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Prosecutorial Discretion in the Post-Booker World

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I. INTRODUCTION

Critics have long attacked the Sentencing Guidelines ("Guidelines") on the grounds that they increased prosecutorial power at the expense of the courts.[1]

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1. For a small sampling of the critique, see, e.g., KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 141 (1998) ("[T]he exercise of broad prosecutorial authority over sentencing *within a system that severely limits the sentencing discretion of federal judges* means that the power of prosecutors is not subject to the traditional checks and balances that help prevent abuse of power."); Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 247 (2005) ("[T]he Guidelines system has markedly enhanced the power of prosecutors to influence the range of available sentencing options before the sentencing hearing ever begins."); Nancy Gertner, *Sentencing Reform When Everyone Behaves Badly*, 57 ME. L. REV. 569, 577 (2005) ("Executive power was substantially increased, notably the power of the prosecutor."); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252 (2004) ("The overwhelming and dominant fact of the federal sentencing system, beyond the Commission and the guidelines and mandatory penalties, is the virtually absolute power the system has given prosecutors over federal prosecution and

Under the Guidelines, prosecutors gained the ability to determine a defendant's sentence through the charges they filed, the plea bargains they struck, and the concessions they made. With limited exceptions, the judge was bound to sentence the defendant within the Guidelines range.[2] Now that the Guidelines are advisory, however, a critical question to ask is how prosecutorial discretion has been affected under *United States v. Booker*.[3] Has the power that flowed to prosecutors under the Guidelines returned to the courts? Have we turned back the clock to the days pre-November 1, 1987, when the Guidelines first took effect?[4]

Prognostication is always a risky business, and even more so after the passage of almost two decades and a recent sea change in the law. As of November 1, 1987, the Minnesota Twins had just won their first World Series;[5] Michael Jackson's "Bad" was the number one hit in the United States;[6] and the Berlin Wall still stood.[7] Post-*Booker* commentary runs the gamut of reactions. In the initial euphoria following *Booker*, some hailed the decision as a victory for defendants or the courts.[8] Others have been more cautious. Some have taken a wait-and-see approach[9] or said that *Booker's* consequences should not be

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sentencing."); Robert Weisberg & Marc L. Miller, *Sentencing Lessons*, 58 STAN. L. REV. 1, 29 (2005) ("It has been a virtual mantra for observers of federal sentencing, both before and after *Booker*, that the Guidelines produced a great 'transfer of power' to prosecutors."). *But see* Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1137 n.6 (2004) (calling "ill-founded" the argument that "it is now mainly the initial selection of charges by prosecutors that determines the length of sentence," because of internal Department of Justice charging policies that limit prosecutorial discretion and because "while the Guidelines certainly have somewhat tied judges' hands, the knots are looser than is commonly believed").

2. U.S. SENTENCING GUIDELINES MANUAL § 5K (2005) (departures).

3. 543 U.S. 220 (2005).

4. U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM xviii (2004) [hereinafter FIFTEEN YEARS OF GUIDELINES SENTENCING].

5. *See* M.L.B.com Baseball's Best, *1987 World Series, Game 7, Twins' First Championship* (Oct. 25, 1987), http://minnesota.twins.mlb.com/NASApp/mlb/mlb/baseballs_best/mlb_bb_gamepage.jsp?story_page=bb87ws_gm7_stlmin (on file with the *McGeorge Law Review*).

6. *See* The Eighties Club, *Top 100 Songs of 1987*, http://eightiesclub.tripod.com/id224.htm (on file with the *McGeorge Law Review*).

7. The Berlin Wall fell two years later in November 1989. *See* Serge Schmemann, *Wall Opened at the Old Center of Berlin, and Mayors Meet; Communists Call Congress; Square is Mobbed*, N.Y. TIMES, Nov. 13, 1989, at A1. The Soviet Union did not begin its dissolution until August 1991. *See* Bill Keller, *Soviet Turmoil: Soviets' Rush Toward Disunion Spreads; Europe Embracing Baltic Independence; Purge of Military*, N.Y. TIMES, Aug. 26, 1991, at A1.

8. *See* Joy Anne Boyd, Comment, *Power, Policy, and Practice: The Department of Justice's Plea Bargain Policy as Applied to the Federal Prosecutor's Power Under the United States Sentencing Guidelines*, 56 ALA. L. REV. 591, 609 (2004) ("The *Booker* case represents a positive shift in the balance of power between prosecutors and federal judges as it reinstates much of the judges' discretionary powers that Congress had steadily eroded in the years following the Sentencing Reform Act of 1984."); Bill Rankin, *Justices Strike Down Sentencing Guidelines*, ATLANTA J. & CONST., Jan. 13, 2005, at A1 ("[C]riminal defense attorneys . . . applauded the ruling."); David G. Savage, *Judges Freed from Sentencing Rules; the Supreme Court Says the Guidelines Are No Longer Mandatory*, L.A. TIMES, Jan. 13, 2005, at A1 (calling *Booker* a "victory for the judiciary and a setback for lawmakers who would like to limit judges' sentencing authority").

9. *See* Gertner, *supra* note 1, at 583 ("It is too early to understand how these changes will affect the power of the prosecutor and, in particular, plea bargaining. Predictions in this area are notoriously inaccurate.").

overstated.[10] One commentator has argued that, under the circumstances, *Booker* may prove to be a victory for prosecutors.[11]

This article takes a measured position. On the one hand, *Booker* has diminished prosecutorial discretion somewhat. That point, perhaps, is obvious. In theory, the Guidelines are no longer mandatory, and prosecutors have less power to control sentencing. On the other hand, reports of the demise of prosecutorial discretion have been greatly exaggerated. Post-*Booker*, prosecutorial discretion remains vast and, indeed, for a number of reasons is still likely to be greater than it was in the pre-Guidelines era. Much has happened since November 1, 1987, including the passage of mandatory minimum laws and the acculturation of federal judges to the Guidelines, which, in the aggregate, serve to protect or enhance prosecutorial power.

II. PROSECUTORIAL DISCRETION

A. *Overview*

In assessing *Booker's* effect on prosecutorial discretion, it is important to bear in mind the full scope of that discretion. Justice Jackson, once the Attorney General of the United States, wrote that "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America."[12] The federal prosecutor wields considerable, and often unreviewable, discretion over almost every aspect of a criminal case, from its beginning to its end.[13]

Two reasons are often articulated for the "broad discretion"[14] that prosecutors have in enforcing the federal criminal code. One reason is based on separation of powers. Prosecutors help the President "discharge his constitutional respon-

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10. *See* Bowman, *supra* note 1, at 257 ("The only difference between pre- and post-*Booker* Guidelines is that judges now have some as-yet-undefined amount of additional discretion to vary from the Guidelines, and the government has experienced a very modest (and probably short-lived) reduction in control over sentencing outcomes."); James G. Carr, *Some Thoughts on Sentencing Post-Booker*, 17 FED. SENT'G REP. 295, 295 (2005) ("[P]rosecutorial influence over sentencing outcomes, which the Guideline system in real-world practice had greatly enhanced, remains substantial."); Mark Osler, *This Changes Everything: A Call for a Directive, Goal-Oriented Principle to Guide the Exercise of Discretion by Federal Prosecutors*, 39 VAL. U. L. REV. 625, 626 (2005) ("Even given these sudden shifts, federal prosecutors today still wield tremendous discretion, even if it less than that accorded to judges (for the moment)."); Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 173 (2005) ("In fact, the pre-*Booker* system was never as mandatory as sometimes portrayed, and the new characterization of the system as advisory is a shibboleth.").

11. *See* Margareth Etienne, *Into the Briar Patch?: Power Shifts Between Prosecution and Defense After* United States v. Booker, 39 VAL. U. L. REV. 741, 742 (2005) ("Although only time will reveal the true winners and losers of the *Booker* decision, there is good reason to believe that the prosecution has won this round and that criminal defendants will have to seek favorable sentencing changes elsewhere.").

12. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

13. Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WISC. L. REV. 837, 837-38 (2004) ("Few decisions prosecutors make are subject to legal restraints or judicial review."). For a discussion of the history of scholarship on prosecutorial discretion, see *id.* at 837 n.1.

14. United States v. Armstrong, 517 U.S. 456, 464 (1996); Wayte v. United States, 470 U.S. 598, 607 (1985).

sibility to 'take Care that the Laws be faithfully executed.'"[15] "By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable to his country in his political character, and to his own conscience."[16]

The second reason is related to the first: as a matter of institutional competency, "the decision to prosecute is particularly ill-suited to judicial review."[17] Courts would have difficulty assessing the many factors inherent in prosecutorial decision making, including "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan . . . ."[18] Excessive judicial oversight of prosecutors might also "chill law enforcement" and "undermine prosecutorial effectiveness."[19]

When a matter is referred to the prosecutor, she must first decide if it should be investigated. If the prosecutor chooses to decline prosecution, that declination is unreviewable.[20] A prosecutor deciding to pursue the matter can often direct the investigation. Who should law enforcement agents interview? Which leads should be pursued? Should places be searched and evidence seized? If so, which places and what evidence? Is a warrant necessary, or is there an applicable exception to the warrant requirement? Would electronic surveillance be helpful? If so, can a warrant be obtained either under Title III[21] or under the Foreign Intelligence Surveillance Act?[22] What forensic analysis needs to be done?

At some point, the prosecutor may proceed to the grand jury. Absent a waiver by the defendant, the grand jury must indict all felony cases.[23] The prosecutor can determine what evidence the grand jury will hear and which witnesses should be subpoenaed to the grand jury. Once a witness is brought to the grand jury, counsel is excluded; nor is a judge present.[24] The prosecutor can also ask the grand jury to issue subpoenas to compel the production of certain

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15. *Armstrong*, 517 U.S. at 464 (quoting U.S. CONST. art. II, § 3); *see also* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1546-55 (1981) (discussing justifications for prosecutorial discretion).

16. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803).

17. *Wayte*, 470 U.S. at 607.

18. *Id.*

19. *Id.*

20. *See Armstrong*, 517 U.S. at 464.

21. 18 U.S.C.A. § 2518 (West 2000).

22. 50 U.S.C.A. §§ 1801-1811 (West 2003 & Supp. 2005).

23. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .").

24. FED. R. CRIM. P. 6(d)(1) (allowing only "attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device" to be present).

types of evidence, from documents to physical evidence.[25] Thus, the prosecutor guides the grand jury's broad investigative powers.[26]

If charges are warranted, the prosecutor now has the discretion to select the charges that the grand jury will be asked to consider. "In the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [her] discretion.'"[27] As a practical matter, she now has more choice than ever before in the history of the United States. The past few decades have witnessed a surge in the number of federal crimes enacted by Congress.[28] Many crimes carry tough mandatory minimum sentences. This is particularly true with respect to certain narcotics and firearms offenses.[29]

Assuming the grand jury returns an indictment, the prosecutor now has the discretion to move for the defendant's pretrial detention if the defendant poses a danger to the community or a flight risk.[30] Even if the defendant is not detained pretrial, the prosecutor can request that certain conditions of release be imposed.[31] If the prosecutor does not object to the conditions proposed by the defendant or Pretrial Services, the court may be more inclined to adopt those conditions.

After the arraignment, the defense has the opportunity to file motions that challenge different aspects of the government's case.[32] These motions can cover a myriad of theories, from motions to suppress evidence on the grounds that the evidence was taken in violation of the laws of the United States,[33] to motions to sever counts or defendants[34] and motions to dismiss charges on the basis of vindictive prosecution or unfair pretrial publicity.[35] Whatever the motion, the prosecutor can choose to oppose or not oppose the motion. A decision by the prosecutor not to oppose the motion will often be dispositive; the court will usually grant the motion.

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25. FED. R. CRIM. P. 17(c)(1).

26. United States v. R. Enter. Inc., 498 U.S. 292, 297 (1991) ("The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred.").

27. United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

28. There are more than 3000 federal crimes. Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SCI. 39, 40-44 (1996). Over forty percent of all federal crimes have been enacted since 1970. ABA TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998).

29. *See, e.g.*, 21 U.S.C.A. § 841 (West 1999 & West Supp. 2005) (mandatory minimum penalties for drug offenses); 18 U.S.C.A. § 924(c) (West 2000 & West Supp. 2005) (mandatory minimum penalties for firearm offense).

30. 18 U.S.C. § 3142(d)(2) (West 2000).

31. *Id.* § 3142(c) (enumerating possible conditions on release).

32. FED. R. CRIM. P. 12(b) (listing motions that must be filed pretrial).

33. *Id.* at 12(b)(3).

34. *Id.* at 12(b)(3)(D), 14.

35. *Id.* at 12(b)(3)(D).

If the parties enter into plea negotiations, the prosecutor wields the discretion to control the terms of an offer.[36] The offer may minimally discount the charges reflected in the indictment, or the offer may be far more generous. The prosecutor also has the power to determine if she wishes to work with a potential cooperating defendant. Cooperation may be particularly important for defendants otherwise facing lengthy prison sentences, especially a mandatory minimum penalty under the drug laws.[37] Once the cooperation is complete, the prosecutor has the power to inform the court of the defendant's helpfulness. Obviously, an enthusiastic letter from the prosecutor may prove decisive to a sentencing judge.

If the case goes to trial, the prosecutor develops a theory of her case and the strategy for implementing it. She decides which witnesses to call and what evidence to present; she alone determines what the opening statement will be, as well as the closing argument and rebuttal. Issues will arise during trial that also allow for the exercise of prosecutorial discretion. The defense may proffer evidence or ask that certain jury instructions be given. Again, if the prosecutor does not object to the defense request, invariably the request will be granted.

Prosecutorial discretion arises again if the jury convicts the defendant. If the defendant was released pre-trial, the prosecutor may now move for his detention.[38] At sentencing, the prosecutor may ask that a particular sentence be imposed. As part of that allocution, she may oppose the defendant's attempt to obtain a more lenient sentence and argue for a more severe sentence based upon the circumstances of the case.

Post-sentencing, the prosecutor still retains a considerable amount of discretion. Among other things, the prosecutor has the discretion to decide whether or not to appeal the sentence imposed by the court.[39] She may also file a Rule 35 motion to reduce the sentence if the defendant cooperates post-sentencing and provides substantial assistance.[40] While the Bureau of Prisons bears ultimate responsibility for the placement of prisoners, the prosecutor may contact the Bureau to share her views on where the defendant should be incarcerated. The prosecutor's views will be solicited at some later date if the

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36. Ronald J. Allen & Ethan A. Hastert, *From* Winship *to* Apprendi *to* Booker*: Constitutional Command or Constitutional Blunder?*, 58 STAN. L. REV. 195, 214 (2005) ("Through prosecutorial discretion, the executive enjoys vast discretion in the enforcement of substantive criminal laws. The prosecution has the sole authority and discretion to initiate criminal proceedings. Prosecutorial discretion bestows prosecutors with the power to decide whom to charge and what to charge them with, thus investing these agents of the executive with the power to decide whether to even subject a would-be defendant to a criminal jury. Plea bargaining gives the executive branch a rich method of avoiding juries as well. At trial, prosecutors decide what evidence to present, how to present it, and what story it will be used to instantiate.") (footnote omitted).

37. 18 U.S.C.A. § 3553(e) (West 2000 & West Supp. 2005) (providing the court with "authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense").

38. 18 U.S.C. § 3143 (2000).

39. 18 U.S.C.A. § 3742(b) (West 2000 & West Supp. 2005) (allowing government to appeal sentence).

40. FED. R. CRIM. P. 35(b). In 2000, 1453 individuals received a Rule 35 sentence reduction. FIFTEEN YEARS OF GUIDELINES SENTENCING, *supra* note 4, at 106.

defendant seeks executive clemency, whether a pardon or commutation of sentence.[41] "The United States Attorney may support, oppose, or take no position on a pardon request."[42]

*B. Under the Guidelines Pre-*Booker

Since the Guidelines took effect, there has been a veritable outpouring of scholarship on the ways in which they have increased prosecutorial discretion.[43] It is widely accepted that under the Guidelines sentencing power flowed from judges to prosecutors.[44] In the indeterminate pre-Guidelines era, judges had virtually unreviewable discretion in imposing a sentence that fell within the limits provided by the statute of conviction.[45] A primary purpose of the Sentencing Reform Act of 1984,[46] which led to the creation of the Guidelines, was to constrain judicial discretion, and, in particular, to eliminate "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . ."[47]

Thus, the Guidelines created a determinate sentencing regime. It would be incorrect to say that judges had no discretion under the Guidelines.[48] In fact, they

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41. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 1-2.111 *available at* http://www.usdoj.gov/pardon/petitions.htm (on file with the *McGeorge Law Review*) ("The United States Attorney can contribute significantly to the clemency process by providing factual information and perspectives about the offense of conviction that may not be reflected in the presentence or background investigation reports or other sources.").

42. *Id.*

43. *See* Weisberg & Miller, *supra* note 1, at 29 ("It has been a virtual mantra for observers of federal sentencing, both before and after *Booker*, that the Guidelines produced a great 'transfer of power' to prosecutors. This is because prosecutors have free rein over which charges to bring, and judges are considerably circumscribed in their choice of sentences under fairly rigid Guidelines rules."); Miller, *supra* note 1, at 1252 ("The overwhelming and dominant fact of the federal sentencing system, beyond the Commission and the guidelines and mandatory penalties, is the virtually absolute power the system has given prosecutors over federal prosecution and sentencing.").

44. *See supra* notes 1, 43.

45. *See* Koon v. United States, 518 U.S. 81, 96 (1996) ("Before the Guidelines system, a federal criminal sentence within the statutory limits was, for all practical purposes, not reviewable on appeal."); United States v. Tucker, 404 U.S. 443, 447 (1972) ("[A] sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review.").

46. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1976 (codified as amended in scattered sections of 18 and 28 U.S.C.).

47. 28 U.S.C.A. § 991(b)(1)(B) (West 1993 & West Supp. 2006); *see also Koon*, 518 U.S. at 92 (noting that perception of unjustified sentencing disparities led Congress to create the United States Sentencing Commission and to charge with it developing a comprehensive set of sentencing guidelines); FIFTEEN YEARS OF GUIDELINES SENTENCING, *supra* note 4, at 11 ("The 'first and foremost' goal of sentencing reform is avoiding unwarranted sentencing disparity."); Bowman, *supra* note 1, at 243-44 ("The principal critique of the pre-Guidelines federal sentencing system was that it concentrated too much power in the hands of individual sentencing judges, power that was unconstrained either by a priori legislative rules or even by post hoc appellate review.") (citation omitted).

48. *Koon*, 518 U.S. at 92 ("The Act did not eliminate all of the district court's discretion, however."); Bowman, *supra* note 1, at 245 (noting that judges "retained substantial theoretical sentencing discretion through the unconstrained power to sentence within ranges, through the departure power to impose sentences outside of ranges, and through the hidden but very real de facto discretionary authority that they were given through the

retained some discretion, but it was limited. Based on a preponderance of the evidence standard,[49] they were often called upon to make factual findings that could increase or decrease a sentence.[50] After calculating the defendant's offense level and criminal history score, they were required to impose a sentence within the relevant sentencing range.[51] This range varied by about twenty-five percent from the top of the range to its bottom.[52] In limited circumstances, judges could also make departures, whether upward or downward, from the Guidelines range.[53]

In contrast to judges, who lost the discretion they had exercised in an indeterminate sentencing regime, prosecutors gained power under the Guidelines.[54] First, the Guidelines amplified the power prosecutors have always had in making charging decisions. While prosecutors have long exercised charging discretion, in the pre-Guidelines era, the judge, not the prosecutor, eventually decided what the sentence would be in the event of conviction. Under the Guidelines, however, the prosecutor's charging decision was tied to a specific sentencing range from which the judge had circumscribed discretion to depart.[55]

Second, the Guidelines adopted principles of "real offense" sentencing,[56] and this too enhanced prosecutorial power.[57] Relevant conduct rules require the district court to consider the actual offense conduct, including facts that may not have been specified in the indictment or established as elements of the charged

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power to find sentencing facts"); Reitz, *supra* note 10, at 173 ("[T]he pre-*Booker* system was never as mandatory as sometimes portrayed . . . .").

49. U.S. SENTENCING GUIDELINES MANUAL § 6A1.3, cmt. (2005); United States v. Watts, 519 U.S. 148, 156 (1997) (per curiam).

50. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2005) (listing application instructions for Guidelines).

51. *Id.* § 1B1.1(g).

52. *Id.* § 5A (sentencing table).

53. *Id.* §§ 4A1.3, 5K; *Koon*, 518 U.S. at 92 ("Congress allows district courts to depart from the applicable Guideline range if 'the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'").

54. *See supra* notes 1, 43.

55. STITH & CABRANES, *supra* note 1, at 247 (noting importance of charging decisions under the Guidelines); Bowman, *supra* note 1, at 247-48 ("[T]he Guidelines system has markedly enhanced the power of prosecutors to influence the range of available sentencing options before the sentencing hearing ever begins."); Weisberg & Miller, *supra* note 1, at 29 ("[P]rosecutors have free rein over which charges to bring, and judges are considerably circumscribed in their choice of sentences under fairly rigid Guidelines rules.").

56. FIFTEEN YEARS OF GUIDELINES SENTENCING, *supra* note 4, at 25 (noting that the Guidelines are "a significantly *real offense*, as opposed to *charge offense*, sentencing system"); *see also* U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, cmt., n.1 (2005) (The Guidelines have "a number of real elements.").

57. Margareth Etienne, *Parity, Disparity, and Adversariality: First Principles of Sentencing*, 58 STAN. L. REV. 309, 316 (2005) ("A federal prosecutor need only possess enough reliable, admissible evidence to convict the defendant of something beyond a reasonable doubt; once the conviction is obtained, the prosecution can use virtually any information it possesses in order to obtain the desired sentence."); William J. Powell & Michael T. Cimino, *Prosecutorial Discretion under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?*, 97 W. VA. L. REV. 373, 383-89 (1995) (noting increase in prosecutorial discretion in part because of standard of proof at sentencing and relevant conduct rules).

offense.[58] In narcotics cases, for example, the court must aggregate all drugs trafficked by the defendant that were "part of the same course of conduct or common scheme or plan as the offense of conviction."[59] "This means, for example, that a defendant convicted of selling drugs to an undercover officer on one occasion is sentenced . . . for the amount of drugs involved in *all* the drug trafficking known to the court that was part of the same course of conduct or common scheme or plan as that one sale."[60] Even conduct for which the defendant had been acquitted could be considered, as long as it was established by a preponderance of the evidence.[61] While courts have long had this discretion,[62] under the Guidelines once the judge makes the requisite findings she must take them into account at sentencing.[63] Prosecutors influence this process through the evidence they introduce as relevant conduct.

Third, prosecutors also hold the key to sentences below what might otherwise be the applicable Guidelines range. Through plea bargaining they can agree to an offense of conviction that carries a statutory maximum below the defendant's Guidelines exposure; they can agree not to seek aggravating factors that would increase a defendant's punishment; or they can stipulate to mitigating factors that, in effect, reduce the potential sentence.[64] Similarly, prosecutors control the filing of substantial assistance motions, which allow the court to depart downward from the guideline range.[65] They also control the ability of the court to grant an additional reduction of one offense level under section 3E1.1(b) for timely acceptance of responsibility.[66]

Fourth, in some cases, the sheer complexity of the Guidelines arguably adds to prosecutorial power.[67] The latest Guidelines Manual is more than 600 pages long and has been amended 680 times as of November 1, 2005;[68] it contains a plethora of highly technical rules. Although the Probation Office prepares the

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58. FIFTEEN YEARS OF GUIDELINES SENTENCING, *supra* note 4, at 26.

59. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(2).

60. FIFTEEN YEARS OF GUIDELINES SENTENCING, *supra* note 4, at 26.

61. United States v. Watt, 519 U.S. 148, 157 (2005).

62. *Id.* at 151-52.

63. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3.

64. Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1338-39 (2005).

65. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1; FED. R. CRIM. P. 35(b)(4); *see also* Bowman, *supra* note 64, at 1337 ("[B]y giving prosecutors a monopoly on the power to make substantial assistance motions, the guidelines made prosecutors the gatekeepers of downward departures for cooperation.").

66. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(b); Bowman, *supra* note 64, at 1338.

67. Bowman, *supra* note 1, at 251 ("The combination of complexity, rigidity, and severity conferred tremendous power on prosecutors at the district level."); Etienne, *supra* note 57, at 320 ("Unnecessary complexity will almost always benefit the repeat player in federal court."); Weisberg & Miller, *supra* note 1, at 29 ("Scholars widely perceive the power of prosecutors to have increased compared to the pre-Guidelines world, in part because the complexity and rigidity of the system can be used like a control panel by experienced prosecutors to produce the outcomes they desire.").

68. U.S. SENTENCING GUIDELINES MANUAL, app. C (2005).

presentence report,[69] and the judge decides sentencing issues,[70] neither is involved in plea negotiations,[71] when knowledge of the Guidelines is at a premium. A defense lawyer who seldom practices in federal court may be at a disadvantage in negotiating a plea agreement or litigating sentencing issues against an experienced federal prosecutor, who will be better equipped to navigate the intricacies of the Guidelines.[72]

To a modest extent, self-imposed Department of Justice policies may cabin prosecutorial discretion in making charging decisions and negotiating plea agreements.[73] Those internal policies began with Attorney General Richard Thornburgh, and continued with Attorney General Janet Reno, and Attorney General John Ashcroft.[74] The Ashcroft Memorandum is the most important of the recent statements of Justice Department policy.[75] Like its predecessors, it attempts to create national uniformity in charging decisions and plea bargaining. To avoid unwarranted disparities, the Ashcroft Memorandum requires that "federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case . . . ."[76] Nevertheless, there are significant exceptions to the policy, including "cases where post-indictment circumstances cause a prosecutor to determine in good faith that the most serious offense is not readily provable, because of a change in the evidence or some other justifiable reason . . . ."[77] Prosecutors may also bargain away readily provable charges in "other exceptional circumstances," including circumstances that take into account an office's workload and resources.[78]

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69. FED. R. CRIM. P. 32(d).

70. *Id.* at 32(i).

71. FED. R. CRIM. P. 11(c)(1) (barring court from participating in plea negotiations).

72. Etienne, *supra* note 57, at 320-21.

73. Commentators differ on the extent to which those policies constrain prosecutorial discretion. *Compare* Litman, *supra* note 1, at 1137-38 n.6 ("The policy of charging the most serious readily provable offense remains in effect, with some modifications, and is taken seriously in most federal districts."), *with* Osler, *supra* note 10, at 634-35 (calling it "fair to say that the Ashcroft Memorandum *limits* discretion," but noting exceptions to the policy and arguing that it fails to provide "*principled, goal-oriented,* and *consistent* guidance").

74. For a history of the policies, see Amie N. Ely, Note, *Prosecutorial Discretion as an Ethical Necessity: The Ashcroft Memorandum's Curtailment of the Prosecutor's Duty to "Seek Justice,"* 90 CORNELL L. REV. 237, 252-63 (2004); Boyd, *supra* note 8, at 597-99.

75. Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors Regarding Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm (on file with the *McGeorge Law Review*); *see also* Memorandum from James Comey, Deputy Att'y Gen., to All Federal Prosecutors Regarding Department Policies and Procedures Concerning Sentencing (Jan. 28, 2005), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/dagjan_28_comey_memo_on_booker.pdf [hereinafter Ashcroft Memorandum] (on file with the *McGeorge Law Review*) (giving post-*Booker* guidance to federal prosecutors that reaffirms the Ashcroft Memorandum).

76. Ashcroft Memorandum, *supra* note 75, at 2.

77. *Id.* at 3.

78. *Id.* at 4-5.

C. *And Then There Was* Booker

In hindsight, *United States v. Booker*[79] has an air of inevitability about it; the denouement of a long march of cases that began with *Jones v. United States*,[80] and continued with *Apprendi v. New Jersey*,[81] *Ring v. Arizona*,[82] and *Blakely v. Washington*.[83] In *Booker*, a five to four majority of the Supreme Court held that the Guidelines violated the Sixth Amendment because they required a district judge to impose an enhanced sentence based on various factual findings made by the judge, not the jury.[84] "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[85]

That being said, in a remarkable turnabout, a second five to four majority of the Court in *Booker* then issued a remedial opinion that preserved the Guidelines by making them advisory.[86] The Court addressed the Sixth Amendment infirmity by using severability analysis to excise the statutory provisions that made the Guidelines mandatory.[87] The upshot of *Booker* is that a district court is no longer required to impose a sentence within the applicable Guidelines range. The court must still consider the Guidelines, including the applicable sentencing range, but may "tailor the sentence in light of other statutory concerns" in the Sentencing Reform Act.[88] On appeal, sentences must be reviewed for "unreasonableness."[89]

III. LIMITS ON *BOOKER*

To some extent, *Booker* reduces prosecutorial power that flowed from the Guidelines. But the extent of that diminution should not be overstated. Despite the fact that the Guidelines are advisory, rather than mandatory, there are significant limits on *Booker's* reach with respect to prosecutorial discretion. Those limits stem from several different factors: (1) the range of prosecutorial discretion; (2) the proliferation and importance of mandatory minimum statutes;

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79. 540 U.S. 220 (2005).

80. 526 U.S. 227 (1999).

81. 530 U.S. 466 (2000).

82. 536 U.S. 584 (2002).

83. 542 U.S. 296 (2004).

84. 543 U.S. at 232 (Stevens, J., delivering the opinion of the Court in part). Justice Stevens was joined by Justices Souter, Scalia, Thomas, and Ginsburg.

85. *Id.* at 244.

86. *Id.* at 245 (Breyer, J., delivering the opinion of the Court in part). Justice Breyer was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg. Justice Ginsburg was the swing vote for both majorities of the Court.

87. *Id.* at 245, 258-65.

88. *Id.* at 245-46.

89. *Id.* at 260-65.

(3) the likely response of the courts to *Booker*; and (4) an application of bargain theory.

A. *Range of Prosecutorial Discretion*

At the outset it is important to recognize that *Booker* only affected the discretion prosecutors acquired under the Guidelines. This is only a small part of the panoply of powers prosecutors possess in modern times.[90] Then Attorney General Robert Jackson was speaking in a pre-Guidelines world when he told a conference of United States Attorneys that "[i]t would probably be within the range of that exaggeration permitted in Washington to say that assembled in this room is one of the most powerful peace-time forces known to our country."[91] A prosecutor's discretion was "tremendous:"

> He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole.[92]

With the exception of parole, which the Sentencing Reform Act of 1984 abolished,[93] Jackson's words are as true today as they were in 1940.

Moreover, while *Booker* reduced the power of prosecutors to determine the parameters of a defendant's sentence, it hardly eliminated that power. Prosecutors still possess the power to select charges for indictment. Even without the Guidelines, prosecutors can files charges that carry mandatory-minimum penalties. Similarly, prosecutors retain the power to grant substantial assistance motions and the power to introduce evidence at sentencing to argue that a defendant's relevant conduct ought to result in an enhanced sentence.

Of course, prosecutors also retain their plea bargaining power. Among other things, they can make a non-binding "recommend[ation], or agree not to oppose

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90. Osler, *supra* note 10, at 626 ("Though they may not have the same ability post-*Booker* to leverage mandatory Sentencing Guidelines, prosecutors retain the power to guide investigations, accept or decline cases, draft charges, press for convictions through plea negotiation, and seek specific sentences.").

91. Jackson, *supra* note 12, at 3.

92. *Id.*

93. Bowman, *supra* note 64, at 1323.

the defendant's request, that a particular sentence[,] or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply."[94] Beyond that, under Rule 11(c)(1)(C) prosecutors can offer a plea to a binding sentence or sentencing range and to the applicability or non-applicability of sentencing factors. The sentencing court may accept or reject the plea agreement. If the court accepts the agreement, however, it cannot modify its terms.[95]

B. Mandatory Minimum Sentences

That the Guidelines are now advisory under *Booker* fails to take into account the recent proliferation of federal criminal statutes that impose mandatory minimum penalties. Mandatory minimum statutes are not a recent innovation in American law; the earliest such statutes date from the Founding.[96] Beginning in the mid-1980s, as part of the "war on drugs," Congress began to pass mandatory minimum laws that targeted drug trafficking and violent crime.[97] The Anti-Drug Abuse Act of 1986[98] provided tough penalties for narcotics offenses triggered by the weight and type of drugs involved. Five grams of crack cocaine resulted in a mandatory minimum sentence of five years incarceration;[99] fifty grams (a little less than two ounces) resulted in a ten year sentence.[100] Congress has also passed laws that impose mandatory minimum penalties for using, carrying, or possessing a firearm during the commission of a crime of violence or drug trafficking offense,[101] a mandatory life sentence for violent repeat offenders,[102] and mandatory minimum penalties for sex offenders.[103] There are over 100 mandatory minimum penalties in the federal criminal code.[104]

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94. FED. R. CRIM. P. 11(c)(1)(B).

95. *Id.* 11(c)(1)(C) ("[S]uch a recommendation or request binds the court once the court accepts the plea agreement.").

96. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6-7 (1991) [hereinafter MANDATORY MINIMUM PENALTIES]; George Lardner, Jr. & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790-1850*, 16 FED. SENT'G REP. 212 (2004) (describing early mandatory minimum laws that applied to slave trading, fraud on the Bank of the United States, theft of mail, and crime in the District of Columbia).

97. MANDATORY MINIMUM PENALTIES, *supra* note 96, at 9.

98. 21 U.S.C.A. § 841 (West 1999 & West Supp. 2005).

99. *Id.* § 841(b)(1)(B)(iii).

100. *Id.* § 841(b)(1)(A)(iii).

101. 18 U.S.C.A. § 924(c)(1) (West 2000 & West Supp. 2005) (imposing a five-year sentence for using or carrying the firearm; seven years for brandishing the firearm; and ten years for discharging the firearm).

102. *Id.* § 3559(c)(1) (West 2000).

103. *Id.* § 2251 (West 2000 & West Supp. 2005) (imposing a fifteen-year sentence for first-time offender who sexually exploits children).

104. FIFTEEN YEARS OF GUIDELINES SENTENCING, *supra* note 4, at 3; MANDATORY MINIMUM PENALTIES, *supra* note 96, at 11.

For our purposes, the most important mandatory minimum laws on which to focus involve narcotics. For over three decades, drug offenses have constituted the largest portion of the federal criminal docket.[105] In recent years, they have accounted for around forty percent of all federal convictions.[106] Only a small percentage of the cases involve simple possession of drugs; most involve drug trafficking.[107] This is important because the majority of drug trafficking offenses involve quantities of drugs sufficient to trigger mandatory minimum sentences. In fiscal year 2003, almost sixty percent of all drug offenders were convicted under laws with a mandatory minimum penalty.[108] This is not surprising. United States Attorneys Offices typically do not prosecute small drug cases. In cases involving limited quantities of drugs, federal prosecutors usually defer to state prosecution.

As commentators and courts alike have noted, the mandatory minimum drug laws give great power—or, to put it more bluntly, a hammer—to prosecutors.[109] First, as Justice Breyer has observed, mandatory minimum laws "transfer

105. FIFTEEN YEARS OF GUIDELINES SENTENCING, *supra* note 4, at 47; U.S. SENTENCING COMMISSION, ANNUAL REPORT 2003, 38 (2004) [hereinafter ANNUAL REPORT 2003].

106. *See* ANNUAL REPORT 2003, *supra* note 105, at 38; U.S. SENTENCING COMM'N, SELECTED 2004 SOURCEBOOK TABLES tbl.3 (2005), *available at* http://www.ussc.gov/ANNRPT/2004/selected_2004.pdf (on file with the *McGeorge Law Review*); Weisberg & Miller, *supra* note 1, at 11 (discussing rise in federal drug prosecutions from the 1970s to the present).

107. U.S. SENTENCING COMM'N, SELECTED 2004 SOURCEBOOK TABLES tbl.3. In fiscal year 2004, there were 23,572 convictions for trafficking; 346 convictions for use of a communication facility; and 1296 convictions for simple possession. *Id.*

108. ANNUAL REPORT 2003, *supra* note 105, at 39.

109. Harris v. United States, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring); MANDATORY MINIMUM PENALTIES, *supra* note 96, at 31 ("Mandatory minimums employ a structure that allows a shifting of discretion and control over the implementation of sentencing policies from courts to prosecutors. The manner in which prosecutorial discretion is exercised in charge selection, filing of informations to trigger mandatory enhancements based on prior convictions, plea bargaining, and the making of motions for sentence reduction based on a defendant's substantial assistance in the investigation of other crimes, determine the extent and consistency with which statutory minimum sentences are actually applied."); AM. BAR ASS'N J. KENNEDY COMM'N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 26-27 (2004) ("[Mandatory minimums] tend to shift sentencing discretion away from courts to prosecutors."); Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 114-15 (2005) (noting that mandatory-minimum sentences plus the Guidelines have increased prosecutorial power and that prosecutors control whether mandatory minimum sentences will be imposed); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 153 (2005) ("Mandatory minimum sentence laws exert a powerful pull on plea negotiations, because a prosecutor's promise not to file (or to dismiss) charges that carry a mandatory minimum penalty can create enormous gaps in the sentence imposed and enormous incentives to plead guilty."); John S. Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 311, 314 (2004) ("Since the power to determine the charge of conviction rests exclusively with the prosecution for the eighty-five percent of the cases that do not proceed to trial, mandatory minimums transfer sentencing power from the court to the prosecution."); Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 88 (2003) ("[T]he vast increase in prosecutorial power to control narcotics sentences is at the core of the problems with federal narcotics sentencing. The profusion of new narcotics and gun proscriptions, almost all of which carry mandatory minimum prison sentences, transformed the traditional prosecutorial power to charge into the contemporary prosecutorial power to determine the length of the sentence the defendant will serve.").

sentencing power to prosecutors, who can determine sentences through the charges they decide to bring."[110] Second, they "generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency."[111] There are few ways to avoid a mandatory minimum drug sentence. One is to qualify for the "safety-valve" provision, which is intended to apply to nonviolent low-level offenders with a minimal criminal history.[112] Another is to provide "substantial assistance" to the government.[113] Here, the prosecutor holds the cards, deciding whether to work with potential cooperators and whether, at the end of the day, a cooperator should receive a substantial assistance motion.[114] Even if she files the motion, she controls the content of the motion, to which the sentencing court must give "[s]ubstantial weight."[115] In general, absent such a motion, the court cannot depart for substantial assistance.[116]

In short, nothing about *Booker* undermines the current mandatory minimum regime that applies to a substantial portion of all federal prosecutions and to the bulk of federal drug cases.[117] After all, the mandatory minimum laws trump the Guidelines, so that a Guideline sentence cannot be "less than any statutorily required minimum sentence."[118] Prosecutors continue to possess the charging discretion that determines if a defendant will be subjected to a mandatory minimum penalty. They also control the filing of substantial assistance motions and Rule 35(b) motions for sentence reduction.[119]

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110. *Harris*, 536 U.S. at 571 (Breyer, J., concurring). In narcotics cases, this includes the filing of an information that informs the court of a defendant's prior record. 21 U.S.C.A. § 851 (West 1999). The information can result in a doubling of the mandatory minimum sentence or even mandatory life imprisonment. 21 U.S.C.A. § 841(b)(1)(A) (West 1999 & West Supp. 2005).

111. *Harris*, 536 U.S. at 570 (Breyer, J., concurring).

112. 18 U.S.C.A. § 3553(f) (West 2000).

113. *Id.* § 3553(e); 28 U.S.C.A. § 994(n) (West 1993); FED. R. CRIM. P. 35(b)(4) (allowing post-sentencing substantial assistance).

114. 18 U.S.C.A. § 3553(e) (West 2000 & Supp. 2005); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2005).

115. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 cmt. n.3 (2005).

116. 18 U.S.C.A. § 3553(e) (West 2000 & Supp. 2005) (stating that substantial assistance departure is contingent "[u]pon motion of the government"); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2005). District courts have limited power to review the government's decision not to file such a motion. They may only review the refusal for "an unconstitutional motive." Wade v. United States, 504 U.S. 181, 185-86 (1992).

117. *See* FIFTEEN YEARS OF GUIDELINES SENTENCING, *supra* note 4, at xvi ("Statutory minimum penalties are invoked unevenly and introduce disproportionality and disparity when they prevent the guidelines from individualizing sentences."); Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277, 290 (2005) ("[B]efore *Booker*, when the Guidelines operated as mandatory sentencing rules, and even after *Booker* in cases involving mandatory minimum sentencing provisions, federal sentencing judges have had relatively little opportunity to 'consider every convicted person as an individual.'").

118. U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(c)(2) (2005).

119. One issue worth watching is whether *Booker* will result in fewer defendants cooperating with the government. The Attorney General has voiced that concern. Alberto Gonzales, Prepared Remarks of Attorney General Alberto Gonzales, Sentencing Guidelines Speech (June 21, 2005), *available at* http://www.usdoj.

C. Response of the Courts

The response of lower courts to *Booker* may serve as another potential limit on its reach. To the extent that district courts continue to follow the Guidelines, prosecutorial discretion remains little diminished by *Booker*. For a number of reasons, it appears likely that, in most cases, courts will continue to impose sentences within the relevant Guidelines range. First, *Booker* itself requires trial courts to consider the Guidelines, and post-*Booker* case law has begun to interpret the "reasonableness" standard of review in a manner that is deferential to Guidelines sentences. Second, most federal judges have been appointed post-November 1, 1987, and are thus acculturated to using the Guidelines, which have become their frame of reference in imposing sentence. Third, federal judges are undoubtedly aware of the post-*Booker* backlash that has occurred and the clamor for legislative reform. They are apt to use their discretion carefully so as to avoid giving the impression of judicial overreaching. Post-*Booker* statistics compiled by the United States Sentencing Commission reveal that judges are, in fact, following the Guidelines in the majority of cases, though at the low end of the historical compliance rate. Finally, an examination of states with voluntary guidelines shows that the compliance rate can be high.

1. Reasonableness Standard of Review

One constraint on sentencing judges comes from *Booker* itself. Under *Booker*, "district courts, while not bound to apply the Guidelines, must consult

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gov/ag/speeches/2005/06212005victimsofcrime.htm (on file with the *McGeorge Law Review*); *see also* Bowman, *supra* note 1, at 257 n.90 (noting the Justice Department's concern over "the de facto repeal of the government's monopoly on substantial assistance motions"); David B. Fein & Joshua Ratner, *Sentencing Post-*Booker *From a Defense Perspective*, N.Y. L.J., May, 19 2005 at 4 (speculating that "a defendant may not need a 5K1 motion to obtain a sentence below the guidelines range"); Alan Ellis & James H. Feldman, *Representing White Collar Clients in a Post-*Booker *World*, CHAMPION 12, 14 (Sept./Oct. 2005), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/white_collar_from_ellisfeldman.pdf (on file with the *McGeorge Law Review*) (expressing hope that "[a] court may now impose a below-the-guidelines sentence based on a defendant's cooperation even without a government motion"). Those concerns are unwarranted in drug cases involving mandatory minimum penalties. The relevant statute is clear that sentences below a mandatory minimum must still be triggered by a government substantial assistance motion. 18 U.S.C.A. § 3553(e) (West 2000 & Supp. 2005). Post-*Booker*, one court has also held that in calculating the advisory Guidelines range, unless the government files a substantial assistance motion, any assistance the defendant provides is not a permissible basis for a downward departure. United States v. Crawford, 407 F.3d 1174, 1182 (11th Cir. 2005). While it is too early to tell, post-*Booker* statistics show that judges granted 6796 substantial assistance departure motions in 2005 (14.6% of all post-*Booker* sentences). U.S. SENTENCING COMM'N, SPECIAL POST-*BOOKER* CODING PROJECT 1 (Dec. 2005) [hereinafter SPECIAL POST-*BOOKER* CODING PROJECT], *available at* http://www.ussc.gov/Blakely/PostBooker_120105.pdf (on file with the *McGeorge Law Review*). Clearly, thousands of defendants continue to cooperate with the government. Moreover, it might be difficult to attribute any drop in cooperation to *Booker* alone. In 1989, substantial assistance departures occurred in only 3.5% of the cases. U.S. SENTENCING COMM'N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Figure G (1997). That percentage increased each year until it peaked at 19.7% in 1995. *Id.* Since then it has fallen steadily to reach the present rate. *See* U.S. SENTENCING COMM'N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Figure G (2001); SPECIAL POST-*BOOKER* CODING PROJECT, *supra*, at 7.

those Guidelines and take them into account when sentencing."[120] The court may then "tailor the sentence in light of other statutory concerns."[121] The sentence is reviewed for "unreasonableness" on appeal.[122] As a result, *Booker* ensures that the Guidelines continue to have relevance. District courts cannot simply ignore them in imposing sentence. Indeed, the United States Sentencing Commission has opined that "the sentencing court *must* consider the guidelines and that such consideration necessarily *requires* the sentencing court to calculate the guideline sentencing range."[123] The Courts of Appeals have agreed.[124] Indeed, improper calculation of the Guidelines range in and of itself results in error that may require the sentence to be vacated and the case remanded for resentencing.[125]

More than that, the key question now becomes how much weight the Guidelines should be given in assessing the reasonableness of a sentence. The United States Sentencing Commission has taken the position that the sentencing court must give "substantial weight to the Federal Sentencing Guidelines in determining the appropriate sentence to impose."[126] Two conflicting interpretations have emerged from the Courts of Appeals. Several Circuits have held that a sentence within the relevant Guidelines range is entitled to a rebuttable presumption of reasonableness.[127] Other Circuits have declined to

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120. United States v. Booker, 543 U.S. 220, 265 (2005) (Breyer, J., delivering the opinion of the Court in part).

121. *Id.* at 245-46. Those statutory concerns are articulated in 18 U.S.C.A. § 3553(a). *Id.* Judges are required to consider Sentencing Commission policy statements, avoid unwarranted sentencing disparities, and provide restitution to victims. *Id.* at 259-60. They must impose sentences that "reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care." *Id.* at 260.

122. *Id.* at 260-61.

123. *Prepared Testimony of Judge Ricardo H. Hinojosa, Chair, U.S. Sentencing Comm'n, before the Subcomm. on Crime, Terrorism, and Homeland Security, H. Comm. on the Judiciary* at 2 (Feb. 10, 2005), *available at* http://www.ussc.gov/Blakely/bookertestimony.pdf (on file with the *McGeorge Law Review*).

124. *See* United States v. Crawford, 407 F.3d 1174, 1178 (2005) ("[The] consultation requirement, at a minimum, obliges the district court to calculate *correctly* the sentencing range prescribed by the Guidelines."); United States v. Haack, 403 F.3d 997, 1002-03 (8th Cir. 2005) ("[T]he sentencing court must first determine the appropriate guidelines sentencing range, since that range does remain an important factor to be considered in imposition of a sentence."); United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005) ("This duty to 'consider' the Guidelines will ordinarily require the sentencing judge to determine the applicable Guidelines range even though the judge is not required to sentence within that range."); United States v. Hughes, 401 F.3d 540, 546 (4th Cir. 2005) ("Consistent with the remedial scheme set forth in *Booker*, a district court shall first calculate (after making the appropriate findings of fact) the range prescribed by the guidelines."); United States v. Crosby, 397 F.3d 103, 113 (2d Cir. 2005) ("the sentencing judge must consider the Guidelines").

125. *See* United States v. Price, 409 F.3d 436, 443 (D.C. Cir. 2005) ("[W]hen the District Court purports to apply the Guidelines it must do so without error."); *Crawford*, 407 F.3d at 1179 ("In other words, as was the case before *Booker*, the district court must calculate the Guidelines range accurately."); United States v. Mashek, 406 F.3d 1012, 1020 (8th Cir. 2005) (remanding for resentencing without reaching reasonableness inquiry if defendant "sentenced as a result of an incorrect application of the guidelines"); *Mares*, 402 F.3d at 519 (noting importance of Guidelines range being "properly calculated" for reasonableness review).

126. *Prepared Testimony of Judge Ricardo H. Hinojosa*, *supra* note 123, at 4.

127. *See, e.g.*, United States v. McDonald, 461 F.3d 948, 953 (8th Cir. 2006); United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006); United States v. Williams, 436 F.3d 706, 707 (6th Cir. 2006), *petition for*

adopt such a presumption.[128] In support of the latter position, the Second Circuit has explained, "[b]ecause 'reasonableness' is inherently a concept of flexible meaning, generally lacking precise boundaries, we decline to fashion any per se rules as to the reasonableness of every sentence within an applicable guideline or the unreasonableness of every sentence outside an applicable guideline."[129]

Regardless of the precise standard articulated by the courts, one thing is clear: *Booker* has not resulted in district courts being given carte blanche at sentencing.[130] We have not returned to the days of indeterminate sentencing. In a number of cases, district courts that significantly varied from the Guidelines have been reversed under the reasonableness inquiry.[131] It is also clear that if a district

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cert. filed (U.S. July 11, 2006) (No. 06-5275); United States v. Green, 436 F.3d 551, 554 (5th Cir. 2006); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005).

128. *See, e.g.*, United States v. Hunt, 459 F.3d 1180, 1185 (11th Cir. 2006); United States v. Jimenez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006) (en banc), *petition for cert. filed* (U.S. Aug. 4, 2006) (No. 06-5727); United States v. Cooper, 437 F.3d 324, 332 (3d Cir. 2006); *Crosby*, 397 F.3d at 115 (2d Cir. 2005). The Supreme Court has granted *certiorari* in two cases that will resolve this inter-Circuit split and provide further guidance to district courts. *See* United States v. Claiborne, 439 F.3d 479 (8th Cir. 2006), *cert. granted*, 2006 WL 2187967 (U.S. Nov. 3, 2006) (No. 06-5618); United States v. Rita, 177 Fed. Appx. 357 (4th Cir. 2006), *cert. granted*, 2006 WL 2307774 (U.S. Nov. 3, 2006) (No. 06-5754).

129. *Crosby*, 397 F.3d at 115 (2d Cir. 2005).

130. *See* AM. BAR ASS'N, CRIM. J. SEC., REPORT ON *BOOKER* AND RECOMMENDATION, 17 FED. SENT'G REP. 335 (2005) (arguing that advisory guidelines "may not greatly change the status quo"); Bowman, *supra* note 64, at 1320 ("[I]t is not yet clear that the 'advisory' guidelines called for by *Booker* will be so very different than the mandatory guidelines they replaced."); Carr, *supra* note 10, at 295 ("[Judicial] discretion is far from unfettered, as it was before passage of the Sentencing Reform Act. The Supreme Court's ruling that the Guidelines are advisory makes clear that the Guidelines necessarily play a crucial role in the determination of individual sentences. *Booker* neither repeals nor repudiates the Guidelines; it restores, rather, substantial but not unlimited judicial discretion, while restraining that discretion within the Guideline framework."); Osler, *supra* note 10, at 630 ("The shift to advisory guidelines does not mean all former powers of prosecutors evaporate. Many judges may choose to follow the lead of the first federal District Court judge to rule in the post-*Booker* environment [and] give the guidelines 'considerable weight' in sentencing .... So long as judges similarly follow old practices, prosecutors' powers will be undiminished."); Reitz, *supra* note 10, at 156 ("*Booker* has reduced the mandatory character of the Federal Guidelines, but the degree of change should not be overstated. The Court has not made the Federal Guidelines toothless, nor has it reinstituted the kind of sentencing discretion held by district court judges in the days of indeterminate sentencing.... There is reason to think that the post-*Booker* Federal Sentencing Guidelines still pack as much wallop as any sentencing guidelines in the country."); Weisberg & Miller, *supra* note 1, at 25 ("*Booker* has loosened the legal reins over sentencing judges somewhat, but ... 'the degree of change should not be overstated.'").

131. United States v. McDonald, 461 F.3d 948, 953 (8th Cir. 2006) (vacating sentence roughly fifty percent below the Guidelines range of 262 to 327 months); United States v. Jackson, 408 F.3d 301, 304-05 (departing downward from the Guidelines range of twenty-seven to thirty-three months to three years of probation, including six months of home confinement); United States v. Haack, 403 F.3d 997, 1005 (departing from the guideline of 180 months to seventy-eight months). For unpublished dispositions that reach a similar result, see United States v. Miller, 2005 WL 3271316 (6th Cir. 2005) (vacating a sentence based on fourteen-level downward departure, where court failed to provide adequate explanation); United States v. Brown, 152 Fed. Appx. 55 (2nd Cir. 2005) (imposing consecutive sentences based on judge's "personal attitude"); United States v. Doe, 128 Fed. Appx. 179 (2d Cir. 2005) (departing upward from the Guidelines to statutory maximum of ten years for passport fraud where defendant refused to reveal his true name and Presentence Report recommended a term of six to twelve months imprisonment); *see also* Carr, *supra* note 10, at 296 ("[D]eviations from the norm continue to be subject to close appellate scrutiny."). In *McDonald*, the dissent noted that post-*Booker* the Eighth Circuit has routinely affirmed sentences above the Guidelines range, while reversing most

court makes a variance, it must articulate its reasons for doing so.[132] Not surprisingly, perhaps, a district judge's dislike of the Guidelines is insufficient to withstand reasonableness review on appeal.[133] In short, "it would be a mistake to think that, after *Booker/Fanfan*, district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum."[134]

2. *Acculturation of the Courts*

Beyond *Booker's* requirement that the Guidelines be consulted and sentences reviewed for reasonableness, there is yet another dynamic in play that may limit the extent to which judges exercise their sentencing discretion: most judges are acculturated to the Guidelines. Indeed, the majority of federal judges at both the appellate and district court levels have only known the Guidelines regime. More than that, a recent survey of federal judges shows that overall, most accept the Guidelines, however grudgingly, and believe that they achieve several important goals.

First, federal judges are accustomed to sentencing under the Guidelines.[135] Most federal judges—indeed, an entire generation of federal judges—have only

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sentences below the Guidelines range. 461 F.3d at 960. The court has affirmed sixteen above-Guidelines sentences, while reversing only one; conversely, it has reversed twenty-five below-Guidelines sentences, while affirming only four. *Id.*

132. *Jackson*, 408 F.3d at 305 (holding that a district court must discuss reasonableness of variance from Guidelines range); United States v. Mashek, 406 F.3d 1012, 1016 n.4 (8th Cir. 2005) ("When a district court exercises its discretion to depart or vary from the appropriate guidelines range, it must continue to provide the reasons for its imposition of the particular sentence."); *Mares*, 402 F.3d at 519 ("[W]hen the judge elects to give a non-Guideline sentence, she should carefully articulate the reasons she concludes that the sentence she has selected is appropriate for that defendant."); United States v. Hughes, 401 F.3d 540, 546 ("If the court imposes a sentence outside the guideline range, it should explain its reasons for doing so."); United States v. Crosby, 397 F.3d 103, 116 (2nd Cir. 2005) (noting that Supreme Court in *Booker* "left unimpaired" provisions of Sentencing Reform Act that require district court "to state in writing 'with specificity' the reasons for imposing a sentence outside the calculated Guidelines range"); *see also* Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 178-81 (2005) (discussing reasonableness review, under which, there is a strong requirement to justify sentence that diverges from Guideline range).

133. *Haack*, 403 F.3d at 1006 (holding it improper for a sentencing judge to downward depart based on personal dissatisfaction with the Guidelines).

134. *Crosby*, 397 F.3d at 113; *see also* Carr, *supra* note 10, at 295 ("[W]hile, in all likelihood, all District Judges welcome the discretion returned to them by *Booker*, that discretion is far from unfettered, as it was before passage of the Sentencing Reform Act.").

135. Carr, *supra* note 10, at 295 ("Most of today's District Judges, having been appointed since 1987, have known only the Guideline system."); Kim Hunt & Michael Connelly, *Advisory Guidelines in the Post-*Blakely *Era*, 17 FED. SENT'G REP. 233, 236 (2005) (noting that most federal judges have only known the world of the guidelines and are likely to continue to impose guideline sentences); Reitz, *supra* note 10, at 166 ("[T]he insistence within the system that the difficult process be performed with exactness must carry psychological force. Why bother with labyrinthine calculations—and why go to the trouble to enforce their accuracy—if they can be lightly discarded by sentencing judges? Important officials like federal judges are not accustomed to idle exercises of great effort and no consequence.").

known the Guidelines regime. There are approximately 1262 federal judges.[136] 992 are district judges; 270 are appellate judges. The majority of judges at both levels became judges after the Guidelines took effect. 615, or 62%, of the district judges became judges after November 1, 1987; 149, or 55%, of the appellate judges became judges after November 1, 1987.

Even for judges who took the bench prior to November 1, 1987, the Guidelines have undoubtedly shaped their views of sentencing, not only in terms of what the appropriate sentence might be or how severely a crime should be punished, but also in terms of how they think about sentencing and the interplay between criminal history and offense conduct, including principles of real offense sentencing that take into account the defendant's full range of conduct.[137] Nineteen years is a long time, and for the past nineteen years those judges have used the Guidelines in imposing or reviewing sentences. Unless the judge has sat for an unusually long time (thirty-eight years or more), she has spent more time sentencing under the Guidelines than she did under the prior indeterminate regime.

Second, not only are judges accustomed to the Guidelines, but they have increasingly come to accept them.[138] To be sure, judges are not uncritical of the Guidelines.[139] Nevertheless, in 2002, the Sentencing Commission surveyed district court and appellate judges for their views on the Guidelines. Approximately seventy-eight percent of all judges reported that the Guidelines were at least moderately effective in achieving the purposes of sentencing.[140] Similarly, judges believed that the Guidelines had been relatively effective in achieving four of the sentencing goals of the Sentencing Reform Act: "providing punishment levels that reflect the seriousness of the offense;" "providing adequate deterrence to criminal conduct;" "protecting the public from further

136. These figures come from the database at the Federal Judicial Center and are as of October 4, 2005. *See* Federal Judicial Center, History of the Federal Judiciary, http://www.fjc.gov/history/home.nsf (on file with the *McGeorge Law Review*).

137. Etienne, *supra* note 11, at 752 ("Twenty years of Guidelines have changed judges and have forever altered their sense of what sentences are just and appropriate.").

138. Carr, *supra* note 10, at 295 ("[T]he judicial hostility to the Sentencing Guidelines that marked their early years is largely a thing of the past.").

139. FIFTEEN YEARS OF GUIDELINES SENTENCING, *supra* note 4, at app. C, 2-3. In particular, many judges remain concerned over the severity of sentences in drug trafficking cases. *Id.* A plurality of federal judges also indicated two areas in which the Guidelines were less effective in achieving the purposes of sentencing: providing defendants with training, medical care, or treatment in the most effective manner, where rehabilitation was appropriate; and maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors. *Id.* at 2. For recent examples of judges criticizing the Guidelines, see United States v. Haack, 403 F.3d 1001, 1001. The judge stated at sentencing, "I'm not trying to say marijuana ought to be legalized or anything like that. I'm just saying, you know, I've given many outrageous sentences under these guidelines almost all in the drug area." *Id.* Gertner, *supra* note 1, at 575-77 (critiquing the Guidelines); Louis F. Oberdorfer, *Mandatory Sentencing: One Judge's Perspective—2002*, 40 AM. CRIM. L. REV. 11, 16-18 (2003); John S. Martin, Jr., *Editorial: Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31 (calling the Guidelines "a sentencing system that is unnecessarily cruel and rigid").

140. FIFTEEN YEARS OF GUIDELINES SENTENCING, *supra* note 4, at 1.

crimes of the defendant;" and avoiding unwarranted sentencing disparities among similarly situated defendants.[141]

While it remains to be seen if the bounds of acculturation loosen over time, for now at least it appears that federal judges will generally continue to abide by the Guidelines. At a minimum, the Guidelines serve as a convenient benchmark against which to evaluate a possible sentence. In many respects, it may also be easier to resort to the Guidelines than to engage in fully individualized sentencing on a case-by-case basis.[142] In written remarks, two federal judges have noted the continuing importance of the Guidelines. Judge James G. Carr has explained that "[e]ven those whose federal judicial experience predates the Guidelines have become accustomed . . . to the presence of the Guidelines and appear generally to accept the Guidelines' role in their daily judicial lives."[143] Judge Nancy Gertner has similarly observed:

> I have absolutely no doubt that, however one characterizes the Guidelines, their advantages and their flaws, the Guidelines will continue to play an important part in sentencing. They have shaped the vocabulary we use to describe sentences and the standards we use to evaluate and compare cases. Because there were no alternative rules prior to the Guidelines—no empirical studies linking particular sentences to particular crime control objectives, no common law of sentencing—and there have been none since, the Guidelines will continue to have a critical impact.[144]

3. Political Pressure

Yet another factor may temper the extent to which judges decide to depart from the Guidelines: the fear of creating an appearance of judicial overreaching.[145] Federal judges are not politically naïve; after all, they were once nominated by a President and confirmed by the Senate. Most, if not all, judges

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141. *Id.* at 2.

142. Etienne, *supra* note 11, at 752 ("Good judging is difficult, time-consuming work and the Guidelines offer a systematic rational alternative that seems less arbitrary than the completely unguided discretion of the preceding indeterminate sentencing era.") (citing United States v. Ranum, 353 F. Supp. 2d 984, 987 (E.D. Wis. 2005)). "Sentencing will be harder now than it was a few months ago. District courts cannot just add up figures and pick a number within a narrow range. Rather, they must consider all of the applicable factors, listen carefully to defense and government counsel, and sentence the person before them as an individual." *Id.*

143. Carr, *supra* note 10, at 295.

144. Gertner, *supra* note 1, at 584.

145. Etienne, *supra* note 11, at 752 ("[A]n advisory guideline system may not lead to changes in sentencing results because district court judges may be wary of what lawmakers might do if they perceive that new sentences are wildly inconsistent with what the guidelines would have required. The threat of an adverse congressional response limiting judicial discretion may be the most significant prosecutorial check on sentencing."); Reitz, *supra* note 10, at 167 (discussing how federal judges have "extra-legal incentives" to follow the Guidelines because of the threat of legislative action).

are surely aware of the fact that the Attorney General has already decried the post-*Booker* "increasing disparity in sentences, and a drift toward lesser sentences"[146] and called for "the construction of a minimum guideline system" in which sentencing courts would be bound by the Guidelines minimum but the Guidelines maximum would be advisory.[147]

No doubt judges are also aware of the fact that Congress has already considered a post-*Booker* "fix" that would convert the Guidelines into a mandatory minimum sentencing regime.[148] In his remedial opinion for the Court, Justice Breyer seemed to envision legislative action, when he noted, "[o]urs, of course, is not the last word: The ball now lies in Congress' court."[149] Similarly, judges have had to respond to the PROTECT Act of 2003,[150] which, among other things, was intended to reduce the number of downward departures under the Guidelines.[151] In other words, the executive and legislative branches of government are displeased with *Booker* and are monitoring what the courts do. To the extent a judge is considering a departure from the Guidelines based on *Booker*, one would expect her to do so cautiously and with an awareness of the politics of the day and the politicization of crime.[152]

4. *Post-*Booker *Statistics*

To date, post-*Booker* sentencing statistics show that, by and large, courts continue to sentence defendants within the relevant Guidelines range. Of course, there is always a risk in trying to predict trends based on preliminary data;

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146. Gonzales, *supra* note 119, at 3.

147. *Id.* at 5.

148. Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005, H.R. 1528, 109th Cong. § 12 (2005). For commentary on possible legislative fixes to *Booker*, see Letter from Frank O. Bowman, III, Professor of Law, Ind. Univ. Sch. of Law, to Members of the H. Subcomm. on Crime, Terrorism, & Homeland Sec. (Apr. 11, 2005) (critiquing H.R. 1528), *reprinted in* 17 FED. SENT'G REP. 311 (2005); Allen & Hastert, *supra* note 36, at 205 ("If Congress can merely flip the statutory Guidelines and make all aggravators into mitigators, and there is no obvious reason why not, then *Apprendi*, like *In re Winship*, is largely a case of meaningless formalism."); Reitz, *supra* note 10, at 167 (noting that Congress could enact "a matrix of mandatory minimum penalties or some other wholly new sentencing regime that would eliminate all vestiges of judicial sentencing discretion"); Weisberg & Miller, *supra* note 1, at 33 (calling legislation that would impose mandatory minimum sentences across the board the "nuclear option").

149. United States v. Booker, 543 U.S. 220, 265 (2005).

150. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act (PROTECT Act) of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003).

151. *See* Reitz, *supra* note 10, at 167. For critical commentary on the PROTECT Act, see Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295 (2004); Miller, *supra* note 1; Osler, *supra* note 10; David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. Rev. 211 (2004).

152. *See* United States v. Pirani, 406 F.3d 543, 565 (8th Cir. 2005) ("[I]n light of the prevailing political climate many district judges would have been reluctant to vocalize any criticism of a guideline sentence."); Reitz, *supra* note 10, at 167; Gertner, *supra* note 1, at 576; Franklin E. Zimring, *Penal Policy and Penal Legislation in Recent American Experience*, 58 STAN. L. REV. 323, 333 (2005) ("[The] new wave of legislation-driven shifts in penal policy was a major innovation in the American politics of criminal justice.").

Booker was decided on January 12, 2005. Nevertheless, from that date to November 1, 2005, federal courts have imposed 46,470 sentences.[153] 61.7% of the sentences were within the Guidelines range.[154] 24.2% of the cases involved a government-sponsored downward departure.[155] 1.4% of the cases involved a sentence above the Guidelines range.[156] 12.8% of the cases involved a non-government-sponsored sentence below the Guidelines range.[157]

The rate of sentencing within the Guidelines range—61.7%—appears to be the lowest reported compliance rate since the Guidelines were enacted, but at the low end of the historical range when government-sponsored departures are taken into account. In 2001, 64% of all sentences fell within the Guidelines range; in 2002, that figure was 65%; in 2003, 69.4%; in 2004, 72.2%.[158] The post-*Booker* Guidelines compliance rate would likely be somewhat higher but for the substantial percentage of government-sponsored departures (24.1%), which exceeds the percentage of such departures in 2003 (22.2%) and 2004 (21.9%).[159]

The compliance rate only tells part of the story. Another important question to ask is whether *Booker* has led to larger reductions when judges decide to sentence below the Guidelines range. So far, at least, the answer to that question appears to be no. The data is limited, but in 2003 in cases involving non-government-sponsored downward departures, there was a median decrease of twelve months or 40% from the minimum Guidelines sentence.[160] In drug trafficking cases, there was a sixteen-month or 33.8% median decrease from the minimum Guidelines sentence.[161] Post-*Booker*, in cases involving non-

153. SPECIAL POST-*BOOKER* CODING PROJECT, *supra* note 119, at 1.

154. *Id.*

155. *Id.*

156. *Id.* This figure was derived by adding the 1.1% of cases categorized as "otherwise above the Guideline range" to the .3% of cases for "departure above the Guidelines." *Id.* Though the report's sum of all percentages would total 100.1%, this error appears to have resulted from rounding all percentages to the nearest tenth. *See id.* Terminology has developed post-*Booker* to categorize non-Guidelines sentences as either "departures" or "variances." *Id.* "Departures" occur when the judge bases the sentence on grounds articulated in the Guidelines. *Id.* "Variances" are sentences "otherwise above [or below] the Guidelines range." *Id.*

157. *Id.*

158. *Id.* at 7. The Sentencing Commission compiles and reports this data on a fiscal year basis. Thus, the reference to any given year means fiscal year, not calendar year. The data reported for 2004 reflects sentencings prior to *Blakely v. Washington*, which was decided on June 24, 2004. SPECIAL POST-*BOOKER* CODING PROJECT, *supra* note 119, at 11, n.1. The 1989 compliance rate was 82%. U.S. SENTENCING COMM'N, 1995 ANNUAL REPORT tbl.H (1996). In 1990, it was 83.4%, *id.*; in 1991, 80.6%, *id.*; in 1992, 77.4%, *id.*; in 1993, 75.3%, *id.*; in 1994, 71.1%, *id.*; in 1995, 71%, *id.*; in 1996, 69.6%. U.S. SENTENCING COMM'N, 1996 ANNUAL REPORT 35 (1997). In 1997, it was 67.9%. U.S. SENTENCING COMM'N, 1997 ANNUAL REPORT 37 (1998). In 1998, it was 66.3%. U.S. SENTENCING COMM'N, 1998 ANNUAL REPORT 38 (1999). In 1999, it was 64.9%, U.S. SENTENCING COMM'N, 1999 ANNUAL REPORT 42 (2000). In 2000, it was 64.5%. U.S. SENTENCING COMM'N, 2000 ANNUAL REPORT 42 (2001).

159. SPECIAL POST-*BOOKER* CODING PROJECT, *supra* note 119, at 7. The Sentencing Commission does not report this data for years prior to 2003. *Id.* at 11 n.5.

160. U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.31A (2004). The Sentencing Commission does not appear to have published earlier data on this point.

161. *Id.*

government sponsored departures or variances, the median reduction was twelve months or around 33%.[162] In drug trafficking cases, the median decrease was seventeen to nineteen months or 26.3% to 27.7% of the Guidelines minimum.[163] The extent of the decrease in absolute terms is slightly greater post-*Booker* in drug trafficking cases, but the percentage decrease from the Guidelines minimum is actually less than it was in 2003. Thus, to date, it appears that district judges have been circumspect in exercising their post-*Booker* discretion. By and large, they have continued to impose Guidelines sentences, and when they have sentenced below the Guidelines range, they have made relatively modest adjustments.[164]

5. *Laboratory of the States*

An examination of what happens in states that have voluntary or advisory sentencing guidelines may be instructive. At least eighteen states and the District of Columbia use a sentencing guideline system.[165] In nine of those states and the District of Columbia, the guidelines are advisory.[166] Not all states with advisory guidelines have high compliance rates. In Arkansas, the rate ranged from zero percent for rape to 20.2% for aggravated robbery and 64.5% for drug distribution.[167] The compliance rate in many states, however, is quite high.[168] Virginia had a 79.4% compliance rate in fiscal year 2004.[169] Maryland had an 87% compliance rate in 2001 and 80% in 2002.[170] Utah's compliance rate was 79% for sex offenses and 86% for all other offenses.[171]

Thus, developments at the state level may serve as a useful point of comparison for what may happen federally in the post-*Booker* world. While more study in this area would be helpful—in particular an examination of the similarities and differences between systems used in the states and the federal system—there is no reason to conclude that advisory guidelines inevitably lead to low compliance rates.[172] That, coupled with the emerging reasonableness standard of review, the acculturation of judges, and political pressure on the courts, may

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162. SPECIAL POST-*BOOKER* CODING PROJECT, *supra* note 119, at 22.

163. *Id.* at 21-22.

164. Moreover, according to a recent report of the United States Sentencing Commission, "[t]he average sentence length after *Booker* has increased." U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING vii (2006) [hereinafter FINAL REPORT].

165. Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1195 (2005).

166. Hunt & Connelly, *supra* note 135, at 233.

167. *Id.* at 236.

168. *Id.*; *see also* Frase, *supra* note 165, at 1198 ("'[C]ompliance rates' in some voluntary guidelines jurisdictions are quite high.").

169. Hunt & Connelly, *supra* note 135, at 236.

170. *Id.*

171. *Id.*

172. *Id.* ("[L]ow compliance rates do not seem intrinsic to advisory guidelines states.").

mean that the federal compliance rate remains in the historical range, though, perhaps, on the low side. Of course, prosecutors will continue to possess the discretion to influence the compliance rate. Now, as before *Booker*, they possess the power to file substantial assistance motions,[173] create early disposition (or "fast track") programs,[174] or stipulate to sentences below the Guidelines range.[175]

D. Bargain Theory

While district judges have continued to impose Guidelines sentences in most cases, the fact remains that they now have more latitude to impose a non-Guidelines sentence. This discretion creates uncertainty on a case-by-case basis, greater uncertainty than under the Guidelines pre-*Booker*, when the likely sentence was usually fairly easy to predict. Uncertainty may be viewed as an opportunity for one party in a negotiation, but as a risk to another. Even more so than in the past, rational parties will attempt to predict the likely sentence of the judge. Much will depend upon the parties' read of the sentencing proclivities of the judge.

Bargain theory helps inform the analysis of how the uncertainty created by *Booker* will influence prosecutorial discretion. A considerable body of scholarship has explored bargain theory in a criminal context.[176] Recent scholarship has often focused on distortions in the bargaining process that create inefficiencies and impede a defendant's ability to evaluate the terms of an offer or to reach an optimal resolution.[177] Nevertheless, a starting point for bargain theory analysis is that parties attempt to predict the likely outcome of trial, including the probability of conviction and the likely sentence to be imposed. "[P]arties bargain over the allocation of criminal punishment in order to reassign and thereby reduce the risks of an uncertain future . . . ."[178] A critical question

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173. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2005).

174. *Id.* § 5K3.1 (2005).

175. FED. R. CRIM. P. 11(c)(1)(C).

176. For a small sampling of such scholarship, see Wright, *supra* note 109; William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); Jeffrey Standen, *Plea Bargaining in the Shadow of the* Guidelines, 81 CAL. L. REV. 1471 (1993); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1935 (1992); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971).

177. *See* Wright, *supra* note 109, at 86 ("[T]he combination of charging and sentencing options gave federal prosecutors the power to distort trial outcomes."); Stuntz, *supra* note 176, at 2548 ("[I]n a variety of ways and for a variety of reasons, criminal settlements do *not* efficiently internalize the law."); Bibas, *supra* note 176, at 2469-527 (describing institutional and human distortions on the "shadow-of-trial model of plea bargaining").

178. Scott & Stuntz, *supra* note 176, at 1935.

becomes how risk averse the parties are. The more likely "[a] settlement is . . . to take place . . . the greater the defendant's aversion to risk."[179]

Here, the initial post-*Booker* statistics are telling. In .7% of the cases the judge sentenced above the Guidelines range and specifically cited *Booker* as a basis for the increase.[180] In 7.1% of the cases, the judge cited *Booker* and sentenced below the Guidelines range.[181] Based on this data, it appears that a judge is roughly ten times more likely to sentence downward than upward with her post-*Booker* discretion.

As a result, in many cases prosecutors will hold fewer cards than they did before *Booker* when the judge had less discretion to sentence outside the Guidelines range. Yet the fact remains that in at least some non-Guidelines cases, the judge may go upward, not downward. After *Booker*, the rate of above-range sentences has doubled.[182] In cases in which a defendant fears an above-range sentence or is particularly risk-averse, the prosecutor may gain increased leverage, for the defendant, theoretically, could receive a sentence up to the statutory maximum. A plea agreement might well reduce this risk.

Indeed, in this post-*Booker* world, one would expect to see more attempts by the parties to contract about the uncertainty created by the risk of judicial departures or variances, either upwards or downwards. The parties could do this by entering into an agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), whereupon they stipulate to an agreed upon sentence that the court cannot modify.[183] Post-*Booker*, preliminary data indicates that the government stipulated to a sentence outside the Guidelines range in 3% of the cases.[184] It will be interesting and instructive to see if this figure increases over time. If so, it could become a significant source of sentencing disparity.[185]

IV. CONCLUSION

To a limited extent, *Booker* has reduced prosecutorial discretion. Now that the Guidelines are advisory, prosecutors have less control over a defendant's sentence. Prosecutors retain great power, however, and there are important limits

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179. Landes, *supra* note 176, at 99; *see also* Easterbrook, *supra* note 176, at 1975 ("[R]isk-averse persons prefer a certain but small punishment to a chancy but large one.").

180. SPECIAL POST-*BOOKER* CODING PROJECT, *supra* note 119, at 1. This figure is derived by adding the percentages of cases in which the court sentenced "[a]bove the [r]ange with *Booker*/18 U.S.C. § 3553," or .6%, and the cases in which the court made an "[u]pward departure with *Booker*/18 U.S.C. § 3553," or .1%, for a total of .7%. *Id.*

181. *Id.* This figure is derived by adding the percentages of cases in which the court made a "[d]ownward [d]eparture with *Booker*/18 U.S.C. § 3553," or 1.0%, and the cases in which the court sentenced "[b]elow the [r]ange with *Booker*/18 U.S.C. § 3553," or 6.1%, for a total of 7.1%. *Id.*

182. FINAL REPORT, *supra* note 164, at vii.

183. FED. R. CRIM. P. 11(c)(1)(C).

184. SPECIAL POST-*BOOKER* CODING PROJECT, *supra* note 119, at 1.

185. The Ashcroft Memorandum should limit Rule 11(c)(1)(C) plea agreements to non-Guideline sentences, but, as noted previously, there are significant exceptions to the policy. In any event, it does not preclude an agreement to a Guidelines sentence.

on *Booker's* reach. First, *Booker* only affects prosecutorial discretion under the Guidelines. All other aspects of prosecutorial discretion are left untouched. Second, since the Guidelines were first enacted, Congress has passed a slew of statutes that impose mandatory-minimum penalties. These statutes remain; their constitutionality is not in question. Independently of the Guidelines, they provide prosecutors with a significant amount of leverage, particularly with respect to charging decisions and in plea bargaining.

Third, sentencing courts are likely to be circumspect in using their new-found freedom. District courts must still consult the Guidelines, and the Courts of Appeals have begun to give content to the reasonableness standard of review. While the law is emerging, it appears that a Guidelines sentence is a safe harbor of sorts and will generally be held reasonable. Moreover, judges may be acculturated to the Guidelines. Most judges have only known the Guidelines regime. They are also aware of the intense scrutiny, both executive and congressional, that they are under and the "nuclear option" of across-the-board mandatory minimums being considered.[186] Indeed, preliminary data confirms that sentencing courts have hardly reveled in exercising their post-*Booker* discretion. By and large, most sentences fall within the relevant Guidelines sentencing range.

Bargain theory provides one more reason why *Booker's* reach may be limited in some cases. Although a judge may use her discretion to depart downward from the relevant Guidelines sentencing range, it is also possible that she will depart upward. *Booker* has not proven to be a one-way ratchet. Even more so than before *Booker*, parties must evaluate a sentencing judge's predilections. Uncertainty enhances risk and risk may create more pressure to enter into a plea agreement. Prosecutorial discretion may be increased on an ad hoc basis in a post-*Booker* world, for a defendant may fear receiving a sentence at the statutory maximum.

The wild card in all of this post-*Booker* analysis is what Congress will do now that the Guidelines are advisory. One noted commentator has predicted that *Booker's* result is "politically unsustainable."[187] Indeed, as Justice Breyer observed in his remedial opinion, "[t]he National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice."[188] Whatever legislative action may follow should not be driven by concern for the post-*Booker* loss of prosecutorial discretion. Otherwise, the Guidelines and *Booker* may give rise to the most unwarranted and ironic disparity of all: concern for federal prosecutors and executive power, rather than the overall fairness of the criminal justice system and sound sentencing policy.

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186. Weisberg & Miller, *supra* note 1, at 33 (describing the proposed legislative fix of across-the-board mandatory minimum penalties as the "nuclear option").

187. Bowman, *supra* note 1, at 257.

188. United States v. Booker, 543 U.S. 220, 265 (2005).

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