.13, which provides for a downward departure for reduced mental capacity only where it contributed to the commission of the offense, §5K2.19, which prohibits departures for post-sentencing rehabilitative efforts but makes no mention of pre-sentencing efforts, and §5K2.0, a catchall departure guideline, which was inapplicable).

¹⁵⁶ See Sentencing Law and Policy (Jan. 20, 2005), at http://sentencing.typepad.com/sentencing_law_and_policy/2005/week3/index.html. This informative blog is managed by Professor Doug Berman from Ohio State.

¹⁵⁷ *Id.*

¹⁵⁸ Pub. L. No. 99-570, 100 Stat. 3207 (1986); codified at 21 U.S.C. § 841(b) (2000).

¹⁵⁹ *United States v. Clary*, 846 F. Supp. 768 (E.D. Mo. 1994), *rev'd* 34 F.3d 709 (8th Cir. 1994); Kevin J. Cloherty & Dawn M. Perlman, *Powder vs Crack: 100 to 1 Current Quantity Ratio Under Attack*, 50 FED. LAW. 50 (2003); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1308-09 (1995) (concluding that equal protection analysis should be loosened to account for unconscious racism, especially where a criminal prohibition has a seriously disproportionate impact on black defendants). In 1994, blacks comprised 90.4% of all federal crack cocaine drug offenders. *United States v. Smith*, 73 F.3d 1414 (6th Cir. 1994) (Jones, J., concurring). In 1993, only 4% of federal crack cocaine offenders were white, and 88% of such defendants were black. *United States v. Armstrong*, 517 U.S. 456, 478 (1996) (Stevens, J., dissenting) (citing to U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 39, 161 (Feb. 1995)).

¹⁶⁰ On May 11, 1995, the Commission presented an amendment to Congress recommending that the 100:1 ratio be replaced with a 1:1 ratio equivalence between crack and powder cocaine. 60 Fed. Reg. 25,074 (1995). In 1997, the Commission recommended altering the penalties to reflect a 5:1 ratio, on July 3, 1997, the Attorney General recommended adopting a similar 5:1

Booker, are now imposing crack cocaine sentences below that formerly required by the Guidelines.¹⁶¹ Similarly, some judges are availing themselves of the opportunity to reject what they consider draconian drug sentences for low-level “mules,” as the Guidelines base the penalty upon the actual quantity of the drug possessed or that is the subject of the conspiracy, regardless of whether a particular defendant knew the quantity involved or was aware of the full scope of the conspiracy.¹⁶²

In another category of cases, judges who disagree with various aspects of the Commissioners’ policy choices regarding fraud sentences have used *Booker* as a means of voicing this disagreement. In *United States v. Ranum*,¹⁶³ Judge Adelman sentenced a loan officer convicted of misapplying bank funds to a year and a day in prison, rather than the recommended guideline range of thirty-seven to forty-six months.¹⁶⁴ Post-*Booker*, he “may no longer uncritically apply the guidelines” but must instead “consider *all* of the § 3353(a) factors, not just the

ratio, and on July 22, 1997, the Clinton Administration publicly proposed reducing the ratio to 10:1. U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (1997). The text of the proposed amendments to the guidelines are reprinted at *Amendments to the Federal Sentencing Guidelines Policy Statements and Official Commentary*, 57 CRIM. L. REP. 2095, 2096 (1995). Congress refused to introduce a bill to implement any of these solutions. In 2002, the Commission again declared the 100:1 ratio “unjustified.” U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY viii (May 2002), available at <http://www.ussc.gov/LEGIST.htm>. Congress again refused to act. See Elizabeth Tison, *Amending the Sentencing Guidelines for Cocaine Offenses*, 27 S. ILL. U. L.J. 413, 429 (2003).

¹⁶¹ See, e.g., *United States v. Smith*, No. 02-CR-163, 2005 WL 549057 (E.D. Wis. 2005) (Judge Adelman) (granting below guideline sentence to defendant convicted of crack offense); *United States v. Simon*, No. CR-90-216CPS, 2005 WL 711916 (E.D.N.Y. 2005) (Judge Sifton) (holding that post-*Booker* courts do not have to follow the 100:1 crack to powder ratio, and sentencing defendant to 262 months rather than the guideline recommended 324-405 months); *United States v. Thomas*, No. 03-CR-30033-MAP, 2005 U.S. Dist. LEXIS 3972 (D. Mass. 2005) (Judge Ponsor); *United States v. Harris*, No. 04-0157, 2005 U.S. Dist. LEXIS 3958 (D.D.C. 2005) (Judge Robinson); *United States v. Carvajal*, No. 04 CR 222AKH, 2005 WL 476125 (S.D.N.Y. 2005); *United States v. Nellum*, No. 2:04-CR-30, 2005 WL 300073, at *3 (N.D. Ind. 2005).

¹⁶² U.S. District Judge Arcara in Buffalo gave a one day sentence to a female drug mule rather than imposing the Guideline range of twenty-four to thirty months. Dan Herbeck, *Thanks to High Court, Drug Defendant Gets 2nd Chance*, THE BUFFALO NEWS, Jan. 20, 2005, at B1.

¹⁶³ *United States v. Ranum*, 353 F. Supp. 2d. 984 (E.D. Wis. 2005).

¹⁶⁴ Judge Adelman asserted that pursuant to *Booker*, he must impose a sentence “sufficient but not greater than necessary to comply with the purposes set forth” in 18 U.S.C. § 3553(a). *Id.* at 985. Thus, he must consider the nature of the offender, the nature of the offense, the need to avoid unwarranted disparities, the kind of sentences available, and the needs of the public and victim. He “may no longer uncritically apply the guidelines and, as one court suggested, ‘only depart . . . in unusual cases for clearly identified and persuasive reasons.’” *Id.* Judge Adelman is convinced that the latter quoted approach, espoused by Judge Paul Cassell in *United States v. Wilson*, 355 F. Supp. 2d. 1269 (D. Utah 2005), is “inconsistent with the holdings of the merits majority of *Booker*.” *Id.*

guidelines.”¹⁶⁵ In Mr. Ranum’s case, the victims will be more likely to receive restitution (as provided for by 18 U.S.C. § 3553(a)(7)) if the period of imprisonment is short and the defendant can get back to work. Most importantly, the defendant’s offense level under the advisory guidelines was largely the product of the loss amount. Judge Adelman disagrees with this guideline choice in white-collar cases, preferring to assess “personal culpability,” which may or may not correspond to loss amount depending upon “the nature of the case.”¹⁶⁶ In Ranum’s case, the “defendant’s culpability was mitigated in that he did not act for personal gain or for improper personal gain of another” but rather made a series of reckless loans which went bad.¹⁶⁷ That, coupled with the defendant’s solid employment history, his need to raise his daughters, and his need to care for his elderly depressed mother and Alzheimer’s ridden father, supported the low sentence. Likewise, former Connecticut Governor John Rowland received only a year and a day in prison for his plea to conspiracy to steal honest service, despite a Guideline range of fifteen to twenty-one months, and a prosecutorial recommendation of thirty to thirty-seven months.¹⁶⁸

At least some judges appear to be granting larger § 5K1.1 substantial assistance departures than requested by the government. For example, Judge Presnell in *United States v. Bevelt*¹⁶⁹ rejected the “government’s philosophically one-sided bid to marginalize the judicial branch” by controlling the amount of downward departures, finding instead that judicial control over substantial assistance departures would better serve the goal of eliminating sentencing disparity.¹⁷⁰ Thus, Judge Presnell granted the defendant a five-level departure for cooperation with the authorities (Mr. Bevelt immediately told the government who gave him the kilogram of powder cocaine he tried to smuggle from Jamaica to Florida), despite the government’s request for only a two-level departure (because the crew member who had given the drugs to the defendant

¹⁶⁵ *Id.* at 985-86 (emphasis in original).

¹⁶⁶ *Id.* at 990.

¹⁶⁷ *Id.*

¹⁶⁸ William Yardly & Stacey Stowe, *A Conrite Rowland Gets a Year for Accepting \$107,000 in Gifts*, N.Y. TIMES, Mar. 19, 2005, at A.3. Thus, Judge Dorsey either granted a downward departure under the Guidelines or a *Booker* variance, but because the opinion is not published it is impossible to say which one. The extra day was to the defendant’s benefit, as he is eligible for the 15% “good time” reduction only if his sentence is over one year.

¹⁶⁹ No. 6:04-cr-199-Orl-31DAB (M.D. Fla. 2005), at http://sentencing.typepad.com/sentencing_law_and_policy/files/judge_presnell_belvelt_sentencing_opinion.pdf.

¹⁷⁰ *Id.* This is because cooperation agreements allow more culpable defendants to receive shorter sentences than less culpable ones, and because there is much disparity among districts in the application of § 5K1.1. *Id.* at 4 (citing *Am. College of Trial Lawyers Report and Proposal on § 5K1.1 of the U.S. Sentencing Guidelines*, 38 AM. CRIM. L. REV. 1503, 1524-25 (2001)).

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had already absconded).¹⁷¹ The Commentary to § 5K1.1 provides that “substantial weight should be given to the government’s evaluation of the extent of the defendant’s assistance,”¹⁷² and, prior to *Booker*, it was a matter of course for the court to grant whatever decrease the government suggested.

Recent cases also show that a few judges are using their new found discretion to increase sentences in particularly egregious cases, beyond what the former mandatory federal sentencing guidelines would allow.¹⁷³ For example, Mr. Negron-Cabrera was sentenced to 114 months imprisonment for assaulting his wife with a deadly weapon, though his Guideline range was forty-six to fifty-seven months.¹⁷⁴ Judge Minaldi of Port Charles, Louisiana, did not believe that the Guidelines sentence accounted for the seriousness of the assault, during which the defendant threatened to kill the victim and held her hostage for over two hours. In New Jersey, U.S. District Judge Cavanaugh sentenced a former federal immigration inspector to seven and one-half years in prison for smuggling, more than two years longer than the fifty-one to seventy-one months under the guidelines and a harsher term than even the prosecutors recommended.¹⁷⁵

Not all judges are treating the Guidelines so cavalierly. A few judges, like Judge Paul Cassell in Utah, have publicly embraced the position that they will sentence defendants to the same term they would

¹⁷¹ Judge Presnell seemed less than thrilled with the government’s argument that anything outside the guidelines range is per se unreasonable and that he would be put in a *Booker* report (referring to the Department’s policy of placing judges who sentence below guidelines minimums or government-approved downward departures on a “*Booker* Sentencing Report Form,” as described in a memorandum from James P. Comey, Deputy Attorney General, U.S. Dept. of Justice, *Department Policies and Procedures Concerning Sentencing* (Jan. 28, 2005), at <http://www.nysacd.org/aa/documents/MouthpieceMarch2005WEB.pdf>.

¹⁷² U.S. SENTENCING GUIDELINE MANUAL § 5K1.1, comment n.3 (2004).

¹⁷³ See, e.g., *Former Militia Member Sentenced*, available at <http://www.cadillacnews.com/articles/2005/03/25/news/news01.txt> (Mar. 25, 2005) (noting that Judge Quist sentenced Norman David Sommerville in Grand Rapids, Michigan, to eighty months for possession of a machinegun, despite the fifty-one to sixty-three month sentence recommended by the Guidelines); John P. Martin, *Janiszewski Gets Stiffest Penalty Despite Calls for Lenience*, NEW JERSEY STAR-LEDGER, available at <http://www.nj.com/news/ledger/index.ssf?/base/news-21/111172998090850.xml> (Mar. 25, 2005) (noting Judge Pisano’s forty-one-month sentence for Robert Janiszewski in New Jersey for taking bribes, despite the prosecutor’s request for a lighter sentence due to the defendant’s assistance as a cooperating witness in numerous other cases).

¹⁷⁴ *Negron-Cabrera Sentenced to Over Nine Years in Prison*, LEESVILLE DAILY LEADER, available at <http://www.leesvilledailyleader.com/articles/2005/03/23/news/news4.txt> (Mar. 23, 2005).

¹⁷⁵ John P. Martin, *Irate Judge Throws Book at Smuggler*, THE STAR LEDGER available at <http://www.nj.com/news/ledger/jersey/index.ssf?/base/news-9/1111561194122990.xml> (Mar. 25, 2005). The prosecution recommended the lighter term due to defendant’s cooperation.

have received if the Guidelines were mandatory.¹⁷⁶ Judge Cassell opined that trial judges should give “*considerable weight*” to the Guidelines in determining post-*Booker* sentences,¹⁷⁷ and thus he sentenced Mr. Wilson to 188 months in prison for armed bank robbery, in conformity with the guideline recommended range of 188-235 months in prison.

The U.S. Sentencing Commission has recently begun to collect information on post-*Booker* sentences, and a comparison of their new data with data from previous years confirms my suspicions that federal district judges will not be shy about using their new-found authority. A chart showing all reported decisions between January 12 and March 15, 2005 shows that only 62.1% of the over five-thousand cases were within the Guidelines range.¹⁷⁸ This is a marked decrease over the 71% of sentences that conformed to the Guidelines in 1995 and the 65% in 2002.¹⁷⁹ These statistics support the proposition that judges are willing to disregard the guidelines under the new system. The U.S. Sentencing Commission chart further shows that 1% of the 1.9% above guideline range sentences are directly attributable to *Booker*.¹⁸⁰ The 1.9% figure itself is a marked increase over the .9% above Guideline range sentences in 1995 and the .8% in 2002. Judges apparently feel free to give higher as well as lower sentences than those required by the old mandatory guideline regime. More significantly, 36% of post-*Booker* sentences are below the Guidelines range—larger than any other year between 1995 and 2002.¹⁸¹ Of those lower-range sentences, 8.6% are directly attributable to *Booker*.¹⁸²

¹⁷⁶ See, e.g., *United States v. Wilson*, 355 F. Supp. 2d. 1269, 1270 (D. Utah 2005) (holding that the recommended Guidelines sentence should receive considerable weight); *United States v. Duran*, No. 2:04-CR-00396-PGC, 2005 WL 395439 (D. Utah 2005); *United States v. Wanning*, 354 F. Supp. 2d. 1056 (D. Neb. 2005); see also *United States v. Peach*, 356 F. Supp. 2d. 1018, 1021 (D.N.D. 2005) (“This Court is of the opinion that the proper methodology for sentencing in the post-*Booker* environment is that federal district courts should give the Sentencing Guidelines ‘substantial weight.’”).

¹⁷⁷ *Wilson*, 355 F. Supp. 2d. at 1271 (emphasis not in original, and likewise not in the Supreme Court’s command in the *Booker* case).

¹⁷⁸ Memorandum from the Office of Policy Analysis to Judge Hinojosa, Chair of the USSC (Mar. 22, 2005), available at http://www.ussc.gov/Blakely/Booker_032205.pdf (last visited Apr. 17, 2005).

¹⁷⁹ U.S. SENTENCING COMMISSION, FEDERAL SENTENCING STATISTICS REPORT FOR FISCAL YEARS 1995-2002, TABLE 8.

¹⁸⁰ The other .9% were classified as an upward departure from the guideline range.

¹⁸¹ U.S. SENTENCING COMMISSION, *supra* note 179.

¹⁸² *Id.* The Commission report noted that this figure is reached by subtracting those below-range sentences due to substantial assistance and fast track government motions, and subtracting those where the judge classified the sentences as a “downward departure.” The

Once a federal district judge sentences below a formerly mandatory guideline range, there is not much the prosecutor can do about it. Appellate courts are, for the most part, affirming post-*Booker* sentences as “reasonable.”¹⁸³ So long as the district judge calculated the guidelines range and “considered” it, she need not give that factor any greater weight than any other factor that the court is instructed to consider by 18 U.S.C. § 3553(a).¹⁸⁴ Reversals, thus far, seem to be instances where the district court miscalculated the guidelines range.¹⁸⁵ I anticipate that sentences within the federal sentencing guidelines range will be “presumptively reasonable.” This will decrease the appellate workload and is consistent with the demand from the Supreme Court that the guidelines be “considered.” On the other hand, I doubt an appellate court could impose a “presumptively unreasonable” label to sentences outside the guidelines, as this would transform the guidelines into a de facto mandatory sentence.¹⁸⁶

When will a sentence outside the Guideline range be “unreasonable”? My guess is essentially never, so long as the judge calculated, considered, and rejected the guideline sentence in favor of a competing factor from 18 U.S.C. § 3553(a), and so long as the sentence is

remaining 8.6% either cite no reason or cite *United States v. Booker* or 18 U.S.C. § 3553 as the reason for the low sentence.

¹⁸³ “We review the sentence imposed for unreasonableness, judging it with regard to the factors in 18 U.S.C. § 3553(a).” *United States v. Killgo*, 397 F.3d 628, 630 (8th Cir. 2005); *United States v. Cramer*, 396 F.3d 960, 965 (8th Cir. 2005); see also *United States v. Yahnke*, 395 F.3d 823, 824 (8th Cir. 2005) (“The courts of appeals review sentencing decision for unreasonableness.”); *United States v. Hughes*, No. 03-4172, 2005 WL 628224 (4th Cir. 2005) (noting that trial judges should still consider the Guideline range under § 3553(a)(4) as well as all other factors set forth in § 3553(a), and the judge is required to state his reason for sentencing outside the guidelines under § 3553(c)(2), and an appellate court will affirm any sentence within statutory maximum that is “reasonable”). But see *United States v. Rogers*, 400 F.3d 640 (8th Cir. 2005); *infra* note 188.

¹⁸⁴ District courts adopting this position include *Simon v. United States*, CR-90-216CPS, 2005 WL 711916 (E.D.N.Y. 2005) (noting that § 3553(a), which includes the calculation of the guidelines range in (a)(4), does not distinguish between the weight to be given to any of the factors listed); *United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. 2005) (giving “heavy weight” to the Guidelines may be in conflict with sections 3553(a)’s command to consider a multitude of factors); *United States v. Biheiri*, 356 F. Supp. 2d 589 (E.D. Va. 2005); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019 (D. Neb. 2005); *United States v. Myers*, 353 F. Supp. 2d 1026 (S.D. Iowa 2005).

¹⁸⁵ See, e.g., *United States v. Villegas*, No. 03-21220, 2005 WL 627963 (5th Cir. 2005) (noting that where the trial court sentences under the guidelines, the appellate court will review de novo whether it properly interpreted and applied the Guidelines, but where the district court exercises its post-*Booker* discretion to impose a non-guidelines sentence, the review will be under the new reasonableness standard).

¹⁸⁶ See *Simon*, 2005 WL 711916, at *4 (“[T]he greater the weight given to the Guidelines, the closer the court draws to committing the act that *Booker* forbids—a Guidelines sentence based on facts found by a preponderance of the evidence by a judge.”); see also *Biheiri*, 356 F. Supp. 2d at 595.

within the statutory minimum and maximum penalty. A judge would need to act irrationally or with invidious discrimination before entertaining a realistic fear of reversal on appeal. As Justice Scalia so astutely noted in his *Booker* dissent, there is simply no benchmark for reasonability beyond what Congress prescribes as the statutory maximum. Just as there was no judicial review of sentences before the SRA, I predict that eventually, after the kinks are worked out, there will be no meaningful review of sentencing post-*Booker*.¹⁸⁷

It is possible, however, that appellate courts may develop an enforceable federal law of sentencing through appellate opinions. In the first published circuit court opinion applying the reasonableness standard of review, the court reversed a sentence of probation for the offense of being a felon in possession of a firearm as unreasonable in light of the sentencing factors identified in 18 U.S.C. § 3553(a). In *United States v. Rogers*,¹⁸⁸ the trial judge had considered the fifty-one to sixty-three month sentence recommended by the Guidelines and departed downward on the bases of extraordinary rehabilitation—the defendant, though deer hunting while on parole in a state drug case, had managed to stay off drugs and had reunited with his family. The Eighth Circuit, though providing no discussion of the nature of the reasonableness standard or how it should be applied in other cases, opined that the sentence was unreasonably low in light of the defendant’s criminal history and congressional direction to protect the public and deter defendants with a similar record. Should the courts continue in this vein and develop set ranges for certain offenses based upon particular facts (such as whether the defendant demonstrated respect for the law or admitted acts of drug use)¹⁸⁹ these facts may well become elements of greater offenses under *Booker*. If so, defendants will argue that it violates the Sixth Amendment to allow judicial fact-finding on these matters. The government will argue that these factors are not based upon legislative enactments (a requirement in *Blakely* and *Booker*) but upon a judicially created common law of sentencing that is exempt from the jury requirement. While a similar argument (that the guidelines were not legislative enactments because they were promulgated by the U.S. Sentencing Commission, an administrative body located in the judicial

¹⁸⁷ See *Williams v. New York*, 337 U.S. 241 (1949) (noting that judge could raise defendant’s sentence from the life imprisonment recommended by the jury to death based upon his conclusion at sentencing that Mr. Williams possessed “a morbid sexuality” and was a “menace to society,” and may consider any information he chooses to at sentencing). While there was reasonability review under the SRA prior to *Booker*, this was only for the length of departures and for the few instances where there was no guideline established for a crime. That review functioned only because there was a mandatory guidelines system as a backdrop.

¹⁸⁸ 400 F.3d. 640 (8th Cir. 2005).

¹⁸⁹ *Id.* at 642.

branch) failed in *Booker*, the disconnect between the sentence and the legislative enactment (here the sentencing factors set out in 18 U.S.C. § 3553(a)) is stronger.

What are we to make of this data? For those who believe that the primary purpose animating the Guidelines is uniformity, we probably already have sufficient data to conclude that Justice Breyer's experiment is failing. For those who desire improved uniformity over the pre-1984 days, yet long for some judicial discretion to account for unusual cases, and especially for those who believe prosecutors possessed excessive power under the Guidelines, the experiment is somewhat of a success.

III. PLEA BARGAINING AFTER BOOKER

Most post-*Booker* sentencing, like most pre-*Booker* sentencing, will be based not upon jury trials but upon plea-agreements. The interesting post-*Booker* questions are whether the total percentage of guilty pleas will decrease, whether plea deals will get sweeter for defendants, and whether judges will have any more input into sentencing after accepting a guilty plea. My guess is that the answer to all of these questions will be in the affirmative.

The federal criminal justice system, as presently constructed, relies on the upward of 93% of defendants pleading guilty and waiving their right to a jury trial.¹⁹⁰ The overall plea rate must remain relatively constant—pressures from judges, prosecutors offices, and prison systems will ensure that this continues.¹⁹¹ What can change, however, is the structure and outcome of the plea negotiations.

Prosecutors, who controlled the show pre-*Booker* through a combination of charge and fact bargaining, offering downward departures based upon substantial assistance, agreeing to acceptance of responsibility adjustments, and threatening mandatory minimum and consecutive sentences,¹⁹² will do everything in their power to replicate

¹⁹⁰ In 1998, 93.6% of federal defendants pled guilty. See U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig. C (3d ed. 1998), available at <http://www.ussc.gov/ANNRPT/1998/Sbtoc98.htm> (last visited Apr. 17, 2005).

¹⁹¹ Most scholars agree that resource and time constraints on the part of prosecutors, courts, and prison systems demand that the plea rate remain constant or decrease. See, e.g., SARA SUN BEALE & NORMAN ABRAMS, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 748 (3d ed. 2000) (“In order to keep the system from grinding to a halt, the Guidelines had to accommodate, and even encourage, plea bargaining.”); WAYNE R. LAFAYE, ET AL., CRIMINAL PROCEDURE § 21.1 (2d ed. 1999); Fisher, *supra* note 21; Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

¹⁹² See, e.g., SMITH & CABRANES, *supra* note 27, at 141 (noting that “the exercise of broad prosecutorial authority over sentencing within a system that severely limits the sentencing discretion

this pre-*Booker* world. Immediately after *Blakely v. Washington* was rendered, the Department of Justice sent a memorandum to all U.S. Attorney's Offices instructing Assistants to seek to obtain plea agreements that waived all rights under *Blakely*, and included the provisions that:

[T]he defendant agrees to have his sentence determined under the Sentencing Guidelines; waives any right to have facts that determine his offense level under the Guidelines . . . alleged in an indictment and found by a jury beyond a reasonable doubt, agrees that facts that determine the offense level will be found by the court at sentencing by a preponderance of the evidence and that the court may consider any reliable evidence, including hearsay; and agrees to waive all constitutional challenges.¹⁹³

Now prosecutors can instead ask for *Booker* waivers. They will attempt to get defendants to contract into a plea agreement that stipulates that the Guidelines are mandatory, or that stipulates to a particular Guideline sentence, and that waives the defendant's right to petition the judge for a more lenient sentence.

There are three types of plea agreements under Federal Rule of Criminal Procedure 11(c): agreements to dismiss one or more charges under 11(c)(1)(A); agreements to make a nonbinding sentencing recommendation under 11(c)(1)(B); and agreements for a specific sentence under 11(c)(1)(C).¹⁹⁴ A pre-*Booker* regime could be accomplished by using these so called 11(c)(1)(C) pleas to a set term of years. Some U.S. Attorney's Offices have adopted plea policies that purport to agree only to those deals that allow the government to withdraw if the judge goes below an agreed upon sentence (and allow the defendant to withdraw if the judge exceeds the maximum agreed upon sentence). At least some judges in Detroit, Michigan, have refused

of federal judges means that the power of prosecutors is not subject to the traditional checks and balances that help prevent abuse of that power") (emphasis in original); Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive Sentencing,"* 126 U. PA. L. REV. 550 (1978); Susan R. Klein, *Double Jeopardy's Demise,* 88 CAL. L. REV. 1001 (2001) (reviewing GEORGE C. THOMAS III, *DOUBLE JEOPARDY: THE HISTORY, THE LAW* (1998)) (suggesting that prosecutors have inordinate power to charge and sentence in part because of the Court's current interpretation of the double jeopardy clause).

¹⁹³ Memorandum from James Comey, Deputy Attorney General, to all Federal Prosecutors, Departmental Legal Positions and Policies in Light of *Blakely v. Washington* at 4 (July 2, 2004), available at http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_blakely_memo_7204.pdf (last visited Apr. 17, 2005).

¹⁹⁴ See FED. R. CRIM. P. 11(c)(1)(A)-(C).

to accept such plea agreements in their courtrooms.¹⁹⁵ While judges need not accept such pleas, the incentive of moving cases along will drive many jurists to accept them.

However, even if judges routinely accept such deals, defendants will have little incentive to agree to contract back to a pre-*Booker* world, or to agree to a Federal Rule of Criminal Procedure 11(c)(1)(C) plea containing a guideline sentence. As Nancy King and I argued immediately after the Court rendered *Apprendi*, plea deals will improve for defendants post-*Booker*.¹⁹⁶ Defendants have most of the new bargaining chips in this new system. Prosecutors realize that many judges think the Guidelines are too harsh, especially for white collar and drug cases, so deals should be to lower sentences than pre-*Booker*. Judges are now free to add the three point "acceptance of responsibility" decrease without waiting for a government motion to do so, and even further can grant reductions for acceptance even if the government refuses to offer a plea agreement.¹⁹⁷ Judges can depart downward or ignore the Guidelines altogether, so long as they can articulate a "reason" for doing so.

I anticipate that we might also see more "open pleas" to indictment, and in fact, many of my sources in various U.S. Attorney's Offices confirm that this is occurring. If the defendant is willing to plead guilty but the government refuses to negotiate a deal (because the defendant will not agree on a *Booker* waiver or a particular application of the Guidelines), and the defendant wishes to assure that she obtains some credit for accepting responsibility and not unnecessarily taking up the court's time, she may wish to plead straight up to the indictment, without any formal plea agreement. Because the Guidelines are not mandatory and guideline enhancements are not elements of greater offenses after *Booker*, prosecutors cannot charge the Guideline aggravators in indictments and insist that a defendant plead to the greater offense (thereby forcing the judge to enhance a sentence on that basis). These guideline aggravators would constitute surplusage, and

¹⁹⁵ See DETROIT NEWS, *supra* note 151 (reporting that Alan Gershel, chief of the criminal division for the United States Attorney's Office in Detroit, sent a letter to judges explaining its new policy, and that some defense lawyers and judges have rejected these arrangements).

¹⁹⁶ King & Klein, *Apprendi and Plea Bargaining*, *supra* note 77, at 295-306 (*Apprendi* provides new elements that prosecutors must prove beyond a reasonable doubt after employing the Federal Rules of Evidence, if they want assurances that judges will increase sentences based upon those facts).

¹⁹⁷ See, e.g., Nancy J. King & Susan R. Klein, *Acceptance of Responsibility and Conspiracy Sentences in Drug Prosecutions After Apprendi*, 14 FED. SENTENCING REPORTER 165 (2002) (suggesting pre-*Booker* that the Commission amend §3E1.1 to clarify that acceptance points are appropriate for defendants whose unambiguous offers to plead guilty to a lesser-included offense are rejected by the prosecution).

defendants could insist that they be stricken.¹⁹⁸ This gives the defendant the opportunity to convince the judge to a sentence lower than recommended by the Guidelines for the charged offense. There is simply no reason to agree to a sentence at the Guideline range or higher without anything in exchange.

However, most defendants will still plead guilty. While the number of statutory enhancements the Supreme Court has left in effect are dwindling, a judge probably still cannot sentence below a statutory minimum without a government request for substantial assistance, or unless the defendant fits within the safety valve provision. Similarly, a defendant cannot get a consecutive sentence count (like a weapons offense pursuant to 18 U.S.C. § 924(c)) dropped without the prosecutor's approval.¹⁹⁹ In cases where the government has no large clubs to hold over the defendant, there will still be agreements as defendants trade trial rights for better plea deals. After a period of post-*Booker* sentencing, prosecutors and defense attorneys in every district will get a sense of how each particular judge sentences, and will bargain in the shadow of that expected outcome. No defendant would sensibly agree to waive indictment and plead before his case was drawn out of the wheel and he

¹⁹⁸ In those post-*Blakely* and pre-*Booker* jurisdictions that refused to apply *Blakely* to the Federal Sentencing Guidelines, caselaw held that when prosecutors put federal sentencing guidelines facts into indictments, these facts were surplusage and must be stricken. *See, e.g.,* *United States v. Brown*, No. 00-CR-939, 2004 WL 1879949 (N.D. Ill. 2004) (court granted defendant's motion to strike sentencing allegations from the indictment and forbade the government from proving up, either at trial or at a bifurcated sentencing hearing, any evidence of obstruction of justice); *United States v. Mutchler*, 333 F.Supp.2d 828 (S.D. Iowa 2004) (court granted defendants' motion to strike four "aggravating factors" from the superseding indictment; the court determined that "the aggravating factors are not criminal conduct defined by Congress and, as such, have no place within the charging documents against the defendants"); *United States v. Jardine*, No. CR.A. 04-219, 2004 WL 2314511 at *4 (E.D. Penn. 2004) (holding that as additional factors are "not criminal conduct defined by Congress," they "have no place within the charging documents against defendants").

Now that the *Booker* Court has held that the guidelines are advisory and thus guideline facts are not elements of greater offenses to be submitted to juries, caselaw still correctly holds that guideline facts are surplusages and must be stricken from indictments. *See United States v. Cormier*, 226 F.R.D. 23 (D.Me 2005) (holding that non-drug-quantity "sentencing allegations," i.e., aggravating factors, in federal narcotics trafficking/ weapons indictment, including allegations that defendant had brandished firearm while committing offense of possessing firearm in furtherance of drug trafficking crime, that firearms used in drug trafficking offenses were stolen, and that defendant committed offenses less than two years after release from imprisonment on prior sentence, were surplusage subject to strike; allegations did not state elements of offenses and were matters only for determination at sentencing under advisory Sentencing Guidelines).

¹⁹⁹ Pursuant to the Ashcroft memorandum, Assistants United States Attorneys are not supposed to use §924(c) as a bargaining chip, but are instead instructed to accept pleas only to "the most serious readily provable offense." Reprinted in 6 FED. SENT. RPT. 347 (1994)

saw what judge he drew. Most judges will establish a track-record of rewarding those who plea, and a record of which § 3553(a) sentencing factors they favor. Therefore, though there may be more trials in certain districts depending upon busyness, I predict that pleas will remain at a relatively steady state of equilibrium nationwide.

IV. CONCLUSION

As one would expect, federal district and appellate judges and Supreme Court Justices are all lobbying for the continuation of the advisory guidelines that the Court created in *Booker*. The Judicial Conference of the United States “urged Congress to take no immediate legislative action to alter the federal sentencing system in the wake of the Supreme Court ruling limiting the Sentencing Guidelines to an advisory role.”²⁰⁰ The Judicial Conference is the principle policy-making body for the federal court system, its presiding officer is Chief Justice William Rehnquist, and it is further comprised of the chief justices of the thirteen courts of appeals and a district judge from each of the twelve geographic circuits. The Conference stated in a March 15, 2005 report that “it would oppose legislation that would respond to the Supreme Court’s decision in *United States. v. Booker/United States. v. Fanfan* by raising directly the upper limit of each sentencing guideline range or expand the use of mandatory minimum sentences.”²⁰¹

Despite this heartfelt recommendation from the bench, we should not be surprised to see Congress continue its decades long trend of reducing rather than expanding judicial discretion in criminal sentencing.²⁰² Congress is unlikely to believe that voluntary guidelines will achieve sentencing uniformity or proportionality. Even if unwarranted disparity is held in check by stringent “reasonability” review on appeal, Congress will likely believe that only the elected legislature is the appropriate institution to make such normative and policy judgments as whether rehabilitation is effective, whether a defendant’s drug-addiction or veteran status should decrease her penalty, and whether a white-collar offense is more or less serious than a drug or violent offense. One simple way Congress could impose mandatory guidelines is to enact legislation informing the Court that it divined legislative intent incorrectly in *Booker*. Of course Congress

²⁰⁰ See *Chief Justice in Good Form*, entry date March 15, 2005, last viewed on April 18, 2005, available at http://www.scotusblog.com/movabletype/archives/2005/03/Chief_Justice_i.html.

²⁰¹ News Release, Administrative Office of the U.S. Courts, *Conference Calls Off-Site Security for Judges Top Priority* (March 15, 2005), available at <http://www.uscourts.gov/ttb/mar05ttb/security/> (last visited Apr. 17, 2005).

²⁰² See *supra* notes 33-46.

would have to pay the Sixth Amendment price for mandatory guidelines—enhancing facts would be submitted to a jury for a beyond a reasonable doubt finding. Congress could “Blakelyize” with the least amount of pain by simplifying the Guidelines—retaining only the few enhancements most regularly employed. I suggested in my testimony before the U.S. Sentencing Commission that Congress or the Commission replace the present 258 box grid (based upon six criminal history categories and forty-three offense levels) with ten offense levels, retaining the same zero to life spread by increasing the judicial discretionary range within each grid from 25 to 40%.²⁰³ This shifts some fact-finding authority back to juries and retains some judicial discretion.

Some commentators have gone much further by suggesting a return to jury sentencing.²⁰⁴ Some of these scholars call for jury findings of all facts leading to any difference in penalty, some suggest that the jury actually set the ultimate sentence. While a few states have chosen jury fact finding, and an even smaller subset, like my home state of Texas, allow jury sentencing, it is beyond the scope of this paper to explain all of the drawbacks associated with this idea. Suffice it to say here that this method of sentencing is highly unlikely to be embraced by Congress, at least as a first choice.

If advisory guidelines turn out to give too much leeway (and I believe Congress already considers this the case), and Congress rejects jury sentencing or my more modest compromise position, Congress may well turn to an updated version of the eighteenth century pure “charge offense” or “determinate sentencing.” Rather than a set sentence for every crime, Congress may re-enact most of the Guidelines as mandatory minimum penalties. Judge Cassell, in the first published post-*Blakely* opinion, predicted that Congress might replace “the carefully-calibrated Guidelines with a series of flat mandatory minimum sentences.”²⁰⁵ Facts triggering mandatory minimum sentencing need not be submitted to the jury under *Booker*, so Congress could cabin judicial leniency by mandating judicial fact finding on all former Guideline enhancers (now statutory mandatory minima) in this manner. This

²⁰³ See Klein testimony, U.S. Sentencing Commission, *supra* note 111.

²⁰⁴ Rachel E. Bartow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33 (2003) (recommending jury sentencing); Paul Kirgis, *The Right to a Jury Decision on Sentencing Facts After Booker: What the Seventh Amendment Can Teach the Sixth Amendment*, 39 GA. L. REV. (forthcoming 2005) (suggesting that the Sixth Amendment jury trial right in criminal cases match the Seventh Amendment jury right in civil cases by requiring a jury decision on all fact questions, regardless of when those questions arise in the proceeding).

²⁰⁵ *United States v. Croxsford*, 324 F. Supp. 2d 1230, 1254 (D. Utah 2004).

system retains judicial discretion only to increase but never decrease sentences.

In fact, Congress is presently considering a proposal that does just that.²⁰⁶ Such a fix is constitutional only so long as the Supreme Court refuses to overrule *Harris v. United States*.²⁰⁷ If Justice Breyer supplied the fifth concurring vote in *Harris* only because he had not yet accepted that *Apprendi* would remain good law, it is possible that there may now be enough votes to overrule it. Those who scoff at the notion of the Court overruling a constitutional decision only a few years old should stop and consider that such a decision would give federal judges, once again, primacy and discretion in criminal sentencing.

²⁰⁶ See § 12 of HR 1528, "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005," introduced by Rep. James Sensenbrenner (transforming the guidelines into a complex series of mandatory minimum penalties by prohibiting judges from using enumerated factors to sentence below the guidelines range but permitting thirty-six factors which a sentencing judge could consider in sentencing above the range).

²⁰⁷ 536 U.S. 545 (2002). Justice Scalia joined three of the four dissenters from *Blakely* and *Apprendi*, Justices Kennedy and O'Connor and Chief Justice Rehnquist, to make up the four-member plurality in *Harris*. Justice Breyer concurred. See *supra* notes 86-87.