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Freedom to Sentence: District Courts after Booker, The

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The Freedom to Sentence: District Courts After *Booker*

Deborah Young*

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In the months since the Supreme Court decided *United States v. Booker* and *United States v. Fanfan*,¹ federal district court judges have had greater freedom to sentence than in the preceding seventeen years. This article analyzes to what extent, and how, district courts have embraced their new freedom. Despite a few judges’ comments to the contrary, sentencing pursuant to *Booker* does not equate with the discretionary world of pre-Guidelines sentencing.² The freedom to sentence today is moderated by the advisory Federal Sentencing Guidelines and

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1. 543 U.S. 220 (2005). Throughout this article *Booker* will be used to refer to the Supreme Court opinion for these combined cases.

2. As Judge Nancy Gertner stated the matter, “advisory does not mean a regime without rules, or a return to the standardless sentencing which preceded the SRA.” *United States v. Jaber*, 362 F. Supp. 2d 365, 367 (D. Mass. 2005) (citing MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1972)). Judge Bataillon said: “[T]he contention that *Booker* signals a return to pre-Guidelines discretion is an overstatement. In contrast to the unfettered and unreviewable discretion to sentence a defendant at any point within a broad statutory range that existed prior to the Guidelines, a sentencing court’s discretion is now constrained by the notion of ‘reasonableness.’” *United States v. Kelley*, 355 F. Supp. 2d 1031, 1035 (D. Neb. 2005).

appellate review for reasonableness. Within those boundaries, district courts are making choices that provide insight into what is working in federal sentencing and what needs reconsideration.

This examination of district court sentencing post-*Booker* has immediate importance in explaining how courts are interpreting that watershed opinion. Of course, appellate courts are already reviewing district court decisions and developing the law for each circuit on the key issues. So, as a measure of what the law of sentencing will ultimately be after *Booker*, district court sentencing memoranda are of only limited value. What these sentencing documents do provide, however, is a picture of what federal district judges believe are the important issues with the Federal Sentencing Guidelines today. After reviewing hundreds of post-*Booker* cases, this article identifies the key areas of concern discussed by district court judges. The article also identifies how these concerns arise from the main themes of discretionary sentencing.

This article first sketches the change from discretionary sentencing to mandatory sentencing before *Booker* and follows with a brief summary of *Booker*. The examination of post-*Booker* cases illustrates how trial courts have interpreted and applied *Booker*. Given *Booker's* lengthy, two-part majority opinion by two different Justices, there is a great deal of language for lower courts to interpret and use as fodder for their positions. This article identifies and discusses the key issues that have arisen for district courts in the wake of *Booker*: how much deference district courts should give the Guidelines, how *Booker* has renewed consideration of previously resolved disputes about sentencing procedures, and the major areas where judges are choosing to give non-Guidelines sentences.³

An examination of the sentences imposed post-*Booker* identifies how district courts judges believe they should sentence federal criminal defendants when they have the freedom to do so.⁴ Various factors that could influence a judge's sentencing choices are considered and common themes underlying their choices are identified. Most of these judges have many years of experience sentencing under the Guidelines. The choices they have made post-*Booker* can enlighten the conversation of all involved in the next stage in sentencing history. Hopefully the administration, the United States Sentencing Commission ("Commission"), and Congress will seriously consider the voices of these district court judges as they determine their respective responses to *Booker*.

3. This article will use the term "non-Guidelines sentence" to refer to a sentence where the court either did not sentence a defendant within the range prescribed by the Guidelines, including any applicable departures or enhancements, or where the court explicitly stated it was imposing a non-Guidelines sentence.

4. Statutory mandatory minimum sentences still restrict a court's freedom to sentence according to principles of punishment.

I. DEVELOPMENT OF THE FEDERAL SENTENCING GUIDELINES

The twentieth century saw the rise of, and the demise of, rehabilitative sentencing. In the early part of the century, the previous concept of punishment as retribution was criticized.⁵ The focus of sentencing was accordingly shifted from the gravity of the criminal act to the dangerousness of the offender.⁶ All states and the federal government developed sentencing schemes in which an initial indeterminate sentence was imposed and later reviewed by a parole board.⁷ In the vast majority of jurisdictions, the initial indeterminate sentence was imposed by a judge, but a few states used jury sentencing.⁸ Sentencing was viewed as a professional decision about the individual that, at least theoretically, focused on what would be required for rehabilitation.

The pendulum began to swing the other way and, by the 1970s, judges and scholars were loudly questioning the unfettered discretion in sentencing, probation, and parole decisions.⁹ Recent history has led many observers and commentators to view disagreements over sentencing as a pitched battle between Congress and federal judges, but the original quest to limit disparity was championed by judges. Indeed, Judge Marvin E. Frankel's 1973 work, *Criminal Sentences: Law Without Order*,¹⁰ was one of the most influential calls for change. He contended that judges had too much discretion and applied their own values, there were no unifying principles behind sentencing, and there was substantial disparity in sentencing.¹¹

Others disagreed, explaining that discretionary sentencing did have common underlying principles. One study described the core concepts of discretionary sentencing as evaluating the harm caused, determining blameworthiness, and predicting the consequences of a sentence.¹² Then, after this evaluation, the court had to translate these assessments into a sentence. The translation of the assessment of harm, blameworthiness, and consequences into an actual sentencing was the source of the disparity in discretionary sentencing.¹³

In response to the growing concern over disparity, various sentencing models were considered. Some suggested the imposition of appellate review, as was used

5. Deborah Young, *Fact-finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299, 307 (1993-1994) (citing Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 823-24 (1968)).

6. *Id.*

7. *Id.*

8. Arthur W. Campbell, *LAW OF SENTENCING* 258 (2d ed. 1991).

9. See, e.g., Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904 (1962), reprinted in SANFORD H. KADISH, *BLAME AND PUNISHMENT* 243, 252 (1987).

10. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

11. *Id.*

12. STANTON WHEELER ET AL., *SITTING IN JUDGMENT: THE SENTENCING OF WHITE COLLAR CRIMINALS* (1988).

13. *Id.* at 9-10.

in England.¹⁴ By the 1970s, states were beginning to use determinate sentencing schemes and the United States Board of Parole had adopted a Guideline Table in which sentences were determined by the severity of the offense and the inmate's previous criminal record.¹⁵

The complex history and development of the Federal Sentencing Guidelines has been recounted in many fine articles. This article highlights only a few key decisions, the fundamental turning points in guidelines development, and the key cases leading up to *Booker*. Choices made by the Commission and the courts that seemed final at the time have emerged again as open to question after *Booker*. In looking back at the developmental history now, it becomes apparent that where no consensus was achieved about key decisions, there are now differences among sentencing judges.

In the same year Congress established the United States Sentencing Commission, it also adopted several mandatory minimum statutes for drug and weapons offenses.¹⁶ These mandatory minimums presaged the diminishment of judges' discretion that the Federal Sentencing Guidelines imposed. Initially, prosecutors charged in the indictment facts establishing the basis for a mandatory sentence, such as the quantity of the drug or the presence of a weapon. These facts were then either proved at trial to the jury or admitted in a guilty plea. But in 1986, the Supreme Court considered mandatory minimums in the context of a Pennsylvania state law that provided a minimum sentence of five years imprisonment for specified felonies if the court found, by a preponderance of the evidence, that the defendant visibly possessed a firearm during the commission of the felony.¹⁷ Defendant McMillan argued that visible possession was an element of the offense or, in the alternative, that Due Process required it be proved beyond a reasonable doubt.¹⁸ The Supreme Court upheld the statute against the claim, saying the weapon possession was a sentencing factor, although Justice Stevens strongly dissented.¹⁹ Thus, when guidelines sentencing began in 1987, there was precedent for judicial fact-finding of "sentencing factors" that mandated specific sentences.

The Guidelines identified three objectives Congress had for sentencing: (1) honesty, (2) uniformity, and (3) proportionality.²⁰ The Commission explained each of these. By honesty, the Commission meant transparency, so that the

14. Young, *supra* note 5, at 318 n.116.

15. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 229 (1993).

16. For a summary of the history of mandatory minimum penalties in the United States, see U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991) [hereinafter MANDATORY MINIMUM PENALTIES].

17. *McMillian v. Pennsylvania*, 477 U.S. 79 (1986).

18. *Id.* at 84-93.

19. *Id.* at 93-94.

20. U.S. SENTENCING GUIDELINES MANUAL Ch. 1, Part A (1987), reprinted in U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 cmt. background (2005).

sentence a judge imposed would be the sentence served, unaltered by subsequent parole decisions.²¹ Uniformity referred to the effort to narrow the “wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders.”²² Proportionality meant imposing “appropriately different sentences for criminal conduct of different severity.”²³

While the second goal of uniformity refers to “similar offenders,” both the second and third goals, as translated into the Guidelines, focused primarily on defining and measuring the criminal conduct. The degree of similarity among offenders was translated into the Guidelines as a measure of a defendant’s criminal history. Other aspects of a defendant’s life that might have previously been considered as mitigating or exacerbating factors were largely excluded from consideration under the Guidelines. The Guidelines explicitly stated that age,²⁴ education and vocational skills,²⁵ mental and emotional conditions,²⁶ physical condition or appearance, drug or alcohol dependence or abuse, gambling addiction,²⁷ employment record,²⁸ family ties and responsibilities,²⁹ military, civic or charitable or public service and similar prior good works, lack of guidance as a youth, and circumstances indicating a disadvantaged upbringing were all factors deemed “not ordinarily relevant” in determining the sentence or determining a departure. The single aspect of a defendant’s life that is routinely considered relevant under the Guidelines is the defendant’s criminal history.³⁰

Accordingly, the Guidelines system that was created was heavily focused on the criminal conduct, and much less so on characteristics and circumstances of the defendant. The offense conduct that forms the basis for determining the offense level in the Guidelines refers not just to the conduct charged in the indictment or information, but to all relevant conduct. The relevant conduct provisions were an effort to shift the Guidelines system from one end of the spectrum, a charge offense based assessment of criminal conduct, toward a “real offense based assessment” of criminal conduct. Adjustments can be made to the offense level based on such factors as the defendant’s role in the offense.³¹

Over time, the Guidelines system became even more real offense based, as opposed to charge offense based. As challenge after challenge was brought over the relevant conduct provisions, courts determined that relevant conduct could

21. *Id.*

22. *Id.*

23. *Id.*

24. U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (2005).

25. *Id.* § 5H1.2.

26. *Id.* § 5H1.3.

27. *Id.* § 5H1.4.

28. *Id.* § 5H1.5.

29. *Id.* § 5H1.6.

30. *Id.* § 5H1.8.

31. *Id.* § 5H1.7 (2005) (noting that the defendant’s role in the offense was relevant for determining, but not departing from, the applicable Guideline range).

include conduct beyond the statute of limitations,³² conduct for which the defendant was never charged,³³ and conduct of which the defendant was acquitted.³⁴ Moreover, the evidence of this relevant conduct did not have to be evidence that would even be admissible in a trial. It could be hearsay. Each of these rulings increased the conduct for which defendants would be held accountable and accordingly, the length of sentences imposed.

Congress codified greater penalties, even as relevant conduct was expansively interpreted. It also decreased the discretion of sentencing judges. Those who watched the Guidelines develop from the very beginning witnessed a seemingly inexorable creeping toward more severe sentences with decreasing flexibility.³⁵ In response to the combination of higher penalties and less judicial discretion, judges were increasingly voicing discontent with the Guidelines by the late 1990s. With hindsight, one can see that there was growing momentum against the Guidelines, but the Guidelines continued to be affirmed. A key decision that defined the scope of relevant conduct was *United States v. Watts*, decided in 1997.³⁶ A jury convicted Watts of possession with intent to distribute cocaine, but acquitted him of using a firearm in relation to a drug offense. Despite the acquittal, the district court found by a preponderance of the evidence that Watts had possessed the guns in connection with the drug offense and increased his base offense level and thus his sentence. The Supreme Court upheld that decision, but Justice Stevens vigorously dissented, foreshadowing later decisions including *Booker*.

The following year a bare majority affirmed a sentence that relied on a prior conviction that was found by the Court under the preponderance of the evidence standard. In *Almendarez-Torres v. United States*,³⁷ the defendant was charged with and pleaded guilty to illegal reentry into the United States in violation of 18 U.S.C. § 1326. The statute had a maximum penalty of two years incarceration for illegal reentry, but up to twenty years if the initial deportation was due to conviction for an aggravated felony.³⁸ The court found by a preponderance of the evidence that the defendant had committed the prior felony and sentenced the defendant to a Guidelines sentence of eighty-five months.³⁹ A bare majority of the Court found the statute constitutional, holding that the fact of a prior conviction was the sort of recidivism commonly treated as a sentencing factor. Justice Scalia wrote a strong dissent arguing that the majority holding raised

32. See, e.g., *United States v. Silkowski*, 32 F.3d 682, 686-88 (2d Cir. 1994).

33. E.g., *United States v. Pollard*, 986 F.2d 44, 46-47 (3d Cir. 1993).

34. *United States v. Watts*, 519 U.S. 148 (1997).

35. The United States Sentencing Commission issued a report in May of 2004 that concluded the average defendant in 2002 spent about double the time in jail as the average defendant in 1984. U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 139 (2004).

36. *Watts*, 519 U.S. 148.

37. 523 U.S. 224 (1998).

38. 18 U.S.C. § 1326 (2000)

39. *Almendarez-Torres*, 523 U.S. at 227.

serious constitutional issues.⁴⁰ That same term the Court affirmed a trial judge's determination of relevant conduct involving drug quantity according to the Guidelines in *United States v. Edwards*.⁴¹

In 1999, the Supreme Court identified, in dicta, a significant limit on judicial fact-finding that increases a defendant's sentence. In *Jones v. United States*,⁴² the Court held that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty . . . must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."⁴³ In 2000, the Supreme Court in *Apprendi v. New Jersey*,⁴⁴ converted the *Jones* Court's dicta into law in a state case. The *Apprendi* Court declared unconstitutional a hate crime enhancement that enabled a judge to impose a sentence higher than the otherwise available statutory maximum based on a finding of racial animus by a preponderance of the evidence.⁴⁵ In dicta, the Court said, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."⁴⁶ However, the five to four split vote and the five separate opinions delivered by the Justices raised many questions about the exact scope and importance of the Court's ruling.

Two years later, the case of *Harris v. United States*⁴⁷ went to the Supreme Court. Harris was convicted of 18 U.S.C. § 924 (carrying a firearm). The mandatory minimum for that offense was five years for carrying a firearm and seven for "brandishing" a firearm. The court found Harris guilty of carrying a firearm in a bench trial.⁴⁸ At the sentencing hearing, the court then found him guilty of the brandishing, using a preponderance of the evidence standard.⁴⁹ With Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Breyer in the majority, the Supreme Court affirmed the conviction by holding that the "brandishing" increase was similar to a traditional sentencing factor like a prior conviction.⁵⁰ Thus, the Court ruled that *Apprendi* did not apply to a mandatory minimum. Justice Breyer wrote separately, however, saying that he could not see the difference between this case and *Apprendi*, although he continued to believe *Apprendi* was incorrect.⁵¹ Dissenting Justices Thomas, Stevens, Souter, and

40. *Id.* at 248 (Scalia, J., dissenting).

41. 523 U.S. 511 (1998).

42. 526 U.S. 227 (1999).

43. *Id.* at 243 n.6.

44. 530 U.S. 466 (2000).

45. *Id.*

46. *Id.* at 490.

47. 536 U.S. 545 (2002).

48. *Id.* at 551.

49. *Id.*

50. *Id.* at 545.

51. *Id.* at 569.

Ginsburg believed that raising the floor was covered by *Apprendi* just as raising the ceiling was. They said such a “fact exposes a defendant to greater punishment than what is otherwise legally prescribed.”⁵²

The development of the constitutional law of sentencing continued with *Ring v. Arizona*.⁵³ In *Ring*, a defendant who had been sentenced to death following his conviction for first-degree murder challenged Arizona’s capital sentencing scheme, arguing that it violated the Sixth Amendment by permitting the judge, rather than the jury, to find the aggravating factor necessary for imposition of the death penalty. The Court agreed with the defendant, suggesting that *Apprendi*’s term “statutory maximum” meant the maximum sentence that could be imposed solely on the basis of facts found by the jury.⁵⁴

The watershed case of *Blakely v. Washington*⁵⁵ applied these Sixth Amendment principles to a state guidelines sentencing scheme. In *Blakely*, a defendant pleaded guilty to kidnapping his wife. Based on the facts admitted in Blakely’s plea agreement, his crime was subject to a statutory maximum of ten years and a “standard range” of forty-nine to fifty-three months under Washington’s sentencing guidelines.⁵⁶ After hearing Blakely’s wife describe the kidnapping, however, the sentencing judge imposed an enhanced sentence of ninety months based on his conclusion that the kidnapping involved “deliberate cruelty.”⁵⁷ The issue on appeal was whether Washington’s sentencing scheme violated the Sixth Amendment by permitting the judge to impose a sentence in excess of the maximum authorized under the guidelines based on facts not admitted by the defendant or submitted to a jury. Relying on *Apprendi*, the Court’s five-member majority said yes. In Justice Scalia’s words, “[w]hen a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ . . . and the judge exceeds his proper authority.”⁵⁸

By striking down Washington’s Sentence Reform Act, the *Blakely* Court cast grave doubt on the vitality of mandatory guideline schemes nationwide, including the Federal Sentencing Guidelines. In the wake of *Blakely*, lower federal courts divided over whether and how that case applied in the federal system. The Supreme Court quickly granted certiorari to address this issue in the consolidated cases of *United States v. Booker* and *United States v. Fanfan*.⁵⁹

52. *Id.* at 579.

53. 536 U.S. 584 (2002).

54. *Id.* at 584.

55. 542 U.S. 296 (2004).

56. *Id.* at 299-300.

57. *Id.* at 300.

58. *Id.* at 304 (citing 1 J. BISHOP, CRIMINAL PROCEDURE § 87 (2d ed. 1872)).

59. 543 U.S. 220 (2005).

II. THE CHANGE WROUGHT BY *BOOKER*

Freddie J. Booker was charged with possession with intent to distribute at least fifty grams of crack cocaine. He was convicted by a jury of that offense.⁶⁰ The jury had heard evidence that Booker had 92.5 grams of crack cocaine. The mandatory minimum penalty for the offense was incarceration for ten years, with a statutory maximum possible penalty of life imprisonment.⁶¹ The district court followed the sentencing Guidelines as they were being interpreted at that time. Accordingly, the judge considered all relevant conduct and found, by a preponderance of the evidence, that Booker had possessed a total of 658 grams of crack cocaine, for a base offense level of thirty-six.⁶² The court's additional finding that Booker had obstructed justice resulted in an enhancement.⁶³ Applying the Guidelines, the sentencing range was 360 months to life imprisonment.⁶⁴ Had the court based the sentence solely on the 92.5 grams of crack cocaine—the evidence presented to the jury—the Guidelines sentence would have been 262 months.⁶⁵ The judge sentenced Booker to thirty years imprisonment.⁶⁶

The Seventh Circuit Court of Appeals held that this application of the Guidelines conflicted with *Apprendi v. New Jersey*⁶⁷ as interpreted by *Blakely v. Washington*.⁶⁸ The majority reasoned that the quantity of crack cocaine was a fact that had to be presented to the jury because it was a “fact that increases the penalty for a crime beyond the prescribed statutory maximum,”⁶⁹ where the maximum sentence was that which a “judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.”⁷⁰ Judge Easterbrook dissented on both procedural and substantive grounds.⁷¹

The companion case of *United States v. Fanfan*⁷² presented the same issues in a case where the district court declined to sentence based on the additional relevant conduct in a possession with intent to distribute cocaine case. The government in *Fanfan* filed a notice of appeal to the First Circuit and petitioned the Supreme Court for a writ of certiorari before judgment. The Court granted the petition.

60. *United States v. Booker*, 375 F.3d 508, 509 (7th Cir. 2004).

61. *Id.* at 509.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 510.

66. *Id.* at 509.

67. 530 U.S. 466, 490 (2000).

68. 542 U.S. 296 (2004).

69. *Booker*, 375 F.3d at 510 (citing *Apprendi*, 530 U.S. at 490).

70. *Id.* at 510 (citing *Blakely*, 542 U.S. at 303).

71. *Id.* at 515.

72. No. 03-47-P-H, 2004 U.S. Dist. LEXIS 18593 (D. Me. June 28, 2004).

The Supreme Court issued a majority opinion for *Booker* and *Fanfan* in two distinct parts, written by two Justices. First, Justice Stevens wrote, for a bare majority including Justices Scalia, Souter, Thomas, and Ginsburg, an affirmation of *Apprendi*. It held that, under the Sixth Amendment, “[a]ny 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.”⁷³ Justice Stevens pointed out that over time there had been an “increasing emphasis on facts that enhance[d] sentencing ranges”⁷⁴ and that this emphasis increased the judge’s power while reducing that of the jury. Thus, concluded Justice Stevens,

[T]he Court was faced with the issue of preserving an ancient guarantee under a new set of circumstances. The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime.⁷⁵

Notable in Justice Stevens’s opinion was his discussion of *Watts* in which acquitted conduct was the basis for a sentencing increase. Justice Stevens pointed out that defendant *Watts* had not contended that the sentencing enhancement was a violation of the Sixth Amendment right to jury trial, but had presented instead a double jeopardy claim. Thus, the issue before the Court in *Booker* was not raised in *Watts*.⁷⁶

The second part of the majority opinion in *Booker-Fanfan* was written by Justice Breyer, for a bare majority including Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Ginsburg. Justice Breyer addressed the remedy for the Sixth Amendment violation described by Justice Stevens. Justice Breyer set forth two possible remedies: the application of a jury trial requirement for all facts relied on at sentencing or the alternative of converting the mandatory guidelines to advisory guidelines.⁷⁷ Justice Breyer’s opinion opted for the latter, with Justice Stevens supporting the former remedy in his dissenting opinion. Justice Breyer engaged in a cost-benefit analysis of the two options. He stated that because the language of the Sentencing Act contemplates judge, not jury, sentencing, imposing jury fact-finding would weaken the real conduct aspect of the Guidelines; imposition of a Sixth Amendment requirement on the Federal Sentencing Guidelines would be too complex; plea bargaining would make

73. *Booker*, 543 U.S. at 244 (citing *Apprendi* 530 U.S. at 490).

74. *Id.* at 236.

75. *Id.* at 237.

76. *Id.* at 240.

77. *Id.* at 246.

matters worse, i.e. less real conduct based, giving prosecutors too much power to decide what facts to charge; and Congress would not have approved of a system in which it was harder to adjust sentences upward than downward.⁷⁸ After concluding that “Congress, had it been faced with the constitutional jury trial requirement, likely would not have passed the same Sentencing Act,”⁷⁹ Justice Breyer turned to the inquiry of which portion of the statute had to be severed to put the act in compliance with the Sixth Amendment constitutional requirement recognized in the first part of the Court’s opinion.⁸⁰

Justice Breyer then announced that the law could be made constitutional by severing and excising two provisions: the requirement of 18 U.S.C. § 3553(b)(1) that the Guidelines sentence, absent a justified departure, is mandatory and the provisions of 18 U.S.C. § 3742(e) regarding appeals with a *de novo* standard of review.⁸¹ Without these provisions, Justice Breyer concluded the sentencing act could function independently. Having excised the standard of review on appeal by severing § 3742(e), Justice Breyer announced that the implicit standard of review was reasonableness, which had in fact been the statutory standard until amendments to § 3742 in 2003 provided for *de novo* review of departures.⁸²

Justice Stevens, joined in his dissent by Justice Souter and in part by Justice Scalia, criticized Justice Breyer’s remedy as overbroad and contrary to Congress’s intent in passing the Sentencing Act.⁸³ Justice Stevens pointed out that although the House initially passed an advisory guidelines statute in 1984, the Senate’s version of mandatory guidelines prevailed.⁸⁴ Furthermore, since the initial passage of the Sentencing Act in 1984, Congress had decreased judicial discretion.

Justices Scalia and Thomas joined Justice Stevens’s majority opinion, but also wrote separately. Justice Scalia lamented that one could not foretell whether the remedial opinion would result in appellate review that imposed *de facto* mandatory sentencing or in just one more layer of unfettered judicial discretion. Justice Thomas wrote to explain that a narrower holding was appropriate, because the Guidelines as *applied* in Booker’s case resulted in an unconstitutional sentence, but did not mandate the facial invalidation of the statute that the majority imposed.⁸⁵

Booker told lower courts that the Guidelines, as written, violated the Sixth Amendment, that the remedy would be to treat the Guidelines as advisory (although they had to be considered in each case) and that appellate review would be based on reasonableness. But the two parts of the majority opinion do not fit together neatly.

78. *Id.*

79. *Id.* at 258.

80. *Id.*

81. *Id.* at 258-59.

82. *Id.* at 260-61.

83. *Id.* at 272.

84. *Id.* at 294.

85. *Id.* at 316.

This opinion of more than one hundred pages provided lower courts with a great deal of language on which to rely, but some of it seemingly inconsistent.

III. POST-*BOOKER*: KEY CHOICES FOR DISTRICT COURTS

District courts were ready when the Supreme Court issued *Booker*. They had cases waiting to be sentenced and cases waiting for resentencing. The day after *Booker* was decided, Judge Cassell of Utah issued the first district court opinion analyzing this new sentencing paradigm.

A. *Weight Given to the Guidelines*

In the case of *United States v. Wilson*,⁸⁶ Judge Cassell identified the key issue for district courts as “how ‘advisory’ the Guidelines are” post-*Booker*. Judge Cassell set forth one standard for district courts to follow. He wrote that he would continue to give “considerable weight” or “heavy weight” to the Sentencing Guidelines, deviating from the applicable range only “in unusual cases for clearly identified and persuasive reasons.”⁸⁷ Judge Cassell, a former law professor, wrote a lengthy, thoughtful opinion explaining that his decision was based on the fact that Congress had ratified the Guidelines as the appropriate sentences to achieve the goals of the Sentencing Act.

In the *Wilson* opinion, Judge Cassell states that Justice Scalia accurately described the sentencing judge’s freedom: “[T]he sentencing judge, after considering the recited factors (including the Guidelines) has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range.”⁸⁸ It is interesting that Judge Cassell describes Justice Scalia’s statement as “accurate” because there now are clearly limitations of reasonableness and appellate review that did not exist before the Guidelines.⁸⁹ Judge Cassell further contends that the “wise exercise of that discretionary authority” requires a judge to consider the congressional mandates of the past sixteen years.⁹⁰ Judge Cassell recognizes the purposes of the Sentencing Reform Act as stated in 18 U.S.C. § 3553(a) (“§ 3553 factors”):

- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;

86. 350 F. Supp. 2d 910 (D. Utah 2005). Judge Cassell issued a second memorandum in the case a few weeks later. *United States v. Wilson*, 355 F. Supp. 2d 1269 (D. Utah 2005).

87. *Id.* at 912.

88. *Id.* at 913-14 (citing *United States v. Booker*, 543 U.S. 220, 305 (2005) (Scalia, J., dissenting)).

89. *Id.* at 914.

90. *Id.*

- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]⁹¹

Notably, at this point in his argument, Judge Cassell does not list the other 3553(a) factors courts are directed to consider, including the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, and restitution. Judge Cassell concludes that the Guidelines sentences, having been crafted by an expert agency and refined over fifteen years, generally achieve these congressionally-mandated purposes of punishment.⁹² He also argues that further evidence that the Guidelines generally achieve just punishment includes surveys that the Guidelines match the public's view of appropriate sentences.⁹³

With respect to deterrence, Judge Cassell argues that the United States Sentencing Commission, with its staff and expertise, is in a much better position to determine what sentences will deter than is an individual judge.⁹⁴ He also cites several studies indicating that the decline in violent crime over the past years was due to the increased rate of incarceration.⁹⁵ In considering the purpose of rehabilitation, Judge Cassell rather succinctly states that rehabilitation is in a secondary position for serious crimes, in part because "the court has no way of determining whether a defendant has been rehabilitated."⁹⁶

Turning to the parsimony provision of § 3553, that a "court shall impose a sentence sufficient, but not greater than necessary,"⁹⁷ Judge Cassell concludes that the Guidelines sentences are designed to meet the key goal of providing *sufficient* punishment.⁹⁸ The final reason Judge Cassell urges deference to the Guidelines is to avoid unwarranted sentencing disparity, which Judge Cassell says "was the main goal of the Sentencing Reform Act."⁹⁹ Here Judge Cassell sees no middle ground. Judge Cassell predicts that if each judge follows his or her own views of just punishment and adequate deterrence, the result would be "intolerable" and a "return to the pre-Guidelines days" with "astounding disparities."¹⁰⁰ In this argument, Judge Cassell ignores both the standard of reasonableness imposed by *Booker* and the opportunity for appellate review as

91. *Id.* (citing 18 U.S.C. § 3553(a)(2) (2000)).

92. *Id.* at 914.

93. *Id.* at 916-18 (citing PETER ROSSI & RICHARD BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS CONVERGE, 92-93, tbl.5.5).

94. *Id.* at 921.

95. *Id.* at 918-20.

96. *Id.* at 921-22.

97. *Id.* at 922.

98. *Id.* at 922-24.

99. *Id.* at 924.

100. *Id.*

possible mediating factors. Judge Cassell concludes that, “the Guidelines are the *only* standard available to all judges around the country today. For that reason alone, the Guidelines should be followed in all but the most exceptional cases.”¹⁰¹

In sum, Judge Cassell’s determination to give substantial weight to the Guidelines develops from his assessment that Congress and the Commission have already satisfied the purposes delineated in § 3553(a)(2) in determining the appropriate guidelines. Judge Cassell also seems to be considering the implications for Congress of how judges interpret *Booker*. Judge Cassell suggests that if judges exercise too much discretion, Congress will surely legislate against that.¹⁰²

In the second published district court opinion applying *Booker*, *United States v. Ranum*,¹⁰³ Judge Adelman of the Eastern District of Wisconsin strongly disagreed with Judge Cassell. Judge Adelman said that *Wilson* is inconsistent with the remedial majority in *Booker*, which “direct[s] courts to consider all of the section 3553(a) factors, many of which the Guidelines either reject or ignore.”¹⁰⁴ Judge Adelman viewed the Sentencing Guidelines and the § 3553(a) factors as sometimes creating conflicts that courts would have to resolve. Judge Cassell, in stark contrast, viewed the Guidelines as implementing the § 3553(a)(1) factors.¹⁰⁵

Judge Adelman also pointed out the other provisions of § 3553(a), including subsection (1), which directs the courts to consider “the nature and circumstances of the offense and the history and characteristics of the defendant,”¹⁰⁶ and subsection (7), which directs courts to consider the need to provide restitution to victims.¹⁰⁷ He noted that with respect to the latter, the Guidelines explicitly forbid departures to facilitate restitution.¹⁰⁸

Judge Adelman reasoned that while courts must “seriously consider” the Guidelines and give reasons for sentences outside the range, “in doing so courts should not follow the old departure methodology.”¹⁰⁹ Judge Adelman went on to state, “[t]he Guidelines are not binding, and courts need not justify a sentence outside of them by citing factors that take the case outside the ‘heartland.’”¹¹⁰

Rather, courts are free to disagree, in individual cases and in the exercise of discretion, with the actual range proposed by the Guidelines, so long

101. *Id.* at 925.

102. *Id.* at 931-32.

103. 353 F. Supp. 2d 984 (E.D. Wis. 2005).

104. *Id.* at 985-86.

105. *Wilson*, 350 F. Supp. 2d at 916-24 (D. Utah 2005).

106. *Id.* at 985.

107. *Ranum*, 353 F. Supp. 2d at 985.

108. *Id.* at 986 (citing *United States v. Seacott*, 15 F.3d 1380, 1388-89 (7th Cir. 1994)).

109. *Id.* at 986-87.

110. *Id.* at 987.

as the ultimate sentence is reasonable and carefully supported by reasons tied to the § 3553(a) factors.¹¹¹

Judge Adelman has been one of the most prolific authors of sentencing memoranda, having written more than two dozen in the ten months following *Booker*. In those cases, some defendants were sentenced to Guidelines sentences, but the majority received sentences below the Guidelines.

Wilson and *Ranum* became guideposts for other courts that then identified their own philosophies by reference.¹¹² In the ensuing weeks, several courts explicitly agreed with *Ranum*, including courts in West Virginia,¹¹³ Iowa,¹¹⁴ New York,¹¹⁵ and New Mexico.¹¹⁶ Judge Goodwin of West Virginia weighed in with *Ranum* for two main reasons. First, he said, § 3553(a) directed courts to consider factors that were not thoroughly considered by the Guidelines, such as age, education, and health and, second, to treat the advisory Guidelines as presumptively reasonable would be the “equivalent of imposing a ‘*de facto* mandatory sentence’” on a defendant.¹¹⁷ Other courts weighed in strongly in favor of *Wilson*’s deference to the Guidelines, including judges in Texas,¹¹⁸ North Dakota,¹¹⁹ New Mexico,¹²⁰ Nebraska,¹²¹ and Tennessee.¹²² One judge described his

111. *Id.* at 987.

112. For example, an Ohio district court said, “[w]hile this Court is cognizant of the line of district court cases which have held that the sentencing Guidelines provide the ‘presumptively correct sentence’ and should be given ‘heavy,’ ‘substantial,’ or ‘great’ weight . . . it is not persuaded by their reasoning that the Guidelines operate as a sort of ‘super factor’ trumping everything else in all but unusual cases.” *United States v. Strange*, 370 F. Supp. 2d 644, 650 (N.D. Ohio 2005) (citations omitted).

113. Judge Goodwin said, “I have taken the position articulated in *United States v. Ranum* [citation omitted] and other cases, that the proper treatment of the Guideline advice is to balance it with the other sentencing factors found in § 3553(a).” *United States v. Moreland*, 366 F. Supp. 2d 416, 418 (S.D. W.Va. 2005).

114. *United States v. Myers*, 353 F. Supp. 2d 1026, 1028 (S.D. Iowa 2005) (“This Court adopts Judge Adelman’s view. To treat the Guidelines as presumptive is to concede the converse, i.e., that any sentence imposed outside the Guideline range would be presumptively unreasonable in the absence of clearly identified reasons. If presumptive, the Guidelines would continue to overshadow the other factors listed in section 3553(a), causing an imbalance in the application of the statute to a particular defendant by making the Guidelines, in effect, still mandatory.”).

115. *Simon v. United States*, 361 F. Supp. 2d 35 (E.D.N.Y. 2005)

116. *United States v. Pacheco-Soto*, 386 F. Supp. 2d 1198, 1203 (D.N.M. 2005) (“The *Ranum* approach appropriately encourages district courts to abandon a ‘fear of judging’ outside the confines of the Guidelines.”).

117. *Moreland*, 366 F. Supp. 2d at 418 (S.D. W.Va. 2005) (citing *Simon*, 361 F. Supp. 32).

118. *United States v. Harper*, 360 F. Supp. 2d 833, 834 (E.D. Tex. 2005) (“*Booker/Fanfan* makes the sentencing Guidelines advisory. But the opinion’s clear import requires the court to give the Guidelines substantial weight. The better reasoned decision interpreting *Booker/Fanfan* espouses this interpretation. See *United States v. Wilson* 350 F. Supp. 2d 910 (D. Utah 2005). This view is especially appropriate, given Congressional intent and guidance expressed over the years before and after the Guidelines were adopted, the enormous input from all stakeholders to Congress and to the Sentencing Commission, and the years of study and revision by the Sentencing Commission.”)

119. *United States v. Peach*, 356 F. Supp. 2d 1018 (D. N.D. 2005); *United States v. Zastoupil*, No. C1-04-76, 2005 WL 1398689 (D.N.D. June 14, 2005).

120. *United States v. Corral-Alvarez*, 381 F. Supp. 2d 1286 (D.N.M. 2005).

121. *United States v. Wanning*, 354 F. Supp. 2d 1056 (D. Neb. 2005).

approach as making the Guidelines the centerpiece of sentencing.¹²³ Another court emphasized the Commission's post-*Booker* statement urging that courts give substantial weight to the Guidelines.¹²⁴

Several courts, while not expressly agreeing with *Ranum*, rejected the reasoning in *Wilson*. Just two weeks after *Wilson*, Judge Bataillon of Nebraska rejected the government's request to sentence a defendant within the Guidelines "absent highly unusual circumstances."¹²⁵ To do that, reasoned judge Bataillon, would "effectively convert[] the now-advisory Guidelines to mandatory Guidelines triggering unconstitutionality in the same way the Washington Guidelines did in *Blakely*."¹²⁶

Judge Ellis of the Eastern District of Virginia declined to label the degree of deference to be afforded the Guidelines. He succinctly noted that, on the one hand, § 3553(a) did not differentiate among the various factors to be considered, including the Guidelines sentence, but also recognized, on the other hand, that avoiding unwarranted disparities required some benchmark, such as what the Guidelines provided.¹²⁷ Judge Ellis ultimately emphasized that, "sentencing, in the end, must involve the exercise of *judgment, i.e.,* a judge's discerning opinion that results from identifying and weighing fairly all of the factors relevant to achieving the statutory sentencing goals."¹²⁸ Judge Collier of Tennessee reached a middle ground as well, recognizing that Congress is in the best position to make some determinations, such as judging which drugs are most dangerous to society, but that the court could better make judgments about such factors as whether someone really was a career offender.¹²⁹

In Judge Gertner's first opinion addressing *Booker*, *United States v. Jaber*,¹³⁰ she also declined to label the degree of deference to be afforded the Guidelines, but expressly rejected *Wilson's* reasoning.¹³¹ Judge Gertner concluded that *Wilson* overstated the case for deference to the Commission and Guidelines because (1) the Guidelines were not and could not be comprehensive; (2) the Guidelines did not implement the purposes of sentencing enumerated by § 3553(a); (3) the Commission had not developed the Guidelines through analysis as the statute had anticipated; (4) Congress only approved the Guidelines generally, not specific

122. *United States v. Clay*, No. 2:03CR73, 2005 WL 1076243 (E.D. Tenn. May 6, 2005).

123. *United States v. Bailey*, 369 F. Supp. 2d 1090, 1103 (D. Neb. 2005).

124. *Peach*, 356 F. Supp. 2d at 1020-21 (citing Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security, Commission on the Judiciary, 109th Cong. (Feb. 10, 2005) (testimony of Judge Ricardo H. Hinojosa, Chair of the United States Sentencing Comm.)).

125. *United States v. Kelley*, 355 F. Supp. 2d 1031, 1036 (D. Neb. 2005).

126. *Id.*

127. *United States v. Bieheiri*, 356 F. Supp. 2d 589, 593 (E.D. Va. 2005).

128. *Id.* at 594.

129. *United States v. Phelps*, 366 F. Supp. 2d 580, 580-90 (E.D. Tenn. 2005).

130. 362 F. Supp. 2d 365 (D. Mass. 2005).

131. Prior to *Booker*, Judge Gertner had decided to apply the Guidelines as advisory. *United States v. Mueffelman*, 327 F. Supp. 2d 79 (D. Mass. 2005).

guidelines; (5) the Guidelines may reflect general public opinion, but not the public's view of individual cases; and (6) there is substantial debate about whether the Guidelines have led to crime reduction.¹³² Recognizing the continuing importance of the Guidelines, Judge Gertner said that in each case courts should "explain, correlate to the purposes of sentencing, cite to authoritative sources, and be subject to appellate review."¹³³ She also urged the Commission to return to its original mission of studying the effect of sentences on the crime rate and monitoring disparity.¹³⁴

Some judges have decided to factor into the determination of how much weight to give to the advisory Guidelines sentence how certain they are that the fact-finding was accurate. For example, Judge Goodwin of West Virginia concluded that after calculating the advisory Guidelines sentence according to the Guidelines procedures, including the preponderance of the evidence burden of proof, he would then calculate a "Guidelines" sentence using the beyond a reasonable doubt standard of proof.¹³⁵ Judge Goodwin will then evaluate the difference between the two to "weigh the reliability of the advice provided by the Guidelines."¹³⁶

These early opinions interpreting *Booker* immediately demonstrated the difficulty in discerning the appropriate degree of deference to the Guidelines that Justice Scalia had predicted in his dissenting opinion in *Booker*.¹³⁷ One court characterized the debate among federal district judges as "raging."¹³⁸ Differences in perspective among district judges are further demonstrated by one court's expectation that Congress will have to clarify the degree of deference to be afforded the Guidelines, while another court eagerly awaits an appellate court opinion to provide the clarification.

This discussion has thus far focused on the first level of difference among judges: the named degree of deference to be given to the Guidelines, for which great deference or just one factor among many under § 3553 are two key descriptions. The next inquiry is, does the terminology translate into an actual difference in sentencing? One judge may say she is giving great weight to the Guidelines, yet impose a sentence that is fifty percent less than the advisory Guidelines sentence.¹³⁹ Another judge may state that he is treating the advisory Guidelines as just one factor among many, yet impose precisely the sentence

132. *Jaber*, 362 F. Supp. 2d at 372-75.

133. *Id.* at 376.

134. *Id.*

135. *United States v. Gray*, 362 F. Supp. 2d 714, 723 (S.D. W.Va. 2005).

136. *Id.*

137. 543 U.S. 220, 312-14 (2005).

138. *United States v. Bailey*, 369 F. Supp. 1090, 1103 (D. Neb. 2005).

139. *See, e.g., United States v. Clay*, No. 2:03CR73, 2005 WL 1076243 (E.D. Tenn. May, 6 2005).

Although the court calculated the Guidelines sentence as either 188 to 235 months or 234 to 293 months and said it was giving substantial weight to the Guidelines, it imposed a sentence of 156 months, in part due to the crack-cocaine disparity. *Id.*

calculated under the Guidelines. In each instance the judge may be announcing a philosophy to be followed in subsequent cases, yet pronouncing a sentence in a single case that does not really verify whether the judge is in fact giving great or little deference to the advisory Guidelines.

There are many examples, however, that do indicate judges are sentencing according to their underlying choice about how much deference to give to the advisory Guidelines. For example, the case of *United States v. Gleich* demonstrates how deferential some judges remain toward the Guidelines.¹⁴⁰ The court initially sentenced Gleich under the Guidelines to ninety-seven months imprisonment for receipt of material involving the sexual exploitation of minors and possession of material involving the sexual exploitation of minors.¹⁴¹ The defendant appealed the sentence and the appellate court ruled that a five-level enhancement the district court had imposed under United States Sentencing Guideline section 2G2.2(b)(4) for engaging in a pattern of activity involving the sexual exploitation of a minor was unsupported by the evidence. On remand, the district court made clear that it believed the original sentence, and the enhancement underlying it, were correct. The court recalculated the Guidelines without the enhancement, resulting in a sentencing range of forty-six to fifty-seven months incarceration. The court imposed a sentence of fifty-seven months, giving deference to the Guidelines, rather than using the court's discretion to impose a higher sentence.¹⁴²

Beyond the fundamental, initial determination of the weight to be given to the Guidelines, judges are giving different weight depending on what determination is being calculated and what evidence is being used to establish a fact. In subsection C below, there is further discussion of the weight given, or not given, to particular determinations, such as the offense levels for crack cocaine, and to instances when the judges think the Guidelines do not give enough importance to some aspect of the defendant's life. With the sheer number of cases that district courts must sentence, *Booker* has quickly become accepted, despite these differences in interpretation. By the summer of 2005, some courts were issuing sentencing orders without even mentioning what weight to give the Guidelines after *Booker*. They simply proceeded to calculate the Guidelines sentences, determine any departures with the § 3553 factors, and impose a sentence.¹⁴³

140. No. 2:03CR73, 2005 WL 741921 (D.N.D. Mar. 30, 2005).

141. *Id.* at *1.

142. The court even stated, “[a] just and reasonable punishment is a sentence near the statutory maximum of fifteen years rather than at the low end of the advisory Guideline range.” *Id.* at *3.

143. See, e.g., *United States v. Frappier*, 377 F. Supp. 2d 220 (D. Me. 2005).

B. Have District Courts Changed How They Fact-Find for the Guidelines?

In addition to determining how much weight to accord the Guidelines now that they are advisory, district courts have had to decide whether the same fact-finding procedures should apply post-*Booker*. Although the degree of deference to the Guidelines calculation may seem like the most influential determinant of a defendant's ultimate sentence, the procedure used to calculate the advisory Guidelines sentence may have even greater influence in an individual case. In the original Federal Sentencing Guidelines effective in 1987, the Commission gave little attention to the procedures to be used at sentencing. The Commission included three brief guidelines, sections 6A1.1, 6A1.2, and 6A1.3, to set forth procedures.¹⁴⁴ They provided that there had to be a pre-sentence investigation and report (absent an explicit finding that one was not needed), that the pre-sentence report had to be disclosed prior to sentencing so parties could state any objection in writing, that parties had the opportunity to present information to the court regarding any factor important to the sentencing that was in dispute, and that the court should resolve any disputed factors. Gradually the courts interpreted the Guidelines and subsequent policy statements that controlled the procedural aspects of sentencing.

The burden of proof to be applied to fact-finding under the Guidelines was much debated and much litigated long before *Booker*. In assessing the relevant conduct for which a defendant is to be held accountable, every federal circuit ultimately concluded, despite arguments by commentators to the contrary, that in most instances the appropriate standard of proof for resolving factual disputes at sentencing was a preponderance of the evidence.¹⁴⁵ In reaching this conclusion, courts cited the Supreme Court's acceptance of the preponderance of the evidence standard for a mandatory minimum penalty.¹⁴⁶ In 1991, the Sentencing Commission amended the commentary to policy statement 6A1.3, explicitly adding that "use of a preponderance of the evidence standard is appropriate to meet the due process requirements and policy concerns in resolving disputes regarding application of the Guidelines to the facts of a case."¹⁴⁷ In 1997, the Supreme Court spoke approvingly of this language in *Watts* when it held that a sentencing court could consider conduct underlying an acquitted charge if that

144. U.S. SENTENCING GUIDELINES MANUAL §§ 6A1.1-3 (2005). These were amended and relabeled as policy statements in 1989. U.S. SENTENCING GUIDELINES MANUAL App. C, amend. 293 (2005).

145. See, e.g., *United States v. Wilson*, 900 F.2d 1350, 1353-54 (9th Cir.1990); *United States v. Frederick*, 897 F.2d 490, 492-93 (10th Cir.); *United States v. Alston*, 895 F.2d 1362, 1372-73 (11th Cir.1990); *United States v. Wright*, 873 F.2d 437, 441-42 (1st Cir.1989); *United States v. Guerra*, 888 F.2d 247, 251 (2d Cir. 1989); *United States v. McDowell*, 888 F.2d 285, 290-91 (3d Cir.1989); *United States v. Urrego-Linares*, 879 F.2d 1234, 1237-38 (4th Cir 1989); *United States v. Casto*, 889 F.2d 562, 570 (5th Cir.1989); *United States v. Silverman*, 889 F.2d 1531, 1535 (6th Cir. 1989); *United States v. White*, 888 F.2d 490, 499 (7th Cir. 1989); *United States v. Gooden*, 892 F.2d 725, 727-28 (8th Cir.1989); *United States v. Burke*, 888 F.2d 862, 869 (D.C. Cir. 1989).

146. See, e.g., *Wright*, 873 F.2d at 441 (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 92 (1986)).

147. U.S. SENTENCING GUIDELINES MANUAL App. C, amend. 387 (2005).

conduct was proved by a preponderance of the evidence.¹⁴⁸ The following year the Court again implicitly approved finding relevant conduct by a preponderance of the evidence in *United States v. Edwards*.¹⁴⁹

In his *Booker* majority opinion, Justice Stevens acknowledged that the *Watts* case was in such tension with the holding of *Booker*.¹⁵⁰ Justice Stevens wrote that *Watts* was not inconsistent with *Booker*, because in *Watts* the issue of a Sixth Amendment violation of the right to a jury had not been raised. Instead, Justice Stevens reminded us, *Watts* questioned the impact of the double jeopardy clause on the Guidelines. He concluded that it was that the Court had failed to address the issues now presented in *Booker*.¹⁵¹

Under *Booker*, district courts are consistently following a predictable set of steps in imposing sentences. Virtually every district court first calculates the Guidelines sentence, then determines whether any upward or downward Guidelines departures are warranted.¹⁵² The court then considers the other factors set forth in § 3553 and evaluates the Guidelines sentence in light of those factors. Then the court imposes sentence. But an important issue among district courts after *Booker* is whether the district court should follow all of the Guidelines rules in determining the advisory Guidelines sentence. Some district courts have interpreted *Booker* to mean that the courts are now free to make different choices on these key issues.

Most judges have concluded that when the Supreme Court said in *Booker* that sentencing courts should consider the Guidelines, that meant that the sentencing court should continue to follow all of the procedures set forth in the Guidelines.¹⁵³ Thus the vast majority of district courts are applying the preponderance of the evidence standard as the burden of proof for all fact-finding at sentencing.¹⁵⁴ As one would imagine, courts that have stated they will give great weight to the Guidelines determination are in agreement that they should follow all the procedural aspects of determining the sentences that are prescribed by the Guidelines and policy statements. They continue to determine factual

148. *United States v. Watts*, 519 U.S. 148 (1997).

149. 523 U.S. 511 (1998).

150. 543 U.S. 220, 241.

151. *Id.* n.4.

152. Some defense counsel have argued that this process is too slanted toward the Guidelines. They contend that a court should first consider what an appropriate sentence would be under the § 3553 factors without determining the Guidelines sentence. The court should then determine the Guidelines sentence, compare the two, and make a final decision.

153. See, e.g., *United States v. Phelps*, 366 F. Supp. 2d 580, 585 (E.D. Tenn. 2005) (concluding that post-*Booker*, in most cases, the court would “proceed just as it always has, ruling on objections to the PSR and resolving any factual disputes to the extent they would affect the applicable Guidelines range.”) “In doing so, the Court will continue to apply the preponderance of the evidence standard and will not consider itself restricted by the Federal Rules of Evidence.” *Id.*

154. See, e.g., *United States v. Agostini*, 365 F. Supp. 2d 530 (S.D.N.Y. 2005); *United States v. Ferby*, No. 00-DR-0053A, 2005 WL 1544802 (W.D.N.Y. July 1, 2005); *United States v. Little*, No. 3:02DR-27-H, 2005 U.S. Dist. LEXIS 33935 (W.D. Ky. Dec. 15, 2005).

matters at sentencing by the preponderance of the evidence as the Guidelines state.¹⁵⁵

Even among those who say that the Guidelines are now truly advisory and should not be given substantial deference over other § 3553 factors, most judges are following the Guidelines directive to determine the facts by a preponderance of the evidence. Judge Adelman of the Eastern District of Wisconsin, an ardent supporter of the view that the Guidelines are just one factor to be considered under 18 U.S.C. § 3553, is determining facts by a preponderance of the evidence.

Some courts that were requiring proof of facts beyond a reasonable doubt before *Booker* have returned to the lower standard of preponderance of the evidence. For example, following *Blakely v. Washington*¹⁵⁶ the District of Maine had required that “facts supporting Sentencing Guidelines enhancements be proven to a jury beyond a reasonable doubt, unless the defendant stipulated to the relevant facts or consented to judicial factfinding.”¹⁵⁷ After *Booker*, a court in that district concluded that a stipulation or jury verdict was no longer necessary to support an enhancement.¹⁵⁸ The court factored in an enhancement for an obliterated serial number in calculating a defendant’s Guidelines sentence, but then imposed a non-Guidelines sentence to make the sentence identical to the one his co-defendant had received in his pre-*Booker* sentence.¹⁵⁹ Judge Beaty of North Carolina held that although he had previously announced alternative sentences, in case the Guidelines were found unconstitutional, he would not have those sentences stand post-*Booker* because he had determined them by looking solely at the facts found by the jury or admitted by the defendant.¹⁶⁰ Judge Beaty held that those alternative sentences were “not in line with” the *Booker* remedial majority’s decision.¹⁶¹ The court would now determine the sentences based on all facts established by a preponderance of the evidence.¹⁶²

Other courts have developed a middle ground between the two possible burdens of proof: beyond a reasonable doubt and by a preponderance of the evidence. Judge Goodwin read *Booker* as requiring an initial determination of the Guidelines sentence according to the Guidelines procedures, including the burden of proof of preponderance of the evidence. However, in each case he then plans to evaluate the evidence under the beyond a reasonable doubt standard. Where the two results differ, he will consider the difference as an indication of the degree of reliability of the Guidelines advisory sentence. Judge Goodwin also

155. U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 Commentary (2005).

156. 542 U.S. 296 (2004).

157. *United States v. Revock*, 353 F. Supp. 2d 127, 128 (D. Me. 2005) (citing *United States v. Zompa*, 326 F. Supp. 2d 176 (D. Me. 2004) and *United States v. Fanfan*, 2004 WL 1723114, at *5 (D. Me. June 28, 2004)).

158. *Id.* (citing *United States v. Booker*, 543 U.S. 220, 244-45, 263-65 (2005)).

159. *Id.* at 129.

160. *United States v. Penniegraft*, 357 F. Supp. 2d 854, 856 (M.D.N.C. 2005).

161. *Id.*

162. *Id.* at 857.

said that although he does not believe the *Crawford* rule on confrontation applies at sentencing, he will give greater weight, when facts are in dispute, to first hand testimony rather than hearsay.¹⁶³

Acknowledging that numerous appellate cases have held that fact-finding by a preponderance of the evidence standard is appropriate after *Booker*, Judge Antoon of the Middle District of Florida issued a caveat similar to Judge Goodwin's: "The variance between the preponderance of the evidence standard and the reasonable doubt standard must necessarily bear, to some extent, on the persuasive force of an advisory Guidelines range."¹⁶⁴ Judge Antoon further contended that this was consistent with the continuing principle that determinations affecting one's liberty should be decided with exacting scrutiny.¹⁶⁵

As is the case regarding the degree of deference to be given to the advisory Guidelines, judges are not always explicit in stating the reasoning behind the manner in which they now determine a sentence. One court simply stated that although a presentence investigation report found a loss figure of \$8,000,000, the court would not rely on this because the amount had not been admitted by the defendant in his plea.¹⁶⁶ The court did not explain the basis for its decision.

The appellate courts that have considered the burden of proof after *Booker* have held that fact-finding under a preponderance standard is constitutional.¹⁶⁷ However, no appellate court has yet said that a district court can *not* use a higher burden of proof. The Seventh Circuit stated, "[t]he remedial portion of *Booker* held that decisions about sentencing factors will continue to be made by judges, on the preponderance of the evidence, an approach that comports with the sixth amendment so long as the guideline system has some flexibility in application."¹⁶⁸ Similarly, the Fifth Circuit announced in *United States v. Mares* that, "[t]he Guideline range should be determined in the same manner as before *Booker/Fanfan*. . . . The sentencing judge is entitled to find by a preponderance

163. "I strongly encourage the use of witness testimony and cross-examination to resolve factual disputes at sentencing, notwithstanding my finding that *Crawford* does not apply at sentencing under the post-*Booker* sentencing regime." *U.S. v. Gray*, 362 F. Supp. 2d 714, 725 (S.D.W. Va. 2005).

164. *United States v. Maali*, No. CR-171ORL28KRS, 2005 WL 2204982, at *4 (M.D. Fla. Sept. 8, 2005) (citing *Gray*, 362 F. Supp. 2d at 723-24; *United States v. Coleman*, 370 F. Supp. 2d 661, 668 (S.D. Ohio 2005)).

165. *Id.* (citing *In re Winship*, 397 U.S. 358, 372 (1970)).

166. *United States v. West*, 383 F. Supp. 2d 517, 523 (S.D.N.Y. 2005).

167. *See, e.g., McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005) ("The remedial portion of *Booker* held that decisions about sentencing factors will continue to be made by judges, on the preponderance of the evidence, an approach that comports with the sixth amendment so long as the guideline system has some flexibility in application."); *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005) ("The sentencing judge is entitled to find by a preponderance of the evidence all the facts relevant to the determination of a Guideline sentencing range and all facts relevant to the determination of a non-Guidelines sentence."); *United States v. Guzman*, 404 F.3d 139, 143 (2d Cir. 2005); *Cirilo-Munoz v. United States*, 404 F.3d 527, 532-33 (1st Cir. 2005); *United States v. Yagar*, 404 F.3d 967, 972 (6th Cir. 2005) ("[A] finding under the Guidelines must be based on reliable information and a preponderance of the evidence."); *United States v. Pirani*, 406 F.3d 543, 552 n.4 (8th Cir. 2005).

168. *McReynolds*, 307 F.3d at 481.

of the evidence all the facts relevant to the determination of a Guideline sentencing range and all facts relevant to the determination of a non-Guidelines sentence.”¹⁶⁹

Uncertainty remains, however, because just two weeks after the Fifth Circuit announced in *Mares* that the preponderance of the evidence standard was adequate, a district court within that jurisdiction held that *Mares* was not controlling in light of the Supreme Court’s subsequent ruling in *Shepard v. United States*.¹⁷⁰ The Supreme Court held that a police report could not be relied on for enhancements under the Armed Career Criminal Act because that was a fact that, absent a waiver by the defendant, had to be found by a jury.¹⁷¹ The district court stated, “this court must respectfully conclude that the even more recent Supreme Court decision in *Shepard* requires that sentence enhancements under the Guidelines require more than inferences drawn from a preponderance of the evidence.”¹⁷²

Although in the minority, some district courts have held that the preponderance of the evidence standard is inadequate for fact-finding at sentencing post-*Booker*. Among such district courts, some require a beyond a reasonable doubt burden of proof as a matter of preference while others say it is a constitutional requirement. In *United States v. Schuler*, the district court held that “it is up to the District Court’s discretion as how to establish the factual basis for the sentencing factors.”¹⁷³ The court went on to conclude that each sentencing court could choose whether to have the jury find sentencing factors beyond a reasonable doubt or find the sentencing factors itself by a preponderance of the evidence.

Judge Marbly of Ohio stated that he believed enhancements should be determined by beyond a reasonable doubt, but decided that, in light of the consensus of appellate courts, he would use preponderance of the evidence for enhancements not involving acquitted conduct.¹⁷⁴ For enhancements involving acquitted conduct, he stated that the reasonable doubt standard should always be used. Judge Marbly held that otherwise a defendant’s Sixth Amendment right to a jury trial is “eviscerated.”¹⁷⁵ However, in determining the sentence in the case before him, Judge Marbly concluded that he would not disregard the jury’s acquittal, since that would marginalize the jury and give the government an unfair second opportunity to prove its case.¹⁷⁶ Thus, Judge Marbly seemingly refused to consider the acquitted conduct as a basis for enhancement under any

169. *Mares*, 402 F.3d at 519.

170. 544 U.S. 13 (2005).

171. *United States v. Harper*, 360 F. Supp. 2d 833, 835 (E.D. Tex. 2005).

172. *Id.* at 836.

173. 373 F. Supp. 2d 1244, 1248 (D. Wyo. 2005).

174. *United States v. Coleman*, 370 F. Supp. 2d 661, 668 (S.D. Ohio 2005).

175. *Id.* at 672.

176. *Id.*

standard. Judge Friedman of the District of Columbia agreed that while most factual issues at sentencing could be decided by a preponderance of the evidence, acquitted conduct would have to be proved beyond a reasonable doubt, if it could properly be considered at all.¹⁷⁷

Other courts insisting that the beyond a reasonable doubt standard is required have also relied on the Fifth Amendment's due process requirement. Judge Bataillon of Nebraska held, "the Due Process Clause is implicated whenever a judge determines a fact by a standard lower than 'beyond a reasonable doubt' if that factual finding would increase the punishment above the lawful sentence that could have been imposed absent that fact."¹⁷⁸ The court stated that "in order to comply with due process in determining a reasonable sentence, [it] will require that a defendant is afforded procedural protections under the Fifth and Sixth Amendments in connection with any facts on which the government seeks to rely to increase a defendant's sentence."¹⁷⁹ Judge Bataillon further held that a defendant cannot waive the burden of proof.¹⁸⁰ Judge Bataillon acknowledged that the line between a sentencing factor and an element of the crime was unclear after *Booker*. He decided that the best course was to err on the side of avoiding a constitutional problem and thus adopt sentencing procedures that complied with Fifth and Sixth Amendments procedural safeguards. Judge Bataillon announced that he would "require that facts that enhance a sentence are properly pled in an indictment or information, and either admitted, or submitted to a jury (or to the court if the right to a trial by jury is waived) for determination by proof beyond a reasonable doubt."¹⁸¹ Recognizing that this might not be *required* by *Booker*, the court noted that it was not precluded. He further held that "it can never be reasonable to base any significant increase in a defendant's sentence on facts that have not been proved beyond a reasonable doubt." In the case under consideration, the court decided that the government had not proved beyond a reasonable doubt that the defendant had possessed a counterfeit device, as alleged by the government and in the presentence report.¹⁸²

In a subsequent methamphetamine case, Judge Bataillon applied this analysis and limited the quantity of drugs for which the defendant could be sentenced to that stated in the indictment and admitted to in the guilty plea.¹⁸³ Similarly, in a counterfeiting case, the court based the offense level on the \$800 in counterfeit money to which the defendant pleaded guilty and declined to consider the

177. *United States v. Baldwin*, 389 F. Supp. 2d 1, 2 (D.D.C. 2005).

178. *United States v. Kelley*, 355 F. Supp. 2d 1031, 1035 (D. Neb. 2005) (citing *United States v. Booker*, 543 U.S. 220, 319 n.6 (2005) (Thomas, J., dissenting in part)).

179. *Coleman*, 355 F. Supp. 2d at 1037.

180. *Id.*

181. *Id.* at 1039.

182. *Id.*

183. *United States v. Rodriguez*, No. 8:03CR36, 2005 WL 1319259 (D. Neb. June 3, 2005).

additional \$1320 attributed to the defendant in the presentence report.¹⁸⁴ Judge Bataillon noted in another case that applying an obstruction of justice enhancement would violate the defendant's Fifth Amendment right to due process because the facts were not pled in the indictment or proven beyond a reasonable doubt.¹⁸⁵

Judge Gertner is one of the judges who has interpreted *Booker* as the death knell for *Watts*. In *United States v. Pimental*,¹⁸⁶ Judge Gertner concluded that the holding in *Booker* logically requires abandoning *Watts*: "It makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury . . . and *also* conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing."¹⁸⁷ Judge Gertner points out Justice Stevens statements in *Booker* that in *Watts* the Supreme Court did not consider the Sixth Amendment issue in that case.

Judge Gertner recognizes that other courts have found continued reliance on acquitted conduct permissible after *Booker*, i.e., that *Watts* was not eroded, by focusing on Justice Breyer's remedial portion of the majority opinion. But, she argues that "[t]o consider acquitted conduct trivializes 'legal guilt' or 'legal innocence.'"¹⁸⁸ Judge Gertner contends that only in a completely indeterminate sentencing scheme would it be acceptable to use the preponderance of the evidence standard. The current system, however, is quite different because facts have important consequences.

Judge Gertner next concludes that even if *Watts* is still valid, the appropriate standard of proof is beyond a reasonable doubt because the advisory Guidelines sentence plays a "critical role."¹⁸⁹ Under Judge Gertner's view, the more limited the freedom to sentence, the greater procedural protections there must be: "If the Guidelines continue to be important, if facts the Guidelines make significant continue to be extremely relevant, then Due Process requires procedural safeguards and a heightened standard of proof, namely, proof beyond a reasonable doubt."¹⁹⁰

One district court seems simply unwilling to accept Justice Breyer's remedial opinion. Judge Holmes, of the Northern District of Oklahoma, issued an opinion just nine days after *Booker* in which he essentially adopted Justice Stevens's dissent as his procedure. Judge Holmes disagreed with Justice Breyer's remedial opinion, saying "[t]he Court finds that the history of the Act dictates that any

184. *United States v. Kwame Okai*, No. 4:05CR19, 2005 WL 2042301 (D. Neb. Aug. 22, 2005).

185. *United States v. Lozano*, No. 8:03CR481, 2005 WL 3019488, at *5 (D. Neb. Nov. 10, 2005).

186. 367 F. Supp. 2d 143 (D. Mass. 2005).

187. *Id.* at 150 (emphasis in original).

188. *Id.* at 152.

189. *Id.* at 153.

190. *Id.* at 154.

federal sentencing system should be mandatory.”¹⁹¹ Judge Holmes announced that he would continue to sentence according to his pre-*Booker* plan that included accepting a guilty plea only when accompanied by a Sixth Amendment waiver of jury trial that expressly applied to sentencing and judicial fact-finding at sentencing with a beyond a reasonable doubt standard in accordance with the Federal Rules of Evidence.¹⁹²

The differing burdens of proof can make a significant difference in sentences involving relevant conduct. A number of district courts believe *Booker* left unanswered what is constitutionally required procedurally at sentencing, particularly when the government asks that the defendant be sentenced based on relevant conduct of which the defendant was acquitted.¹⁹³ Some courts, looking to Justice Stevens’s majority opinion, believe that *Watts* is no longer good law and acquitted conduct must, at a minimum, be proved beyond a reasonable doubt.¹⁹⁴ Other courts, looking to Justice Breyer’s remedial opinion, believe that now that the Guidelines are advisory, courts can and should decide relevant conduct issues based on a preponderance of the evidence.¹⁹⁵ Until this difference is resolved, there will be disparities in sentences imposed under the two different standards.¹⁹⁶ The district courts are clearly waiting for the Supreme Court to provide more direction on the limits of *Apprendi*, *Blakely*, and *Booker*. With two new members of the Court, that direction is even more difficult to predict.

C. *Imposing Non-Guidelines Sentences*

Once the district court has calculated the advisory Guidelines sentence, the court has discretion to choose whether to impose that Guidelines sentence or some other reasonable sentence after considering the factors of § 3553(a). This section identifies when and why courts are choosing to impose non-Guidelines sentences in certain cases. The first group of cases deals with perceived disparities, issues that were vigorously litigated prior to *Booker* and resolved either by the courts or by Congress. Their resolution, however, was without a strong consensus among the judiciary. Consequently, with the new freedom offered by *Booker*, some district courts have found the previous rule unreasonable and applied a different standard. The second group of cases presents fact patterns where a departure may have been available, but the court chose to take the shortcut of considering what was a reasonable sentence under §

191. *United States v. Barkley*, 369 F. Supp. 2d 1309, 1315 (N.D. Okla. 2005).

192. *Id.* at 1318.

193. *E.g.*, *United States v. Coleman*, 370 F. Supp. 2d 661 (S.D. Ohio 2005).

194. *E.g.*, *United States v. Baldwin*, 389 F. Supp. 2d 1 (D.D.C. 2005).

195. *E.g.*, *United States v. Agostini*, 365 F. Supp. 2d 530 (S.D.N.Y. 2005); *United States v. Ferby*, No. 00-DR-0053A, 2005 WL 154802 (W.D.N.Y. July 1, 2005); *United States v. Little*, No. 3:02DR-27-H, 2005 U.S. Dist. LEXIS 33935 (W.D. Ky. Dec. 15, 2005).

196. For a discussion of the two *Booker* opinions clashing on appeal, see Craig Green, *Booker and Fanfan: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 GEO. L.J. 395 (2005).

3553. The third group identifies cases in which a court found a factor that the Guidelines have deemed “not normally relevant” and relied on it to impose a lesser sentence. Cases in this group could easily overlap with those involving potential departures. The final group is instances where the sentencing court simply disagreed with the Guidelines sentence, based on the facts of the offense itself. In each of these cases, the court judged the conduct to be less deserving of punishment than the Guidelines did. In many of these non-Guidelines categories, courts cite the “parsimony” provision of § 3553(a).

1. Disparity

While a key Guidelines goal, indeed perhaps Congress’s overriding goal, was to reduce unwarranted disparity, many district courts view the freedom granted by *Booker* as allowing them to avoid disparities imposed by the Guidelines. Two areas where many judges believe the Guidelines currently impose disparities are “fast-track” sentencing for illegal immigration and the “100 to 1 ratio” for calculating crack cocaine sentences in contrast with powder cocaine sentences.

Jurisdictions that have a “fast-track” program offer substantially reduced sentences to defendants who promptly plead guilty to illegal reentry into the United States. These programs originated with federal prosecutors in states adjacent to Mexico that had tremendous numbers of reentry cases.¹⁹⁷ Under a fast-track program, a defendant who pleaded guilty early in the case and waived rights for motions and appeals could negotiate for a lower sentence through charge bargaining or a downward departure. Congress codified fast-track programs in the PROTECT Act of 2003.¹⁹⁸ Under these statutory provisions, the Attorney General can authorize fast-track programs in jurisdictions where the United States Attorney makes a request to have the program. The defendant must admit the facts and waive rights to pretrial motions, appeal, and collateral attack. In exchange, the government can recommend a four-level downward departure under United States Sentencing Guideline section 5K3.1. Although fast-track programs originated in states bordering Mexico, they are now available in an odd collection of jurisdictions including Nebraska, North Dakota, and the Northern District of Georgia.¹⁹⁹ There remain, however, fast-track programs outside of those authorized by the PROTECT Act that allow charge bargaining, potentially resulting in even greater decreases.

Some judges found the disparate sentences available for defendants convicted of illegal entry in fast-track jurisdictions troubling even before *Booker*. But, appellate courts consistently upheld the sentences.²⁰⁰ After *Booker*, however,

197. *United States v. Perez-Chavez*, 422 F. Supp. 2d 1255, 1267 (D. Utah 2005).

198. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 101 et. seq., 117 Stat. 65 (2003).

199. *Perez-Chavez*, 422 F. Supp. 2d at 1267.

200. *See, e.g., United States v. Bonnet-Grullon*, 212 F.3d 692, 697-705 (2d Cir. 2000).

judges have raised their concerns anew. In *United States v. Medrano-Duran*, Judge Kennelly of the Northern District of Illinois determined that the defendant's sentence of fifty-seven to seventy-one months under the Guidelines would range from thirty-seven months to sixty-three months under a fast-track program, depending on the jurisdiction in which he was prosecuted.²⁰¹ The court concluded that the disparity between the Guidelines sentence and the sentences available under fast-track programs was an unwarranted disparity among similarly situated defendants under § 3553(a)(6).²⁰² The court stated, "[t]here is nothing in § 3553, *Booker*, or any other existing authority to support a construction of § 3553(a)(6) that allows Congress and prosecutors to determine what sentence disparities are warranted and unwarranted but prevents a court from doing so."²⁰³ Accordingly, the court reduced the defendant's Guidelines range by three offense levels and imposed a sentence of forty-one months.

Judge Adelman first discussed the fast-track problem in *United States v. Galvez-Barrios*.²⁰⁴ In sentencing below the advisory Guidelines sentence for illegal reentry by a defendant with a prior aggravated felony conviction, Judge Adelman considered three key factors. First, Judge Adelman determined that the defendant's prior aggravated felony (aggravated battery) was not deserving of the sixteen-level increase in the offense level in part because of the specific circumstances of the prior felony.²⁰⁵ Second, Judge Adelman looked at the history of the amendment that provided for the sixteen-level enhancement for a prior conviction for an aggravated felony. Seemingly persuaded in part by a law review article, Judge Adelman noted that the significant enhancement was not the result of research, but was simply approval of a sentencing commissioner's suggestion.²⁰⁶ Third, Judge Adelman addressed the disparity between districts with fast-track programs and those that did not have such programs. He concluded that "it may be appropriate in some cases for [a] court to exercise . . . [its] discretion to minimize the sentencing disparity that fast-track programs create."²⁰⁷ Thus, the court imposed a sentence of twenty-four months, a four-level reduction. In a subsequent case, however, Judge Adelman declined to sentence below the advisory Guidelines, despite the defendant's request, based on fast-

201. *United States v. Medrano-Duran*, 386 F. Supp. 2d 943, 947 (N.D. Ill. 2005).

202. The court noted that the fast-track programs were not limited to districts with high numbers of illegal reentry cases. Prosecutors offices in Oregon, Idaho, Nebraska, and North Dakota handled only a few reentry cases a year but had fast-track programs. *Id.* at 947.

203. *Id.*

204. 355 F. Supp. 2d 958 (E.D. Wis. 2005).

205. The circumstances of the earlier case were that the defendant shot a man while trying to recover his property that the man and his associates had stolen from the defendant. Given these facts, Judge Adelman concluded that the defendant was not a danger to society because he committed no crimes other than illegal entry in the past twelve years. *Id.* at 964.

206. *Id.* at 962 (citing James P. Fleissner & James A. Shapiro, *Sentencing Illegal Aliens Convicted of Reentry After Deportation: A Proposal for Simplified and Principled Sentencing*, 8 FED. SENT'G REP. 264, 268 (1996)).

207. *Id.* at 963.

track disparity. In *United States v. Peralta-Espinoza*,²⁰⁸ Judge Adelman held that the thirty-month Guidelines sentence was appropriate because the defendant had reentered the United States to commit drug offenses.²⁰⁹

Presented with a fast-track disparity case with compelling facts, Judge Cassell of Utah “reluctantly” concluded that he should not vary from the Guidelines because that would ignore Congress’s directive in the PROTECT Act that only the Attorney General can authorize fast-track programs.²¹⁰ He reasoned that although the programs clearly caused sentencing disparity among similar defendants, Congress could conclude the benefits of quickly processing lots of illegal reentry cases outweighed the disparities. Thus, any disparity was arguably not “unwarranted.”²¹¹ The defendant in question was subject to a Guidelines sentence of eighteen to twenty-four months incarceration that would have been reduced to ten to sixteen months in a fast-track program with a three-level reduction. He had reentered the United States only at his wife’s urging, because she was dealing with overwhelming family burdens, including a premature infant and a terminally ill grandfather. Judge Cassell further noted that a fast-track program would have been available in Utah, but the Attorney General had denied the request of the United States Attorney for Utah to have one. Judge Cassell, while adhering to the Guidelines on this issue, urged “action to reduce the geographical differences,” noting, “the appearance of justice is not well served when the length of time a man spends in prison turns, without clear explanation, on the happenstance of the district in which he is arrested.”²¹² Ultimately, Judge Cassell departed from the sentence, based on extraordinary family circumstances, and sentenced the defendant to eight months.²¹³

While the fast-track disparity issue is relatively new, the crack to powder cocaine ratio of 100 to 1 dates back almost twenty years and has affected sentences in thousands of cases. This disparity has been extensively analyzed by scholars and the United States Sentencing Commission.²¹⁴ In the Anti-Drug Abuse Act of 1986 Congress established that one gram of crack cocaine would be treated the same as 100 grams of powder cocaine in determining mandatory minimum sentences.²¹⁵ The Commission relied on the mandatory minimums of that statute when it established the offense levels for crack cocaine and powder cocaine under the Guidelines. It subsequently reconsidered the discrepancy many times. In 1995, the Commission recommended treating crack cocaine and powder

208. 383 F. Supp. 2d 1107 (E.D. Wis. 2005).

209. *United States v. Ramirez-Ramirez*, 365 F. Supp. 2d 728 (E.D. Va. 2005).

210. *United States v. Perez-Chavez*, No. 2:05-CR-00003PGC, 2005 U.S. Dist. LEXIS 9252, at *1-2.

211. *Id.* at *23. (May 16, 2005).

212. *Id.* at *23.

213. *Id.* at *43.

214. *E.g.*, U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002).

215. Anti-Drug Abuse Act of 1986, Pub.L. 99-570, § 1001, 100 Stat. 3207 (1986).

cocaine equally, but Congress disapproved the proposed amendment. In 1997, the Commission urged Congress to consider alternatives, but Congress did not. In 2002, the Commission again asked Congress to correct this disparity, concluding in its report that the great difference in punishment is unwarranted and disparately impacts Blacks. As one court noted, “it is virtually impossible to find any authority suggesting a principled basis for the current disparity in sentences.”²¹⁶

With *Booker’s* ruling that the Guidelines are advisory, judges have been able to reconsider the 100 to 1 ratio for crack cocaine. In what appears to be the first published opinion after *Booker* discussing the issue, *United States v. Smith*,²¹⁷ Judge Adelman rejected the 100 to 1 ratio. Judge Adelman held that imposing a sentence where crack was deemed the equivalent of one hundred grams of powder cocaine was unreasonable and created unwarranted disparity. In support of his determination that the 100 to 1 ratio was unreasonable, Judge Adelman cited cases and articles concluding that the disparity lacked “persuasive penological or scientific justification and creates a racially disparate impact in federal sentencing.”²¹⁸ He also emphasized the Commission’s conclusion that there is no basis for the ratio of 100 to 1. Instead of the 100 to 1 ratio, Judge Adelman decided to apply a 20 to 1 ratio, which had been suggested by the Commission but rejected by Congress.

In the subsequent case of *United States v. Leroy*,²¹⁹ Judge Adelman said that in using the 20 to 1 ratio he was relying on 18 U.S.C. § 3553(a), which grants courts discretion to assess whether the Guideline range is greater than necessary to meet the purposes of sentencing, and 18 U.S.C. § 3553(a)(6), which allows courts to sentence to avoid unwarranted disparity. Because application of the Guidelines would have created unwarranted disparity among defendants who had been found guilty of similar conduct, and would have resulted in a sentence greater than necessary to comply with the purposes of 18 U.S.C. § 3553(a)(2), the court imposed a non-Guideline sentence using a 20 to 1 crack to cocaine ratio.²²⁰ Many other courts have also applied this 20 to 1 ratio, often citing *Smith*.²²¹

216. *United States v. Perry*, 389 F. Supp. 2d 278, 303 (D.R.I. 2005).

217. 359 F. Supp. 2d 771 (E.D. Wis. 2005).

218. *Id.* at 777.

219. 373 F. Supp. 2d 887, 891 (E.D. Wis. 2005).

220. *See also United States v. Beamon*, 373 F. Supp. 2d 878 (E.D. Wisc. 2005) (applying a 20 to 1 ratio).

221. *See, e.g., United States v. Castillo*, No. 03 Cr. 835, 2005 WL 1214280 (S.D.N.Y. May 20, 2005); *Perry*, 389 F. Supp. 2d at 303 (providing a lengthy discussion of the Commission’s conclusions about the crack disparity); *United States v. Stukes*, No. 03 CR. 601, 2005 U.S. Dist. LEXIS 23394 (S.D.N.Y. Oct. 12, 2005) (using a 20 to 1 ratio with no discussion of it except citing *Smith*).

Other courts have agreed that the 100 to 1 ratio is unreasonable and have imposed an even smaller ratio.²²² In *United States v. Fisher*, the court used a 10 to 1 ratio to calculate the defendant's Guideline sentence.²²³ The court noted several of the concerns discussed by Judge Adelman, but also expressed concern that defendants being sentenced for crack offenses rarely received safety valve treatment that would allow them to escape the mandatory minimum. The difficulty, of course, is that there is now great disparity for defendants who are sentenced for possession for sale or possession with intent to distribute crack cocaine based on the 100 to 1 ratio versus the 20 to 1 ratio, or the even lower 10 to 1 ratio.

Other courts may impose a non-Guidelines sentence in a crack cocaine case without specifically stating a substitute ratio.²²⁴ In *United States v. Nellum*, the court emphasized the § 3553(a) factors that led it to impose a sentence of 108 months instead of a sentence in the Guidelines range of 168 to 210 months.²²⁵ The court noted that the defendant would be sixty-five by the time of his release, an unlikely age for recidivism, and also emphasized the crack versus cocaine sentencing disparity.²²⁶ The court concluded that it did not need to identify an alternative to the 100 to 1 ratio because the court relied on the "myriad" of other § 3553 factors in determining the actual sentence.²²⁷

Some judges who believe the crack-cocaine ratio is too extreme have still chosen to follow the Guidelines. One court said:

[J]udge-made changes to the crack Guidelines, while sometimes principled, are (1) undemocratic, and (2) not plainly superior to the judgments of Congress. We should maintain the status quo when exercising our *Booker* discretion within the context of the crack cocaine Guidelines because we are judges and not legislators and because the status quo is what Congress has chosen. When it comes to the severity of punishment, Congress has the right to be wrong.²²⁸

In a direct response to this argument, another court stated, "the Guidelines are not an act of Congress. Furthermore, they are no longer mandatory according

222. See, e.g., *United States v. Clay*, No. 2:03CR73, 2005 WL 1076243 (E.D. Tenn. May 6, 2005). The ratio in *Clay* was not specified, nor was the quantity on which the court based the sentence, but it had to be between 5 to 1 and 20 to 1.

223. *United States v. Fisher*, No. 01 CR 543 -1, -2, -3, 2005 U.S. Dist. LEXIS 23184 (S.D.N.Y. Oct. 11, 2005).

224. See, e.g., *Simon v. United States*, 361 F. Supp. 2d 35 (E.D.N.Y. 2005).

225. *United States v. Nellum*, No. 2:03CR73, 2005 WL 300073 (N.D. Ind. Feb. 6, 2005).

226. *Id.* at *3-4.

227. *Id.*

228. *United States v. Tabor*, 365 F. Supp. 2d 1052, 1060 (D. Neb. 2005) (footnote omitted); see also *United States v. Cooper*, No. 01 CR 543 -1, -2, -3, 2005 LEXIS 16745 (N.D. Ill. Aug. 11, 2005) (considering an earlier sentencing that was remanded, the court said it was for Congress to change the crack-powder disparity, not the court).

to the Supreme Court's decision in *Booker*.²²⁹ Still, other courts are imposing sentences with the 100 to 1 ratio, finding in the particular case that the advisory Guidelines sentence is reasonable, without determining whether it is reasonable in all cases.²³⁰

Relying on *Booker*, district courts have claimed the opportunity to consider anew what constitutes unreasonable disparity. The above discussion considers disparity imposed by particular guidelines. A court can also employ a non-Guidelines sentence to avoid what the court perceives to be potential unwarranted disparity between the defendant currently being sentenced and a co-defendant. In *United States v. Strange*, the court imposed a sentence of twenty-one months rather than the Guidelines sentence of twenty-seven to thirty-three months because co-defendants had received fifteen and eighteen months respectively, even though their lower sentences were due to section 5K1.1 substantial assistance departures.²³¹

2. *Alternative to Finding Departures*

Some district courts are using the advisory Guidelines decreed by *Booker* to essentially grant departures while avoiding direct review of them. For example, in considering the sentence for a sixty-nine-year-old defendant who pleaded guilty to three counts of distribution of Oxycontin, the court recognized that the defendant's multiple, severe health problems, including the fact that she was now confined to a wheelchair, could be a basis for a downward departure from the Guidelines range of ninety-seven to 121 months.²³² The court noted that such a departure required the court to determine that the Bureau of Prisons was unable to accommodate the medical problems. Finding the record silent on this matter, the court concluded that the Bureau of Prisons would be able to meet some of the defendant's needs and thus, held a downward departure was not appropriate.²³³ The court went on to impose a non-Guidelines sentence of probation.²³⁴ This seems to be a clear case of a court using discretionary sentencing as a shortcut. The court avoided the more lengthy process of gathering evidence to determine whether the Bureau of Prisons could provide adequate care, as well as the possibility of a finding of inadequate basis for the departure, given how much the sentence was decreased.

Another court was asked to depart downward from the fifty-seven to seventy-one-month Guidelines sentence because one of the crimes for which the

229. *United States v. Fisher*, No.S3 03 CR 1501, 2005 U.S. Dist. LEXIS 23184, at *27 (S.D.N.Y. Oct. 11, 2005).

230. *See, e.g., United States v. Phelps*, 366 F. Supp. 2d 580 (E.D. Tenn. 2005).

231. *United States v. Strange*, 370 F. Supp. 2d 644 (N.D. Ohio 2005).

232. *United States v. Seiber*, No. 4:04-CR-28, 2005 WL 180164, at *1-3 (E.D. Tenn. July 29, 2005).

233. *Id.*

234. *Id.* at *4.

defendant was convicted, possession of a semiautomatic assault rifle, was no longer a crime by the time of the sentencing.²³⁵ Rather than deciding if such a departure was appropriate, the court opted to impose a “reasonable sentence” of forty months, which was in the Guidelines range for the remaining counts of conviction.²³⁶ Similarly, in *United States v. Toback*,²³⁷ the court issued a non-Guidelines sentence because of the impact the defendant’s incarceration would have had on his employees, even though a downward departure had been allowed in a similar case in the same circuit.

In *United States v. Huerta Rodriguez*,²³⁸ the defendant was charged with illegal reentry into the United States after having been deported following conviction for an aggravated felony. The defendant’s criminal history category was V due to multiple misdemeanor convictions for driving while intoxicated. The court noted that had the Guidelines still been mandatory, it would have granted a downward departure for the criminal history category. Because the Guidelines are now advisory, the court could sentence the defendant to a lower sentence based on reasonableness and the § 3553 factors, without any concern for review of the determination that grant departures.²³⁹

A court may rely on the advisory nature of the Guidelines as a backup to a departure. In *United States v. Pineyro*,²⁴⁰ Judge Gertner granted a downward departure to a defendant who suffered from a severe bone disease after finding that the Bureau of Prisons could not adequately care for him; she granted another downward departure for diminished capacity due to brain damage the defendant received in a car accident. Granting a total downward departure of nine levels, Judge Gertner sentenced the defendant to probation. Judge Gertner expressly noted in the written Case Summary that she would reach the same sentence under the reasonableness standard of *Booker*.²⁴¹ Thus, even if an appellate court were to find a departure improper, the sentence could still be found reasonable.

3. Considering Factors “Not Ordinarily Relevant” Under the Guidelines

A third category of non-Guidelines sentences is where the court considers factors that the Guidelines deem not ordinarily relevant. These factors include personal characteristics such as age, education and vocational skills, mental and emotional conditions, physical condition or appearance, drug or alcohol dependence or abuse, gambling addiction, employment record, family ties and responsibilities, military service, civic, charitable, or public service and similar

235. *United States v. Mullins*, 356 F. Supp. 2d 617, 619 (W.D. Va. 2005).

236. *Id.* at 620-21.

237. No. 01 Cr. 410, 2005 U.S. Dist. LEXIS 6778 (Apr. 19, 2005).

238. 355 F. Supp. 2d 1019 (D. Neb. 2005).

239. *Id.*

240. 372 F. Supp. 2d 133 (D. Mass. 2005).

241. *Id.* at 138.

prior good works, lack of guidance as a youth, and circumstances indicating a disadvantaged upbringing.²⁴² A review of post-Booker cases provides examples of each of these being a basis for a reduced, non-Guidelines sentence.

In *United States v. Phillips*,²⁴³ the defendant was convicted of transporting six hundred kilograms of marijuana while working as a long distance trucker transporting broccoli. The court gave the defendant a downward adjustment of four levels for his role as a minimal participant. This resulted in a Guidelines sentence of fifty-two to sixty-three months. The court cited the defendant's "relatively advanced age" of fifty-eight and sentenced the defendant to thirty months incarceration.²⁴⁴ The court concluded that because of the defendant's age and his minimal involvement he would not commit another crime. The court did not discuss the fact that age was deemed not normally relevant by the Guidelines.

Another case involving a non-Guidelines sentence where age was a factor was *United States v. Nellum*.²⁴⁵ Nellum was convicted of distribution of five grams or more of cocaine base. The quantity sold on the count of conviction was twenty-seven grams, but with the inclusion of relevant conduct the court found Nellum responsible for 204 grams. The court determined the defendant's Guidelines range was 168 to 210 months. The court sentenced the defendant to 108 months after considering the § 3553(a) factors. The court noted that the defendant's age of fifty-seven "weighed heavily in mitigating the defendant's sentence."²⁴⁶ The court noted that the defendant would be sixty-five when he was released from prison and concluded that the likelihood of recidivism at that time was very low. The court also considered the defendant's good relationship with his children, his drug addiction, his serious medical problems, his past military service, and the nature of the offense, including the crack to cocaine powder disparity. The court noted that age, family ties, medical problems, and military service are all deemed not normally relevant by the Guidelines.²⁴⁷

Youthful age was a significant factor in *United States v. Gall*.²⁴⁸ The defendant pleaded guilty to one count of conspiracy to distribute ecstasy. His Guidelines range was thirty to thirty-seven months. In sentencing the defendant to probation, the court considered several factors under § 3553(a). The court noted that all of the defendant's criminal activity had occurred when he was twenty-one years old, or younger, that he voluntarily withdrew from the drug conspiracy, and that his behavior since his departure from the conspiracy was excellent, including graduating from college and starting his own business. In considering the defendant's age, the court noted recent psychological studies

242. *United States v. Booker*, 534 U.S. 220 (2005); see also *supra* notes 14-19.

243. 368 F. Supp. 1259 (D.N.M. 2005).

244. *Id.*

245. No. 2:04-CR-30-PS, 205 WL 300073 (N.D. Ind. Feb. 3, 2005).

246. *Id.* at *3.

247. *Id.* at *4-5.

248. 374 F. Supp. 2d 758 (S.D. Iowa 2005).

indicating that the human brain may not be complete until the age of twenty-five and the Supreme Court's determination that, at least with respect to capital offenses, adolescents are less culpable for their actions than adults.

In a case of possession of firearms after having been committed to a mental institution, a forty-nine year-old defendant had no prior criminal record, not even an arrest, but had a lengthy history of mental illness.²⁴⁹ Under the Guidelines, the sentence would be twelve to eighteen months incarceration. The defendant, the government, and the probation officer all requested a departure to permit home confinement and credit the seven months already served, based on mental and emotional condition, diminished capacity, post-offense rehabilitation, and multiple circumstances. The court decided that the departure was not warranted by the Guidelines, concluding in part that the defendant's mental condition fell within Guidelines section 5H1.3's admonition that mental conditions are not normally relevant. Instead, the court imposed the sentence requested—five months of home confinement to complete the twelve month sentence—as a non-Guidelines sentence. In reaching this sentence, the court considered several § 3553(a) factors, including § 3553(a)(2)(D) (the need for medical care), § 3553(a)(2)(C) (protection of the public), and § 3553(a)(1) (the nature and circumstances of the offense and history of the defendant).²⁵⁰ In considering the protection of the public, the court concluded that continuing the defendant's medical treatment would better serve the public in the long run. The court was also able to take into account the defendant's ignorance of the law, even though that was not a legal defense to the crime.²⁵¹

The advisory Guidelines thus also allow a judge to interpret provisions of § 3553 in a way different from the Guidelines. For example, one purpose of sentencing is to protect the public from future crimes. The Guidelines achieve this goal by imposing greater sentences of incarceration for more serious crimes. Under advisory guidelines, as demonstrated above, a judge is free to determine that it is in the best long-term interest of the public to not impose a longer sentence, and instead, to promote a treatment plan.²⁵² Or, the court may conclude the chance of recidivism by an older defendant is slight.

What may prove more problematic are cases where the court sentences a defendant substantially below the Guidelines due to a host of other factors. In *United States v. Gener*,²⁵³ the defendant was subject to a Guidelines sentence of 87 to 108 months for selling heroin. The court sentenced him to five years of supervised release, citing his difficult childhood, his major learning disability, his drug addiction, and family difficulties including the death of his father.²⁵⁴

249. *United States v. Jones*, 352 F. Supp. 2d 22, 23 (D. Me. 2005).

250. *Id.* at 26.

251. *Id.*

252. *Id.* at 22.

253. No. 04 Cr. 424-17, 2005 U.S. Dist. LEXIS 25764 (S.D.N.Y. Oct. 26, 2005).

254. *Id.*

In the case of *United States v. Kacvinsky*,²⁵⁵ the court imposed a sentence of probation rather than eighteen to twenty-four months incarceration in part because the defendant had lost his job as a police officer and lost related benefits. Although the court did not explicitly say so, it seemed to consider these losses as adequate punishment for the offense.

In each of the above cases, the court fashioned a sentence it believed was reasonable based on § 3553 factors. In each case, at least one factor that was considered was deemed not normally relevant by the Guidelines. Most of the judges took care to explain why the factor was relevant in the particular case and conducted a thoughtful analysis. Many other courts, however, are declining to consider facts deemed by the Guidelines to be not normally relevant, even though they may be factors under § 3553. Consequently, defendants with the same characteristics may receive the benefit of a downward adjustment from one judge, but not from another, because it is outside the Guidelines. Hopefully, the Commission will monitor these cases and consider issues, such as declining recidivism with advancing age, in formulating future guidelines.

4. *Disagreement with Specific Guidelines Results*

Judges may also impose a non-Guidelines sentence to avoid application of a particular provision of the Guidelines that they believe results in a sentence greater than necessary under § 3553(a). For example, United States Sentencing Guideline section 2K2.1 provides that, for a conviction of a felon possessing a firearm, the penalties are escalated based on offenses committed within ten years of the firearms possession. In a case where the possession extended back more than ten years, and thus encompassed crimes from almost twenty years earlier, the court calculated the sentence according to the Guidelines, which resulted in a sentencing range of forty-one to fifty-one months.²⁵⁶ Calculating the sentence by extending only ten years back from the date of the discovery of the weapons, rather than from the date of their initial possession, the sentence would have been ten to sixteen months.²⁵⁷ The court imposed twenty-one months as the reasonable sentence under § 3553.

In *United States v. Bitsilly*,²⁵⁸ the defendant was charged with criminal sexual abuse of a minor under the age of sixteen. The court found that at the time of the offense the thirty-five year-old defendant and the fifteen year-old victim had a consensual sexual relationship.²⁵⁹ At sentencing, the court noted that they now had an infant daughter and that both of their families supported their continuing relationship. The defendant's only other criminal behavior involved minor

255. No. 1:05 CR 363, 2005 U.S. Dist. LEXIS 34933 (N.D. Ohio Dec. 22, 2005).

256. *United States v. Frappier*, 377 F. Supp. 2d 220, 226-27 (D. Me. 2005).

257. *Id.* at 222.

258. 386 F. Supp. 2d 1192 (D.N.M. 2005).

259. *Id.* at 1196.

alcohol-related offenses. The court found that there was no danger to the public because the defendant had no history of child sexual abuse. The court concluded that the advisory Guidelines sentence of eighteen to twenty-four months was greater than necessary and imposed probation. The court noted, "I have not [seen] anything like this in my eleven years on the bench. I do not believe that the Sentencing Commission contemplated such a situation when formulating the relevant Guideline provision."²⁶⁰

In *United States v. Jaber*,²⁶¹ defendant Momoh pleaded guilty to an indictment charging him with possessing and distributing pseudoephedrine while knowing it would be used to make a controlled substance. Judge Gertner calculated his Guidelines sentence as fifty-seven to seventy-one months after factoring all available departures. She imposed a sentence of two years probation because he was a low-level employee who received no profit. Also, the court considered his excellent record on presentence release, during which time he cared for his four young children while his wife was ill. As in many of the cases in which a non-Guidelines sentence is imposed, the court cited the parsimony phrase of § 3553(a): "The court shall impose a sentence sufficient, but not greater than necessary."²⁶²

Each of these cases illustrates a way in which a court might find a sentence outside the Guidelines range. In the first, the court believed that the inclusion of remote criminal conduct overstated the culpability of the defendant when the Guidelines were applied. In the second, the court believed the unique circumstances of the case, which the court emphasized were extraordinary, made it a much less serious crime. In the third, the court factored in the impact of the sentence on the defendant's family and also relied on personal characteristics to judge that there was little need for specific deterrence.

IV. SENTENCING THEMES IN POST-BOOKER SENTENCINGS

The overriding conclusion from reviewing hundreds of post-*Booker* sentencing opinions is that district court judges are carefully, thoughtfully sentencing under *Booker*. Of course, the available written statements of reasons for sentencings represent only a fraction of the federal sentencings that have occurred post-*Booker*.²⁶³ But, the available memoranda consistently demonstrate that judges are carefully considering the now advisory Guidelines sentences and usually have clear reasons for imposing non-Guidelines sentences. Judges are

260. *Id.* at 1198.

261. 362 F. Supp. 2d 365 (D. Mass. 2005).

262. 18 U.S.C. § 3553(a) (1984).

263. Reviewing available sentencing memoranda can provide a distorted view as one learns much about the thoughts of the prolific writers and nothing about the judges who do not provide written sentencing memoranda. For example, included in the review of sentencing memoranda for this article were more than twenty written by Judge Adelman. Also, it seems likely that the judges most likely to provide written explanations are those who are sentencing outside the Guidelines.

aware that these early opinions will be scrutinized. Some caution that Congress is watching.²⁶⁴ Others urge that Congress consider these opinions part of a dialogue.²⁶⁵ And lest someone label them soft or hard on defendants, some even remind us in an opinion that they have sentenced both above and below the Guidelines in varying cases.²⁶⁶

The concerns that emerge from all of these cases reflect the themes identified in decades of discretionary sentencing. First, a sentencer must assess the harm caused.²⁶⁷ Under the Guidelines, the Commission, sometimes in response to Congress's specific legislation, has calculated the harmfulness of each crime in its designation of the base offense level.²⁶⁸ Most of the time courts accept this estimation but they reject what they believe are false assessments of harm. This is the case with the crack versus powder cocaine disparity. No court seems to believe that the tremendously longer sentences for crack cocaine accurately reflect the seriousness of the crime. While some courts are still willing to defer to Congress's judgment on the matter, many others are not. Similarly, courts are troubled by fast-track programs where the sentence imposed is a consequence of the locale of prosecution rather than an assessment of harm. Some courts have more broadly expressed distrust of the Guidelines in drug cases where the reliance on quantity may overstate culpability or where sentences are substantially longer now than they were historically.²⁶⁹ Thus, these cases call for Congress and the Commission to reassess the harm calculated by the Guidelines in these few areas.

Courts are also concerned with substituting a judicial determination of harm for the jury's determination, through the application of relevant conduct provisions. This is especially troubling with acquitted conduct on two grounds. District courts worry about the message sent by a criminal justice system that essentially disregards the jury's verdict if it is for acquittal. And courts are also concerned about imposing a deprivation of liberty when evidence has been tested only by the preponderance of the evidence burden of proof. Under discretionary sentencing courts could weigh evidence of harm as they chose; although, with no norms, this inevitably led to differing applications by different judges. With discretionary sentencing, there has been a slight re-emergence of this opportunity to weigh the evidence, but this may soon be limited by higher courts.

264. *United States v. Wilson*, 350 F. Supp. 2d 910, 931-32 (D. Utah 2005).

265. Judge Adelman's hope is that district court sentencing decisions accompanied by written opinions become one part of the dialogue with the Sentencing Commission. *Id.* at 986.

266. *See, e.g., United States v. Kacvinsky*, No. 1:05 DR 363, 2005 U.S. Dist. LEXIS 35933 (N.D. Ohio Dec. 22, 2005).

267. For a full discussion of this model of discretionary sentencing, see STANTON WHEELER ET AL., *SITTING IN JUDGMENT: THE SENTENCING OF WHITE COLLAR CRIMINALS* (1988).

268. Terrance F. MacCarthy & Nancy B. Murnighan, Symposium on the Seventh Circuit as a Criminal Court: The Seventh Circuit and Departures from the Sentencing Guidelines: Sentencing by Numbers, 67 CHI.-KENT L. REV. 51, 63-64 (1991).

269. *United States v. Kelley*, 355 F. Supp. 2d 1031 (D. Neb. 2005).

Once the court determines the harm it must decide how blameworthy the defendant is. Blameworthiness traditionally included such factors as intent, relative culpability among multiple defendants, and whether the defendant cooperated or covered up a crime. Sometimes courts also considered personal information to try to make a judgment of character. Under the Guidelines, some aspects of blameworthiness are taken into account, such as cooperation and, to a limited extent, culpability among multiple defendants. But, the Guidelines basically judge blameworthiness on two determinants—the act committed and the defendant’s criminal history—permitting nowhere near the flexibility that existed in discretionary sentencing. In considering the act, judges generally assign blameworthiness by a single fact, such as quantity of drugs. However, district courts know that quantity does not necessarily indicate one’s place in a distribution hierarchy and they may want to make a more individual assessment of who is the kingpin in an organization. With respect to the defendant’s criminal history, courts sometimes find that this receives too much weight in the Guidelines calculation. Under discretionary sentencing, courts routinely considered all aspects of a defendant’s life. Courts looked beyond the crime of conviction and considered factors such as mental illness, youth, and even addiction. The Guidelines have designated these factors as not normally relevant. Thus, post-*Booker* cases where courts are imposing non-Guidelines sentences based on facts not normally relevant may be adjusting the assessment of blameworthiness.

The third stage of discretionary sentencing was assessing the consequence of a sentence on the defendant, others in contact with the defendant, and the public. This entailed both determining the social cost of the sentence and calculating its deterrent effect, both specific and general. This aspect of sentencing was often very utilitarian, encompassing the concept now presented in the “parsimony” clause to not impose a sentence longer than necessary. This necessarily requires courts to determine what sentence is necessary, both for punishment and for deterrence. Some courts, obviously focusing on general deterrence, argued that Congress and the Commission are better suited to decide what level of punishment would deter.²⁷⁰ But other courts have focused on individual deterrence and responded that only the trial court can assess the individual to try to determine what is necessary to deter that person from committing another crime. The assessment of individual deterrence leads to consideration of additional factors deemed not normally relevant by the Guidelines, such as education, employment history, and family and community ties. The determination of what punishment is appropriate can also vary if the court factors in the consequences of that punishment on others, such as family members and the community, both factors that the Guidelines believe are not normally

270. *E.g.*, United States v. Perez-Chavez, No. 2:05-CR-00003PGC, 2005 U.S. Dist. LEXIS 9252 (D. Utah May 16, 2005).

relevant. Thus, with a renewal of discretion, some courts are again taking into account the impact of the sentence and factoring in personal circumstances that can lead one court to impose a lighter sentence than another because of the impact of the potential sentence. The danger here is the re-emergence of sentencing based on an individual judge's values, such as routinely imposing lesser sentences for those who served in the military. The Commission might want to reconsider having more areas of gradation to account for these factors in a controlled way. For example, while caring for family members may not normally be relevant, caring for a seriously handicapped or ill child might be designated relevant. Without such gradation, this area is ripe for unwarranted disparity.

When courts disagree about the degree of deference to give the Guidelines it is largely because they disagree about how well the Guidelines have met the goals of § 3553 and thus considered the traditional themes of sentencing. Congress and the Commission can raise the level of confidence in judges by responding to the key issues. For some issues, there will be no consensus. Judges are not monolithic and Congress is in part driven by politics. And there is a continuing balancing act between affording proportionality and minimizing disparity. But, these early cases suggest there is tremendous consensus under the discretionary Guidelines and much of the discord could be abated with a few key changes to the Guidelines. As the Commission has long championed, the crack to powder disparity should be erased or substantially reduced. Similarly, the fast-track programs should either be applied nationwide or at least assigned geographically based on some coherent reasoning, such as overwhelming numbers of cases in relation to resources. These changes alone would account for a substantial number of non-Guidelines sentences. The severity of drug sentences should also be reviewed. If Congress chooses not to act, then it will be up to the appellate courts to decide whether district courts can impose different standards such as for crack to powder ratios, under the reasonableness standard. But, truly avoiding disparity in sentencing under discretionary guidelines requires consensus. Where the Guidelines do not reflect the actual consensus of the courts, there will be tension and sentencing differences.

V. CONCLUSION

This article has examined and explained how federal district judges are using their recently decreed freedom to sentence. Taking a long view, the issues this article identifies may be considered symptoms of the lack of a coherent sentencing philosophy to guide federal sentencing law. Some commentators believe that until we resolve that any sentencing scheme is doomed to failure. But, for the short term, studying these cases demonstrates that federal district judges disagree about a few key areas: what weight to give the Guidelines, what standards should be applied for fact-finding at sentencing, where courts believe the Guidelines impose, rather than reduce, disparity, and what factors the courts

believe are inadequately considered in the Guidelines. And, in all of these cases, there remains the tension between the Guidelines' goals of imposing consistent sentences for similar conduct and tailoring a sentence to fit an individual's circumstances, which was the judge's role for so many decades before guidelines sentences.

This review of district court decisions might lead one to expect that statistical analysis of post-*Booker* sentences would show significant changes, such as a pattern of shorter sentences where judges have used a higher burden of proof, declined to consider acquitted conduct, and exercised discretion in other ways that decreased a defendant's offense level. However, the data thus far does not indicate any significant decline in the length of sentences imposed.²⁷¹

The current advisory guidelines system—though accomplished by a circuitous route of Congressional legislation, years of testing the limits of mandatory guidelines, and ultimately their disapproval by an extremely divided Supreme Court—has actually come very close to the ideal of reform that was held by Senator Kennedy and many others in the 1970s. This moment affords Congress the opportunity to consider that the freedom to sentence under a reasonableness standard with advisory guidelines has not resulted in dramatically different sentences than under the Guidelines. Allowing judges to continue to sentence in the current post-*Booker* model for a significant period of time will provide the best information to assess whether advisory guidelines will work for federal sentencing. District courts can provide a dialogue for Congress and the Commission through sentencing memoranda and case law that develops through the appellate process. The reform movement of the 1970s, spurred by judges, academics, and legislators, emphasized the need for benchmark standards and individualized sentencing. There was also recognition of the important role appellate review of sentencing can serve to promote uniformity. For the first time, district courts today have guidelines, appellate review, and now the freedom to sentence.

271. U.S. SENTENCING COMM'N, CASES SENTENCED SUBSEQUENT TO *U.S. v. BOOKER* (2005) (providing data extraction as of November 1, 2005).

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