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The Illegality of Resentencing

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The Supreme Court held in *United States v. Booker*[2] that mandatory application of the United States Sentencing Guidelines was inherently unconstitutional.[3] It responded by erasing from the Sentencing Reform Act[4] all provisions that required adherence to the Guidelines and by directing that cases on direct appeal be remanded to district courts for resentencing under an advisory Guidelines regime.[5] Through this whitewash of the United States Code, the Court believed that the federal sentencing structure could be constitutionally preserved.

Unfortunately, it missed a spot. Another provision of federal law, overlooked in *Booker* and in hundreds of subsequent appellate cases, still obliges district judges to adhere to the Guidelines when resentencing a defendant on remand from a court of appeals. These judges are put in an unenviable Catch-22: follow *Booker* and resentence under an advisory scheme or follow the statute and resentence under a mandatory scheme. Whatever choice they make, the resulting sentence will be illegal, in violation of either the United States Constitution or the United States Code.

This article will offer, in Parts I and II, a brief overview of federal sentencing law and the decision in *Booker*. It will then address, in Parts II and III, the illegality of resentencing under 18 U.S.C. § 3742(g)(2). The article concludes, in Parts IV and V, by explaining that, although none of the sentences imposed on remand after *Booker* has been legal, none of them should be overturned.

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1. Law Clerk, The Honorable D. Michael Fisher, United States Court of Appeals for the Third Circuit; J.D., *summa cum laude*, The Dickinson School of Law of The Pennsylvania State University (2003).

2. 543 U.S. 220 (2005).

3. *Booker*, 543 U.S. at 242.

4. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

5. *Booker*, 543 U.S. at 258, 268.

I.

The Sentencing Reform Act was enacted in 1984 as a means to promote consistency and uniformity in sentencing.[6] Prior to the Act, federal judges had operated in a largely indeterminate sentencing world, in which their discretion to impose a particular sentence, although confined by the broad ranges established in the United States Code, was otherwise unfettered.[7] The result, at least as perceived by many legislators, was wildly disparate sentences for similarly situated criminals, depending wholly upon the philosophy and mood of the judges before whom they appeared.[8] The Act sought to reign in these vagaries by imposing a structured regime under which judicial sentencing discretion would be channeled through a series of defined policies and practices.[9]

These policies took the form of the United States Sentencing Guidelines, issued by the United States Sentencing Commission in 1987.[10] The Guidelines offer a series of detailed instructions by which judges can determine the appropriate sentence "range" for a defendant by reference to the particular circumstances surrounding the offense.[11] They provide a base "offense level" for crimes

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6. S. REP. NO. 98-225, at 39, 59 (1983).

7. Mistretta v. United States, 488 U.S. 361, 363 (1989); KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9-37 (1998); MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973); Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 300-05 (2000); Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1358-61 (1999) (reviewing STITH & CABRANES, *supra*).

8. *E.g.*, S. REP. NO. 98-225, at 65 (1983) ("The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform."); 130 CONG. REC. 1644 (1984) (statement of Sen. Kennedy) (characterizing sentencing disparities as a "national disgrace"); *see also Mistretta*, 488 U.S. at 365 ("Serious disparities in sentences . . . were common."); Nancy J. King & Susan R. Klein, *Beyond* Blakely, 16 FED. SENT'G REP. 316, 328 n.62 (2004) ("Disparate sentences for similarly situated defendants were based primarily upon geography, race, gender, and judicial philosophy."). A compelling challenge to this perception is presented in STITH & CABRANES, *supra* note 7, at 31-32, 106-12.

9. 28 U.S.C. §§ 991, 994; S. REP. NO. 98-225, at 65 (1983); *see also Mistretta*, 488 U.S. at 367-68; STITH & CABRANES, *supra* note 7, at 2-3. For a comprehensive review of the legislative background of the Sentencing Reform Act, see Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

10. UNITED STATES SENTENCING GUIDELINES ch. 1, pt. A (2004); *see also* 28 U.S.C. § 994; STITH & CABRANES, *supra* note 7, at 2-3.

11. UNITED STATES SENTENCING GUIDELINES ch. 1, pt. A; Bowman, *supra* note 7, at 305 ("The Federal Sentencing Guidelines are, in a sense, simply a long set of instructions for one chart - the Sentencing Table.") (footnote omitted); *cf.* STITH & CABRANES, *supra* note 7, at 3 (noting that the Guidelines Manual consists of "more than nine hundred pages of technical regulations and amendments, weighing close to five pounds - which may be usefully

under the United States Code and a "criminal history category" for the defendant reflecting his or her prior convictions.[12] The judge is then directed to make a number of other factual findings, relating to offense and offender characteristics, that raise or lower the base offense level and criminal history category.[13] Once these adjustments are complete, the judge consults a sentencing table to determine the recommended term of imprisonment, expressed as a minimum and maximum number of months.[14]

Despite their title, the "Guidelines" were undoubtedly mandatory.[15] The Sentencing Reform Act required judges to apply the Guidelines and to impose a sentence within the range prescribed therein.[16] Only if the judge concluded on the record that other circumstances, "not adequately taken into consideration by the Sentencing Commission," strongly militated in favor of a different sentence could he or she depart from the recommended range.[17] These "departures," although recognized in the statute, were strictly regulated by the Commission and, in practice, were rarely available.[18] With few exceptions, the range prescribed by the

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compared to, for example, the Internal Revenue Code, which weighs in at just under four pounds") (footnote omitted).

12. UNITED STATES SENTENCING GUIDELINES ch. 1, pt. A; Bowman, *supra* note 7, at 305-06; M.K.B. Darmer, *The Federal Sentencing Guidelines After* Blakely *and* Booker*: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C. L. REV. 533, 540-44 (2005).

13. UNITED STATES SENTENCING GUIDELINES § 1B1.1; Bowman, *supra* note 7, at 305-06; Darmer, *supra* note 12, at 540-44.

14. UNITED STATES SENTENCING GUIDELINES ch. 5, pt. A; *cf.* UNITED STATES SENTENCING GUIDELINES § 5E1.2(c)(3) (providing ranges of fines for various offense levels). Other commentators have offered more technical descriptions of the sentencing table:

> The sentencing table is a two-dimensional grid which measures the seriousness of the current offense on its vertical axis and the defendant's criminal history on its horizontal axis. The goal of guidelines calculations is to determine an offense level and a criminal history category, which together generate an intersection in the body of the grid. Each intersection designates a sentencing range expressed in months. . . . The . . . sentencing table . . . has 43 offense levels, 6 criminal history categories, and 258 sentencing range boxes.

Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1324-25 (2005). For a lengthier discussion of the Guidelines by one of their authors, see Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

15. STITH & CABRANES, *supra* note 7, at 2 ("Despite the use of the term guidelines, the sentencing rules issued by the Sentencing Commission are binding on the federal judiciary.").

16. 18 U.S.C. § 3553(b)(1); *see infra* note 53 (quoting statute).

17. 18 U.S.C. § 3553(b)(1); *see also* United States v. Ameline, 376 F.3d 967, 975-76 (9th Cir. 2004); United States v. Booker, 375 F.3d 508, 510-12 (7th Cir. 2004), *aff'd*, 543 U.S. 220 (2005).

18. *Booker*, 543 U.S. at 223; *see also* STITH & CABRANES, *supra* note 7, at 145-47; Michael S. Gelacak et al., *Departures Under the Federal Sentencing Guidelines: An Empirical*

Guidelines marked the absolute bounds of the district court's sentencing discretion.[19]

Subsequent legislation offered even more restrictions. Most notable for these purposes is the PROTECT Act of 2003,[20] particularly those provisions known as the "Feeney Amendment."[21] The Feeney Amendment, in addition to implementing de novo appellate review for all departures,[22] reaffirmed the obligation of district courts to adhere to the Guidelines in cases remanded from courts of appeals:

> A district court to which a case is remanded . . . shall not impose a sentence outside the applicable guidelines range except upon a ground that —
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> > (A) was specifically and affirmatively included in the [district court's] written statement of reasons . . . in connection with the previous sentencing of the defendant prior to the appeal; and
> >
> > (B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.[23]

This provision, codified at 18 U.S.C. § 3742(g)(2), eliminated in cases on remand what little discretion a district court had previously enjoyed to impose a sentence outside of the Guidelines range.[24]

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and Jurisprudential Analysis, 81 MINN. L. REV. 299, 353, 364 (1996); *cf.* UNITED STATES SENTENCING GUIDELINES § 5K2.0 cmt. n.3 ("[I]nasmuch as the Commission has continued to monitor and refine the guidelines since their inception . . . it is expected that departures based on the weight accorded to any such circumstance will occur rarely and only in exceptional cases.").

19. STITH & CABRANES, *supra* note 7, at 2-3, 31-32, 106-12, 145-47; Bowman, *supra* note 7, at 308; *see also Booker*, 543 U.S. at 223; *Ameline*, 376 F.3d at 975-76; *Booker*, 375 F.3d at 510-12.

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

21. *Id.* § 401; H.R. REP. NO. 108-66, at 58 (2003) (Conf. Rep.). For the legislative background of the Act, see, for example, Mark Osler, *Uniformity and Traditional Sentencing Goals in the Age of Feeney*, 16 FED. SENT'G REP. 253 (2004).

22. PROTECT Act § 401 (codified at 18 U.S.C. § 3742(e)); *see also infra* note 54 (quoting statute).

23. PROTECT Act § 401.

24. United States v. Andrews, 390 F.3d 840, 852-53 (5th Cir. 2004) ("[T]he plain language of § 3742(g) appears to handcuff any court on remand . . . ."); *see, e.g.*, United States v. Kostakis, 364 F.3d 45, 53 (2d Cir. 2004); Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENT'G REP. 310, 313-14 (2003).

Judges and commentators denounced these provisions.[25] They argued that the Sentencing Reform Act and the Feeney Amendment swung the balance too far in favor of mechanistic and deterministic sentencing and away from individualized consideration of retributive and rehabilitative needs.[26] Nevertheless, courts had little choice but to follow congressional commands and adhere strictly to the Guidelines.[27]

II.

That is, until *Booker*. Following *Booker* it became clear that mandatory application of the Guidelines is questionable not only from a policy standpoint, but from a constitutional one as well.[28] The right to a jury trial, embodied in the Sixth Amendment,[29] guarantees that a defendant will suffer no greater punishment upon conviction than that which is authorized by the legislature based solely on the facts found by a jury.[30] In other words, the maximum sentence that a judge may constitutionally impose is that permitted exclusively by the jury's verdict or the defendant's admissions; the judge cannot rely on his or her own findings to

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25. *E.g.*, Letter from William H. Rehnquist, Chief Justice, United States Supreme Court, to Congress (Apr. 5, 2003), *reprinted in* 15 FED. SENT'G REP. 307, 345 (2003); *see also* Vinegrad, *supra* note 24, at 313-14. The controversy that erupted over the Feeney Amendment has been detailed in numerous other articles. *See generally* Osler, *supra* note 21; Tracy Friddle & Jon M. Sands, *"Don't Think Twice, It's All Right": Remands, Federal Sentencing Guidelines & the Protect Act - A Radical "Departure"?*, 36 ARIZ. ST. L.J. 527 (2004); Vinegrad, *supra* note 24; Mark T. Bailey, Note, *Feeney's Folly: Why Appellate Courts Should Review Departures from the Federal Sentencing Guidelines with Deference*, 90 IOWA L. REV. 269 (2004).

26. *E.g.*, STITH & CABRANES, *supra* note 7, at 2-3, 31-32, 106-12, 145-47; *see also* Wright, *supra* note 7, at 1355 ("Federal sentencing experienced a revolution fifteen years ago, and many are now convinced that this revolution has become a Reign of Terror.").

27. *See, e.g.*, United States v. Khan, 325 F. Supp. 2d 218, 233-34 (E.D.N.Y. 2004) (following the Feeney Amendment but describing it as "much-criticized" and "unsound").

28. Some lower courts had previously recognized, based on prior decisions of the Supreme Court, that the Guidelines system could not pass constitutional muster. *See, e.g.*, United States v. Booker, 375 F.3d 508, 510-12 (7th Cir. 2004), *aff'd*, 343 U.S. 220 (2005). A comprehensive jurisprudential history of *Booker* is, of course, outside the scope of this article. For a good treatment on the subject, see Ian Weinstein, *The Revenge of* Mullaney v. Wilbur*:* United States v. Booker *and the Reassertion of Judicial Limits on Legislative Power To Define Crimes*, 84 OR. L. REV. 393 (2005), or any number of other academic and judicial sources, *see, e.g.*, United States v. Johns, 336 F. Supp. 2d 411, 417-21 (M.D. Pa. 2004); Darmer, *supra* note 12.

29. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

30. *Booker*, 343 U.S. at 230 (citing United States v. Gaudin, 515 U.S. 506, 511 (1995)); Blakely v. Washington, 542 U.S. 296, 301-08 (2004); United States v. Apprendi, 530 U.S. 466, 490-91 (2000).

justify a higher sentence.[31] Any fact that increases the maximum punishment to which the defendant is exposed must be submitted to a jury or admitted by the defendant.[32]

This principle took center stage in *Booker*. The defendant in *Booker* had pled guilty to possession with intent to distribute at least fifty grams of cocaine base.[33] This offense carried a maximum sentence of life imprisonment under 21 U.S.C. § 841,[34] but the base range prescribed by the Guidelines, premised solely on the offense level for the crime of conviction, was 210 to 262 months.[35] During a sentencing hearing, the trial judge determined that the defendant had possessed an additional 566 grams of crack and had obstructed justice, increasing the Guidelines imprisonment range to 360 months to life.[36] The judge imposed a sentence of thirty years imprisonment.[37]

The Supreme Court reversed. Its decision was premised upon the rule that a defendant may suffer no greater punishment than that which is authorized by the verdict of the jury.[38] The maximum sentence that the district court could have imposed on the defendant in *Booker*, based solely on the offense of conviction, was 262 months, the maximum of the Guidelines base range.[39] Any facts raising this range would increase the maximum punishment to which the defendant was exposed and would therefore implicate the right to a jury trial.[40] Yet, the district court had based its final sentence of thirty years on facts found by the judge, without submission to a jury or admission by the defendant.[41] Reliance on

31. *Booker*, 54 U.S. at 231-38 (citing *Apprendi*, 530 U.S. at 490); *see also Blakely*, 542 U.S. at 303 ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.").

32. *Apprendi*, 530 U.S. at 490-91. To allow a judge to impose punishment for conduct that was not submitted to a jury would, in the words of Justice Scalia, render trial "a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish." *Blakely*, 542 U.S. at 306.

33. *Booker*, 543 U.S. at 227.

34. 21 U.S.C. § 841(a)(1), (b)(1)(a)(iii), *cited in Booker*, 543 U.S. at 227.

35. *Booker*, 543 U.S. at 227 (citing U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(c)(4), 4A1.1).

36. *Id.*

37. *Id.*

38. *Id.* at 227-36.

39. *Id.*

40. *Id.*

41. *Id.*

these facts to increase the base range under the Guidelines violated the defendant's rights under the Sixth Amendment.[42]

This exposed not only the illegality of the defendant's sentence, but the constitutional infirmity of the entire federal sentencing system.[43] There is no provision in the Guidelines for a jury to make findings of fact relevant to the recommended sentencing range.[44] Instead, the Guidelines contemplate that these facts will be found by a judge based on information presented during a post-trial hearing.[45] These facts will increase the sentencing range, but, since they are not submitted to the jury or admitted by the defendant, they cannot constitutionally be relied upon to increase the final sentence.[46] The sentencing process dictated by the Guidelines is thus inherently incompatible with the one required by the Sixth Amendment.[47]

The Court recognized that the constitutional problem was traceable to the mandatory nature of the Guidelines.[48] The right to a jury trial attaches to facts relevant to the Guidelines only because those facts restrict the sentencing authority of the district court: unless the judge makes these findings, he or she may not impose a sentence higher than the base range.[49] If the district court was not bound by the Guidelines range – if the Guidelines merely advised the district court as to the appropriate sentence

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42. *Id.* (characterizing the problem as that "the jury's verdict alone does not authorize the sentence[; rather, the] judge acquires that authority only upon finding some additional fact") (quoting Blakely v. Washington, 542 U.S. 296, 304 (2004)).

43. *Id.* at 240, 247-48.

44. *Id.* at 240.

45. *Id.*; *see* FED. R. CRIM. P. 32(i)(3) (providing that "the court" must resolve disputed matters at sentencing); *see also* U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 ("In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law."); *id.* § 6A1.3(a) ("In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy."); *cf.* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

46. *Booker*, 543 U.S. at 232-241 (citing *Apprendi*, 530 U.S. at 490).

47. *Id. at* 240, 258.

48. *Id.* The *Booker* opinion was authored in two parts by two Justices. The first part, holding that sentencing enhancements under a mandatory Guidelines regime based on facts not submitted to a jury violate the rights recognized in *Apprendi*, was authored by Justice Stevens. *Id.* at 225-45. The second part, addressing the remedy for the violation, was authored by Justice Breyer. *Id.* at 245-68. The swing vote was Justice Ginsburg.

49. *Id.* at 260.

without actually limiting its authority – then facts relevant to the Guidelines would no longer increase the maximum punishment to which the defendant is exposed and would no longer implicate the right to a jury trial.[50] A district court could then apply the Guidelines as they were intended, increasing the recommended range based on judicial findings of fact and imposing a final sentence inside or outside that range, consistent with constitutional guarantees.[51]

The Court adopted this approach. It decided to eliminate all aspects of the Sentencing Reform Act that directed, or even mentioned, mandatory application of the Guidelines.[52] Only two provisions fell into this category, in the Court's view: "the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure), *see* 18 U.S.C. § 3553(b)(1),[53] and the provision that sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range, *see* [18 U.S.C.] § 3742(e).[54]" These excisions, the Court believed, would

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50. *Id.*

51. *Id.* All of the Justices agreed on this particular point. *Id.*; *see also supra* note 48 (noting split majorities in *Booker*).

52. *Id.*

53. Section 3553(b)(1) provided, in pertinent part, as follows:

> [T]he court shall impose a sentence of the kind, and within the range [prescribed by the United States Sentencing Guidelines], unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

18 U.S.C. § 3553(b)(1).

54. Section 3742(e) provided, in pertinent part, as follows:

> Upon review of the record, the court of appeals shall determine whether the sentence —
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> (1) was imposed in violation of law;
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> (2) was imposed as a result of an incorrect application of the sentencing guidelines;
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> (3) is outside the applicable guideline range, and
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> (A) the district court failed to provide the written statement of reasons required by [the Sentencing Reform Act];
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> (B) the sentence departs from the applicable guideline range based on a factor that —
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> (i) does not advance the objectives set forth in [the Sentencing Reform Act]; or
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> (ii) is not authorized under section 3553(b); or
>
> (iii) is not justified by the facts of the case; or
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> (C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the

render the Guidelines advisory, freeing the trial judge to impose any sentence permitted under the United States Code, regardless of the sentence recommended by the Guidelines.[55] This would presumably remedy the constitutional infirmity of the federal system.[56]

III.

Alas, it was not to be. One provision yet remains that mandates application of the Guidelines, dooming all resentencing to illegality. Subsection (g)(2) of 18 U.S.C. § 3742 still requires district courts, in cases remanded from the courts of appeals, to impose a sentence within "the applicable guidelines range."[57] This places district courts in the same position they occupied before *Booker*:

> reasons for the imposition of the particular sentence, as stated by the district court[;] . . . or
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> (4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.
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> The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

18 U.S.C. § 3742(e).

55. *Booker*, 543 U.S. at 259-61.

56. *Id.*

57. 18 U.S.C. § 3742(g)(2); *cf.* 18 U.S.C. § 3553(b)(2) (providing that the district court must impose a sentence within the Guidelines range for "[c]hild crimes and sexual offenses"), *declared unconstitutional by* United States v. Selioutsky, 409 F.3d 114, 117 (2d Cir. 2005). Another section of the Sentencing Reform Act, 18 U.S.C. § 3553(f), contains a similar prescription, mandating imposition of a sentence within the Guidelines range for controlled substance violations when the district court declines to honor an otherwise applicable statutory minimum sentence. *Id.* ("Notwithstanding any other provision of law, in the case of an offense under . . . the Controlled Substances Act [or] . . . the Controlled Substances Import and Export Act . . . the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission . . . without regard to any statutory minimum sentence . . . ."). However, unlike 18 U.S.C. § 3742(g)(2), this provision does not interpose a threshold restriction on the sentencing authority of the judge; rather, it applies only if the judge first finds that certain mitigating circumstances are present. *See* 18 U.S.C. § 3553(f) (requiring the court to find, *inter alia*, that the defendant does not have more than one criminal history point and that the offence did not involve violence or serious injury). That this statutory constraint arises from post-trial judicial findings, and serves only to lessen the maximum sentence to which the defendant is otherwise exposed by the jury's verdict, arguably exempts it from the constitutional concerns underlying *Booker*. *See, e.g.*, United States v. De Los Santos, 420 F.3d 10, 13 n.3 (1st Cir. 2005); *see also* United States v. Holguin, 436 F.3d 11, 115-19 (2d Cir. 2006) (suggesting, but declining to expressly hold, that mandatory application of the Guidelines under 18 U.S.C. § 3553(f) is constitutional).

required to rely on judicial findings of fact under the Guidelines to determine the bounds of their sentencing authority.

The Supreme Court did not refer to this provision in *Booker*. No court of appeals has mentioned the provision in remanding a case post-*Booker*, and no district court has identified it in resentencing a defendant.[58] Indeed, it has been acknowledged only rarely in judicial opinions and academic literature since its enactment in 2003.[59] Subsection (g)(2) seems to have fallen through the cracks.

But its impact cannot be discounted. It renders every sentence imposed on remand, whether based on *Booker* or not, illegal.

Subsection (g)(2), like the excised 18 U.S.C. § 3553(b)(1), requires district courts to impose a sentence in compliance with the Guidelines.[60] District courts are bound, under this provision, by the base range established by the Guidelines for the offense of conviction absent additional findings of fact.[61] These findings increase the maximum punishment to which the defendant is exposed, but they are to be made by a judge, not a jury.[62] As *Booker* demonstrates, this process is fundamentally inconsistent with the constitutional right to a jury trial.[63] A sentence imposed on a defendant in compliance with 18 U.S.C. § 3742(g)(2) is illegal under the Sixth Amendment.[64]

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58. This conclusion is based on a review of opinions available in the federal reporters and online databases. There may, of course, be federal judges who recognized the issue in an unpublished or oral decision.

59. *See* United States v. Andrews, 390 F.3d 840, 852-53 (5th Cir. 2004); United States v. Lynch, 378 F.3d 445, 449 n.4 (5th Cir. 2004); United States v. Riley, 376 F.3d 1160, 1166 (D.C. Cir. 2004); United States v. Nichols, 376 F.3d 440, 444 n.3 (5th Cir. 2004); United States v. Phipps, 368 F.3d 505, 512-13 (5th Cir. 2004), *rev'd on other grounds sub nom.* Gilley v. United States, 543 U.S. 1104 (2005); United States v. Kostokis, 364 F.3d 45, 53 (2d Cir. 2004); United States v. Martin, 363 F.3d 25, 36 & n.18 (1st Cir. 2004); United States v. Lauersen, 348 F.3d 329, 344 n.16 (2d Cir. 2003); United States v. Khan, 325 F. Supp. 2d 218, 233-34 (E.D.N.Y. 2004); Friddle & Sands, *supra* note 25, at 528-45; Vinegrad, *supra* note 24, at 313-14; Peter B. Krupp, *The Return of Judicial Discretion: Federal Sentencing under "Advisory" Guidelines after* United States v. Booker, BOSTON B.J., Mar.-Apr. 2005, at 20.

60. 18 U.S.C. § 3742(g); *see also supra* text accompanying note 23 (quoting 18 U.S.C. § 3742(g)(2)); *cf.* 18 U.S.C. § 3553(b)(1); *Booker*, 543 U.S. at 226, 240.

61. *See Andrews*, 390 F.3d at 852-53; *Khan*, 325 F. Supp. 2d at 234.

62. *See, e.g.*, United States v. Ameline, 376 F.3d 967, 975-76 (9th Cir. 2004); United States v. Booker, 375 F.3d 508, 510-12 (7th Cir. 2004), *aff'd*, 543 U.S. 220 (2005); *see also supra* note 45 (quoting provisions requiring judicial findings of fact).

63. *Booker*, 543 U.S. at 258-59.

64. *See id.* To be precise, a Sixth Amendment violation will occur only if the final sentence is actually above the "base" range established by the Guidelines. *See id.* at 267-68. However, even sentences imposed within the base range should be considered unlawful, in light of the district court's obligation to recognize the unconstitutionality of 18 U.S.C. § 3742(g)(2). *See Booker*, 543 U.S. at 267-68; United States v. Davis, 407 F.3d 162, 164-65 (3d Cir. 2005) (en banc); *see also* United States v. Storer, 413 F.3d 918, 923-24 (8th Cir.

Unfortunately, the converse is also true: a sentence imposed on a defendant in compliance with the Sixth Amendment is illegal under 18 U.S.C. § 3742(g)(2). A sentence is lawful under *Booker* only if the district court recognized that it was not bound by the recommended Guidelines range and honored its obligation to consider all pertinent information in imposing sentence.[65] But subsection (g)(2) not only requires a district court to impose a sentence within the applicable Guidelines range; it expressly precludes the court from considering information that was not identified in the prior proceedings and approved by the court of appeals.[66] To satisfy the dictates of the Sixth Amendment, the court must necessarily disregard those of 18 U.S.C. § 3742(g)(2).

The district court is caught in a Catch-22. If it follows the Sixth Amendment, it violates 18 U.S.C. § 3742(g)(2); if it follows 18 U.S.C. § 3742(g)(2), it violates the Sixth Amendment. Either way, the final sentence will be illegal. The only question is whether the illegality will flow from a statutory or a constitutional violation.

IV.

This obviously leaves the federal judiciary in a bit of a quandary. Districts courts are effectively precluded from issuing legal sentences on remand. Courts of appeals are faced with an avalanche of cases in which remanded sentences must be remanded again, only so they can be remanded once more.

The only way out of this spiral is for one level of the federal courts to declare, as they must, that 18 U.S.C. § 3742(g)(2) is unconstitutional. There is no way to reconcile 18 U.S.C. § 3742(g)(2) with the Sixth Amendment. Like the provisions excised in *Booker*, subsection (g)(2) establishes a mandatory Guidelines scheme that is fundamentally inconsistent with the constitutional guarantee of trial by jury.[67] It must be struck.

2005) (distinguishing between a "constitutional" *Booker* violation, where the final sentence is above the base range, and a "statutory" *Booker* violation, where the final sentence is imposed under a mandatory Guidelines regime).

65. *Booker*, 543 U.S. at 267-86; *see also, e.g.*, United States v. Lake, 419 F.3d 111, 113-14 (2d Cir. 2005); *Davis*, 407 F.3d at 164-65.

66. 18 U.S.C. § 3742(g) (prohibiting district court from imposing sentence outside of the Guidelines except upon a ground that "was specifically and affirmatively included in the [district court's] written statement of reasons . . . in connection with the previous sentencing of the defendant prior to the appeal" and "was held by the court of appeals, in remanding the case, to be a permissible ground of departure"); *see Andrews*, 390 F.3d at 852-53; *Khan*, 325 F. Supp. 2d at 234.

67. *See Booker*, 543 U.S. at 259-61.

This does not, however, spell reversal for the thousand resentencings that have occurred since *Booker*.[68] Courts of appeals have long adhered to the principle of harmless error, under which a mistake will not be grounds for reversal if it had no effect on the lower court's ultimate decision.[69] While this concept has fairly bedeviled the federal courts in other contexts,[70] it is easy to apply in this situation: all of these violations are harmless.

The reason for this fortunate result is that federal courts have universally ignored the command of 18 U.S.C. § 3742(g)(2). Neither the Supreme Court nor the courts of appeals, in remanding judgments for resentencing after *Booker*, has mentioned the provision.[71] To the contrary, they have instructed district courts to treat the Guidelines as advisory.[72] Predictably, district courts have responded by resentencing defendants in accordance with the Sixth Amendment, without reference or adherence to 18 U.S.C. § 3742(g)(2).[73]

The resulting statutory violations are always harmless. An appellate court reviewing the sentence, if a challenge is made under subsection (g)(2), would be forced to conclude that the statutory provision fatally conflicts with the constitutional right to a jury trial.[74] The result would be excision of the provision.[75] There would then be no reason for the court to direct a remand, despite the obvious statutory violation, since the statute would no longer be in force and the district court properly viewed the Guidelines as

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68. A search conducted on February 3, 2005, of the circuit court opinions database in Westlaw, using the search "we +3 vacate remand reverse /9 remand! /6 re-sentenc! & Booker & da(2005 2006)," produced 1100 results.

69. *See, e.g.*, *Lake*, 419 F.3d at 113-14; *see also* United States v. Olano, 507 U.S. 725, 734 (1993); FED. R. CRIM. P. 52(a); *cf. Booker*, 543 U.S. at 268 ("[W]e expect reviewing courts to apply ordinary prudential doctrines, [including] . . . the harmless-error doctrine.").

70. *See, e.g.*, United States v. Woods, 440 F.3d 255, 257-60 (5th Cir. 2006); United States v. Godines, 433 F.3d 68, 71-72 (D.C. Cir. 2006) (Rogers, J., concurring); United States v. Shelton, 400 F.3d 1325, 1330-31 (11th Cir. 2005).

71. *E.g.*, *Booker*, 543 U.S. at 268; *Lake*, 419 F.3d at 113-14; United States v. Davis, 407 F.3d 162, 164-65 (3d Cir. 2005) (en banc); *see also supra* note 58 (noting the possibility of unpublished decisions recognizing 18 U.S.C. § 3742(g)(2)).

72. *See Booker*, 543 U.S. at 267-68; *see also, e.g.*, *Lake*, 419 F.3d at 113-14; *Davis*, 407 F.3d at 164-65.

73. *See, e.g.*, United States v. Cook, No. 01-CV-80260-DT, 2005 WL 3447866 (E.D. Mich. Dec. 15 2005); United States v. Hopkins, No. 00-40024-06-SAC, 2005 WL 3610341 (D. Kan. Dec. 14, 2005); United States v. Paz, 384 F. Supp. 2d 806 (E.D. Pa. 2005); United States v. Roach, No. 00-CR-411, 2005 WL 2035653 (N.D. Ill. Aug. 27, 2005); United States v. Shearer, No. 1:01-CR-49, 2005 WL 1676747 (N.D. Ind. July 18, 2005); United States v. Green, No. CR-2-01-072, 2005 WL 1460176 (S.D. Ohio June 21, 2005); United States v. Gabriel, No. Crim. A. 02-216, 2005 WL 1060631 (D.D.C. May 4, 2005).

74. *See supra* notes 60-64.

75. *Cf. Booker*, 543 U.S. at 259-60.

advisory in the first instance. The judiciary's ignorance of 18 U.S.C. § 3742(g)(2) thus proves its salvation.

The situation would, of course, be quite different if a maverick district court decided to buck tradition and follow the United States Code. Once again, the court of appeals would have to conclude that subsection (g)(2) must be struck.[76] However, the district court would now have issued an unconstitutional sentence, based on its view that the Guidelines were mandatory.[77] Despite its laudable attempt to follow congressional command, remand would be the result.[78] Fortunately, however, there are no cases in which a district court has taken such a novel path.[79]

V.

Resentencing in the federal system is illegal.[80] Mandatory application of the United States Sentencing Guidelines is required by 18 U.S.C. § 3742(g)(2) but is prohibited by the Sixth Amendment. There is simply no means by which a district court can impose a sentence on remand that comports with both the United States Code and the Constitution.

Yet, there will be no rush to the courthouse by criminal defendants nor a rash of overturned judgments. All of the sentences imposed after *Booker* have been premised on an advisory Guidelines system, satisfying constitutional requirements.[81] The only error in these decisions is noncompliance with a statutory provi-

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76. *See supra* notes 60-64.

77. *Booker*, 543 U.S. at 233-35, 259-60; *see also, e.g.*, United States v. Lake, 419 F.3d 111, 113-14 (2d Cir. 2005); United States v. Davis, 407 F.3d 162, 164-65 (3d Cir. 2005) (en banc).

78. *E.g.*, *Lake*, 419 F.3d at 113-14.

79. *See supra* note 58 (noting the possibility of unpublished decisions recognizing 18 U.S.C. § 3742(g)(2)).

80. Technically, 18 U.S.C. § 3742(g)(2) applies only to resentencings that are conducted following a remand by a court of appeals on grounds that the original sentence was imposed in violation of law or incorrect application of the Guidelines. *Booker*, 43 U.S. at 233-35, 259-60. It would not apply to resentencings conducted by the sentencing court after granting a motion to vacate under 28 U.S.C. § 2255 or another motion to resentence addressed to the district court. *See, e.g.*, United States v. Phelps, 366 F. Supp. 2d 580, 584 (E.D. Tenn. 2005). Nor would it apply when a court of appeals remands a case for a determination of whether the same sentence would be imposed under an advisory Guidelines scheme, for purposes of plain-error analysis. *See* United States v. Paladino, 401 F.3d 471 (7th Cir. 2005) (remanding to allow district court to consider resentencing); United States v. Crosby, 397 F.3d 103, 118 (2d Cir. 2005) (same).

81. This is not to suggest, of course, that district courts have not committed other constitutional errors in resentencing defendants.

sion, 18 U.S.C. § 3742(g)(2), that must be excised from the United States Code. Any violation of this provision is harmless.[82]

There is thus no real incentive for attorneys, either the prosecution or the defense, to raise the issue. Nor is there any viable means by which appellate courts could address it. Issues are generally waived if not raised by the parties,[83] and, since resolution of the issue would have no impact on the outcome of the case, courts of appeals will be understandably reluctant to raise it on their own initiative.[84]

The job must fall to the district courts. Sentencing judges must *sua sponte* recognize the unconstitutionality of 18 U.S.C. § 3742(g)(2) and strike it from the United States Code. A groundswell of district court resistance to subsection (g)(2) will eventually find its way into the federal appellate system. Only then will the remedial whitewash started by *Booker* be complete.

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82. *See* United States v. Hill, 411 F.3d 425, 426 (3d Cir. 2005) ("[W]here . . . a [d]istrict [c]ourt clearly indicates that an alternative sentence would be identical to the sentence imposed under the Guidelines, any error that may attach to a defendant's sentence under *Booker* is harmless."); *see also* United States v. Simpson, 430 F.3d 1177, 1191 (D.C. Cir. 2005) (same); United States v. Christopher, 415 F.3d 590, 593 (6th Cir. 2005) (same); United States v. Thompson, 403 F.3d 533, 535 (8th Cir. 2005) (same); United States v. Paladino, 401 F.3d 471, 482 (7th Cir. 2005) (same); United States v. Antonakopoulos, 399 F.3d 68, 81 (1st Cir. 2005) (same). *But cf.* United States v. Gokey, 437 F.3d 622, 624-26 (7th Cir. 2006) (reversing and remanding case to district court, which had found Guidelines unconstitutional, when district court refused to consider Guidelines recommended range in crafting final sentence); United States v. Davila, 418 F.3d 906, 908-10 (8th Cir. 2005) (same); United States v. Lata, 415 F.3d 107, 112-13 (1st Cir. 2005) (same); United States v. Storer, 413 F.3d 918, 923-24 (8th Cir. 2005) (same); United States v. Barnett, 410 F.3d 1048, 1052 (8th Cir. 2005) (same).

83. *E.g.*, United States v. Kama, 394 F.3d 1236, 1238 (9th Cir. 2005); United States v. Hembree, 381 F.3d 1109, 1110 (11th Cir. 2004); United States v. Al-Hamdi, 356 F.3d 564, 571 n.8 (4th Cir. 2004); United States v. Bongiorno, 106 F.3d 1027, 1034 (1st Cir. 1997); United States v. Valdiosera-Godinez, 932 F.2d 1093, 1099 (5th Cir. 1991).

84. *See, e.g.*, Nagle v. Alspach, 8 F.3d 141, 143 (3d Cir. 1993) (noting that "extraordinary circumstances" may justify consideration of issues not adequately raised, which would otherwise be deemed abandoned and waived).