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BEYOND THE CLASH OF DISPARITIES: COCAINE SENTENCING AFTER *BOOKER*

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INTRODUCTION

In *United States v. Booker*, the Supreme Court invalidated the federal Sentencing Guidelines and, with the stroke of a pen, unsettled more than two decades of established sentencing practice.[1] *Booker* held that the highly detailed Sentencing Guidelines would now be merely "advisory" rather than mandatory,[2] and that judges would now have discretion to impose sentences subject only to the constraint that the sentences be "reasonable."[3] Some recoiled at this apparent nod to judicial discretion. Others welcomed it as a chance to rethink a system that had not lived up to expectations. But all saw it as a major source of conceptual, doctrinal, and practical disorder. As one judge trenchantly remarked, *Booker* "abruptly disengaged the most thorough and carefully considered regime of criminal sentencing in history and . . . substituted a two-word re-

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1. United States v. Booker, 543 U.S. 220 (2005).
2. *Id.* at 246 (opinion of Breyer, J.).
3. *Id.* at 261.

gime of criminal sentencing (perhaps the most abbreviated in history)—the regime of the 'reasonable sentence.'"[4]

Shortly after *Booker*, this most ambiguous and abbreviated regime of criminal sentencing collided with one of the most controversial and prolonged substantive issues in criminal sentencing: the disparity between crack and powder cocaine sentences. Under the Sentencing Guidelines, drug sentences vary based on the quantity of drugs possessed, and possession of just one gram of crack cocaine is punished as harshly as possession of 100 grams of powder cocaine.[5] Known as the "100:1 ratio," this disparity between crack and powder sentences has earned strident criticism and fomented much controversy over the past decade.[6] Many observers consider the ratio to be irrational and unfair, inflicting a disparate impact on African-Americans, who tend to be far more likely to receive crack convictions than powder convictions. Indeed, much of this criticism has come from sentencing judges themselves.[7] Yet, prior to *Booker*, judges could do very little about it. The Sentencing Guidelines were mandatory, and all constitutional challenges to the 100:1 ratio failed.[8] In the wake of *Booker*, however, the issue has reemerged as sentencing judges begin to use their newfound discretion to undermine the 100:1 ratio.[9] Many judges have cited their disapproval of the ratio as a reason for imposing shorter sentences than those recommended by the Sentencing Guidelines, and appellate courts must now struggle with the question of whether such sentences satisfy *Booker*'s standard of "reasonableness."[10]

This Article examines the crack-powder ratio in light of *Booker*'s transformation of federal sentencing. Specifically, it considers the degree to which sentencing judges must continue to abide by the 100:1 ratio advised by the Sentencing Guidelines. In doing

4. United States v. Valencia-Aguirre, 409 F. Supp. 2d 1358, 1364-65 (M.D. Fla. 2006).

5. *See generally* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(C)(11) (2006).

6. *See infra* Part II.A.

7. *See infra* Part II.

8. *See infra* note 56 and accompanying text.

9. To my knowledge, this reemergence has not yet been addressed in the scholarly literature. The popular press and legal advocacy groups, however, have given it much attention. *See, e.g.*, Gary Fields, *Judges Show More Lenience on Crack Cocaine*, WALL ST. J., Jan. 12, 2006, at 2A; *see also* Press Release, Am. Civil Liberties Union, ACLU and Sentencing Experts Renew Call for Federal Courts to Uphold Judges' Right to Reject 100-to-1 Crack/Powder Sentencing Disparity (May 18, 2006), *available at* http://www.aclu.org/drugpolicy/sentencing/25604prs20060518.html.

10. *See infra* Parts II.B.1 (discussing judicial approval) and III.C (discussing appellate approaches).

so, this Article approaches the debate in three different ways—one conceptual, one doctrinal, and one practical—and it attempts to weave these strands into an argument for moderation.

Conceptually, this Article distinguishes between two different and underappreciated ways of thinking about *Booker*'s sentencing doctrine. The first approach, which I shall call "substantive reasonableness," seeks to identify the best sentence measured by generally accepted purposes of punishment.[11] The second approach, which I shall call "structural reasonableness," does not seek to identify the substantively "correct" sentence; rather, it asks who is in the best position to decide particular questions related to sentencing. Substantive reasonableness has been the dominant mode of post-*Booker* analysis. However, this Article contends that it cannot resolve the issue of the crack-powder ratio, since the substantive criteria *Booker* requires courts to consider result in irresolvable analytical gridlock. Hence, structural reasonableness offers a more promising approach. This Article seeks to flesh out this under-theorized structural alternative and use it to resolve the crack-powder issue.

Doctrinally, this Article argues that sentencing judges should not categorically reject the 100:1 Guidelines ratio, as some have been inclined to do. Instead, structural reasonableness demands a more nuanced division of responsibilities: Individualized decisions about a particular offender ought to be made by the sentencing judges who know offenders best and who are better able to make fact-intensive distinctions; in contrast, policy decisions—such as drug quantity ratios—that affect large classes of offenders or the relative relationship between offenses ought to be made by the legislative branch. Finally, appellate courts should police the boundaries between individualized and policy-based sentencing rationales through a two-tiered scrutiny regime.

Practically, this Article argues that the structural approach offers the most fair and flexible judicial solution to what has been an intractable and contentious dispute over cocaine sentencing. The best arguments against the 100:1 ratio are individualized in nature. Hence, within reason, judges should rely on such individualized factors to justify below-Guidelines sentences. Judges should exercise their *Booker* discretion by being more lenient in particular situa-

11. The Court held in *Booker* that such decisions should be guided by the principles of sentencing outlined in 18 U.S.C. § 3553(a). United States v. Booker, 543 U.S. 220, 261 (2005).

tions where the Guidelines are too harsh. However, to the extent judges rely on generalized rationales that affect every crack defendant regardless of circumstances, they tread on decisions more properly made by Congress. Hence, the structural distinction between individualized and policy-based rationales achieves a balance between these objectives, limiting unfair consequences of the 100:1 ratio without overstepping judicial bounds.

This Article proceeds in four parts. Part I surveys the post-*Booker* sentencing scene, explaining the new doctrinal framework and exploring empirical data that reveal *Booker*'s impact on cocaine sentencing. Part II considers the substantive approach to cocaine sentencing. It offers a short history of the cocaine sentencing controversy and argues that the controversy cannot be resolved on substantive grounds. Part III outlines the structural alternative and argues that it offers a better solution. This part seeks to flesh out the distinction between individualized and policy-based sentencing rationales, and it sketches a proposed structural regime. Part IV offers some examples of how the structural approach works in practice.

I. THE POST-*BOOKER* LANDSCAPE

A. Booker*'s Doctrine*

The current federal sentencing regime constitutes the third act of a drama that spans the past half-century. The first act, which began in America's early days but reached its crescendo during the 1960s and 1970s, relied on a rehabilitative ideal of sentencing that granted sentencing judges nearly unrestrained authority to tailor appropriate sentences.[12] However, by the 1970s, this discretionary regime came under vigorous attack. Critics argued that the discretionary system produced arbitrary and inconsistent outcomes, resulting in undue disparity between the sentences of offenders convicted of similar crimes.[13]

Hence, in 1984, Congress reacted to this lack of confidence in judicial discretion by passing the Sentencing Reform Act,[14] thereby

12. For a concise history of early federal criminal sentencing in the United States, see KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9-37 (1998).

13. *See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973) (providing an influential critique).

14. The Sentencing Reform Act became part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1976 (codified as amended in scattered sections of 18 U.S.C. (2000)).

opening the second act in our federal sentencing drama. The Sentencing Reform Act created the independent United States Sentencing Commission and delegated authority to the Commission to establish a set of mandatory guidelines for determining criminal sentences.[15] The resulting Sentencing Guidelines dictated federal criminal sentences with a high degree of specificity, leaving little room for judges to exercise their own judgment in sentencing. Under the Guidelines, sentence lengths were calculated using a complex formula that integrated the offender's underlying crime, specific attributes of the crime, other relevant attributes, and the offender's criminal history. For each category of crime, the Guidelines dictated a Base Offense Level, which was then adjusted to account for "specific offense characteristics" indicative of the severity of the offense. In drug cases, the most important characteristic determining sentence length was quantity.[16] For example, a defendant convicted of possession with intent to distribute five grams of crack would have received a Base Offense Level of twenty-six.[17] The level would have then been increased or decreased based on other "relevant conduct" and "offense adjustments" associated with the crime, such as other crimes committed, the vulnerability of the victim, or the defendant's acceptance of responsibility. Finally, the defendant's Criminal History Category would have been computed, based on the number and severity of prior offenses. The final Offense Level and Criminal History Category calculations would then have been plotted on a matrix that dictated the offender's sentence in the form of a range, indicating a minimum and maximum sentence length.[18] In our example, if the offender had no criminal history and no offense adjustments, the guidelines would require a sentence of sixty-three to seventy-eight months.

This algorithmic approach to sentencing left little room for judicial discretion. Judges could choose within the narrow range

15. 28 U.S.C. § 991 (2000). The Commission's Guidelines become binding six months after official promulgation, unless Congress votes to disapprove them. *See* 28 U.S.C. § 994(p) (2000); *see also* Mistretta v. United States, 488 U.S. 361 (1989) (upholding the constitutionality of Congress's delegation to the Commission).

16. Quantity factors are easy to measure objectively, but critics have questioned whether the Guidelines' strong reliance on quantity appropriately captures the degree of culpability and harm associated with a given crime. *See* STITH & CABRANES, *supra* note 12, at 69-70. In the case of drug crimes, quantity of drugs possessed is an imperfect proxy for an offender's role in a drug-dealing operation. The kingpin may get caught with the "mother lode," or he may not. The focus on quantity trades a flexible, subjective judgment for an imperfect, objective proxy.

17. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 5, § 2D1.1.

18. *Id.* § 5A.

computed from the Guidelines, and they could also "depart" from the Guidelines' range in cases where the defendant's offense differed substantially from the "heartland" case envisioned by the Guidelines.[19] However, the Guidelines closely circumscribed permissible reasons for such departures.[20] Moreover, statutory mandatory minimums further constrained discretion by creating absolute sentencing floors for certain offenses, which judges could not easily avoid.

In 2005, the Supreme Court opened the third act of our sentencing drama with *United States v. Booker*.[21] In a five to four decision, the Court held that the Sentencing Guidelines violated the Sixth Amendment right to trial by jury insofar as they increased defendants' sentences on the basis of facts not found by a jury.[22] However, instead of invalidating the Sentencing Reform Act or requiring juries to decide all sentencing-related factual issues, a separate five to four majority held that the Guidelines could be saved from constitutional error through a small (but consequential) judicial revision of the statute—specifically, a transformation of the Guidelines from mandatory to "advisory."[23] If the Guidelines are no longer binding on judges, the jury right does not attach to sentencing-related fact finding. Or so the Court reasoned.[24] Of

19. *See* Koon v. United States, 518 U.S. 81, 96 (1996), *superseded by statute*, PROTECT Act, Pub. L. No. 108-21, § 401(m)(2)(a), 117 Stat. 650, 675 (2003).

20. *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 5, §§ 5K2.10-2.13, 2.16. As Stith and Cabranes have observed, the Guidelines' grounds for downward departure are limited to "situations in which the substantive criminal law recognizes a partial or full defense to a crime." STITH & CABRANES, *supra* note 12, at 74. Many other rationales for downward departure—including a defendant's "minor role in a crime, diminished mental capacity . . . age, health, [and] familial responsibility"—had been rejected by appellate courts. *Id.* at 100. The most common ground for downward departure is the finding that a defendant has provided "substantial assistance" to prosecutors. *See generally* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 5, § 5K1.1. Departure discretion was also further constrained in 2003, when Congress overturned *Koon*'s abuse-of-discretion standard for appellate review of sentences and replaced it with a de novo standard. PROTECT Act, Pub. L. No. 108-21, § 401(m)(2)(a), 117 Stat. 650.

21. United States v. Booker, 543 U.S. 220 (2005). More precisely, this act began a year earlier with *Blakely v. Washington*, 542 U.S. 296 (2004), which invalidated Washington's state sentencing guidelines. *Booker* applied *Blakely*'s logic, inevitably, to the federal Guidelines.

22. *Booker*, 543 U.S. at 243-44 (opinion of Stevens, J.).

23. *Id.* at 245 (opinion of Breyer, J.).

24. One might charitably describe the Court's logic as opaque. Nevertheless, the merits of the *Booker* decision lie beyond the scope of this Article. Here, we are more concerned with *Booker*'s consequences. For a short critique of the logic behind *Booker*'s remedial holding, see Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665, 677-80 (2006).

course, the instruction that judges treat the Guidelines as "advisory" does little to clarify *how* the Guidelines should advise. Hence, the Court further instructed that appellate courts should review sentences for "reasonableness,"[25] and that such determinations should be guided by the broad purposes of sentencing outlined in § 3553(a) of the federal sentencing statute.[26]

At least on paper, this third act of our sentencing drama appears to herald a rebirth of judicial discretion. The Guidelines are no longer mandatory, and judges are more free to fashion punishments they deem to be reasonable. Yet, this new emancipatory doctrine of "reasonableness" remains in complex, perhaps schizophrenic, tension with the advisory nature of the Guidelines. Indeed, *Booker* has spawned many questions yet to be worked out: What does it mean for the Guidelines to be "advisory"? Upon which factors should sentencing judges rely? What does appellate "reasonableness" review entail? And finally, in this new sentencing regime, what is the proper balance between legislative control, administrative expertise, appellate oversight, and judicial discretion? To these questions, *Booker* gives few answers. Hence, in the wake of *Booker*, the "advisory" Guidelines, "reasonableness" review, and § 3553(a) converge into what can best be considered a nascent common law of sentencing. Naturally, the courts are now straining to fashion rules to govern this new sentencing regime—to distill *Booker*'s vague aspirations into concrete reality.

B. Booker*'s Results*

Before pondering the emerging post-*Booker* rules more fully, let us take a brief detour to examine *Booker*'s early results. One may reasonably question whether *Booker*'s transformation of federal sentencing doctrine has translated into any real changes in sentencing outcomes on the ground. Yet, with respect to crack and cocaine sentencing, *Booker* does appear to have had an impact. Indeed, the impact of *Booker* has been felt more noticeably in crack sentencing than in other areas.

The Sentencing Commission's March 2006 report on the impact of *Booker* provides the latest comprehensive data on post-

25. *Booker*, 543 U.S. at 263 (opinion of Breyer, J.).
26. 18 U.S.C. § 3553(a) (2000).

Booker sentencing trends.[27] Based on analysis of all sentences issued in the year following *Booker*, the Commission reported that judges issued non-government-sponsored,[28] below-Guidelines sentences in 12.5 percent of cases and above-Guidelines sentences in 1.6 percent of cases.[29] This represents a significant increase in non-Guidelines sentencing compared to the period directly preceding *Booker*. In the year prior to *Booker*, judges were able to depart from the Guidelines in extraordinary cases,[30] but they used this authority to issue below-Guidelines sentences in only 5.8 percent of cases[31] and above-Guidelines sentences in 0.8 percent of cases.[32] Of course, these numbers suggest something far short of a revolution, but they are not insignificant either. *Booker* has more than doubled the percentage of cases in which judges are using their discretion to issue sentences not advised by the Guidelines.

Most importantly for the issue at hand, the post-*Booker* expansion in judicial discretion has had even more marked consequences in the area of crack sentencing. The Commission's report observes that post-*Booker* crack sentencing trends are "consistent with those of the other major drug types,"[33] and it concludes that "[c]ourts do not often appear to be using *Booker* . . . to impose below-range sentences in crack cocaine cases."[34] However, the Commission's conclusion paints with too broad a brush. According to the Commission's own data, the percentage of crack cases in which judges have given non-government sponsored below-Guidelines sentences has increased from 4.3 percent before *Booker* to 14.7 percent after

27. U. S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 62 (2006) [hereinafter BOOKER REPORT], *available at* http://www.ussc.gov/booker_report/Booker_Report.pdf.

28. I have chosen to leave out government-sponsored § 5K1.1 substantial assistance departures. These are not directly relevant to the issue at hand, since below-Guidelines sentences in these cases are more a function of prosecutorial discretion than judicial discretion. Here, we are concerned only with *Booker*'s impact on judges' sentencing behavior, not on the behavior of prosecutors.

29. BOOKER REPORT, *supra* note 27, at 62.

30. *See supra* note 20 and accompanying text.

31. *See* BOOKER REPORT, *supra* note 27, at 57 (noting a 6.7 percentage point increase since *Booker*).

32. *See id.* at 58.

33. *Id.* at 126.

34. *Id.* at 111. Activists with a stake in preventing congressional overreaction have also downplayed the impact of *Booker*. *See* Ryan S. King & Marc Mauer, *Sentencing with Discretion: Crack Cocaine Sentencing After Booker*, THE SENTENCING PROJECT 7 (2006), *available at* http://www.sentencingproject.org/pdfs/crackcocaine-after booker.pdf ("These trends do not suggest a seismic shift in federal sentencing, and seem more illustrative of 'business as usual.'").

Booker.[35] The percentage of such sentences in powder cocaine cases has also increased from 4.2 percent before *Booker* to 10.8 percent after *Booker*.[36] Notably, in exercising their *Booker* discretion, judges seem to be somewhat more likely to give below-Guidelines sentences in crack cases than in powder cases. Before *Booker*, downward departure rates for crack and powder offenses were roughly identical (4.2 percent and 4.3 percent, respectively);[37] after *Booker*, judges appear to be giving below-Guidelines sentences at a rate four percentage points higher in crack cases than in powder cases (14.7 percent and 10.8 percent).[38] This is undoubtedly a curious development, and one that has gone unnoticed by the Commission. Hence, although the percentage of below-Guidelines sentences has increased overall, it has increased more so for crack defendants, and judges are more likely to give below-Guidelines sentences to crack defendants than to powder defendants. This is a new phenomenon that has emerged in the wake of *Booker*.

Since *Booker*, judges have issued below-Guidelines sentences in 610 crack cases,[39] and most of these sentences have been based on individualized sentencing rationales.[40] However, judges in a significant number of cases have cited their disagreements with the 100:1 ratio as a reason to give below-Guidelines sentences. Judges have done so in at least thirty-five cases,[41] and ten of these judges have issued published opinions justifying their decisions.[42] In these

35. BOOKER REPORT, *supra* note 27, at 126-28.

36. *See id.*

37. *Id.* at 128 tbl.20; *infra* fig.1.

38. *See* Figs. 1 & 2.

39. BOOKER REPORT, *supra* note 27, at 130.

40. *See id.* at 82 (listing various rationales that have been cited by judges).

41. *Id.* at 131. In an additional seventy-three cases, the crack-powder disparity may have been a factor, but the sentencing courts' references to "disparity" were too vague to know for sure. *Id.* Since there have been a total of 5,112 crack cases since *Booker*, this amounts to between 0.7 percent and 2.1 percent of all crack cases. *Id.* at 128.

42. United States v. Hamilton, 428 F. Supp. 2d 1253 (M.D. Fla. 2006) (reduced from 70-87 months to 36 months); United States v. Stukes, No. 3 CR. 601 (RWS), 2005 WL 2560244 (S.D.N.Y. Oct. 12, 2005) (20:1; reduced from 46-57 months to 33 months); United States v. Fisher, 451 F. Supp. 2d 553 (S.D.N.Y. 2005) (10:1; reduced from 295-353 months to 211 months); United States v. Castillo, No. 3 CR. 835 (RWS), 2005 WL 1214280 (S.D.N.Y. May 20, 2005) (20:1; reduced from 135-168 months to 87 months) (government's appeal to Second Circuit pending); United States v. Clay, No. 2:03CR73, 2005 WL 1076243 (E.D. Tenn. May 6, 2005) (no explicit ratio; reduced from 235-293 months to 156 months); United States v. Williams, 372 F. Supp. 2d 1335 (M.D. Fla. 2005) (no explicit ratio; reduced from 360 months-life to 204 months); Simon v. United States, 361 F. Supp. 2d 35 (E.D.N.Y. 2005) (10:1 or 20:1; reduced from 324-405 months to 262 months); United States v. Harris, No. 04-0157 (JR), 2005 U.S. Dist. Lexis 3958

ten cases with published opinions, judges have generally chosen to replace the 100:1 ratio with their own 20:1 or 10:1 ratios when calculating sentences. This has resulted in an average sentence reduction of thirty-five percent below the minimum sentence advised by the Guidelines.[43] In contrast, other judges have disagreed, refusing to impose a below-Guidelines sentence based on the 100:1 ratio.[44] Moreover, eight circuits have also weighed in. Two have permitted judges to abandon the ratio,[45] while six have overturned district judges' decisions to impose below-Guidelines sentences based on categorical rejection of the 100:1 ratio.[46] In sum, a growing difference of opinion is emerging in the district and circuit courts over the 100:1 ratio, but the issue still remains in its infancy.

II. COCAINE SENTENCING AND THE CLASH OF DISPARITIES

The preceding discussion has provided a snapshot of the doctrinal and practical changes *Booker* has wrought. *Booker* has given judges a measure of freedom from the constraints of the Sentencing Guidelines, yet this new authority remains precarious and perhaps even illusory. The contours of the new sentencing regime will depend on how the courts come to understand *Booker*'s standard of "reasonableness." Nevertheless, judges do appear to be using their

(D.D.C. Mar. 7, 2005); United States v. Smith, 359 F. Supp. 2d 771 (E.D. Wis. 2005) (20:1 ratio; reduced from 41-51 months to 18 months); *see also* United States v. Nellum, No. 2:04-CR-30-PS, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005) (citing unfairness of ratio, but justifying lower sentence based on unrelated individualized factors) (no explicit ratio; reduced from 168-210 months to 108 months).

43. Note that statutory mandatory minimums create a floor below which judges cannot reach. *See supra* text accompanying notes 18-19.

44. *See, e.g.*, United States v. Doe, 412 F. Supp. 2d 87 (D.D.C. 2006); United States v. Tabor, 365 F. Supp. 2d 1052 (D. Neb. 2005).

45. United States v. Pickett, 2007 WL 445937 (D.C. Cir. 2007); United States v. Gunter, 462 F.3d 237 (3d Cir. 2006).

46. *See* United States v. Castillo, 460 F.3d 337 (2d Cir. 2006); United States v. Jointer, 457 F.3d 682 (7th Cir. 2006); United States v. Williams, 456 F.3d 1353 (11th Cir. 2006); United States v. Eura, 440 F.3d 625 (4th Cir. 2006); United States v. Pho, 433 F.3d 53 (1st Cir. 2006); United States v. Spears, 469 F.3d 1166 (8th Cir. 2006). Additionally, three circuits have refused to find the ratio presumptively unreasonable. *See* United States v. Esperance, 165 Fed. App'x 814 (11th Cir. 2006) (per curiam); United States v. Lister, 432 F.3d 754 (7th Cir. 2005); United States v. Cawthorn, 429 F.3d 793 (8th Cir. 2005); United States v. Gipson, 425 F.3d 335 (7th Cir. 2005); *see also* United States v. Thomas, 158 Fed. App'x 623 (5th Cir. 2005) (per curiam) (pre-*Booker* sentence does not constitute plain error, since alleged unfairness of the crack sentencing ratio is insufficient reason to believe district court would have imposed a lower sentence post-*Booker*). This follows a general trend in which many circuits have concluded that within-Guidelines sentences should be accorded a presumption of reasonableness. BOOKER REPORT, *supra* note 27, at 27 (collecting cases).

new discretion in the context of cocaine sentencing, and this has resulted in more below-Guidelines sentences in crack cases than in powder cases. Many of these judges have based their below-Guidelines crack sentences on individualized sentencing rationales. Nevertheless, a significant group of others have explicitly issued below-Guidelines sentences for the primary reason that they disagree with the 100:1 Guidelines ratio.

This Part will examine the debate over the 100:1 ratio more closely, providing a brief history of cocaine sentencing policy and discussing the main objections to the 100:1 ratio. It will then discuss how many judges have treated the 100:1 ratio in the wake of *Booker*, and how their "substantive reasonableness" approach fails to resolve the issue.

A. *The Cocaine Controversy*

The crack-powder sentencing disparity has been controversial since crack first materialized. While cocaine had been present in America since the turn of the century, crack emerged in the late 1970s and spread rapidly to America's major cities by the early 1980s.[47] Crack is a form of cocaine typically made by dissolving powder cocaine in water, adding baking soda, and then heating and drying the mixture until it forms small crystals.[48] The user smokes these crystals and inhales the evaporating fumes in a manner that most quickly and efficiently delivers cocaine to the brain. Crack produces a short, intense feeling of euphoria that is highly addictive.[49]

Due to its addictiveness and low price, crack use skyrocketed in the 1980s, and inner-city gangs fought turf wars for control over lucrative crack distribution networks.[50] Hence, responding to public outcry over what had come to be perceived as a "crack epidemic," Congress passed the Anti-Drug Abuse Act of 1986.[51] The Act established harsh mandatory minimum sentences for serious drug offenders, and in so doing, it enshrined in statute a "100:1"

47. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 32, 36 (1995) [hereinafter 1995 REPORT], *available at* http://www.ussc.gov/crack/chap1-4.pdf.

48. *Id.* at 14. By this method, one gram of powder cocaine will produce approximately 0.89 grams of crack. *Id.*

49. *See* William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1260 (1996).

50. *Id.* at 1243-44.

51. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 21 U.S.C. § 841(a) (2000)).

sentencing ratio for cocaine offenses. The resulting mandatory minimum scheme tied sentence length to drug quantity and treated offenses involving one gram of crack cocaine as severely as one hundred grams of powder cocaine.[52] When the Sentencing Commission created its first set of Guidelines the following year, it aligned cocaine sentences with the drug quantity ratio established in Congress's mandatory minimums.[53]

The sentencing differential between crack and powder cocaine was justified on a variety of grounds, including crack's greater addictiveness, its association with other serious crimes, its low price and ease of manufacture, and its harsher physiological effects.[54] But the sentencing ratio soon came under fire. Critics argued that it unduly targeted low-level dealers, that there is little pharmacological difference between crack and powder cocaine, and that the ratio had a disparate impact on African-Americans.[55] Defendants challenged the cocaine ratio in the courts on equal protection grounds, but no appellate court was willing to strike it down.[56]

However, in response to public criticism, Congress asked the Sentencing Commission to investigate the crack-powder ratio and propose possible modifications.[57] In 1995, the Commission issued its report concluding that although "crack cocaine poses greater harms to society than does powder cocaine" and thus "may warrant higher penalties," the specific 100:1 quantity ratio "should be reexamined and revised."[58] Although the report did not propose a different quantity ratio, the Commission proposed amended Guide-

52. Under the two-tiered mandatory minimum scheme, trafficking in five to forty-nine grams of crack, or 500 to 4,999 grams of powder cocaine, results in a five-year mandatory minimum sentence; trafficking in fifty or more grams of crack, or 5,000 or more grams of powder cocaine, results in a ten-year mandatory minimum sentence. 21 U.S.C. §§ 841(b)(1)(A)(ii) to (iii), 841(b)(1)(B)(ii) to (iii).

53. *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 5, § 2D1.1 cmt. (noting need to coordinate sentencing guidelines with mandatory minimums).

54. *See* 1995 REPORT, *supra* note 47, at 117-18.

55. *See* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1288-99 (1995); Spade, *supra* note 49, at 1266-68.

56. *See* United States v. Singleterry, 29 F.3d 733, 733 (1st Cir. 1994); United States v. Then, 56 F.3d 464, 464 (2d Cir. 1995); United States v. Frazier, 981 F.2d 92, 92 (3d Cir. 1992); United States v. Fisher, 58 F.3d 96, 96 (4th Cir. 1995); United States v. Galloway, 951 F.2d 64, 64 (5th Cir. 1992); United States v. Gaines, 122 F.3d 324, 329 (6th Cir. 1997) (citing cases); United States v. Lawrence, 951 F.2d 751, 751 (7th Cir. 1991); United States v. Clary, 34 F.3d 709, 710 (8th Cir. 1994); United States v. Dumas, 64 F.3d 1427, 1428 (9th Cir. 1995).

57. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280006, 108 Stat. 1796, 2097 (1994).

58. 1995 REPORT, *supra* note 47, at xiii, 195, 197.

lines three months later that would have created identical sentences for crack and powder offenses.[59] After holding hearings, however, Congress rejected the Commission's proposal and directed the Commission to recommend further alternatives to the 100:1 ratio that would punish crack offenses more severely than powder offenses.[60] In 1997, the Sentencing Commission issued a new report recommending that the ratio be reduced by simultaneously raising the crack quantity threshold and lowering the cocaine quantity threshold such that the result would be a 5:1 ratio.[61] This touched off a flurry of proposals in Congress with a variety of ratios. Ultimately, however, Congress could not find a consensus and chose not to amend the existing ratio. In 2001, the Judiciary Committee again asked the Sentencing Commission to recommend changes to the 100:1 ratio. This time, the Commission issued a new report suggesting a 20:1 ratio.[62] Congress held hearings on this new proposal, but it again did not reach a consensus to adopt it.

The debate over the crack-powder ratio has too often been overheated and hyperbolic.[63] Let us begin, then, with a clarification. Some observers have erroneously taken the "100:1" ratio to mean that crack sentences are "100 times longer" than powder sentences.[64] However, it is important to understand that the "100:1" ratio refers to drug quantity, not sentence lengths. Hence, the best way to comprehend the felt disparity of the quantity ratio is to hold quantity constant and compare the sentence lengths that

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59. *See* Amendments to the Sentencing Guidelines for United States Courts; Notice, 60 Fed. Reg. 25,073, 25,076 (May 10, 1995).

60. H. REP. NO. 104-272, at 3 (1995), *reprinted in* 1995 U.S.C.C.A.N. 335, 337.

61. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2, 5, 9 (1997) [hereinafter 1997 REPORT], *available at* http://www.ussc.gov/r_congress/NEWCRACK.PDF.

62. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 107 (2002) [hereinafter 2002 REPORT], *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf.

63. Representative Maxine Waters, a leading member of the Congressional Black Caucus, has accused the CIA of starting the crack epidemic, as part of a plot to fund the Nicaraguan Contras. Spade, *supra* note 49, at 1244. Reverend Jesse Jackson has decried the crack-powder ratio, declaring, "It's racist, it's ungodly, it must change." *Id.* at 1276. On the other side of the issue, Senator Paula Hawkins, speaking in favor of the 1986 Anti-Drug Abuse Act, said, "Drugs pose a clear and present danger to America's national security. . . . This is a bill which has far-reaching impact on the future of civilization as we know it." 132 CONG. REC. 26,436 (1986).

64. *See, e.g.*, Nkechi Taifa, *The "Crack/Powder" Disparity: Can the International Race Convention Provide a Basis for Relief?*, AM. CONST. SOC. L. & POL., May 2006, at 2, *available at* http://www.acslaw.org/files/Crack_Powder_Cocaine_Disparity.pdf (describing crack penalties as "one hundred times more severe" than powder penalties).

result from the Guidelines algorithm. Making these conversions, the 100:1 drug quantity ratio translates into a sentence length ratio that varies from roughly 8:1 to 1:1. The ratio is smallest at the high and low ends of the Offense Level (i.e., quantity) spectrum, and the ratio also gets smaller as the Criminal History Score increases.[65] The median ratio is roughly 3:1, but the ratio is larger for quantity amounts in the middle of the spectrum (quantities between four and 300 grams).[66]

Clarification aside, a 3:1 real sentence differential is quite large and no less deserving of the criticism it has endured. Yet, it remains important—and will be particularly important to the argument of this Article—to articulate precisely why the cocaine ratio is problematic. Unfortunately, much of the debate has tended to focus on two red herrings, thereby failing to reach the heart of the problem. The first of these red herrings is the argument that crack and powder cocaine are indistinguishable substances, since the active ingredient in each is cocaine alkaloid.[67] The powder and crack varieties simply allow for different delivery mechanisms of the same active ingredient. However, while this observation may be formally true, it obscures real and serious functional differences between the drugs. Powder cocaine can be snorted, ingested, or injected; crack can only be smoked. These different methods of use affect how quickly and efficiently the cocaine reaches the bloodstream, and thus they control the drug's degree of impact on the body. The Sentencing Commission explained, "The risk and severity of addiction to cocaine is directly related to the method by which the drug is administered into the body . . . . Smoking . . . produces the quickest onset, shortest duration, and most intense effects, and therefore produces the greatest risk of addiction."[68] This difference in manner of use makes crack inherently more addictive than powder, despite the same active ingredient.[69]

Crack differs from powder in additional ways. Dose-for-dose, the street price of crack is much lower than powder, and the profit

65. Indeed, the Commission itself has pointed out the perversity of this result. *See* 2002 REPORT, *supra* note 62, at 99-100.

66. These ratios are based on the author's calculations, based on data in the U.S. SENTENCING GUIDELINES MANUAL, *supra* note 5, at 133-39, 376. *See infra* figs.3 & 4.

67. 1995 REPORT, *supra* note 47, at 12.

68. 2002 REPORT, *supra* note 62, at 93. Crack has been estimated to put users at a fifty times greater risk of addiction than powder. Spade, *supra* note 49, at 1262.

69. If powder cocaine is injected, it does put the user at similar risk of addictiveness as smoking crack. 2002 REPORT, *supra* note 62, at 93-94. However, only 2.8 percent of powder cocaine users inject it. *Id.*

margins for dealers are much higher.[70] This makes crack a more lucrative business for street gangs and organized crime.[71] It also makes crack more likely to prey on the most vulnerable poor and young users. To the extent drug policy should be based on deterrence rationales, a cheaper and more lucrative drug demands stiffer penalties to discourage dealing and use. Moreover, although social scientists do not all agree, many scholars—and many more anecdotal observers—have noted the unique damage crack has inflicted on communities through its association with violent crime and other forms of criminality and child neglect.[72] For example, one study found that 60 percent of drug-related New York City homicides in 1988 were due to crack.[73] Another recent study has found that crack is associated with a 5 percent increase in overall violent and property crime between 1984 and 1989.[74]

The second red herring in the debate over the 100:1 ratio is the argument that the ratio punishes African-Americans more harshly than other groups. Crack is often thought of as a "black drug," and powder cocaine is considered a "white drug." Eighty-five percent of federal crack offenders are African-American, whereas 69 percent of powder cocaine offenders are white or Hispanic.[75] The harsher penalties for crack have been a major reason for the disproportionately large African-American prison population. This fact has led to cries of "racism,"[76] and also more sophisticated objections based on "disproportionate impact."[77]

However, these objections to the 100:1 ratio only see half of the picture. They fail to account for the enormous damage crack does to African-American communities. Indeed, a recent study has found that crack contributed substantially to homicide rates of African-American males and that crack explains much of the observed

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70. Like any kind of product innovation, consumers and producers of crack share in the surplus created by a more efficient drug.

71. *See* 1995 REPORT, *supra* note 47, at 85-87, 89-90.

72. *See id.* at 93-109 (summarizing various research findings).

73. *Id.* at 96.

74. Roland G. Fryer, Jr. et al., *Measuring the Impact of Crack Cocaine* 6-7 (Nat'l Bureau of Econ. Research, Working Paper No. 11318, 2005), *available at* http://pricetheory.uchicago.edu/levitt/Papers/FryerHeatonLevittMurphy2005.pdf. Although the study observes that the link between crack and crime is less apparent in the 1990s, it attributes this in part to the "declining profitability of crack distribution." *Id.* at 7. The magnitude and likelihood of penalties for distribution are a key factor in profitability.

75. Alfred Blumstein, *The Notorious 100:1 Crack:Powder Disparity—The Data Tell Us that it is Time to Restore the Balance*, 16 FED. SENT'G REP. 87, 89 (2003).

76. *See* Taifa, *supra* note 64, at 1.

77. Sklansky, *supra* note 55, at 1289-90.

increases in low birth weight babies, fetal death, child mortality, and unwed births in African-American communities.[78] In contrast, crack has had no apparent effect on these variables for white communities.[79] Hence, lower penalties and less enforcement for crack offenses might arguably treat African-American drug dealers more "equally," but such leniency would inflict a disparate negative impact on the innocent African-American communities the dealers victimize. Protecting victims of crime is a basic duty owed by the state to all communities, and indeed one way in which racism historically oppressed African-Americans was by denying them this important right.[80] It would be a perverse kind of racial justice that abandoned protection of the majority of law-abiding African-Americans in the name of leniency for their African-American victimizers. As one African-American scholar has aptly put it, "we ought to commend rather than condemn the legislature's distinction between crack and powdered cocaine."[81] He explained, "If it is true that blacks as a class are disproportionately *victimized* by the conduct punished by the statute at issue, then it follows that blacks as a class may be *helped* by measures reasonably thought to discourage such conduct."[82]

David Sklansky, a prominent critic of the 100:1 ratio, replies to this objection to the disparate impact theory by arguing that the ratio's impact on African-American defendants must be viewed in light of the public and legislative atmosphere in which the 100:1 ratio was born.[83] Sklansky characterizes this atmosphere as

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78. Fryer et al., *supra* note 74, at 6.

79. *Id.*

80. African-American legal scholar Regina Austin has observed, "Drive-by shootings and random street crime have replaced lynchings as a source of intimidation, and the 'culture of terror' practiced by armed crack dealers and warring adolescents has turned them into the urban equivalents of the Ku Klux Klan." Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1772 (1992). Another scholar echoes the point:

> Racially invidious under-enforcement purposefully denies African-American victims of violence the things that all persons legitimately expect from the state: civil order and, in the event that crimes are committed, best efforts to apprehend and punish offenders. For most of the nation's history, blacks were denied this public good. . . . In many contexts, in comparison to the treatment accorded to whites, blacks have been denied quite literally the equal protection of the law.

Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1267-68 (1994) (citations omitted).

81. Kennedy, *supra* note 80, at 1269.

82. *Id.*

83. *See* Sklansky, *supra* note 55, at 1300.

"tinged" with racial stereotyping.[84] He also argues that the 100:1 ratio emerged because whites were worried about the spread of crack, a "black drug," into white communities.[85] However, while Sklansky's evidence of stereotyping is not conclusive, it is also irrelevant. Even if crack was widely considered a "black drug" associated with black communities, the 100:1 ratio can be seen as a welcome effort by Congress to solve a "black problem." Moreover, if the 100:1 ratio was instead a reaction to the spread of crack into white communities, Congress would be guilty not of creating the 100:1 ratio, but rather of failing to create it sooner than it did. In any case, conscious and unconscious motivations with regard to race can be very difficult to discern. Instead of such speculation, we are better off taking legislators at their word—and thus understanding the 100:1 ratio as an attempt to stop the destruction crack was inflicting on the most vulnerable communities. In the words of Florida Representative E. Clay Shaw, one of the sponsors of the 1986 Act which created the 100:1 ratio, "[I]n Dade County, in Broward County, and Palm Beach County that I represent, and as a matter of fact right here in this Nation's Capital in the minority areas, they are saying come in and arrest the drug traffickers, get them out of our neighborhood."[86]

Unfortunately, fixation upon the two red herrings discussed above has served to confuse and obscure a much more powerful argument against the 100:1 ratio. When Congress passed the Anti-Drug Abuse Act of 1986, it explicitly aimed to target "serious" and "major" drug traffickers more harshly than small-time dealers.[87] Indeed, this was the purpose behind the Act's new two-tiered mandatory minimum scheme, which tied mandatory minimums to drug quantity.[88] In Senator Robert Byrd's words, the ten-year minimum was for "the kingpins—the masterminds who are really running these operations," the five-year minimum was for "the middle-

84. *Id.* at 1291-94 (describing the legislative atmosphere); *id.* at 1300-01 (defending the disparate impact theory); *see also id.* at 1292 ("[T]he drug of primary concern was strongly associated in the white public mind with a particular racial minority.").

85. *Id.* at 1295.

86. 141 CONG. REC. 28,357 (1995) (remarks of Rep. Shaw). Others prefer not to take such legislators at their word. Representative Maxine Waters caustically replied to Shaw, "I do not want [Representative Shaw] to ever believe that he cares more about my community than I do. I do not want the gentleman to think that somehow his policies and his beliefs are right for my community." *Id.* (statement of Rep. Waters). So much for the idea of the "public interest."

87. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 21 U.S.C. § 841(a) (2000)).

88. *See id.*

level dealers," and quantities below the level that would trigger the minimums were reserved for low-level dealers and users.[89] Ironically, however, Congress's simultaneous zeal to get tough on crack offenders entirely undermined this broader effort to single out high-level traffickers for harsher punishment. The 100:1 ratio ignores the realities of drug distribution networks, where low-level dealers and users are more likely than higher-level traffickers to feel the hammer of crack sentences.[90] In practice, the broad goal of the Anti-Drug Abuse Act and the narrow goal of the Act's 100:1 ratio work at cross-purposes, and the 100:1 ratio has managed to swallow the fundamental retributive and deterrent aims of the Act.

According to the Sentencing Commission's 1995 report, "crack cocaine offenders differ characteristically (e.g., smaller range of activity, less likely to be characterized as performing important functions) from other drug offenders at the higher penalty levels."[91] According to the Commission's data, the majority (59.6 percent) of convicted crack offenders were low-level dealers while low-level dealers composed a minority (31.2 percent) of powder offenders.[92] Indeed, a more recent Commission report suggests that the percentage of convicted crack offenders with a low-level role has increased to 66.5 percent.[93] High-level traffickers tend to deal in powder cocaine, and then distribute it to lower-level dealers who convert it to crack prior to selling it. Hence, the 100:1 ratio effectively punishes the lower end of the distribution network more severely than the higher end. The ratio has created a system that gives the least serious punishment to the most serious offender and the most serious punishment to the least serious offender. One would be hard pressed to find a more perfect way to frustrate the goals of just punishment and effective deterrence.

The perversity of the 100:1 ratio emerges even more clearly when we take a concrete look at the economics of drug distribution. Crack tends to be sold on the street in small, single-dose quantities of roughly 250 milligrams per dose.[94] According to data from the

89. 132 CONG. REC. 14,300 (1986) (statement of Sen. Byrd). The House Judiciary Subcommittee on Crime also echoed Senator Byrd's sentiments. *See* Spade, *supra* note 49, at 1253.

90. *See* 2002 REPORT, *supra* note 62, at 99.

91. 1995 REPORT, *supra* note 47, at 193.

92. *Id.* at 172 tbl.18.

93. 2002 REPORT, *supra* note 62, at 38 fig.5.

94. 1995 REPORT, *supra* note 47, at 85. Quantities and prices can vary widely. The author's calculations are based on numbers in the middle of the ranges reported by the Commission.

early 1990s, this "dime bag" would sell for roughly $10.[95] In contrast, powder cocaine tends to be sold in larger five-to-ten dose units of roughly one gram each, at a price around $85 per unit.[96] Comparing the sentences of low-level crack and powder cocaine dealers with each other reveals a sizeable, but not outrageous, disparity. Assuming he is a first-time offender, a low-level dealer caught with enough powder to make five one-gram sales would receive a Guidelines sentence of ten to sixteen months.[97] That same offender caught with enough crack for five equivalent 250-milligram sales would receive a Guidelines sentence of twenty-seven to thirty-three months. In this example, the offenders have equally culpable roles in the drug network, but the crack dealer's sentence is almost three times as long. Some may consider this unfair, and others may believe it reflects the relative social harms caused by the two drugs. But now let us compare low-level crack dealers with high-level powder dealers. Imagine a drug trafficker who distributes his 500 grams of powder cocaine to eighty-nine street-level dealers. After converting the powder into crack, each dealer will have roughly five grams of crack, which will enable him to make twenty sales for a total of $200.[98] The high-level trafficker will thus be responsible for 1,780 street sales of crack worth almost $18,000 and sold by eighty-nine different dealers. For this crime, the high-level trafficker would receive a Guidelines sentence of sixty-three to seventy-eight months. However, since they converted the powder into crack, each of the eighty-nine low-level dealers would receive an identical sixty-three to seventy-eight-month sentence. Under the 100:1 ratio, these minor street dealers are treated as harshly as the major kingpin.

One final example will suffice to drive home the point. In an actual case, two low-level dealers purchased 225 grams of powder cocaine from a higher-level supplier.[99] When they converted the powder into crack, they were disappointed to discover that the powder yielded only eighty-eight grams, rather than the typical 200. They complained to their supplier, and he agreed to trade the defective crack for a new 225-gram batch of powder. When the two

95. *Id.*

96. *Id.*

97. *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 5, § 2D1.1(c), at 133-39 (offense levels); *id.* at 376 (sentencing table).

98. This assumes a cocaine-crack conversion rate of 0.89. *See supra* note 48 and accompanying text.

99. 1995 REPORT, *supra* note 47, at 193-94.

dealers returned to the supplier with their eighty-eight grams of crack, they were arrested before they could complete the trade. The supplier was subsequently arrested for selling the original 225 grams of powder. Although the supplier and the dealers were all first-time offenders, the supplier received a thirty-three to forty-one-month sentence while the lower-level dealers each received a 121 to 151-month sentence.[100]

In sum, the 100:1 ratio often treats low-level crack offenders as severely as, and sometimes even more severely than, high-level powder offenders. Moreover, high-level drug offenders are, generally, more likely to deal in powder than in crack. The ratio is plainly bad policy. Some difference between crack and powder sentences may be justified by the unique harms inflicted by crack. However, the 100:1 ratio corrects a disparity in harm at the price of creating a much greater disparity in culpability. The 100:1 ratio may not be so problematic for sentencing higher-level crack offenders, but in cases involving low-level dealers or users of crack, it seriously thwarts the aims of fair and just punishment.

B. *Substantive Reasonableness*

As thus far shown, the 100:1 ratio can, in some instances, produce perverse and unfair results. However, the chief flaw in the ratio stems not from the pharmacological similarity of crack and powder, nor from the ratio's disparate racial impact, but rather from a deeper source. The 100:1 ratio distorts the justice system's ability to assign punishment on the basis of culpability and just deserts. Recognizing this reality, though also indulging other arguments against the ratio, the Sentencing Commission has proposed that the ratio be reduced to 20:1, 10:1, or even 5:1.[101] A smaller ratio would recognize the unique harm inflicted by crack, but it would limit the ratio's tendency to distort punishment based on culpability. Congress, however, has yet to take the Commission's advice.

What then, in the wake of *Booker*, should judges do? When sentencing a crack defendant, should judges apply the 100:1 Guidelines ratio, or should they venture away from it on their own? When faced with this question, the first instinct of many judges has been to think in terms of "substantive reasonableness." The *Booker* Court made the Guidelines "advisory" and required judges

100. *Id.*

101. *See supra* notes 61-62 and accompanying text.

to impose "reasonable" sentences in accord with the dictates of § 3553(a). Under § 3553(a), courts must consider a list of more than ten factors, including the applicable Guidelines range,[102] "the nature and circumstances of the offense,"[103] the need for the sentence imposed to "reflect the seriousness of the offense,"[104] the need for the sentence to be "sufficient, but not greater than necessary,"[105] and the need for the sentence to "afford adequate deterrence."[106] However, most relevant to the question of the 100:1 ratio is § 3553(a)(6), which requires judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[107] Through the lens of substantive reasonableness, judges have asked themselves what sentence, based on the 100:1 ratio or a different ratio, will best avoid "unwarranted disparity."

1. Two Reasonable Approaches?

In the wake of *Booker*, § 3553(a)(6)'s command to avoid disparity has become the locus of concern for substantive discussion of the 100:1 ratio. Yet, § 3553(a)(6) lends itself to two radically different conclusions. The first approach, which we might call the ex post view, points to the disparities created by the Guidelines ratio. Although *Booker* and § 3553(a)(4)(A) require judges to "consider" the Guidelines, § 3553(a)(6) requires judges to independently consider the issue of disparity.[108] Hence, read most naturally, § 3553(a) permits judges to consider disparity *within* the Guidelines and, thereby, weigh both § 3553(a) factors—the value of following the Guidelines against the value of eliminating the supposed disparity.[109] As one judge explained, "The guideline's [sic] treatment of crack cocaine versus their treatment of powder cocaine . . . may, in

102. 18 U.S.C. § 3553(a)(4)(A) (2000).
103. *Id.* § 3553(a)(1).
104. *Id.* § 3553(a)(2)(A).
105. *Id.* § 3553(a).
106. *Id.* § 3553(a)(2)(B).
107. *Id.* § 3553(a)(6).
108. *Id.*
109. A close reading of § 3553(a), applying ordinary principles of statutory interpretation, suggests that § 3553(a)(6) should not be construed to simply require adherence to the Guidelines. Such an interpretation of § 3553(a)(6) would render § 3553(a)(4)(A)'s instruction to consider the Guidelines entirely superfluous. *See* Michael M. O'Hear, *The Duty to Avoid Disparity: Implementing 18* U.S.C. § 3553(a)(6) After Booker, 37 McGeorge L. Rev. 627 (2006) [hereinafter O'Hear, *The Duty to Avoid Disparity*].

and of itself, create an unwarranted sentence disparity."[110] In the words of another judge, this disparity exists "between defendants convicted of possessing powder cocaine and defendants convicted of possessing crack cocaine."[111]

Judges have also cited the 100:1 ratio's disparate racial impact as a source of unwarranted disparity. For example, one judge observed, "Perhaps most troubling . . . is that the unjustifiably harsh crack penalties disproportionately impact on black defendants."[112] Under this ex post approach, judges reason that the 100:1 ratio creates unwarranted disparity between a crack defendant and defendants convicted of similar offenses (powder cocaine) or between defendants who differ because of their race.[113] Both rationales are consistent with § 3553(a)'s language, which refers both to the nature of the defendant ("defendants with similar records") and the nature of his actions ("defendants . . . who have been found guilty of similar conduct").[114] Judges cite these disparities and conclude that § 3553(a)(6) requires them to replace the 100:1 ratio with a different ratio, usually 20:1 or 10:1.

However, other judges relying on the same provision have come to an opposite conclusion. Under this second approach, which we might call the ex ante view, judges focus on the forward-looking impact of rejecting the 100:1 ratio and replacing it with a lower ratio. In this view, a judicial decision to categorically reject the 100:1 ratio creates a collective action problem. If every judge

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110. United States v. Clay, No. 2:03CR73, 2005 WL 1076243, at *4 (E.D. Tenn. May 6, 2005) (imposing a 156-month sentence where the Guidelines recommended 235 to 293 months).

111. United States v. Smith, 359 F. Supp. 2d 771, 781 (E.D. Wis. 2005) (employing a 20:1 ratio and imposing an 18-month sentence where the Guidelines recommended 41 to 51 months).

112. *Id.* at 780.

113. *But cf.* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 5, § 5H1.10 (Commission policy statement deeming race to be a factor "not relevant" to the determination of a sentence); 18 U.S.C. § 3553(a)(5) (requiring judges to consider "any pertinent policy statement" issued by the Commission).

114. 18 U.S.C. § 3553(a)(b). Note that the reference to "conduct" rather than "offenses" can lend itself to finding similarity between two defendants convicted of different crimes whose "conduct" was nevertheless similar. *But see* O'Hear, *The Duty to Avoid Disparity*, *supra* note 109, at 641-42 (arguing, based on text and legislative history, that § 3553(a)(6) should be construed to refer only to disparities between defendants with the same offense of conviction, but concluding that crack and powder offenses can be considered "similar crimes"). It should also be noted that § 3553(a)'s reference to "similar records" suggests that Congress probably had something narrower in mind than racially disparate impact. Although the disparate impact theory is plausible, it is not entirely convincing.

adopted the same smaller ratio, there would be no disparity. However, one judge's choice to categorically abandon the 100:1 ratio creates disparity between identical defendants, based simply on which judge a defendant happens to be assigned. As one sentencing judge explained his decision to abide by the 100:1 ratio, the choice of a different ratio "would in all likelihood create greater inter-court (and intra-court) sentencing disparity among federal offenders with similar records who commit *identical* offenses—that is, among crack offenders."[115] Echoing this sentiment, the Fourth Circuit observed that "by its plain language, § 3553(a)(6) seeks to bring about increased uniformity in the sentencing of similarly situated defendants," and this uniformity is frustrated by "giving a sentencing court the authority to sentence a defendant based on its view of an appropriate ratio."[116]

Moreover, the First Circuit pointed to another form of ex ante disparity that would result from judicial rejection of the 100:1 ratio. In contrast to the above inter-judge disparity, the existence of statutory mandatory minimums based on the 100:1 ratio would create intra-judge disparities among defendants, regardless of whether they are sentenced by different judges. Since the five- and ten-year mandatory minimums reflect the 100:1 ratio, rejecting the ratio while abiding by the mandatory minimums would create a huge disparity between defendants possessing quantities large enough to trigger the minimums and those possessing only a small amount less. For example, under the Guidelines, a first-time offender possessing 49 grams of crack would receive a sentence of 97 to 121 months. An identical offender possessing 50 grams of crack, enough to trigger the ten-year mandatory minimum, would receive a statutorily mandated 120-month sentence. If a judge rejects the 100:1 ratio and instead applies a 20:1 ratio to the first offender, his sentence becomes 63 to 78 months. As the First Circuit observed, "a one-gram difference in drug quantity would create a huge sentencing differential (nearly fifty percent)."[117]

2. The Clash of Disparities

The different conclusions reached by the ex post and ex ante views of the 100:1 ratio produce a veritable clash of disparities. Ju-

115. United States v. Doe, 412 F. Supp. 2d 87, 95 (D.D.C. 2006).

116. United States v. Eura, 440 F.3d 625, 633 (4th Cir. 2006), *petition for cert. filed* (No. 05-11659 June 20, 2006).

117. United States v. Pho, 433 F.3d 53, 64 (1st Cir. 2006).

dicial critics and proponents of the ratio each have their own pet disparities, and each side can use its own disparities to rebut those of the other. The ex post critics of the 100:1 ratio point to disparities resulting from the ratio's treatment of similar offenses or offenders in radically different ways. In this view, maintaining the 100:1 ratio furthers drug type disparity and racial disparity. In contrast, the ex ante defenders of the 100:1 ratio point to disparities that would result from individual judges deciding to categorically treat a class of offenders more leniently than other judges would treat that class, or more leniently than the same judge would have to treat similar classes (e.g., those crack offenders subject to mandatory minimums). In this view, rejecting the 100:1 ratio creates inter-judge disparity and intra-judge disparity. Alas, neither the concept of disparity, nor the words and intent of § 3553(a)(6), can provide a rationale for choosing one kind of disparity over another. With regard to the 100:1 ratio, § 3553(a)(6) has no determinative content.

Standing alone, the concept of "unwarranted disparity" becomes either circular or incoherent. An unwarranted disparity results when two similar defendants are treated dissimilarly, but what counts as meaningful dissimilarities are those dissimilarities that are unwarranted. This is the circular version of "unwarranted disparity." Instead of making "unwarranted disparity" a criterion of itself, the incoherent version considers "disparity" to be modified by "unwarranted" and asks judges to somehow distinguish between "warranted" and "unwarranted" disparities. Indeed, this version seems to be what Congress intended when it drafted the statute. As explained in the Senate Judiciary Committee Report, "The key word in discussing unwarranted sentence disparities is 'unwarranted.'"[118] While this is true enough, the incoherence results from the fact that § 3553(a)(6) supplies no criteria for determining what is and is not warranted; by itself, "warrantedness" is an incoherent criterion.[119] Hence, to become coherent, the concept of disparity must find some external principle on which to rely.

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118. S. REP. NO. 95-605, at 1161 (1977).

119. Many scholars and judges have come to the same conclusion with respect to disparity, or its opposite, uniformity. *See, e.g.*, *Doe*, 412 F. Supp. 2d at 94 ("Disparity is a normative principle that necessarily encompasses a judgment about which characteristics of the offense (or the offender) should matter and which characteristics should not."); STITH & CABRANES, *supra* note 12, at 105 ("The trouble begins when we move beyond this slogan [of unwarranted disparity] and ask what factors should be considered in deciding whether particular crimes and particular criminals are 'similar' or 'dissimilar' . . . ."); Michael M. O'Hear, *The Original Intent of Uniformity in Federal*

Yet, searching for such a principle in § 3553(a)(6) feels like searching for water in an arid desert. Indeed, the legislative history of § 3553(a)(6) offers no more than a mirage, for it suggests that Congress had both ex post and ex ante disparity in mind when it wrote the statute. One Senate Judiciary Committee Report noted that the requirement to avoid unwarranted disparity establishes offense and offender characteristics "as the principal determinants of whether two offenders' cases are so similar that a difference between their sentences should be considered a disparity."[120] This echoes the ex post view. However, the same report noted, in reference to disparity, "The offender before [a particular judge] should not receive more favorable or less favorable treatment solely by virtue of the sheer chance that he is to be sentenced by a particular judge."[121] This echoes the ex ante view.

In short, the clash between ex post and ex ante views of crack sentencing disparity and the decision about which kind of disparity to avoid—drug type disparity, racial disparity, inter-judge disparity, or intra-judge disparity—cannot be resolved by the terms of § 3553(a)(6) or its legislative history. One scholar has aptly compared § 3553(a)(6)'s "uniformity ideal" to the old "rehabilitative ideal" that used to dominate the sentencing agenda.[122] Like the older ideal, the new ideal "embraces great complexity and, indeed, encompasses widely different and even conflicting kinds of social policies."[123] Moreover, any hope of turning to § 3553(a)'s other factors in search of a criterion for "unwarranted disparity" runs into even more indeterminacy. The ex post approach might further the need to consider the "nature and circumstances of the offense" (§ 3553(a)(1)) and "provide just punishment" (§ 3553(a)(2)(A)),

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Sentencing, 74 U. CIN. L. REV. 749 (2006) [hereinafter O'Hear, *The Original Intent of Uniformity in Federal Sentencing*] ("[U]niformity seeks to eliminate *unwarranted* sentencing disparities, but also to provide for *warranted* disparities. The problem lies in distinguishing the warranted from the unwarranted."); Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 NW. U. L. REV. 1336, 1336 ("[R]educing sentencing disparity . . . requires a coherent underlying theory of punishment, because disparity is not a self-defining concept.").

120. S. REP. NO. 95-605, at 1161.

121. *Id.* at 893; *see also* S. REP. NO. 98-225, at 161 (1983) ("Each sentence will be the result of careful consideration of the particular characteristics of the offense and the offender, rather than being dependent on the identity of the sentencing judge and the nature of his sentencing philosophy.").

122. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, *supra* note 119, at 791 (quoting FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 2 (1981)).

123. *Id.*

but the ex ante approach might do a better job of taking the Guidelines into account (§ 3553(a)(4)), "promot[ing] respect for the law" (§ 3553(a)(2)(A)), and "afford[ing] adequate deterrence" (§ 3553(a)(2)(B)).[124] And neither approach will tell us what sentence is "sufficient, but not greater than necessary" (§ 3553(a)), since we cannot yet define what is "necessary." Indeed, Judge Posner has observed the "indeterminate and interminable character of inquiry into the meaning and application of each of the 'philosophical' concepts in which section 3553(a) abounds."[125] Through the lens of substantive reasonableness, neither § 3553(a)(6)'s command to avoid disparity nor the rest of § 3553(a)'s grab bag of sentencing factors can adequately resolve the crack-powder issue.

III. BEYOND THE CLASH OF DISPARITIES

At this point it is helpful to pause and remember Alexander Bickel's quip, "no answer is what the wrong question begets."[126] As observed in the previous Part, the substantive approach to the crack-powder issue leads to analytical gridlock. In this Part, I explore a more promising path.

A. *Structural Reasonableness*

Substantive reasonableness asked, "What is the correct sentence for this defendant?" In contrast, structural reasonableness asks a more elementary question: "Who should make particular kinds of decisions related to sentencing?" The substantive approach focused on the "what" and "why"; the structural approach focuses on the "who" and "how."[127] This distinction may seem sub-

124. 18 U.S.C. § 3553(a) (2000).

125. United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005).

126. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 103 (2d ed. 1986).

127. Some appellate courts have recognized a distinction between "substantive" and "procedural" reasonableness review. The former relates to the actual quantum of the sentence given, and the latter usually refers to the duty to calculate the applicable guidelines range or consult § 3553(a). *See, e.g.*, United States v. Webb, 403 F.3d 373, 383-85 (6th Cir. 2005), *reh'g denied*, 2005 U.S. App. Lexis 16621 (6th Cir. 2005) (en banc); United States v. McBride, 434 F.3d 470, 476 n.3 (6th Cir. 2006). As explained in the previous Part, my conception of "substantive reasonableness" encompasses both of those kinds of review. Hence, the use of the term "structural reasonableness" to distinguish something different—the need to consider the nature of the decision and the decision-maker in the sentencing calculus. My concept of "structural reasonableness" also differs from how another scholar has conceptualized sentencing reasonableness. Eric Citron, United States v. Pho*: Reasons and Reasonableness in Post-*Booker *Appellate Review*, 115 YALE L.J. 2183 (2006). In that article, the author distinguishes between

tle or semantic, but it has significant consequences as to how judges think about sentencing. The dominance of the substantive approach in the wake of *Booker*, particularly among district court judges, should not be surprising. Prior to *Booker*, most of the structural questions had already been answered by Congress or the Sentencing Commission, through narrowly circumscribed judicial discretion and sharply delineated permissible and impermissible reasons for Guidelines departures.[128] However, in the wake of *Booker*, our evolving reasonableness regime demands renewed engagement with the basic structural questions at the heart of the sentencing process. Indeed, it demands heightened engagement since trial judges and appellate courts have taken on new obligations as stewards of the entire system's "reasonableness." A complete reckoning of post-*Booker* structural questions lies beyond the scope of this Article.[129] However, this Part will attempt to elaborate and apply the structural perspective as it relates to the crack-powder issue.

Two recent scholars have observed, "the sentencing decision is properly viewed as a series of decisions—each of which is importantly different from the others and each of which can best be performed by a decisionmaker with certain qualities."[130] In contrast to

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"reasonable-length" review and "reasons-based" review, arguing that review of sentences under *Booker* should be based "not on the terms imposed but on the reasons given for imposing them." *Id.* at 2184. However, the author does not address the question central to this Article: In crack sentencing, which reasons should count and why? The author argues that reasonableness review should be about "reasons," rather than merely about sentence lengths. While my concept of reasonableness review encompasses this insight, I go further by arguing that certain kinds of reasons (structural ones) should take precedence over other kinds of reasons (substantive ones).

128. *See supra* notes 19-20 and accompanying text.

129. One relevant and particularly important structural issue to which the appellate courts have indeed given some attention involves the question of what role the "advisory" Guidelines play in a determination of "reasonableness." Most circuits have held that Guidelines sentences should be accorded a "presumption of reasonableness," but at least one circuit has deemed a Guidelines sentence to be unreasonable. *Compare* United States v. Green, 436 F.3d 449 (4th Cir. 2006) (holding that guidelines sentences are presumptively reasonable), *with* United States v. Lazenby, 439 F.3d 928, 933 (8th Cir. 2006) (finding that a guidelines sentence was unreasonable, since "a number of circumstances make this case highly unusual"). Two recent scholars have also attempted to grapple with the structural question head-on. However, unlike this Article, they work at a very high level of abstraction and their analysis yields few concrete doctrinal or practical results. *See* Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124 (2005). Robinson and Spellman build a valuable foundation, but I believe structural issues may be more profitably explored through engagement with actual sentencing disputes. *Cf. Webb*, 403 F.3d at 383 ("[W]e believe it prudent to permit a clarification of [reasonableness] concepts to evolve on a case-by-case basis.").

130. Robinson & Spellman, *supra* note 129, at 1128.

the substantive issue of "unwarranted disparity," the key structural issue in cocaine sentencing is whether *judges* should categorically alter the 100:1 crack-powder ratio—that is, whether the question of the proper ratio is best resolved by Congress or the judiciary. A judge's sentence in crack cases really involves two different decisions—a policy judgment about the appropriate categorical ratio to apply and an individualized judgment about the particular offender's unique culpability.[131] In this Part, I seek to disentangle these two different sentencing decisions, and I argue that policy decisions are better left to Congress while individualized decisions should rest with the sentencing judge. In concrete terms, this means that structural reasonableness requires judges to abide by the 100:1 ratio but permits them to deviate from the Guidelines in individual cases where they find that the defendant's lesser culpability warrants deviation.

In requiring adherence to the 100:1 ratio, a number of courts have appealed to the notion that determining the proper ratio between crack and powder sentences is a "policy judgment" better left to the legislature. As one sentencing judge lamented, "I should defer to the choice of penalties that Congress has made for crack cocaine even though I would quickly do something different if it were within my proper role to choose."[132] Although relying mostly on substantive arguments about disparity, the Fourth Circuit also observed that "sentencing courts should not be in the business of making legislative judgments concerning crack cocaine and powder cocaine."[133] Finally, the First Circuit has given the loudest voice to this perspective, noting that the 100:1 ratio remains "a policy judgment, pure and simple."[134] The court elaborated, "Matters of policy typically are for Congress. [I]n the absence of constitutional infirmity, federal courts are bound by Congress's policy judgments, including judgments concerning the appropriate penalties for federal crimes."[135] In this view, judges should apply § 3553(a)'s factors in an individualized manner to the particular defendants before

131. *Cf.* John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955) (distinguishing between the decision to justify a practice and the decision to justify a particular action falling under that practice).

132. United States v. Tabor, 365 F. Supp. 2d 1052, 1060 (D. Neb. 2005) (rejecting crack defendant's request for a lower sentence), *aff'd*, 439 F.3d 826 (8th Cir. 2006), *petition for cert. filed* (No. 06-5244 May 31, 2006).

133. United States v. Eura, 440 F.3d 625, 633 (4th Cir. 2006), *petition for cert. filed* (No. 05-11659 June 20, 2006).

134. United Stated v. Pho, 433 F.3d 53, 62 (1st Cir. 2006).

135. *Id.* (citations omitted).

them,[136] but they should not be in the business of making categorical decisions about sentencing policy.

B. *The "Policy" Distinction*

In reaching this conclusion, these judges have seized upon a powerful and ultimately persuasive intuition. However, the basis of the structural argument remains vague and inarticulate. The courts have asserted that judges should not "make policy judgments," but they have failed both to justify the assertion and to define what counts as "policy." This leaves the structural approach vulnerable to critics who claim that it is incoherent—indeed, one might think that the structural focus on "policy" is no better in this regard than the substantive focus on "disparity." For example, sentencing scholar Douglas Berman has argued, "[A]ll judicial sentencing decisions plainly are, at some level, policy judgments informed by views on just punishment, crime control, procedural fairness, and other express and implicit considerations."[137] Another observer makes the point even more provocatively, claiming, "Those who say judges shouldn't impose sentences based on policy are clinging desperately to the last shards of a mandatory Guidelines system."[138] These critics make fair points, but I believe the objections rest on some fundamental misunderstandings. Hence, in this Part, let us articulate the structural argument more clearly, asking first what we mean by "policy judgments" and second why judges should refrain from making them. We will then apply this general analysis to the crack-powder issue.

The critics are correct to note that, in some sense, a judge "makes policy" every time she makes a ruling. In Holmesian terms, one might think that policy is a "prophec[y] of what the courts will do in fact, and nothing more pretentious."[139] Nobody disputes the first half of Holmes' remark—that every judicial decision may have the *consequence* of policy—for every decision affects the rights and

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136. *See Eura*, 440 F.3d at 634-39 (Michael, J., concurring).

137. Posting of Douglas Berman to Sentencing Law and Policy Blog, http://sentencing.typepad.com/sentencing_law_and_policy/2006/05/policy_judgment.html (May 7, 2006, 16:51 EST) (emphasis omitted) (posting titled "Policy Judgments at Federal Sentencing: Aren't They Inevitable and Mandated by Congress?").

138. Posting of David Lewis to Sentencing Law and Policy Blog, http://sentencing.typepad.com/sentencing_law_and_policy/2006/05/policy_judgment.html (May 8, 2006, 10:51 EST) (responding to posting of Douglas Berman).

139. *Cf.* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

fortunes of individuals in some way. However, the second half of Holmes' remark—that consequences are all that matter—is more contestable and indeed highlights the key area of disagreement. Our intuition that judges should not make policy runs deeper than consequences and rests on concerns about the *nature* of judicial decisions. To side with Holmes and the critics is to claim that judicial decisions do not differ fundamentally in their nature; they are all of the same kind, and that kind has only substantive and no structural content. I believe our intuitions about the nature of sentencing decisions run in the other direction. The courts have been right to distinguish a policy-based decision as a particular kind of sentencing decision.

What, then, defines whether a decision has the nature of policy? While no simple answer presents itself, one can identify policy rationales by a set of five defining qualities: principle, generality, prospectivity, the nature of the facts, and legislative intent. One can find hints at each of these factors in the cases discussing the crack-powder ratio, and also in other areas of the law,[140] but they have not yet been appreciated.

1. Principle

Efforts to identify uniquely legislative judgments often distinguish between the choice of foundational principles and the choice of how to apply those principles in an individual case.[141] This factor has been conceptualized in various ways. As one judge put it rather morbidly, "[T]he determination that one crime is 'worse' for society than another crime . . . is a . . . value judgment. . . . [W]hen it comes to punishment, judges lack the legitimacy of legislators . . . to create their own categories of evil."[142] In this view, legislative policy judgments are the kind of judgments that establish the deep premises underlying sentencing. As a general principle becomes more specific, it loses the aura of policy and takes on that of application. Other observers have suggested that certain kinds of principled judgments are better suited to legislative policymaking than to ad-

140. Administrative law sometimes makes an analogous distinction between "legislative" and "adjudicative" agency decisions. *Compare* Londoner v. Denver, 210 U.S. 373 (1908) (holding that a municipal tax levied on a select group of property owners required individualized adjudication), *with* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (holding that a general tax levied on all taxable property did not require individual adjudication).

141. *See generally* Rawls, *supra* note 131.

142. United States v. Tabor, 365 F. Supp. 2d 1052, 1059 (D. Neb. 2005), *aff'd*, 439 F.3d 826 (8th Cir. 2006), *petition for cert. filed* (No. 06-5244 May 31, 2006).

judication. For example, John Rawls argued that utilitarian and retributive punishment theories can be reconciled, since "utilitarian arguments are appropriate with regard to questions about practices [i.e., policy], while retributive arguments fit the application of particular rules to particular cases."[143] In a related vein, Douglas Berman has suggested a distinction between offense conduct and offender characteristics, the former being better suited for legislation and proof at trial and the latter being better left to the discretion of judges.[144]

2. Generality

Another way of identifying a policy decision is to look at the scope of its application. Policy judgments tend to affect a large number of people, and they tend to treat people as part of a statistical mass. They speak categorically. As one judge has put it, "for a judge to independently designate categories of offenders and offenses for singular treatment is tantamount to the establishment of sentencing policy."[145]

3. Prospectivity

Policy judgments tend to be forward-looking in nature, while adjudicative judgments tend to be backward-looking. Policy judgments have a strong predictive effect. They are made in order to affect the future, not usually to account for some particular past act.

4. Nature of the facts

Policy judgments tend to apply broadly to a variety of factual situations. They do not require detailed knowledge of the particular situations to which they apply, and they do not depend on facts that are difficult to quantify and ascertain in the aggregate.

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143. Rawls, *supra* note 131, at 5.

144. Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277, 287 (2005) ("Trials are about establishing the specific-offense conduct that the state believes merits criminal punishment; sentencing is about assessing both the offense and the offender in order to impose a just and effective punishment.").

145. United States v. Valencia-Aguirre, 409 F. Supp. 2d 1358, 1376 (M.D. Fla. 2006); *see also* United States v. Pho, 433 F.3d 53, 62 (1st Cir. 2006) (characterizing the district court's rejection of the 100:1 ratio as "categorical, policy-based"); United States v. Doe, 412 F. Supp. 2d 87, 97 (D.C.C. 2006) ("But what Congress's policy choice *does* mean is that courts cannot categorically treat as similar that which Congress has chosen to treat as dissimilar.").

5. Legislative intent

Finally, and perhaps most importantly, policy judgments can be defined in functional terms. Even if one rejects the search for a Platonic definition of "policy," one can still accept the Forrest Gump version: Policy is as policy does. That is, something becomes a policy issue primarily because Congress has chosen to make it so. This is what the Framers meant when they vested the "legislative power" in Congress.[146]

Of course, one can quibble with the ability of individual factors to describe our intuitions about policy, and one can also quibble with the application of any one of these factors. Taken together, however, the five factors seem to acquire some descriptive and determinative power. Let us now move to our second question. Once a policy judgment has been identified as such, why should judges defer such judgments to the legislature? Here, the argument is familiar and rests on concerns related to democratic representation and accountability and the comparative institutional competence of judges and legislatures. Judges abiding by the 100:1 ratio have invoked these themes. One judge colorfully explained his restraint:

> To be clear, if I were the "King," I would adopt [a 20:1 ratio]. My disagreement with judges who use *Booker* to [adopt their own ratios] is not primarily that their reasons are faulty in the abstract, but that they give insufficient deference to Congress' contrary, but reasonable, policy preferences.[147]

Under the old rehabilitative ideal of criminal sentencing, judicial discretion posed few problems. Only judges could adequately assess an offender's potential for rehabilitation. In many ways, the rehabilitative model conceived of punishment as a private matter between judge and defendant. However, as our sentencing system came to embrace theories of punishment such as retribution, deterrence, and incapacitation, it has encompassed broader values and concerns that affect the entire political community—values that are the subject of public interest. As such, these concerns demand resolution in a public, democratic manner. More practically, judges lack the institutional capacity to make policy judgments in a consistent way. Since policy judgments tend to be categorical, they are better made at the legislative level than through a number of disparate decisions by various judges. This appeal to consistency in ap-

146. U.S. CONST. art. I, § 1.
147. *Tabor*, 365 F. Supp. 2d at 1058 n.9.

plication of the law returns us to that old nutshell of disparity. But disparity becomes coherent once one concludes that Congress has made a policy choice that allows one to distinguish between "warranted" and "unwarranted" disparity. If Congress has a clear and ascertainable preference, consistent application of that preference does indeed limit unwarranted disparity.

After considering what makes something a policy judgment, we can more clearly assess the 100:1 ratio in light of the factors we have identified. The first factor, regarding principles, is probably the least helpful, since § 3553(a) can be read as a grab bag of sentencing principles, and thus an effective delegation of authority to set guiding principles. The 100:1 ratio is more like a subsidiary conclusion than a basic principle of sentencing. However, the next three factors—generality, prospectivity, and the nature of the facts—weigh heavily in favor of treating the 100:1 ratio as a policy judgment. The 100:1 ratio is, after all, a ratio. It aims to establish a relationship between two different offenses. This is a broad, categorical judgment that applies prospectively to general classes of action. Indeed, a policy judgment that establishes the relative degree of punishment between two offenses is only a short step from the paradigmatic policy choice of which actions to classify as crimes.

Finally, the factor weighing most heavily in favor of treating the 100:1 ratio as a policy choice is legislative intent. Critics of the ratio point out that the Guidelines are no longer mandatory and thus do not carry the force of law. After *Booker*, statutory mandatory minimums are the only formal legislative enactments constraining judges' abilities to deviate from the 100:1 ratio.[148] But although these critics are formally correct, they miss the point. In light of *Booker*'s standard of review, a sentencing judge's decision need not violate a statute to nevertheless run afoul of structural reasonableness. If legislative intent is clear, a judge's decision to thwart that intent may be unreasonable. Indeed, this is the case with the 100:1 ratio. Congress has spoken clearly to the policy issue, albeit informally. Although the mandatory minimums only set a limit on the ability of a judge to discard the 100:1 ratio, the minimums remain strong evidence of congressional intent. It would be unreasonable to think that when Congress enshrined the 100:1 ratio in the mandatory minimum statute it did not also aim for this ratio to control sentences above and below the minimums. Moreover, the 100:1 ratio has not resulted from legislative error, ignorance, or

148. Of course, § 3553(a) is a statutory constraint too, but a rather soft one.

neglect. Rather, Congress and the Sentencing Commission have engaged in an ongoing dialogue over the ratio. On multiple occasions, Congress has considered and rejected alternative ratios.[149] One hopes Congress may yet adopt the Commission's recommendations, but until then, it remains difficult to deny that Congress has made its choice. As a matter of structural reasonableness, judges should defer to this clear policy choice.

Critics may reasonably worry that the structural approach leaves them with nothing, and that it comes dangerously close to running afoul of *Booker* by making the Guidelines mandatory again. Yet, this need not be the case. Although structural reasonableness requires judges to defer to the policy judgments of Congress, policy judgments by nature tend to be overinclusive. That is, their effects tend to reach beyond their intended purposes. Indeed, this had been a chief argument against the exhaustingly detailed mandatory Guidelines.[150] Hence, the significance of *Booker* lies in the new freedom it gives judges to reject Guidelines policy choices when the policy does not fit the circumstances of individual cases. In this sense, judges can finally escape the distant utilitarianism of policy-setting and the cold regularity of bureaucratic application[151] by focusing on the humane aspect of their sentencing task—understanding the unique circumstances of the defendant. Judges can prevent the tyranny of overinclusive policy choices not by imposing their own rival policy choices, but rather by explaining how a particular defendant engenders individualized reasons—indeed, reasons based on § 3553(a)—to deviate from the Guidelines in a given case.

As Fourth Circuit Judge M. Blane Michael hinted in his concurring opinion in *United States v. Eura*, objections to the 100:1 ratio "can be considered insofar as they are *refracted through* an individual defendant's case."[152] Judge Michael did not elaborate on how this process would work, but our own discussion of the argument against the 100:1 ratio points the way. Recall that the best argument against the 100:1 ratio is not a categorical one based on the pharmacological nature of crack or on the disparate impact the ratio entails. Rather, the central problem with the 100:1 ratio is

149. *See supra* notes 57-62 and accompanying text.

150. *See* STITH & CABRANES, *supra* note 12, at 121-24 (discussing "the arbitrariness of uniformity").

151. *See id.* at 103.

152. United States v. Eura, 440 F.3d 625, 637 (4th Cir. 2006) (Michael, J., concurring).

that it fails to account for individual culpability.[153] It measures the increased harm caused by crack, but it does not account for the relatively lesser culpability of low-level dealers and users. By overweighing harm and under-weighing culpability, the 100:1 ratio frequently leads to injustice in individual cases and fails to serve the original intent of the Sentencing Reform Act. Judges can thus avoid making policy choices and limit the damage caused by the 100:1 ratio by deviating from the Guidelines in cases where the defendant is not a major drug trafficker or manufacturer. This individualized approach is both consistent with structural reasonableness and effective in reducing the perverse effects of the 100:1 ratio.

C. *Standards of Review*

We come finally to the question of how structural reasonableness might be effectuated doctrinally. *Booker*'s concept of "reasonableness" can devolve into an incoherent and inarticulate incantation, or it can evolve into the raw material out of which guiding common law presumptions and rules fruitfully spring. Hence, to become truly reasonable, the concept of "reasonableness" must be divided into manageable pieces. The courts have already adopted one such piecemeal rule—the presumption of reasonableness accorded to within-Guidelines sentences. This is a sensible beginning, since the presumption—so long as it is rebuttable—gives the Guidelines an "anchoring effect"[154] without making them determinative in individual cases (and thus unconstitutionally mandatory).[155] However, the courts have not yet fully elaborated the standard of review for non-Guidelines sentences.

Some judges have chosen to use the old "abuse of discretion" standard.[156] Others have applied something closer to "de novo."[157] And still other judges insist that review be for "'unreasonable-

153. *See supra* Part II.A.

154. O'Hear, *The Duty to Avoid Disparity*, *supra* note 109, at 645.

155. I should note that many people disagree with this characterization and worry that the presumption of reasonableness veers too close to unconstitutional waters. The full debate over this presumption lies beyond the scope of this Article. However, since the presumption can be rebutted, I believe that it serves primarily an informational function, communicating a national norm against which individual judges can make their own independent assessments.

156. *See, e.g.*, United States v. Menyweather, 447 F.3d 625, 631-32 (9th Cir. 2006).

157. *See, e.g.*, United States v. Pho, 433 F.3d 53, 60-61 (1st Cir. 2006).

ness,'" pure and simple.[158] We need not decide the question here in its entirety, but the notion of structural reasonableness that emerges from the dispute over the 100:1 ratio helps us make a contribution to the effort. In short, we should adopt a two-tiered scrutiny regime, whereby individualized sentencing decisions are reviewed deferentially and policy-based decisions are subject to heightened scrutiny. Appellate courts could police the boundaries of structural reasonableness by first determining whether a judge's sentencing decision is individualized or policy-based in nature, and then applying deference to the former and heightened scrutiny to the latter.

As explained in this Part, the structural approach has no intention of stamping out individualized substantive sentencing considerations; it does not aim to make the Guidelines mandatory. Instead, it simply asks judges to read § 3553(a) with an individualized gloss, rather than a categorical policy-focused one. Review for structural reasonableness fulfills the newfound duty of the appellate courts to ensure that the system as a whole functions reasonably. Only in this way can we avoid the "discordant symphony" predicted by *Booker*'s dissenters.[159]

IV. STRUCTURAL REASONABLENESS IN PRACTICE

Two examples will serve to highlight the difference between the approach recommended here and the alternative approach taken by some critics of the 100:1 ratio. The first example comes from a district court case that exemplifies the former approach. In *United States v. Smith*,[160] officers responding to a fire caught the defendant in possession of approximately 70 grams of crack and 650 grams of powder cocaine.[161] After applying the Guidelines and granting the government's request for a § 5K1.1 departure for substantial assistance, the judge calculated a Guidelines range of forty-one to fifty-one months.[162] Then, the judge made an individualized assessment of the defendant based on the § 3553(a) factors. She observed: "Although the offense was serious, no aggravating circumstances were present. Defendant did not appear to have ever committed or threatened violence or to have sold large quantifies

158. *See, e.g.*, *Menyweather*, 447 F.3d at 639 (Kleinfeld, J., dissenting) (quoting United States v. Booker, 543 U.S. 220, 261 (2005)).

159. United States v. Booker, 543 U.S. 220, 312 (2005) (Scalia, J., dissenting).

160. United States v. Smith, 359 F. Supp. 2d 771 (E.D. Wis. 2005).

161. *Id.* at 773.

162. *Id.* at 776.

[sic] of drugs."[163] The defendant had maintained a clean record during the two years between when the offense occurred and when the government charged him.[164] The judge also found the defendant to be "genuinely remorseful."[165] But, she observed, "[H]is guideline offense level was high because he possessed crack cocaine."[166] Noting that "the 100:1 ratio actually targets low level dealers in a manner inconsistent with the intent of the 1986 Act,"[167] she concluded that "guideline sentences vary widely based on facts that have little to do with culpability."[168] In the case before her, however, the individualized need to take culpability into account demanded that she give an eighteen-month sentence.[169]

Now, compare *Smith* to *Simon v. United States*,[170] another crack case also resulting in a below-Guidelines sentence. Agents conducted a stakeout at the defendant's residence, after which he fled from the police.[171] In his residence, agents found 600 grams of crack, forged identification documents, a loaded submachine gun, $72,000 in cash, and all of the accoutrements of a crack manufacturing and dealing operation.[172] For this major offense, the Guidelines advised a sentence of 324 to 405 months.[173] The judge cited his belief, and that of the Sentencing Commission, that the 100:1 ratio exaggerated the harm caused by crack.[174] Accordingly, he chose to apply a 20:1 ratio and impose a 262-month sentence, which would have been at the top of the resulting Guidelines range.[175] The judge's restraint in imposing a sentence at the top of the resulting range stemmed from his qualms about the disparity that his departure from the 100:1 ratio would necessarily engender.[176] The offender's co-defendant, who was guilty of identical criminal conduct and had the same criminal history, had already been sentenced according to the 100:1 ratio.[177]

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163. *Id.* at 776.
164. *Id.*
165. *Id.* at 777.
166. *Id.* at 776.
167. *Id.* at 778.
168. *Id.* at 780.
169. *Id.* at 782.
170. Simon v. United States, 361 F. Supp. 2d 35 (E.D.N.Y. 2005).
171. *Id.* at 41.
172. *Id.*
173. *Id.* at 46.
174. *Id.* at 44-46.
175. *Id.* at 49.
176. *Id.* at 46-47.
177. *Id.* at 48-49.

Although the judge showed some commendable moderation, *Simon* still stands as a useful example of a case in which a deviation from the 100:1 ratio was not warranted. The defendant was a very culpable, high-level crack dealer, and there were few compelling individualized reasons to treat him leniently. Likely understanding this, but wanting to voice his disagreement with the 100:1 ratio, the judge imposed a lower sentence.[178] However, since the lower sentence was not based on individualized factors, rejecting the 100:1 ratio created clear disparity between the offender and his identical co-defendant. When the two offenders meet in prison, it remains hard to imagine that the higher-sentenced co-defendant would feel that his partner in crime had been sentenced in a way that "promote[ed] respect for the law."[179]

Smith and *Simon* represent the two different paths available to judges confronting the 100:1 ratio in the wake of *Booker*. *Smith* manages to uphold the principles of structural reasonableness while also limiting the ill effects of the 100:1 ratio. In contrast, *Simon* reflects the principles, and problems, of substantive reasonableness by replacing one kind of disparity with another glaring one. On a practical level, the former approach also manages to accomplish a moderate and flexible solution to the decades-old problem of the 100:1 ratio. It allows for the ratio to be abandoned in just those cases in which it proves the most troublesome. By restraining judges from making overreaching policy pronouncements, this approach also achieves consistency with the separation of powers and avoids the backlash that would inevitably result from full-scale judicial nullification of Congress's policy choice. Short of congressional action to amend the ratio, structural reasonableness offers the best hope of resolving a deeply controversial problem.

Indeed, there is some evidence that judges are already wisely moving in this direction, quietly and passively softening the blow of the 100:1 ratio by limiting its impact in individual cases.[180] Recall that only thirty-five below-Guidelines sentences so far have been based on categorical rejection of the 100:1 ratio, but judges have

178. *Id.* at 49.

179. 18 U.S.C. § 3553(a)(2)(A) (2006).

180. This phenomenon of "passive resistance" may not be unique to the post-*Booker* period. One pre-*Booker* empirical study observed, "[B]eginning in about 1992, every available indicator suggests that front-line actors in the sentencing system employed their discretion to an ever-increasing degree to lower drug sentence length." Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 554 (2002).

given below-Guidelines sentences in 610 crack cases since *Booker*, and they are doing so at a higher rate than in powder cocaine cases.[181] Most of these 610 sentences have indeed been based on individualized, rather than policy-focused, sentencing rationales.[182] Undoubtedly, partisan champions of judicial discretion will lament the thirty-five, and partisan champions of determinate sentencing will lament all 610. But the rest of us can take comfort in that oldest of practical virtues—moderation.

CONCLUSION: THE SECRET AMBITION OF § 3553(a)

This Article has advanced on three fronts. Conceptually, it has distinguished between substantive and structural approaches to assessing the reasonableness of the 100:1 ratio, and I have argued that the substantive approach leads to an irresolvable clash of disparities. Only a structural approach can take us beyond this clash. Doctrinally, I have sought to give content to this structural approach. I sketched the factors that distinguish policy rationales from individualized rationales, and proposed a standard of review that gives heightened scrutiny to the former and deference to the latter. Finally, and practically, we have seen how the structural approach's distinction between policy and individualized rationales helps achieve a reasonably balanced solution to the crack-powder controversy.

Criminal law scholar Dan Kahan has argued that public talk of deterrence, even if frequently based on ill-supported beliefs, has a useful "cooling effect" on our political discourse.[183] It allows us to mask the contentious issues of moral condemnation that really motivate our opinions on crime and punishment, while making room to talk about these issues in a way that mutes controversy and divisiveness.[184] This, in Kahan's view, is the "secret ambition" of deterrence.[185] In the post-*Booker* milieu, we might also speak in a similar way of the secret ambition of § 3553(a). Like Kahan's view of deterrence, a good case can be made that a substantive reading of § 3553(a) has little value in determining a judge's sentencing decision. One judge colorfully described § 3553(a) as "a theoretical

181. *See supra* Part I.B.

182. *See* BOOKER REPORT, *supra* note 27, at 82 (listing various rationales that have been cited by judges imposing below-Guidelines sentences).

183. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 448 (1999).

184. *See id.* at 476-77.

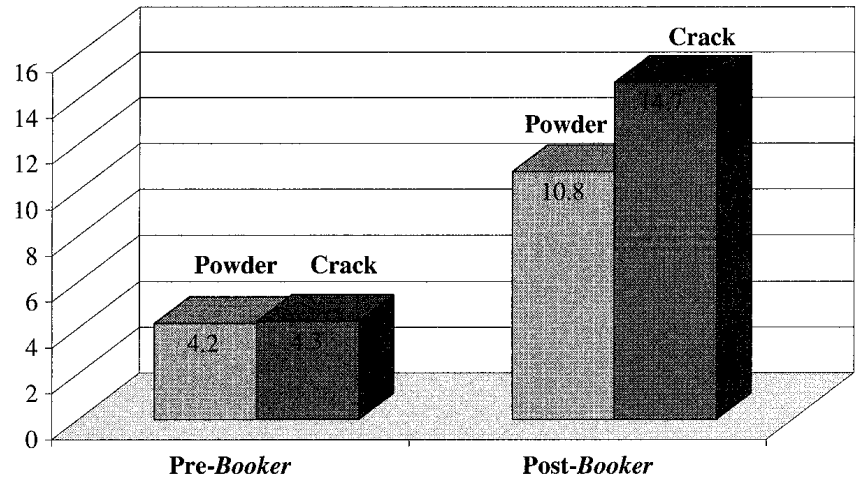
185. *Id.* at 435.

rendition of the supposed attributes of the (mythological) perfect sentence, a shorthand surrogate for all the arguments about punishment that have raged over time without resolution."[186] This is surely true. But more importantly, substantive talk about § 3553(a) masks and mutes the deepest structural issue left wide open in the wake of *Booker*: What balance should we strike between judicial discretion, appellate oversight, administrative expertise, and legislative control? Debates over the proper interpretation of § 3553(a) are really debates over how to answer this question.

Like Kahan's deterrence talk, "substantive reasonableness" discourse can cool some of the deeply felt structural tugs-of-war that have characterized sentencing law and policy. This may indeed be an accurate descriptive theory, explaining why much judicial discussion of cocaine sentencing has been preoccupied with disparity talk. However, there does come a time when peaceful ambiguity must yield to contested clarity. In the wake of *Booker*, judges cannot avoid the need to engage structurally with sentencing disputes—to ask not what particular sentence § 3553(a) requires, but rather to ask what kinds of decisions § 3553(a) permits. We have attempted to take a step in that direction. And in doing so, we have stumbled upon a practical resolution to what has been a very contentious issue in sentencing policy. Beyond the clash of disparities, there is hope.

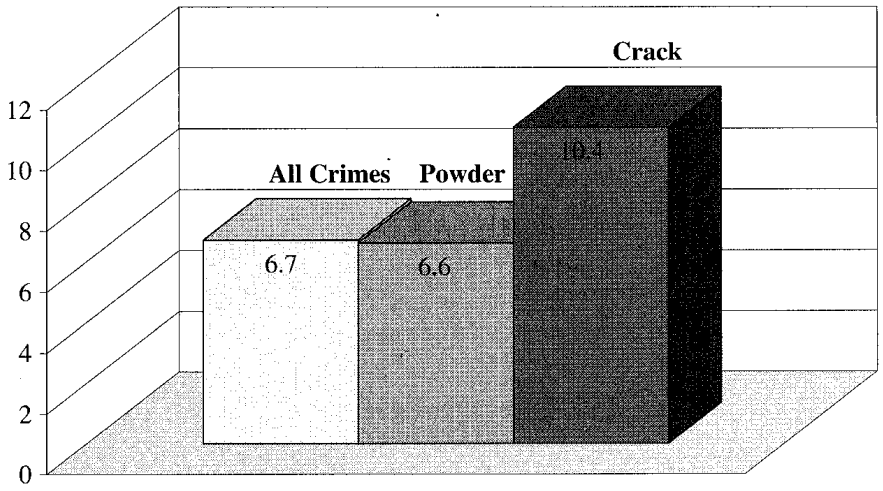
186. United States v. Valencia-Aguirre, 409 F. Supp. 2d 1358, 1375 (M.D. Fla. 2006).

FIGURE 1.
PERCENTAGE OF SENTENCES BELOW
THE GUIDELINES RANGE



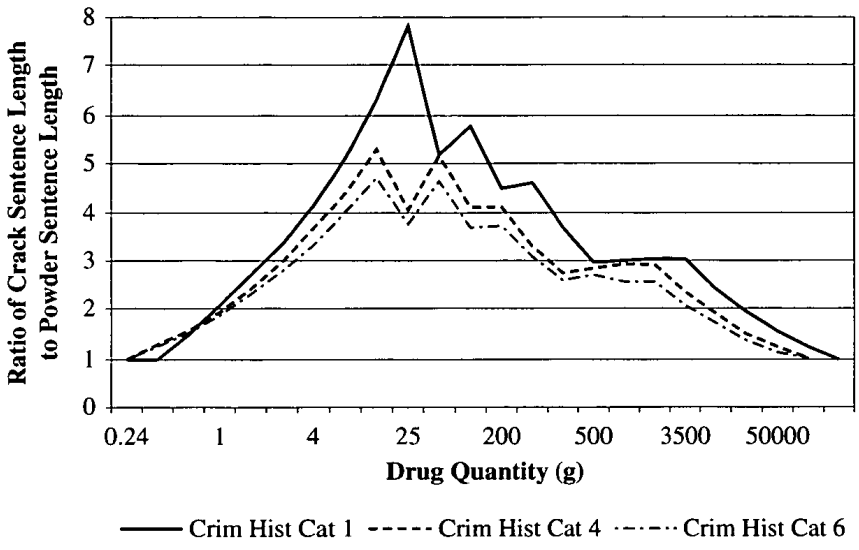
Data Source: UNITED STATES SENTENCING COMMISSION, REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 128 (2006).

FIGURE 2.
INCREASE IN PERCENTAGE OF BELOW-GUIDELINES
SENTENCES AFTER *BOOKER*



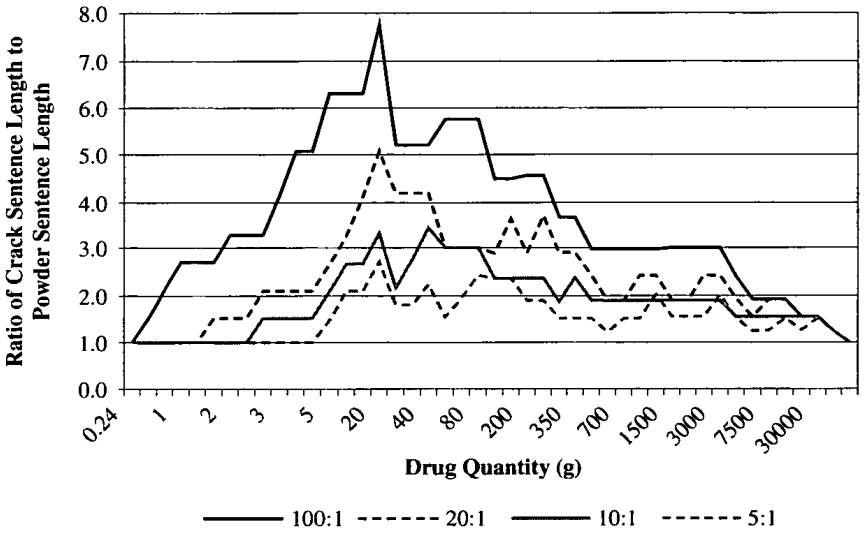
Data Source: UNITED STATES SENTENCING COMMISSION, REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 128 (2006).

FIGURE 3.
CRACK-POWDER SENTENCE RATIO BY DRUG QUANTITY AND CRIMINAL HISTORY CATEGORY



Data Source: Author's calculations based on U.S. SENTENCING GUIDELINES MANUAL 133-39, 376 (2004).

FIGURE 4.
CRACK-POWDER SENTENCE RATIO WITH VARIOUS QUANTITY RATIOS



Data Source: Author's calculations based on U.S. SENTENCING GUIDELINES MANUAL 133-39, 376 (2004).