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Have We Come Full Circle? Judicial Sentencing Discretion Restored in Booker and Fanfan

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Abstract

The much anticipated Supreme Court decision in United States v. Booker and Fanfan has both invalidated the mandatory nature of the federal Sentencing Guidelines as well as restored judicial discretion for federal judges. With the Booker decision there is a renewed opportunity to correct some of the imbalance that came about as a result of the mandatory guidelines and the sentencing policies of the past twenty years. Booker has implications for all future sentencing as the power between the judiciary and the jury has been realigned and the power of the government has been reduced. Sentencing cannot accomplish legitimate goals when it is absolutely uniform nationwide regardless of any justifiable distinctions between defendants or crimes. Based on this principle, the goals of the United States Sentencing Commission were to eliminate unwarranted departures and to advance the goals of uniformity and proportionality. Warranted departures are those factors that should be taken into account when sentencing. In drafting the Guidelines, the Commission sought to establish a system that maintained fairness and avoided rote application in sentencing practices.

Instead, the Guidelines that became effective in 1987 produced a mandatory, rote sentencing process that omitted any judicial discretion and promoted a much-criticized shift in power from the judiciary to the prosecution. Judges resented the fact that their sentencing discretion had evaporated as sentences became harsher and the prison population in this country has swelled to unprecedented numbers. Booker will promote sentencing that is likely to be closer to the original goals of the Sentencing Reform Act which contemplated that sentences would reflect fairness and certainty, two of the hallmarks of due process. With the Booker decision, the Court has opened the way to promote alternative sentencing methods

and to allow the judiciary to consider all relevant matters when sentencing. Lower courts will use the "reasonableness" standard to achieve the goals and policies of sentencing: retribution, deterrence, incapacitation, and rehabilitation. In doing so, courts will now be able to consider all relevant factors concerning a defendant and the offense, restored discretion in sentencing.

HAVE WE COME FULL CIRCLE? JUDICIAL SENTENCING DISCRETION RESTORED IN BOOKER AND FANFAN

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Introduction

Judicial sentencing discretion is alive and well. After almost twenty years of regimented sentencing in federal courts, judicial discretion has been restored and prosecutorial power has been curtailed. With a much anticipated decision, the Supreme Court in *United States v. Booker*[1] and *United States v. Fanfan*[2] found that the United States Sentencing Guidelines ("Guidelines") were unconstitutional. In its rare dual majority opinions, the Court remedied the constitutional violation by excising two provisions of the Guidelines and retaining the remainder of the sentencing scheme as advisory. The *Booker*[3] decision restores judicial discretion, a key component of sentencing that has been absent for the last twenty years.

This article will provide in Part I an overview of the sentencing policies, focusing on the goals of the Sentencing Reform Act of 1984[4] ("SRA") and the operation of the indeterminate sentencing scheme that preceded the Guidelines. The passage of the SRA occurred in response to a mounting dissatisfaction with a sentencing system that featured widespread disparity and discrimination.[5] Because of the discretionary nature of the indeterminate sentencing scheme and the resulting disparities in sentences, legal observers and the public grew critical of a sentencing system which used imprecise parameters and lacked intelligent justification.[6] The most notable problems prior to

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[1] 125 S. Ct. 738 (2005).
[2] *Id.*
[3] In this article I refer to both decisions as *Booker* except where I am making specific reference to the facts of *Fanfan*.
[4] 28 U.S.C. §§ 992-998 (2000); 18 U.S.C. §§ 3551-3586 (2000).
[5] See *Federal Sentencing Guidelines*, Edward M. Kennedy, *Forward*, 29 AM. CRIM. L. REV. 771, ix (1992) ("Passage of the Act marked the end of a sentencing system that had long been a national disgrace.").
[6] Sentencing anomalies were the horror stories that spurred the federal sentencing authority revamping. A defendant could be convicted of the same crime in different districts across the country and have a wide disparity of sentence imposed depending on the judge responsible. Moreover, prosecutorial priorities played a big role in the sentencing disparities. For example, in the Southern District of Florida, a federal district handling major drug cases, the office routinely declined cases involving large quantities of drugs, cases that would be deemed major investigations in many other federal judicial districts. These disparities were by no means limited to drug cases. In white collar criminal cases a criminal defendant in one district

enactment of the SRA were the vastly disparate sentences received by similarly situated defendants appearing before different judges.[7]

The SRA created the United States Sentencing Commission as an independent commission of the judicial branch. The purpose of the Commission, as mandated by Congress in the SRA, was to provide "certainty" and "fairness" in sentencing, which are two of the hallmarks of due process.[8]

Prior to the guidelines, judges were not required to state their reasons for imposing sentence and, often, the sentence reflected the judicial philosophy and even the prejudices of the individual judge.[9] Spearheaded by Senator Edward M. Kennedy, the Guidelines were created by Congress in 1987 in a spirit of bipartisan cooperation and political compromise. After the passage of the SRA and the implementation of the Guidelines, Congress established mandatory minimums;[10] the prison population swelled to unprecedented numbers;[11] and the rigidity of the sentencing practices divided interested observers.[12] After 1987, federal judges saw their traditional discretionary sentencing prerogatives disappear. The *Booker* decision is likely to reinvigorate judicial discretion. This first section of the article will briefly review the cycle of sentencing in

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could be sentenced to probation, while in another district similar conduct would warrant a sentence of 5 years or more.

[7] Kennedy, *supra* note 5, at ix. *See also* William W. Wilkins, Jr., *Response to Judge Heany*, 29 AM. CRIM. L. REV. 795, 797 (1992) ("The actual sentence imposed was too often a result of the luck of the draw or the assignment of a judge to a particular case.").

[8] 28 U.S.C. § 991(b)(1)(B).

[9] See Theresa Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 396 (1991).

[10] There are over 60 federal mandatory minimum statutes containing over 100 different mandatory sentencing provisions. William W. Schwarzer, *Sentencing Guidelines and Mandatory Minimums: The Need for Separate Evaluation*, 4 FED. SENTENCING REP. 352, 353 (1992); UNITED STATES SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 4 (1991).

[11] The prison population in the United States has reached unprecedented numbers. For the reported year 2003, the federal and state prisons held 1,387,000 prisoners. When added to the 691,301 persons held in local jail facilities, the total number of incarcerated adults has exceeded 2 million people. One in 140 people in this country are incarcerated. www.ojp.usdoj.gov/bjs/abstract/p03.htm.

[12] Critics of the Sentencing Guidelines include individuals from many constituencies, ranging from Supreme Court justices, national bar associations to lay members of the public. *See, e.g.*, Clyde E. Bailey, Sr., *The Critical Need for Reform of the Sentencing Laws and Policies of the Federal And State Governments of the United States*, National Bar Association, May 3, 2004. http://www.nationalbar.org/pdf/Kennedy060104.pdf. The NBA took the strong position that the current policies in the criminal justice system over-emphasize incarceration and focus on incarcerating people for their addictions. ". . . [T]he federal sentencing guidelines should permit the exercise of judicial discretion to depart downward for those women and other young drug users who may engage in minor drug trafficking merely to get their own drug supply or to avoid duress, coercion or assaultive conduct against them as victims." *Id.* at 3.

the federal courts since the 1980s and demonstrate why the Court's latest decisions have returned sentencing jurisprudence back to when the SRA first began the dialogue on sentencing in 1984. In fact, the *Booker* decision has resurrected the true original purposes of the Guidelines as articulated in the SRA.[13] Moreover, prosecutors no longer have presumptive power to pre-determine a sentence or to control favorable information at sentencing.

Part II of the article details the latest decision by the Supreme Court in the *Booker* case. In companion five-to-four majorities comprised of different justices,[14] the Court held that the Guidelines actually obligated courts to find facts that increased a defendant's sentence a practice which violated the Sixth Amendment right to a jury trial. The Court reaffirmed the Sixth Amendment rights of criminal defendants to be sentenced based on proof beyond a reasonable doubt by excising two sections of the Sentencing Guidelines and upholding the remaining body of the Guidelines as advisory only. In both opinions, the Court effectively dismantled much of the power of the Sentencing Commission, eliminated the mandatory nature of the Guidelines[15] and brought federal sentencing discretion back to the status that lead to the sentencing debates in the mid-1980s.

Next, in Part III this article will discuss the dilemma for lower courts in defining "reasonableness" according to *Booker's* directives. By setting forth a reasonable standard in sentencing policy, the Court returned to the lower courts much of the discretion that prior sentencing rules had removed. There are two extreme interpretations given to this directive. Courts can ignore the sentencing history of the past twenty years and sentence as if the Guidelines never existed. Courts could also accord the Guidelines the greatest weight and most deference, similar to the mandatory Guidelines system. However,

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[13] "Finally, the Act without its 'mandatory' provision and related language remains consistent with Congress' initial and basic sentencing intent, to 'provide certainty and fairness . . . [while] maintaining sufficient flexibility to permit individualized sentences. . .' 28 U.S.C. § 991(b)(1)(B)." *Booker*, 125 S. Ct. at 767. Congress had as its goal avoiding "unwarranted sentencing disparities [but] permit[ting] . . . warranted [disparities]." *Id.*

[14] Justice Ginsburg signed both opinions. The substantive opinion was written by Justice Stevens, joined by Justices Scalia, Souter, Thomas, and Ginsburg. The remedial opinion was written by Justice Breyer, joined by Rehnquist, O'Connor, Kennedy, and Ginsburg. The coalitions were further divided by the six other concurrences and dissenting opinions filed by eight out of the nine justices.

[15] Although the Court eliminated the mandatory nature of the Guidelines, it did not re-establish the parole system. Paroling authority served as a safety net for overly harsh sentences and provided an opportunity for prisoners to demonstrate reforms and rehabilitation looking toward ultimate release from prison.

neither approach is consistent with *Booker*. Sentencing courts will be challenged to find a common ground to effect the purposes of sentencing by drawing on the original intent of the SRA and developing the" common law" of sentencing.[16]

Part IV focuses on the sentencing concepts that were critical under a mandatory sentencing system and that are now either no longer relevant or of greatly diminished significance. Concepts such as departures and substantial assistance will not have the same importance after *Booker* and this section will suggest why these Guidelines-concepts no longer apply.

Finally, in Part V this article takes the position that*Booker* compels the lower courts to give full consideration to 18 U.S.C. § 3553(a), which contains sentencing factors that were virtually ignored under a mandatory guidelines structure. This consideration will afford the opportunity for a defendant to seek a departure or a non-Guidelines sentence. By doing so, a sentencing court can defer to theGuidelines structure and at the same time fashion a sentence that is individualized to each defendant. In so doing, the court will comply with the intent of Congress when it sought to "provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted."[17] Moreover, by exercising full discretion and giving full weight to section 3553(a) factors, the courts will curtail the prosecutorial power that has wrecked havoc with the implementation of the Guidelines. This outcome restores the constitutional balance of power between the three branches of government.

I. Brief Overview of Sentencing Policies

A. Indeterminate Sentencing

The pre-1980s indeterminate sentencing scheme seems to be a historical relic when viewed from the perspective of the Guidelines sentencing era. One of the many positive aspects of the traditional indeterminate sentencing scheme was the individualized

[16] A "'common law of sentencing' was a fundamental component of the guidelines model that hoped to take advantage of 'the interlocking substantive lawmaking competencies of the commission and the judiciary.'" Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 34 (2000) (quoting Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 Nw. U. L. REV. 1441, 1455 (1997)).

[17] 28 U.S.C. § 991(b)(1)(B) (2000).

structure. Sentences were crafted based not only on the offense but also on the specific characteristics of the defendant's history.

Viewing the case from the bench, a judge had almost boundless authority to evaluate the prosecution, the defense, and the victim when imposing a sentence appropriate to the case. Sentencing discretion was virtually unrestrained, as long as the sentence was within the legal range of the allowable term of months or years set forth by Congress in passing the statutory scheme or statutory maximum.[18] Prior to the Guidelines, there was virtually no appellate review of district court sentences: appellate courts accepted the sentence unless it was clearly erroneous.[19]

Sentencing discretion also existed while the sentence was being served. Then, the paroling authority was available to continually monitor a prisoner's progress and to allow for early release in cases where warranted. Prisoners could earn early release through good behavior or good time credits, demonstrating at least a partial system-wide rehabilitative process. Finally, the executive pardon, although rarely used, addressed miscarriages of justice and also injected compassion and redemption into the criminal justice system.[20] Thus, discretion and parole were two of the distinct qualities that characterized an indeterminate sentencing system because they could temper punishment at either the sentencing decision or during the sentence, or both.[21]

However, much of the criticism of this unrestrained era was prompted by inconsistent results. Public sentiment had shifted as observers critically examined this wide, unreviewable discretion enjoyed by the bench.[22]

B. Goals of the Sentencing Reform Act

Sentencing policy in the federal courts underwent a tremendous upheaval, beginning with the passage of the SRA in 1984, leading to the establishment of the

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[18] Any term of imprisonment, up to the statutory maximum, was permissible. Sentence mitigation fell to the parole authorities to temper the punishment in situations where the prisoner's rehabilitative efforts warranted early release.

[19] In *United States v. Koon*, the Court held that the appropriate standard of review for lower court sentencing was abuse of discretion. 518 U.S. 81 (1996). *Koon* was widely viewed as giving judges the widest amount of discretion over sentencing.

[20] *See generally* Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URB. L.J. 1483 (2000) (discussing the use of the presidential pardon power).

[21] Both discretion and parole were removed in the modern sentencing reform.

[22] *See* Ilene H. Nagel, *Structuring Sentences Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 884 (1990).

Sentencing Commission in 1987 and the passage of the United States Sentencing Guidelines, effective that same year. This sentencing reform was motivated by documented unfairness inherent in an indeterminate sentencing scheme. When similarly situated offenders received punishments that wildly diverged, the interests of justice and fairness were implicated. The Congressional goal of sentencing reform was to "move the sentencing system in the direction of increased uniformity. That uniformity does not consist simply of similar sentences for those convicted of violations of the same statute. . . . It consists . . . of similar relationships between sentences and real conduct, relationships that Congress' sentencing statutes helped to advance. . . ."[23]

The Commission was established to develop policies that "[a]void[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct *while maintaining sufficient flexibility to permit individualized sentences when warranted* by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."[24] The task that the Commission faced was exceedingly complex and it recognized "the difficulty of foreseeing and capturing a single set of guidelines that encompasse[d] the vast range of human conduct potentially relevant to a sentencing decision."[25] Precisely because of the wide range of human nature and the ever expanding federal crimes code, the Commission refused to "limit the kind of factors (whether or not mentioned anywhere else in the Guidelines) that could constitute grounds for departure in an unusual case."[26]

The drafters of the Guidelines sought to establish a "common law of sentencing" with judicial input and reasoned evolution.[27] The Commission's original intent was to develop sentencing policies that would allow "trial and appellate judges, through their articulation and review of reasons supporting decisions to depart from the guidelines in individual cases, [and] have their say in the evolution of principled and purposeful sentencing law and policy."[28] Rather than minimize the courts' involvement in

[23] *Booker*, 125 S. Ct. at 761.
[24] 28 U.S.C. § 991(b)(1)(B) (2000) (emphasis added).
[25] U.S.S.G. ch. I, pt. A, intro. cmt. 4(b).
[26] *Id.*
[27] Berman, *supra* note 16, at 34.
[28] *Id.* at 35.

sentencing, the Commission envisioned courts with a much greater role in framing sentencing policy over the years through appellate review. As one observer commented,

> [t]he courts would have responsibility, however, for developing a jurisprudential approach to those occasions in which it is appropriate to set guideline presumptions aside. The commission, for its part, would benefit from the ongoing elaboration of such a common law of sentencing. Over time, the substantive principles developed by judges could coexist with, or even be incorporated into, the guidelines themselves. Such a partnership model of shared institutional powers was thus a core component of the reformist ideal.[29]

Unfortunately, these sentencing objectives and goals failed to materialize under the mandatory system that developed after the passage of the SRA.

C. Sentencing under Mandatory Guidelines

The SRA had the noble goal of eliminating sentencing disparity across the federal judicial districts and among the judges within a district. What actually came about was a harsh, rigid set of sentencing rules that omitted judicial input and favored executive control. For the last two decades, criminal sentencing in federal court has been controlled by Guidelines. Soon after their passage, the Supreme Court held that the Guidelines were binding for all sentences in federal court.[30]

After 1987, judges lost their broad and unstructured discretion in crafting appropriate punishments for federal offenders. Congress voided the indeterminate scheme in favor of a determinate sentencing structure. With the advent of the mandatory Guidelines, judicial sentencing discretion in the federal court system virtually evaporated. Federal judges' dislike of the Guidelines was widely acknowledged and is evident by the fact that federal judges retired more quickly under a Guidelines system.[31] The Guidelines reduced all federal sentences to a mathematical grid,[32] and, almost without exception, the

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[29] Reitz, *supra* note 16.

[30] Mistretta v. United States, 488 U.S. 361, 391 (1989) ("the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases."); Stinson v. United States, 508 U.S. 36, 42 (1993) ("Commentary which functions to 'interpret [a] guideline or explain how it is to be applied…controls….).

[31] Boylan, *Do the Sentencing Guidelines Influence the Retirement Decisions of Federal Judges*? 33 J. Legal Stud. 231 (2004). The author concluded that "sentencing guidelines lead judges to take senior status earlier. Specifically, under the sentencing guidelines, district court judges take senior status .4 years after becoming eligible to do so. Without the sentencing guidelines, district court judges would select senior status 3 years after becoming eligible." Id. at 231.

[32] U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. A, sentencing table.

United States Department of Justice ("DOJ") predetermined the outcome by the way in which it charged a defendant.[33] The determinate Guidelines scheme required judges to perform a mechanical task after conviction by sentencing a defendant from among a mind-boggling 258 possible categories.[34] However despite the initial reaction, the bench became accustomed to the harsh sentencing structure and the new sentencing concepts such as "relevant conduct," "ranges," and "departures." The Guidelines terminology and parameters framed sentencing language and methods of evaluation. During the last twenty years Congress has increased control over sentencing by imposing harsher statutory sentencing schemes and establishing mandatory minimums.

In the midst of these sentencing overhauls, in 1986 Congress passed the Anti-Drug Abuse Act establishing mandatory minimums of five to twenty years in prison for a variety of drug-related offenses.[35] With the addition of mandatory minimums setting a base line level below which no sentence could fall, sentencing advocacy plummeted.[36]

The combination of mandatory minimums and sentencing guidelines severely restricted the ability of judges to craft discretionary sentences. As an American Bar Association Task Force recently observed:

> The effect on sentencing decisions was enormous. Beginning in the late 1970s, the United States began to respond to concerns about rising crime by implementing an array of policy changes which, in the aggregate, produced a steady, dramatic, and unprecedented increase in the population of the nation's prisons and jails. Between 1974 and 2002, the number of inmates in federal and state prisons rose from 216,000 to 1,355,748, a more than five-fold increase. Between 1974 and 2001, the rate of imprisonment rose from 149 inmates to 628 inmates per 100,000 population, a more than four-fold increase. Jail populations have also increased markedly. Between 1985 and 2002, the number of persons held in local jails more than doubled, from 256,615 to 665,475. By mid-year

[33] For example, the prosecutor had wide discretion to set the amount of loss, the quantity of drugs, or the scope and participants in a conspiracy. In addition, the prosecutor could exercise discretion to establish the length of time a conspiracy existed and identify the leaders and organizers. Each of these factors had significant implications for the ultimate sentence a offender would receive.

[34] The federal sentencing Guidelines have a base offense level from 1-43 and a criminal history range of 1-6., thus producing 258 distinct grids.

[35] See Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition, Politics and Reform*, 40 VILL. L. REV. 383, 408 (1995). The statutory minimums bill was expedited in light of the drug hysteria centered around crack cocaine. *Id.* at 408-11.

[36] Sentencing advocacy plummeted because the defendant facing sentencing is motivated to assist the government, often to the detriment of personal advocacy. A defendant may engage in conduct that is detrimental to the defense position in order to gain a benefit in sentencing.

> 2002, the combined number of inmates in federal and state prisons and jails exceeded two million.[37]

Judges have been vocal in their criticism of the Guidelines calling them "unjust" and "harsh" because of the way they operate in a mandatory sentencing system: the harshness of the Guidelines results in unnecessary punishment in many cases.[38] Further, Justice Kennedy was critical of the Guidelines because they strip the discretionary authority of judges. He recently stated that courts should not have to "blindly follow unjust guidelines."[39]

Judges resented the fact that the Guidelines removed most of the judicial discretion and many concerned observers held the view that the Guidelines system failed to achieve the original goals that were set. "Efforts to eliminate disparity in sentencing have resulted in an incursion on the independence of the federal judiciary, a transfer of power from the judiciary to prosecutors and a proliferation of unjustifiably harsh individual sentences."[40] The most obvious result of the Guidelines has been harsher sentences, many with an adverse racial impact.[41] Long prison sentences have become the norm in the federal system with little diversion to alternative punishment options. Judges simply did not have the flexibility to adjust sentences to alternative punishments, but instead were directed through the guidelines structure to send offenders to prison.

As judicial influence decreased, prosecutorial power grew, producing an unanticipated power shift.[42] In addition, the United States Supreme Court refined its

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[37] Report, *ABA Justice Kennedy Commission Task Force*, 16 (citations omitted) (2004), *available at* www.abanet.org/leadership/2004/annual/dailyjournal/121A.doc.

[38] *See, e.g.*, Rhonda McMillion, *Second Effort: ABA Supports Push to Restore Judicial Discretion in Sentencing*, 90 A.B.A. 62 (Jan. 2004).

[39] *Hearing on Fiscal Year 2005 Appropriations for the Supreme Court Before the House Appropriations Comm.*, 109th Cong. (2004) (Statement of Justice Kennedy), see Gina Holland, *Justice Applauds Bucking Sentencing Law, at* http://news.findlaw.com (Mar. 17, 2004) (quoting Justice Kennedy's view of the guidelines).

[40] American College of Trial Lawyers, *United States Sentencing Guidelines 2004: An Experiment That Has Failed* 1 (Irvine, CA: American College of Trial Lawyers, Sept. 2004).

[41] See *infra*, notes 151-163 and accompanying text.

[42] Prosecutors were in the exclusive position to identify the target or subject of the inquiry, define the relevant conduct, supervise the investigation, draft the charges, prosecute the case, and offer the potential for special sentencing considerations such as bargaining or substantial assistance. While most of these functions were the traditional prerogative of the executive, the judiciary always had the power to check executive abuses by imposing tempered punishments. Moreover, the paroling authority maintained the prerogative to release prisoners at some point when they have demonstrated a degree of rehabilitation. Because the majority of criminal offenses in a mandatory Guidelines system are resolved through pleas, the

interpretation of the limits of judicial discretion in a series of cases, beginning, most notably, with the decision in *Apprendi v. New Jersey*.[43] *Apprendi* restricted the basis upon which a court could sentence a defendant to only those facts found by a jury. *Apprendi* found a Sixth Amendment violation where the sentence was based on judicially found facts rather than facts supported by a jury verdict. The holding in *Apprendi* was limited to sentencing within a statutory maximum and courts could no longer find additional facts on which to base a sentence.

As the Supreme Court was defining the precise intersection between the Sixth Amendment and sentencing policy, the *Blakely v. Washington* case arose [44] *Blakely* was a bombshell in sentencing jurisprudence. Robert Blakely had entered a guilty plea to second degree kidnapping in an agreement with the government. In exchange, he was subject to a ten year statutory maximum, with a sentencing guidelines range of 49-53 months, also by statutory enactment. When the court heard the horrific details of the kidnapping, the judge rejected the plea agreement and sentenced Blakely to ninety months.

The *Blakely* Court extended the holding of *Apprendi* to apply to any fact that increased a sentence beyond that found by a jury or admitted by a defendant.[45] *Blakely* thus impacted all sentences within a mandatory Guidelines system, although the Court held that the decision did not apply to the federal Guidelines. In clarifying *Apprendi*, *Blakely* ruled that a court cannot sentence a defendant by reference to enhancing facts that were not presented to a jury and found beyond a reasonable doubt: to do so would be

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government controls the outcome by coupling the charges with the anticipated sentence to achieve a desired result.

[43] 530 U.S. 466 (2000). See discussion, *infra* Part II.

[44] 124 S. Ct. 2531 (2004). *Blakely* was charged with two counts of first degree kidnapping but he entered into a plea arrangement with the government to plead guilty to second degree kidnapping. *Id.* at 2534. Under Washington law, the more serious kidnapping offense was categorized as a Class B offense and carried a 10 year maximum penalty. *Id.* at 2535. The state of Washington established a sentencing range for second degree kidnapping offense of 49-53 months by statutory enactment. *Id.* The prosecutor agreed to recommend a sentence within this standard range and the defendant entered a plea of guilty. *Id.* at 2534.

The sentencing court held a post-conviction sentencing hearing and listened to the wife's description of the ordeal. *Id.* at 2535. The Court then rejected the plea recommendation and found, by a preponderance of evidence, that the defendant acted with "deliberate cruelty" and imposed an exceptional sentence of 90 months, significantly longer than the maximum permitted under the standard range to which the defendant agreed pursuant to the plea agreement. *Id.*

[45] *Id*. at 2538.

to violate the defendant's Sixth Amendment rights.[46] Ultimately, *Blakely* spawned *Booker*.

II. *Booker* and *Fanfan* Cases

A. Dual Opinions

In the companion cases of *Booker* and *Fanfan*, the Supreme Court issued an unusual dual decision.[47] Both opinions were decided by a five-to-four vote, and only Justice Ginsburg joined both majorities.[48] In *Booker*, the Court found the federal sentencing Guidelines unconstitutional because they permitted a sentencing judge to impose a sentence based on facts found by a judge, not a jury.[49] This aspect of the holding is a natural extension of the *Blakely* holding applied to the federal Guidelines. Under the Court's interpretation of the Guidelines, the sentence could not exceed that authorized by the jury finding in violation of the Sixth Amendment.[50] The decisions were unique in that there were dual majorities: Justice Stevens issued an opinion in which he reviewed the merits of the constitutional challenge to the sentencing Guidelines and found that the Guidelines were unconstitutional; Justice Breyer announced the remedy to be imposed in light of the constitutional violation announced in the companion opinion.[51] Booker benefited from the Court's substantive opinion;[52] Fanfan benefited from the Court's remedial opinion.[53] In both cases the defendants were entitled to re-sentencing based on an advisory Guidelines system.[54]

1. Freddie Booker

Freddie Booker was convicted of dealing drugs and of possession with the intent to distribute at least 50 grams of crack cocaine.[55] As a result, he faced a mandatory minimum sentence of ten years in federal prison.[56]

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[46] *Id*.
[47] 125 S. Ct. 738 (2005).
[48] The substantive opinion was written by Justice Stevens, joined by Justices Scalia, Souter, Thomas and Ginsburg. The remedial opinion was written by Justice Breyer, joined by Rehnquist, O'Connor, Kennedy and Ginsburg. The coalitions were further divided by the six other concurrences and dissenting opinions filed by eight out of the nine justices.
[49] *Booker*, 125 S. Ct. at 746.
[50] *Id*. at 756.
[51] *Id*. at 746.
[52] *Id*. at 769.
[53] *Id*.
[54] *Booker*, 125 S. Ct. at 769.
[55] *Id*. at 746.

Because of Booker's criminal history and offense level, his sentence fell within a range of 210-262 months, double the mandatory minimum.[57] AtBooker 's sentencing hearing the judge found additional facts by a preponderance of the evidence, as he was entitled to do under the Guidelines structure.[58] The judge found factual support for an additional 566 grams of crack cocaine, increasing Booker's Guidelines range to 360 months to life.[59] The sentencing judge followed the Guidelines, evaluated the "relevant conduct," and imposed a sentence of 30 years.[60] These additional facts were not found by the jury. The judge concluded that the mandatory nature of the Guidelines required that the sentence be increased to accommodate this additional information.[61] Booker raised this additional fact finding as violative of the Court's decision in *Blakely* since none of the facts were found beyond a reasonable doubt.[62] As a result, Booker's sentence blurred the fact-finding role of the judge and the jury in violation of the Sixth Amendment.

2. Duncan Fanfan

Duncan Fanfan had a different sentencing problem. He was also a drug dealer convicted of conspiracy to distribute at least 500 grams of cocaine.[63] The guilty verdict supported the quantity of 500 grams.[64] Under the Guidelines, his sentence range was 63-78 months.[65] At sentencing, the judge found additional facts[66] as relevant conduct which could triple Fanfan's sentence to 188-225 months.[67] Fanfan's judge anticipated the impact of *Blakely* on the Guidelines and declined to sentence under the enhanced Guidelines range. The judge read the *Blakely* decision to preclude him from enhancing

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[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Booker*, 125 S. Ct. at 746.
[60] *Id.* The relevant conduct was determined by examining the underlying criminal conduct and factoring this conduct into the sentence range.
[61] *Id.*
[62] United States v. Booker, 375 F.3d 508, 510 (7th Cir. 2004).
[63] *Booker*, 125 S. Ct. at 747.
[64] *Id.*
[65] United States v. Fanfan, 2004 WL 1723114, 2 (D. Me. 2004).
[66] The sentencing judge also found that Fanfan was an organizer and leader of the criminal activity and responsible for an additional 2.5 kilos of cocaine and 261.6 grams of crack. *Booker*, 125 S. Ct. at 747.
[67] *Id.*

Fanfan's sentence above the range based solely on the jury verdict.[68] Thus, Fanfan was sentenced to 78 months.[69]

Even though Fanfan's judge relied only on facts found by the jury, the sentence was struck down in *Booker* since the sentencing judge applied the Guidelines in a mandatory fashion using section 3553(b)(1).[70] Fanfan's sentence did not violate the Sixth Amendment, since the facts supporting his sentence were found by a jury.[71] His sentence violated the *Booker* holding because it was based on the section that made the Guidelines mandatory, a section that*Booker* excised from the operation of the Guidelines.[72]

B. Substantive Opinion

Justice Stevens' substantive result in *Booker* flowed expectedly from the string of Supreme Court sentencing cases that had focused on the Sixth Amendment.[73] Connecting the range of sentencing options to facts found by a judge effectively altered the balance of power between the judge and the jury, implicating the Sixth Amendment right to jury trial. In each of those decisions, the Court expanded the reach of the Sixth Amendment's jury trial clause. In *Jones v. United States*,[74] the Court examined the federal carjacking statute and determined that the statute actually delineated three distinct offenses based on the extent of harm to the victim.[75] The Court concluded that victim harm was really an element of the crime because its determination raised the punishment ceiling.[76] As a result, the extent of harm must be charged and proven beyond a reasonable doubt.[77]

Apprendi v. New Jersey,[78] focused on the maximum sentence established by statute. *Apprendi* held that "[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

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[68] *Id.*
[69] *Fanfan*, 2004 WL 1723114, 5.
[70] *Booker*, 125 S. Ct. at 769.
[71] *Id.*
[72] *Id.*
[73] In total, the Supreme Court issued 6 opinions: 2 majorities written by Justice Stevens and Breyer, and 4 dissenting opinions written by Justices Thomas, Scalia, Breyer, and Stevens.
[74] 526 U.S. 227 (1999).
[75] *Id.* at 230.
[76] *Id.* at 251 n.11.
[77] *Id.* at 251-52.
[78] 530 U.S. 466 (2000).

submitted to a jury, and proved beyond a reasonable doubt."[79] In a death penalty case, *Ring v. Arizona*,[80] the Court stated that capital defendants are also entitled to a jury determination of "any fact on which the legislature conditions an increase in their maximum punishment."[81] *Blakely v. Washington*, the immediate precursor to *Booker*, extended the *Apprendi* holding to those enhancements that are set by the Guidelines' range, not only the statutory maximum.[82]

Justice Stevens' substantive opinion in *Booker* adjudicated the merits of the Sixth Amendment constitutional challenge. This majority opinion concluded that the mandatory nature of the federal sentencing Guidelines compels their failure.[83] The mandatory Guidelines allow no vehicle for a defendant to have the foundational punishment facts determined by a jury beyond a reasonable doubt. Consequently, Justice Stevens found that the Guidelines were in violation of the Sixth Amendment.[84]

Many observers recognized the inevitable outcome: the Court would have to find the Guidelines violative of the Sixth Amendment in the wake of *Blakely*.[85] One judge expressed the view that "*Blakely* dooms the guidelines insofar as they require that sentences be based on facts found by a judge."[86] *Blakely* cast serious doubt on the viability of the Guidelines as courts interpreting *Blakely* have so found.[87] In fact, many lower courts did not wait for the *Booker* opinion to invalidate the Guidelines.[88]

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[79] *Id.* at 490. Although *Apprend*i caused trepidations among practitioners and academics alike when it was decided, in its aftermath the federal Guidelines appeared to be insulated from attack since *Apprendi* dealt with sentencing above a *statutory* maximum. In the four years between *Apprendi* and *Blakely*, the actual impact of *Apprendi* was rather modest. Many of the errors caused by the interpretation of *Apprendi* were excused under the more generous plain error standard.

[80] 536 U.S. 584 (2002).

[81] *Id.* at 589.

[82] 124 S. Ct. 2531.

[83] 125 S. Ct. at 764.

[84] *Id.* at 746.

[85] "If the Washington scheme does not comport with the constitution, it is hard to imagine a Guidelines scheme that would." *Blakely*, 124 S. Ct. at 2550 (O'Connor, J., dissenting).

[86] United States v. Booker, No. 03-4225, slip op. at 4 (7th Cir. July 9, 2004).

[87] *See, e.g.*, United States v. Shamblin, 323 F. Supp. 2d 757 (S.D. W. Va. 2004); United States v. Mueffleman, 327 F. Supp. 2d 79 (D. Mass. 2004); United States v. Croxford, 324 F. Supp. 2d 1230 (D. Utah 2004); United States v. Schaefer, 384 F.3d 326, 330 (7th Cir. 2004).

[88] The Sixth, Seventh, Eighth, and Ninth Circuit courts declared the Guidelines unconstitutional before the *Booker* decision. *See, e.g.*, United States v. Mooney, 2005 WL 696909 (8th Cir. 2005); United States v. Ameline, 376 F.3d 967 (9th Cir. 2004); United States v. Montgomery, 2004 WL 1562904 (6th Cir. 2004); United States v. Booker, 375 F.3d 508 (7th Cir. 2004). Other circuits have found the Guidelines to be consistent with the constitution. *See* United States v. Koch, 383 F.3d 436 (6th Cir. 2004); United States v.

C. Remedial Opinion

Although many anticipated that the Court would have to revert to an advisory system in light of the *Blakely* and *Apprendi* decisions, the surprise segment of the *Booker* opinion was the excision of two sections of the Guidelines.[89] Once the Court determined the aspect of the Guidelines that implicated the Sixth Amendment rights of a defendant, it excised the unconstitutional portion of the Guidelines and retained the essence of what makes the Guidelines a viable punishment tool.[90] The Court determined that implementation of the substantive opinion required the excision of 18 U.S.C. §§ 3553(b)(1) (providing that courts "shall" impose a guidelines sentence)[91] and 3742(e) (setting forth standards of appellate review),[92] both of which were "incompatible with today's constitutional holding."[93] Since section 3553(b)(1) is the provision that makes the Guidelines mandatory, without it the Guidelines become advisory in all future cases.

Notably, the excision was done with the goal of preserving the entirety of the remainder of the SRA. "The remainder of the Act 'function[s] independently.'"[94] The Court was explicit: "Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable."[95]

Hammound, No. 03-4253, slip op. (4th Cir. Aug. 2, 2004); United States v. Pineiro, 377 F.3d 464 (5th Cir. 2004).

[89] Speaking for the *Blakely* dissenters, Justice O'Conner observed that

> [t]he consequences of today's decision will be as far reaching as they are disturbing. Washington's sentencing system is by no means unique. Numerous other States have enacted Guidelines systems, as has the Federal Government. (Citations omitted.) Today's decision casts constitutional doubt over them all and, in so doing, threatens an untold number of criminal judgments. Every sentence imposed under such Guidelines in cases currently pending on direct appeal is in jeopardy. And despite the fact that we hold in *Schriro v. Summerlin*, *ante* ___ U.S. ___, 124 S. Ct. 2519, that *Ring* does not apply retroactively on habeas review, all criminal sentences imposed under the federal and state Guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack.

124 S. Ct. at 2548-49.

[90] 125 S. Ct. at 756-57.

[91] Section 3553(b)(1) states that courts "*shall* impose a sentence . . . within the range." 18 U.S.C. § 3553(b)(1) (2000) (emphasis supplied).

[92] Section 3742(e) provides for a *de novo* standard of review which is dependant on "the Guidelines' mandatory nature." 18 U.S.C. § 3742 (2000). This provision came about after the enactment of the PROTECT Act in 2003. This law revised the standard for appellate review, and it has been declared invalid by the *Booker* decision.

[93] *Booker*, 125 S. Ct. at 756.

[94] *Booker*, 125 S. Ct. at 764 (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)).

[95] *Booker*, 125 S. Ct. at 766.

The use of section 3553(a) as a guide has taken center stage in the immediate future of federal sentencing.[96] There are two possible extremes: afford Guidelines the heaviest deference, adhering closely to Guidelines as though they are still mandatory "except in the exceptional case."[97] On the other hand, courts might celebrate in the advisory nature of the Guidelines, intending to avoid them at all costs and sentence according to individual whim.[98] Either interpretation is a violation of the spirit and holding of *Booker*.

III. Defining Reasonableness

In fixing the *Blakely* problem, the Supreme Court in *Booker* determined to retain the essence of the guidelines as advisory while eliminating the mandatory obligations. In rectifying the constitutional infirmity, the Court assigned the appellate courts the duty of reviewing sentences for "reasonableness." One reaction to this holding is to anticipate a return to the pre-Guidelines discrepancies in sentencing, including the return of unwarranted disparities. Alternatively, opponents of an advisory guidelines system might perceive that this system is inherently inferior to a presumptive or mandatory system.[99] Neither of these expectations need be true.

A. Reasonableness

The Supreme Court replaced the mandatory Guidelines with a more flexible approach to punishment: a "practical standard of review already familiar to appellate courts: review for 'unreasonable[ness].'"[100] The "reasonableness" of a sentence will be the determining factor in future cases and courts will have to carve the way in this new

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[96] See discussion *infra* Part V.

[97] United States v. Wilson, 350 F. Supp. 2d 910 (D. Utah 2005).

[98] One court coined this approach "the free at last" view, a return to pre-1984 indeterminate sentencing. *See* United States v. Jaber, 2005 WL 605787, 4 (D. Mass. 2005).

[99] Legal observers have expressed "concerns from proponents of prescriptive guidelines and from opponents of guidelines generally that advisory systems were ineffective or more trouble than they were worth. These concerns were based on a perception of the superior effects of prescriptive systems and of the inferior outcomes of advisory ones." Kim S. Hunt & Michael Connelly, *Advisory Guidelines in the Post-*Blakely *Era*, ABA WHITE COLLAR CRIMES PUBLICATION F-11 (2005). The authors compare the federal system to state advisory sentencing schemes and conclude that the advisory system can be an effective sentencing tool. "Although some commentators have questioned the efficacy of advisory systems in addressing sentencing disparity and predictability, this article will show that, properly constituted and overseen, these systems have produced results in many ways comparable it those of prescriptive sentencing systems, which themselves have not always achieved or sustained the ambitious goals they have set." *Id.* at F-12.

[100] *Booker*, ___ U.S. at ___, 125 S. Ct. at 765.

era of post-*Booker* sentencing. Reasonableness is a sufficiently flexible standard that will allow a court to sentence within the guidelines or depart when warranted.

Reasonableness, the heart of all future sentencing,[101] "requires a sentencing court to consider Guidelines ranges. . . but it permits the court to tailor the sentence in light of other statutory concerns as well."[102] Specifically, the *Booker* Court stated:

> Without the "mandatory" provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals. . . . The Act . . . requires judges to consider the Guidelines sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant, the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims. And the Act . . . requires judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care.[103]

The fact that reasonableness will govern sentencing does not mean that the Guidelines will no longer be relevant or influential over the judiciary. Rather, courts will be able to craft a sentence that achieves the goals of the SRA whether the sentence be within or outside of the Guidelines. Rote sentencing has been eliminated.

Once judicial fact-determinations are omitted, the judge must rely on other discretionary factors in order to craft a reasonable sentence.

> We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. . . . For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.[104]

It appears that a judge can avoid a Sixth Amendment violation if he exercises genuine sentencing discretion. Even though the Guidelines are now advisory, courts must still consult the Guidelines when assessing the appropriate sentence to be imposed.

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[101] Sentencing is likely to revolve once again should Congress take the invitation of the Court to act on this decision.
[102] *Booker*, 125 S. Ct. at 747 (discussing 18 U.S.C. § 3553 *et seq.*, 28 U.S.C. § 991 *et seq.*).
[103] *Id.* at 764-65. *See also* United States v. West, 2005 WL 180930, at *3, 2005 U.S. Dist. LEXIS 1123, at *7 (S.D.N.Y. Jan. 27, 2005) ("[n]othing in *Booker* appears to suggest that such fact-finding, as limited by the principles of *Apprendi* and its progeny, is inappropriate.").
[104] *Booker*, 125 S. Ct. at 750 (Stevens, J.).

The "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing."[105]

The correct determination of what is and is not reasonable will be the challenge for courts in the immediate future as they attempt to comply with *Booker*'s limitations, while at the same time exercising more sentencing discretion than they have since 1984. Some courts have decreed that they will give "serious" consideration to the Guidelines ranges when sentencing.[106] Regardless of the amount of deference a court gives to the Guidelines, the court should create a record which supports the sentence imposed.

Other post-*Booker* sentencing courts have "considered" the Guidelines when sentencing even though the ultimate sentence is outside of the sentencing range.[107] There is a danger that courts will offer a passing reference to the Guidelines in order to consider them, but without true meaningful reference.[108] Courts which carefully consider both the Guidelines and the individual circumstances of the defendant and the crime will be able to withstand appellate scrutiny of the sentence imposed.[109] There is a strong likelihood that punishment which considers all of the factors that were eliminated by the mandatory guidelines system will better reflect justice than the rote sentences that preceded *Booker*.

1. "Great Weight"

[105] *Id*. at 767.
[106] United States v. Ranum, 353 F. Supp. 2d 984, 985 (E.D. Wis. Jan. 19, 2005). The court also warned that "*Booker* is not an invitation to do business as usual." *Id.* at 987.
[107] United States v. Crosby, 397 F.3d 103, 119 (2d Cir. 2005). The *Crosby* court was the first to evaluate the *Booker* decision for the Second Circuit. The court attempted to provide general guidance to the lower courts of the circuit, but it declined to define "consideration," instead leaving this interpretation to evolve in future sentencing. *See generally id.*
[108] *Crosby*, 397 F.3d at 111. The judge noted that a court cannot satisfy its duty to consider the Guidelines by a generic reference to them when sentencing. *Id.*
[109] Courts should not speculate what a lower court would likely do, since the sentencing framework is now completely different. Courts that are considering whether to re-sentence a defendant who was sentenced in the interim between *Blakely* and *Booker* will most likely have to sentence anew. Both the defendant and the government should be given the opportunity to present all relevant sentencing factors to the court. A judge would be challenged to discern what sentence a district judge "would have imposed . . . in the absence of mandatory Guidelines and de novo review of downward departures." United States v. Ruiz-Alonso, 397 F.3d 815 (9th Cir. 2005). The "fundamental difference between the pre-and post-*Booker* sentencing frameworks illustrates our deep concern with speculating, based merely on a middle-of-the-range sentence imposed under the mandatory Guidelines framework, that the district court would not have sentenced [the defendant] to a lower sentence under the advisory Guidelines regime." United States v. Barnett, 398 F.3d 516 (6th Cir. 2005).

In *United States v. Wilson*,[110] the court afforded the Guidelines "heavy weight, and suggested that any deviation from the Guidelines could occur only in "unusual cases for clearly identified and persuasive reasons."[111] This view is bolstered by the language in *Booker* that"[t] he district courts, while not bound to apply theGuidelines , *must consult* those Guidelines and take them into account when sentencing."[112] The position that Guidelines are presumed valid is flawed and quite possibly a constitutional violation of the *Booker* holding. A sentence that automatically adheres to the Guidelines except in exceptional cases is quite likely per se unreasonable.

The flaw with the *Wilson* court's view is that the Guidelines were never meant to be blindly followed. Congress and the Commission envisioned a true advisory capacity for the Guidelines. It was anticipated that a common law of sentencing would develop with the lower and appellate courts refining what worked and what failed. The SRA at its inception contemplated incorporation of section 3553(a) factors to individualize sentences. Instead, sentencing has evolved with robotic calculation, a result surely not intended by the SRA.

Heavy deference to the Guidelines without more reasoned sentencing does nothing to recognize the reasoning and holding of *Booker* and cases that led to its opinion. Affording great weight to Guidelines continues to treat them as if their mandatory status survived *Booker*. This deferential approach runs counter to the holding in *Booker* which specifically rendered the Guidelines advisory. Rather than continue to support the much criticized Guidelines, *Booker* carved a new path by resurrecting discretion, urging courts to "consider" the Guidelines when sentencing. This approach allows a court to address all, not just some, of the goals of the SRA.

The *Wilson* approach to the weight of the guidelines is in conflict with the directives of *Booker*, as Justice Scalia explains in his dissent:

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[110] United States v. Wilson, 350 F. Supp. 2d 910, 912, 925 (D. Utah 2005). *See also* United States v. Wilson, 355 F. Supp. 2d 1269 (D. Utah 2005) (reaffirming the *Wilson* and addressing critics of the first *Wilson* opinion).

[111] *Id.*

[112] *Booker*, 125 S. Ct. at 767 (emphasis supplied).

> Thus logic compels the conclusion that the 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. If the majority thought otherwise – if it thought the Guidelines not only had to be 'considered' (as the amputated statute requires) but has generally to be followed – its opinion would surely say so.[113]

2. Ignoring the Guidelines

The fact that the Guidelines are now advisory rather than mandatory presents problems for courts which had serious disagreement with theGuidelines ' implementation. Courts are now permitted to exercise judicial discretion and consider the Guidelines, but they must also tailor a sentence with the policies and purposes of the SRA in mind. Jurists have voiced concerns that courts might ignore the Guidelines and the sentence that results will not be bound by reason and thus not reasonable.

> If one does not give the Guidelines "deference," "considerable weight," a "presumption of correctness," or some similar significance, what does one do to harmonize and implement the vaunted statutory goals of sentencing that Judge Pratt and others use, cafeteria style, to do justice? If one reads the decisions of judges who give the Guidelines and their ranges no particular significance ("weight"), one is, sadly, left with the conclusion that well-meaning sentences are now being imposed with little or no coherent organizing principles. One day it may be deterrence (general or specific). Another day it might be "just punishment" that catches our fancy. On the third day we may be seen as promoting "respect for the law." Of course, we never want a sentence longer than necessary. And so on, and so on. We end up selecting the sentencing goal(s) of the day (and thus the sentence of the moment) with much the same whimsy and lack of coherence as children picking the flavor of the day at the ice cream shop.[114]

Courts should not read *Booker* to indicate that they can virtually ignore the Guidelines and return to a time of absolute discretion in sentencing. This perspective would also violate the *Booker* decision, which left intact the majority of the Guidelines provisions. For one thing, this would resurrect some of the very pitfalls that resulted in the passage of the SRA initially, such as discrepancies and lack of uniformity. One court has cautioned that courts should not view *Booker* as a return to the "'free at last' regime,

[113] Booker, 125 S. Ct. at 791. (Scalia, J., dissenting).

[114] This view was expressed by Judge Kopf who cautioned his colleagues against giving their own idiosyncratic sense of justice. United States v. Wanning, 4:03CR3001-1 (D. Neb. 2005).

or a return to pre-1984 indeterminate sentencing."[115] Judges who are inclined to disregard the guidelines might do so in order to favor their own personal agenda of the policies and goals supporting sentencing, a result not contemplated by *Booker*.

3. "Consideration"

The question of what "consideration" a court should give to the Guidelines arose in the *United States v. Crosby* case.[116] The Court stated that sentencing courts are "entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence."[117] The *Crosby* court declined to fashion a bring-line rule, such as that announced in *Wilson*. Rather, *Crosby* stated that lower courts should "consider" the Guidelines when sentencing a defendant. The court welcomed the "concept of 'consideration' in the context of the applicable Guidelines range [and it will] evolve as district judges faithfully perform their statutory duties."[118] As the *Crosby* court noted, "a sentencing judge would violate the Sixth Amendment by making factual findings and *mandatorily* enhancing a sentence above the range applicable to facts found by a jury or admitted by a defendant."[119] The extent to which a lower court will "consider" the guidelines is directly connected with the imposition of "reasonable" sentences.[120]

A well-reasoned approach to the post-*Booker* sentencing process is evident in the case of *United States v. Ranum,*[121] where the court aligned the remedial majority of *Booker* to the factors set forth in section 3553(a). The court recognized that serious consideration must be afforded to the guidelines, but cautioned that "in doing so courts should not follow the old 'departure' methodology." Rather, courts

> need not justify a sentence outside of the [guidelines] by citing factors that take the case outside the 'heartland.' 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 as that the ultimate sentence is reasonable and carefully supported by reasons tied to the § 3553(a) factors.

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[115] *Jaber*, No. 02-CR-10201-NG at 9.
[116] United States v. Crosby, 397 F.3d 103 (2d Cir. 2005).
[117] *Id.* at 112.
[118] *Id.* at 113.
[119] *Id*. at 114.
[120] *Id*. at 119, see reasonableness discussion, Part IV, *infra*.
[121] 353 F. Supp. 2d 984, 986 (E. D. Wis. 2005).

This court noted that the *Wilson* approach was inconsistent with the remedial *Booker* majority opinion which "direct[s] courts to consider all of the § 3553(a) factors, many of which the guidelines either reject or ignore."[122]

B. How advisory are the Guidelines?

The Guidelines are now only one factor (number 3) on a list of five possible factors for courts to consider when sentencing. Courts must considerall of the factors listed in section 3553(a):

1. the nature and circumstances of the offense and the history and characteristics of the defendant;
2. the kinds of sentence available;
3. the guidelines and policy statements issued by the Sentencing Commission, including the advisory guidelines range;
4. the need to avoid unwarranted sentencing disparity; and
5. the need to provide restitution where applicable.[123]

Courts must not slide easily back into a posture that any sentence within the Guidelines is presumed to be reasonable, while any sentence outside of the Guidelines is presumed to be unreasonable. Thus, one court warned, "[t]o treat the Guidelines as presumptive is to concede the converse, i.e., that any sentence imposed outside the Guidelines range would be presumptively unreasonable in the absence of clearly identified factors . . . [and] making the Guidelines, in effect, still mandatory."[124] To assign presumptive reasonableness to post-*Booker* sentencing simply because it follows the advisory guidelines would be a misreading of the *Booker* rationale. The guidelines should be a "useful starting point in fashioning a just and appropriate sentence," but need not dictate the sentence actually imposed.[125] *Booker* is not an "invitation to do business as usual."[126]

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[122] Id. at 986.

[123] 18 U.S.C. § 3553(a)(1), (a)(3), (a)(5)-(7). Section 3553(a)(2) sets forth the purposes of sentencing and contains overriding principles governing all sentences. Section (a)(2) factors identify the purposes of punishment: retribution; deterrence; incapacitation; and rehabilitation. These are discussed more fully in Part V, *infra*.

[124] United States v. Myers, 353 F. Supp. 2d 1026 (S.D. Iowa Jan. 26, 2005). The Court also observed that *Booker* is "an invitation, not to unmoored decision making, but to the type of careful analysis of the evidence that *should* be considered when depriving a person of his or her liberty." *Id.*

[125] United States v. Bihieri, 356 F. Supp. 2d 589, 2005 WL 350585 (E.D. Va. 2005). The sentencing court sentenced the defendant to a sentence within the guidelines' range, but rejected the presumption of "heavy

On the other hand, some courts will view the guidelines as dismantling all that preceded their enactment. Courts which take the position that the guidelines have been tossed aside in favor of a completely discretionary sentencing scheme are equally misguided. *Booker* does not mean a "regime without rules or a return to the standardless sentencing regime which preceded the SRA."[127] Courts can be informed by the guidelines and all of their history, but they should still "consider" the guidelines when imposing sentence. The amount of consideration remains to be worked out through a flexible use of the advisory guidelines in setting a sentence.

Consideration of the Guidelines allows courts to craft sentences by reference to the Guidelines scheme without being bound by it.

> Since there were no alternative rules prior to the Sentencing Guidelines – no empirical studies linking particular sentences to particular crime control objectives, no common law of sentencing – and there have been none since, the Guidelines will continue to have a critical impact. . . . [T]he only way for courts to truly "consider" the Guidelines, rather than to follow them by rote, is to do in each case just what the Commission failed to do – to explain, correlate to the purposes of sentencing, cite to authoritative sources, and be subject to appellate review.[128]

Regardless of the way in which the court labels the deference to the guidelines, a sentencing court can achieve its goals of sentencing as well as the goals articulated by the SRA after *Booker*.

When a sentencing court considers the guidelines the judge can hand out a sentence that is either within or outside of the guidelines by using the tools that the guidelines provide. Courts have already used these methods to achieve just sentences in the early post-*Booker* world.[129]

IV. Departures and Substantial Assistance

Booker will cause a re-evaluation of the sentencing concepts that have gained acceptance in the last twenty years. These concepts will either cease to be relevant or

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weight" assigned the Guidelines by Judge Cassell in *United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005).

[126] United States v. Ranum, 353 F. Supp. 2d 984 (E.D. Wis. 2005).

[127] *Jaber*, No. 02-CR-10201-NG at 3.

[128] *Jaber*, No. 02-CR-10201-NG at 22.

[129] The use of section 3553(a) factors has already been a source for district court judges to achieve a just sentence under *Booker*. *See* discussion, *infra* Part V.

transition to assume new meaning and significance in a post-*Booker* world. In this section, I will discuss the impact that *Booker* will likely have on departures and substantial assistance motions.

A. Departures No Longer Critical

Under section 3553(b) of the Guidelines, departures from the sentencing range were permissible only if "there [is] an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by . . . the Guidelines."[130] The Guidelines ranges were intended to include all relevant information that would form the basis for a departure.

Downward occurred in two main categories: substantial assistance motions controlled by the government[131] and judicially initiated departures for acceptance of responsibility[132] and minor role in the offense.[133] Under the Guidelines, the scope of departures is limited and criminal history is not relevant for downward departures,[134] except in circumstances where it is relevant under §4A1.3.[135] Judges were strictly prohibited from reducing the sentence in cases where the defendant's family responsibilities, aberrant behavior, community ties or diminished capacity warrant mitigation.[136] Now, *Booker* eliminates this strict interpretation of departures.

It remains to be seen what courts will do in reaction to *Booker* about the departure concept. Before *Booker*, departure issues were a major focus of appellate review.[137] Now even if no traditional departure is available, a court may still sentence a defendant outside of the advisory guidelines in the exercise of discretion under § 3553. Courts no

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[130] 18 U.S.C. § 3553(a) (2000).
[131] U.S.S.G. § 5K.
[132] U.S.S.G. § 3B1.2.
[133] U.S.S.G. § 3E1.1.
[134] U.S.S.G. § 4A1.3 () (1)-(2).
[135] U.S.S.G. § 5H1.8
[136] PROTECT Act § 401 (b)(2), 117 Stat. at 668.
[137] The *Booker* decision eliminated the de novo standard of review for sentences that were passed as part of the PROTECT Act.

> In 2003 Congress . . . added a *de novo* standard of review for departures and inserting cross-references to 3553(b)(1). Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 . . . . In light of today's holding, the reasons for these revisions – to make Guidelines sentencing even more mandatory than it had been – have ceased to be relevant. . . . Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.

125 S. Ct. at 765-66.

longer have to resort to "departure" or "heartland" analysis in order to achieve an appropriate sentence.[138] Any liberal departure analysis that might have been reversed could now be upheld under *Booker*'s reasonableness standard and section 3553(a).[139]

1. Departure Option Remains in the Guidelines

The departure option retains viability as part of the Guidelines structure, and the court will continue to take departure methodology into account when sentencing a defendant. Thus, in both setting a sentence and considering a "departure," courts can consult the Guidelines and give greater weight to those factors that would not have been considered prior to *Booker*.[140] "Unless the court calculates and then considers what the Guidelines advise as to a particular sentence in a particular case – that is, the initial Guidelines sentence adjusted by any applicable departures – the court is not in a position to follow *Booker*'s requirements."[141] Thus, courts inevitably will consider the Guidelines range when deciding whether the sentence will fall within a range or outside of a range.

Clearly, whether they agree with the Guidelines system or not, lower courts have become accustomed to sentencing under that system. Disagreement with the harshness of the Guidelines is not an invitation to ignore them when imposing sentences. Most judges are very familiar with using the Guidelines and they will, for the first time, have the opportunity to divert from the ranges in setting sentence.

Under *Booker*, lower sentencing courts can impose a "reasonable" discretionary sentence. In some cases, the Guidelines might provide a reasonable estimation of an appropriate sentence for a particular offender. Sentencing under *Booker* does not have to be whimsical. Courts can give reasoned consideration to both the offenders and the offenses in order to craft an appropriate sentence consistent with *Booker*. Courts can, and should, refer to the Guidelines when deciding on the appropriate sentence. On the other

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[138] The old terminology will most likely remain useful to courts as a reference point. However, courts and litigants should refrain from using the Guidelines-focused terminology since it conjures up the mandatory nature of the per-Booker sentencing practice.

[139] Section 3553(a) of the guidelines provides for many factors that were rendered invalid in a mandatory sentencing scheme. *See* discussion, *infra* Part V.

[140] "The Guidelines permit departures from the prescribed sentencing range in cases in which the judge '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. . . .'" *Booker*, 125 S. Ct. at 750 (quoting 18 U.S.C.A. § 3553(b)(1) (Supp. 2004)).

[141] United States v. Wilson, 355 F. Supp. 2d 1269, 1285 (D. Utah 2005). *See also* United States v. Crosby, 397 F.3d 103 (2d Cir. 2005).

hand, the presumption that the Guidelines apply except in exceptional cases is a clear violation of the *Booker* holding.

After *Booker*, the departure concept is no longer relevant. The old departure methodology need not control a sentence outside of a Guidelines range because the Guidelines are "only one of many factors that a sentencing judge must consider in determining an appropriate individualized sentence."[142] The previous departures contained in U.S.S.G. § 5K2.0(d) do not constrain a sentencing judge any longer.[143] Courts can now consider the Guidelines as advisory and only one factor under section 3553(a) in setting a sentence.[144] A "sentence under this format will not represent a 'departure' under the Guidelines, and will not be considered as a 'departure' for purposes of reporting or recording the Court's post-*Booker* sentence."[145] Thus,

> When the judge exercises her discretion to impose a sentence within the Guideline range and states for the record that she is doing so, little explanation is required. However, when the judge elects to give a non-Guideline sentence, she should carefully articulate the reasons she concludes that the sentence she has selected is appropriate for that defendant. These reasons should be fact specific and include, for example, aggravating or mitigating circumstances relating to personal characteristics of the defendant, his offense conduct, his criminal history, relevant conduct or other facts specific to the case at hand which led the court to conclude that the sentence imposed was fair and reasonable. Such reasons are essential to permit this court to review the sentence for reasonableness as directed by *Booker*.[146]

2. Warranted Disparities and Individualized Sentencing

Congress did not intend the Guidelines to become rote, mechanical rules that bound all judicial discretion. Rather, "[t]he overriding statutory directive to the Sentencing Commission was to eliminate 'unwarranted disparity.' The concept of disparity that it *unwarranted* however, is intelligible only in the context of some accepted

[142] United States v. Ameline, 400 F.3d 646, 655-56 (9th Cir. 2005).
[143] *Id.* at 656.
[144] United States v. Jones, 353 F. Supp. 2d 22 (D. Me. 2005) (court determined that it could not grant a departure, but that it could achieve the same result under section 3553(a) after *Booker*).
[145] United States v. Penniegraft, 357 F. Supp. 2d 854, 857 (D.N.C. 2005).
[146] United States v. Mares, 2005 WL 503715, 2005 U.S. App. LEXIS 3653 (5th Cir. Mar. 4, 2005) (citations omitted).

criteria for determining what disparity is *warranted* – that is, what factors should be taken into account in sentencing."[147]

Sentencing cannot accomplish legitimate goals when it is absolutely uniform nationwide regardless of any justifiable distinctions between defendants or crimes. Based on this principle, the goals of the Commission were to eliminate unwarranted departures, not justified or warranted distinctions, and to advance the goals of uniformity and proportionality. Warranted departures are those factors that *should* be taken into account when sentencing. In drafting the Guidelines, the Commission sought to establish a system that maintained fairness and avoided rote application in sentencing practices. Instead, the Guidelines that were produced in 1987 became the rigid, mandatory, and inflexible rules that have offended the sentencing policies and goals, thus motivating the present sentencing overhaul.

A judge faced with two offenders who, on the surface, appear to be identical, will now have options that were constrained under the pre-*Booker* scheme. This judge can consider the many aspects of the crime, the way in which it occurred, the particular background of the defendant, and both harm and culpability in reaching an appropriate sentence. Individualized sentencing, by definition, factors in those nuances that are not necessarily evident to the neutral observer. Fundamentally distinct offenders should not be treated in an identical manner. In an advisory system, sentencing these different offenders does not cause a problem. The court can take into consideration the key differences between the offenders and make an appropriate adjustment. Factors such as age, harm, the need for rehabilitation, and criminal history can all make a significant difference in the outcome of a sentence.

Under the presumptive system, the judge was compelled to seek equal treatment, something not necessarily indicative of just punishment. It was difficult for judges to reach outside of the presumptive guidelines range to impose a sentence that was just. Sentencing theory has circled to the point that uniformity is not necessarily warranted and "blind uniformity [can] promote inequality."[148] By reinvigorating judicial discretion, the

[147] JOSE CABRANES & KATE SMITH, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 51 (1998).
[148] *Id.* at 141-42.

sentencing process will reduce the prosecutorial discretion and control that was inherent in the mandatory system.[149]

Because the Guidelines are no longer mandatory, the Guidelines range is "only one of many factors that a sentencing court must consider in determining an appropriate individualized sentence."[150] Thus, a court need not be concerned with "departures" from a range in order to arrive at the sentence. A court may consider many factors and is not limited to those factors that had governed departures under U.S.S.G § 5K2.0(d). The concept of a "departure" applies in situations where a mandatory range is the only option. Once the Guidelines are advisory, the notion of a departure is somewhat of a misnomer.

3. Unwarranted Disparities – Crack/Cocaine

It is now evident that the increased criminalization effort has failed to produce the desired results in decreasing the amount of crime. Notably, the war on drugs has been a documented failure.[151] The underlying reasons for the drug war and the intended targets of the war are seldom those same individuals who are ultimately convicted and sentenced to prisons.[152] Current federal drug policies coupled with the massive number of immigration cases in Border States have swelled the national prison and jail population to

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[149] Judicial discretion will moderate prosecutorial power because judges can consider many more factors than they could otherwise consider under a mandatory system. While prosecutors would urge the court to adhere to the Guidelines and sentence offenders to a "range" even where there are key differences between offenders, under an advisory system the judge can balance the disparate treatment and achieve a semblance of individualized justice.

[150] *Ameline*, 400 F.3d at 655-56.

[151] The "war on drugs" has been a failure as it has not decreased the amount of drug abuse or criminal importation of massive quantities of drugs. Moreover, the drug policies have had a disproportionate impact on minorities by virtue of the disparity between the harshness of punishment for crack as opposed to cocaine.

[152] The war on drugs was designed to convict "kingpins" or those large-scale drug importers and distributors. However, in reality the small-scale drug dealers are the ones clogging the prisons. In fact, it is not uncommon for the girlfriends and minor conspirators to receive a harsher sentence under the Guidelines than the major operators given that the minor players have no assistance to offer the government in exchange for a lighter sentence. The low-level dealers are the easiest targets, allowing investigators to increase their statistics simply by observing a street corner in a minority neighborhood to arrest many small time dealers in quantity. A full-blown investigation into the importation of drugs, by major international crime figures, takes much more time, person power, and resource commitment. The resulting conviction rate will not reflect the intensity of the time and effort put forth to capture and prosecute such individuals. It is obvious to observers that the government is much better getting many small-time drug dealers and girlfriends than spinning its wheels to go after the major players. Sterling, *supra* note 35, at 383, 411 (the author notes that Congressional intent was to address the mandatory minimums for drug dealing to combat the kingpins. Instead, the reality has been that the laws allow prosecutors to snare the lowest level targets in the drug hierarchy). Mandatory minimums for small quantities of drugs allow the government to gain convictions and statistics that support the claim that the drug war is being effectively waged and won.

over two million.[153] There is a serious disconnect between the laws targeting certain segments of major criminality and the individuals who are ultimately imprisoned by these same laws. As a result, sentencing practices have produced various anomalies that have outraged many observers because they are disproportional.[154] The objectives of many of the criminal laws and the reality of the sentencing scheme are often not allied.

The Guidelines system increased, instead of decreasing, the racial disparity among offenders. A pertinent example is the crack/cocaine sentencing disparity resulting in the imposition of a 100-1 sentencing scheme in cases involving underlying criminal conduct related to crack rather than the powder form of cocaine.[155] Moreover, between 1984 and 2001, the average punishment for blacks has grown to be thirty months longer than the punishment for white felons.[156] Despite repeated calls for reform, this onerous provision of our drug laws has remained with us and accounts for much of the tremendous increase in the prison population.[157] Rather than reduce disparities, the guidelines have made the situation worse.

After almost twenty years of experience, the Sentencing Commission recently concluded that, "the sentencing guidelines and mandatory minimum statutes have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation."[158] In addition, the United States Sentencing Commission recently

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[153] Report, *ABA Justice Kennedy Commission Task Force*, 16 (2004), *available at* www.abanet.org/ leadership/2004/annual/dailyjournal/121A.doc.

[154] Convicted individuals are receiving disproportionate sentences for minor crimes. *See, e.g.*, Lockyear v. Andrade, 538 U.S. 63 (2003) (defendant struck out on his third conviction and received 50 years to life for 2 petty thefts of video tapes).

[155] In fact, Duncan Fanfan was initially facing 63-78 months for 500 grams of powder cocaine, while Freddie Booker faced a range of 210-262 month for 50 grams of crack cocaine. The differences between these two sentencing ranges points out the discrepancy between how crack and powder cocaine are viewed under the current sentencing policies.

[156] United States Sentencing Commission, Report, *Fifteen Years of Guidelines Sentencing*, ch. 4, 4 (Nov. 2004), *available at* http://www.ussc.gov/15_year/chap4.pdf.

[157] *See* Report, *ABA Justice Kennedy Commission Task Force*, 16 (2004), *available at* www.abanet.org/ leadership/2004/annual/dailyjournal/121A.doc; ABA Report, *The Federalization of Criminal Law* (1998), *available at* http://www.nacdl.org/public/nsf/legislation/overcriminalization/ $FILE/fedcrimlaw2.pdf.

[158] United States Sentencing Commission, Report, *Fifteen Years of Guidelines Sentencing*, ch. 4, 23 (Nov. 2004), *available at* http://www.ussc.gov/15_year/chap4.pdf.

observed that "the harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine."[159]

Before *Booker*, judges lacked the ability to adjust the inherent unfairness between the sentences given to crack offenders compared with the sentences given to cocaine offenders. At a 100-1 ratio, the harshness has been the subject of much study and condemnation.[160] In a post-*Booker* sentencing world, judges can now consider whether the defendant's conviction justifies this harshness.[161] One court explained the new options a sentencing judge will be able to exercise:

> As is now notorious, the guidelines create a 100 to 1 ratio between crack and powder cocaine. In other words, the guidelines treat possession of 50 grams of crack cocaine the same as they treat possession of 5000 grams (5 kilograms) of powder cocaine. Courts, commentators and the Sentencing Commission have long criticized this disparity, which lacks persuasive penological or scientific justification, and creates a racially disparate impact in federal sentencing. . . . To its great credit, the Commission has repeatedly sought to reduce the disparity. * * * Only Congress can correct the statutory problem, but after *Booker* district courts need no longer blindly adhere to the 100:1 guideline ratio.[162]

In the wake of *Booker*, several district courts have invalidated the punishment disparity between crack and powder cocaine. When sentencing defendants convicted of violations involving crack cocaine, these judges have imposed sentences that fall below the ranges set forth under the mandatory Guidelines structure.[163]

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[159] U. S. Sentencing Commission, Fifteen Years of Guidelines Sentencing, pp. xv-xvi (Nov. 2004). This report is available online at http://www.ussc.gov/15_year/15year.htm

[160] Although the Guidelines were intended to eliminate the disparity among sentences and defendants, they have failed to do so regarding race. Douglas C. McDonald & Kenneth E. Carlson, *Sentencing in the Federal Courts: Does Race Matter?* (The Transition to Sentencing Guidelines, 1986-1990), Bureau of Justice Statistics 1994. The Guidelines have neglected to remedy the crack/cocaine disparity. An offender convicted of selling crack receives the same sentence as one convicted of selling 100 time the amount of cocaine. See Charles J. Ogletree, *The Significance of Race in Sentencing*, 6F ED. SENT. R. 229 (1994).

[161] United States v. Smith, No. 02-CR-163 (E.D. Wis. 2005).

[162] *Id.* The court used a 20:1 ratio and sentenced the defendant below the Guidelines.

[163] Unites States v. Harris, 2005 U.S.Dist. LEXIS 3958 (D. D. C. Mar. 7, 2005) (referring to the Sentencing Commission's observations on the disparity between crack and powder cocaine, the court found them to be "sound authority" for the conclusion that the crack guidelines are "greater than necessary"); Simon v. United States, 2005 U.S.Dist. LEXIS 34551 (E. D. N. Y. Mar. 17, 2005) (court recognized the disparity between crack and powder cocaine and sentenced below the guideline range); United States v. Smith, 2005 WL 549057. *6 *10 (E. D. Wis. Mar. 3, 2005) (court conducted an in-depth analysis of case law and analysis and stated that the 1 to 100 ratio lacks justification and creates unwarranted sentencing disparity.)

B. Substantial Assistance

1. Determinate Sentencing and Governmental Power

Critics of blind mandatory sentencing have long recognized that offenders could be given the same sentence despite the fundamental differences between them. Blind uniformity in sentencing can frequently deny rather than enhance justice.[164] Because mandatory Guidelines transferred tremendous power into the hands of prosecutors, reinvigorating judicial discretion should have the positive outcome of moderating prosecutorial discretion.

One of the more unexpected outcomes of the Guidelines system was the increase in prosecutorial power. The tremendous growth in prosecutorial power in the last two decades was halted with the *Booker* decision. Pleas will become less predictable, translating into less power for DOJ.[165] Despite the many positives brought about by the Guidelines, they are not, nor have they ever been, comprehensive and accurate statements of appropriate sentences in all cases falling within their ranges. Neither were the Guidelines intended to create enhanced discretion in the hands of prosecutors.

Over the last several years, sentencing decisions have quietly shifted from the courts to the prosecutors and even to the police and investigators who are involved at the initial stages of a criminal investigation. Executive control of sentencing is initiated well before the matter reaches the courtroom.[166] Prosecutors maintained the traditional powers such as the power to either refuse to prosecute[167] or to structure the charges in such a way that the outcome is almost certain and a specific sentence almost

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[164] CABRANES & SMITH, *supra* note 136, at 105. The authors argue that uniformity "can itself be 'unwarranted:' when unprincipled, blind uniformity promotes inequality." *Id.* at 106.

[165] DOJ urges that the courts run the sentencing options through the Guidelines to determine whether they are reasonable or not. This approach runs afoul of *Booker* because it assumes that a Guidelines sentence is reasonable. By implication, a non-Guidelines sentences is *per se* unreasonable under this approach, a clear violation of *Booker*.

[166] For example, even in cases where the legislature desires effective enforcement, the police can foil enforcement by either refusing to investigate an offense or diverting the action to a less onerous result outside of the court system, with street bargaining or formal diversion programs.

[167] Prosecutor discretion is quite broad and essentially unreviewable. See Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J.L. ETHICS 259 (2001). A prosecutor can divert an investigation into a civil case and the payment of a fine, misdemeanor action, or decline the case altogether. There are numerous avenues of diversion depending on the type of case. These types of diversions, to the extent that they avoid criminal prosecution, are not challenged by the defense for obvious reasons. Moreover, the public is unlikely to be made aware of these day-to-day realities except in cases that rise to public attention. Thus, prosecutors can fashion not only the scope, charges, and benefits to be awarded to a prospective defendant, but they directly control the sentence to be imposed upon conviction. *Id.*

guaranteed.[168] Prosecutors have the ability to fast-track cases, file misdemeanors, define the scope of monetary impact for purposes of restitution and guideline categorization, and decide on the number of charges to be filed.

The Guidelines established a new era of prosecutorial control because a sentence could be pre-determined by reference to the Guidelines. Crafting an indictment with a certain monetary loss, or a quantity of drugs, or number of victims could have dramatic consequences for a defendant's sentence because the characterization placed the criminal activity in certain specific guideline ranges. Charge bargaining became the currency in federal criminal practice. Further, a prosecutor could choose to ignore conduct that would trigger mandatory minimum sentences in favor of a theory allowing a favorable substantial assistance sentencing motion.

There is no doubt that crime legislation became more draconian in the past 20 years with the enactment of thousands of new criminal laws.[169] Massive federalization of crime has been widely criticized as an unwarranted extension by the federal government into the province of the states. The dramatic surge in overall prison population has astounded legal observers at the highest levels and is a national and international disgrace.[170] Nevertheless, Congress shows no signs of retreating from its approach to infuse federal crime into almost every aspect of life.[171]

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[168] Prosecutorial power is almost unlimited. Today there are more federal laws than ever, and the federalization of the criminal justice system has been the subject of much debate and discussion. Federal prosecutors are some of the most powerful actors in the system since they can derail an investigation without the obligation to justify such action. Exceptions are tax cases or other cases where the U.S. Attorney must report to the AG if a declination decision is made.

[169] "So large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes." ABA Report, *The Federalization of Criminal Law*, 9 (1998), *available at* http://www.nacdl.org/public/nsf/legislation/overcriminalization/$FILE/fedcrimlaw2.pdf.

[170]

> Were we to enter the hidden world of punishment, we should be startled by what we see. Consider its remarkable scale. The nationwide inmate population today is about 2.1 million people. In California, even as we met, this state alone keeps over 160,000 persons behind bars. In countries such as England, Italy, France and Germany, the incarceration rate is about 1 in 1,000 persons. In the United States it is about 1 in 143.

Anothony M. Kennedy, Speech at the ABA Annual Meeting (Aug. 9, 2003), *available at* http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/$FILE/Justice_Kennedy_ABA_Speech.pdf.

[171] ABA Report, *The Federalization of Criminal Law*, 9 (1998), *available at* http://www.nacdl.org/public/nsf/legislation/overcriminalization/$FILE/fedcrimlaw2.pdf. The number and extent of crimes has grown so much in recent years that the ABA Task Force cautioned that "it is crucial that the American justice system not be harmed in the process. . . . In the end, the ultimate safeguard for maintaining this valued

Along with increased federalization, Congress sought to reign in federal court judges who were perceived to be sentencing defendants below the guidelines range. As a result of this alarm, Congress passed the PROTECT Act,[172] a law premised, in part, on the view that federal judges were out of control and granting excessive departures from the sentencing Guidelines.[173] Despite the alarm sounded over unwarranted judicial departures, the evidence establishes that it was not the judiciary, but the executive that was initiating over two-thirds of the downward departures.

The United States Sentencing Commission found that, over the time period from 1991-2001, the percentage of sentences within the Guidelines range decreased from 80.7% in 1991 to 63.9% in 2001.[174] Of those downward departures, two-thirds of them were the result of government motions for substantial assistance.[175] "Downward sentencing departures were more frequently due to prosecutor's substantial assistance motions (28 percent) than for any other reasons (16 percent)."[176] During 2001, departures accounted for approximately 10,000 out of 60,000 sentences, or roughly 18%. Of this number, fully one-fourth of these were initiated by the government.[177] Only 25 of these were appealed, and the government won 19 of the 25 cases.[178] Thus contrary to what many observers believed, judicial downward departures were not granted in excess

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constitutional system must be the principled recognition by Congress of the long-range damage to real crime control and to the nation's structure caused by inappropriate federalization. *Id.* at 56.

[172] Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003).

[173] The Feeney amendment to the PROTECT Act was included with a very popular provision designed to quickly locate missing children, known as the "Amber Alert" bill. It passed with an overwhelming support in both the House and Senate without the expertise or input of the Sentencing Commission. The Senate vote was 98-0, and the House vote was 400-25. Bill Summary & Status for the 108th Congress: PROTECT Act, *at* http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SN00151:@@@L&summ2=m&.

[174] United States Sentencing Commission, *Report to the Congress: Downward Departures from the Federal Sentencing Guidelines*, 18 (Oct. 2003), *available at* http://www.ussc.gov/departrpt03/departrpt03.pdf.

[175] The Guidelines provide that the government may file a substantial assistance motion, called a "5K motion" in circumstances where the defendant "provided substantial assistance" to the government in its investigation. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1.

[176] GAO, Report, *Federal Drug Offenses: Departures from Sentencing Guidelines and Mandatory Minimums Sentences, Fiscal Years 1991-2001* (Oct. 31, 2003), *available at* http://www.gao.gov/htext/d04105.htm.

[177] *Id.*

[178] As one federal judge recently observed in a speech to a meeting of the New York Council of Defense Lawyers, "That leaves six cases in which the government tried, but failed to overturn a downward departure. . . . So is there really a longstanding [or serious] problem of downward departures?" Judge Pierre N. Leval, *Address to the New York Council of Defense Lawyers* (Mar. 12, 2004), *in* N.Y.L.J., Mar. 18, 2004.

or as merciful acts judicial acts.[179] The statistics belie the perception that federal judges were granting unwarranted sentencing reductions.

2. 5K Motions

A clear example of prosecutorial discretion that troubled many was the substantial assistance motion, commonly called the 5K motion.[180] This provision, titled Substantial Assistance to Authorities, is focused on government control and reads:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.
>
> (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;
>
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> (5) the timeliness of the defendant's assistance.

The 5K motion is a move for a government-initiated downward departure motion for those situations where the defendant has cooperated or offered assistance to the government. In cases where the defendant cooperates, but that cooperation is deemed insufficient, the government had the sole option to refuse to file the 5K motion.[181] The

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[179] *See* Editorial, *House Without Mercy*, WASH. POST, Apr. 4, 2001, at A20.
[180] U.S.S.G. § 5K1.1.
[181] In *United States v. Jaber*, the defendant assisted the government, but that assistance was not deemed worthy of a substantial assistance motion. 2005 WL 605787, 2005 U.S. Dist. LEXIS 4028 (D. Mass. Mar. 16, 2005). The judge noted,

> With respect to Jaber's cooperation and acceptance of responsibility, Jaber labored mightily to cooperate with the government. In a sealed affidavit, the defendant revealed his considerable efforts to do so. In Florida, his cooperation did not produce any prosecutions, ostensibly because of a change in personnel in the United States Attorney's office. I cannot give Jaber "credit" for that cooperation simply because I do not have all

court had no power to grant any relief and the government had final say whether it was satisfied with the defendant's efforts.

The problem with this lopsided scenario was that in many cases the low level drug offenders were the ones snared in the government's net. As a result, they frequently had no information to offer as to higher level masterminds. Our prisons are crowded with this type of offender to whom the government did not offer a substantial assistance motion since the offender had no assistance to offer. This most obvious example of a reduction of executive power is the fact that defendants no longer will have to depend on the government to file a 5K motion for a judge to hear evidence of assistance or other reasons for a sentence lower than the Guideline range.

The government will lose some of its bargaining power in exchanging for favorable motions because *Booker* has mooted the monopoly on substantial assistance categories controlled by the government. Defendants will now be able to seek departures from the advisory Guidelines range by petitioning the court directly. A defendant can make a showing to the court that he attempted to cooperate with the government, even if the government does not concede that the cooperation is "substantial."

Judges will continue to consult the Guidelines as a touchstone on sentencing. After all, for the last twenty years these mandates have been the cornerstone of federal sentencing and influenced most of the states' sentencing policy. Sentencing procedures after the *Booker* decision will reduce the ability of the government to control the outcome and favor a fair process by giving the judge more, not less, sentencing information.

In an advisory sentencing system a judge will have to explain the different sentences imposed on two similarly situated defendants if warranted.[182] As long as the

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> of the information in the government's possession. Nevertheless, Jaber's repeated efforts to help law enforcement surely bear on his extraordinary acceptance of responsibility, which is both a Guidelines factor and something that impacts on the likelihood of recidivism.

Id. This was a post-*Booker* case, so the judge was not bound by the fact that the government did not file a 5K motion on the defendant's behalf.

[182] Frequently, a defendant will appear, on the surface, to be similarly situated to another defendant. However, under closer inspection, the two defendants will be quite different and warrant distinct punishments. In *United States v. Emmenegger*, a case dealing with fraud amounts, the judge stated "[i]n many cases . . . the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence." 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2004). Sometimes, the amount of fraud loss is dependent on fortuities of the timing of the investigation, the aggressiveness of the government's

sentences are reasonable, an appellate court should have no difficulty upholding the sentences as within the sound discretion of the lower courts.[183]

3. Rebalance of Power

Defense advocacy can now attempt to minimize some of the coercive nature of the Guidelines. This is a welcome return to the traditional status of power between the prosecutor and the defense. A defendant can still seek variances on sentences and the judge can still be within the Guidelines because the Guidelines contain departure ranges.

Booker altered the balance of power between the judge, the jury and the prosecution. Because the law allowed the range of possible sentences to be tied to judicial fact-finding, the Guidelines failed to satisfy the defendant's right to a Sixth Amendment jury trial. The traditional balance of power that occurred between an executive that charges and the judge that sentences was upset when the prosecutor controlled both the charging decision and the likely punishment outcome. Judicial discretion can often be a remedy for the harshness of the punishment or overzealousness of the prosecutors.

Prosecutors are seldom in the best position to adequately determine the appropriate sentence as a routine matter.[184] Prosecutors lack the discretion or training to determine appropriate sentences on a global scale. Rather, prosecutors are consumed with their individual cases, policies, and procedures within a judicial district. The length of a sentence was often driven by the way in which a prosecutor charged the offender.

When judges are performing their historic and traditional role of imposing punishment, they can discern when the punishment does not fit the crime or when the individual is a likely candidate for alternative punishment that is not within the

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undercover operation, and the return to victims or even market forces. Thus, gauging a sentence on amount of loss is not necessarily a relevant indicator without reference to other factors.

[183] United States v. Paladino, 401 F.3d 471, 488 (7th Cir. 2005). In *Paladino* the government cross-appealed a sentence that had been reduced from 235 months to 180 months because of rehabilitation and an incorrect overstatement of the defendant's criminal history. *Id.* at 480. After *Booker*, the government dropped its cross appeal. *Id.* The Seventh Circuit noted that "[u]nder the new sentencing regime the judge must justify departing from the Guidelines, and the justification has to be reasonable, but we cannot think on what basis a 15-year sentence for Peyton, who was 34 years old when sentenced, could be thought unreasonably short." *Id.*

[184] Prosecutors are focused on individual criminal investigations and disputes. As a result, observers have been critical of the power that prosecutors enjoy under the mandatory Guidelines system since they control so much of the sentencing outcome, to the exclusion of the judiciary. Certainly, prosecutorial discretion has more potential to produce disparate sentencing treatment than the conduct of the judiciary, if for no other reason than the sheer number of prosecutors compared with federal district court judges.

Guidelines scheme. The fact that two offenders have an identical offense and prior record, although relevant, is not always a compelling reason for identical punishments. The offenders may have very different ages, backgrounds, military service, addictions, mental capacity, educational levels, and family obligations and may otherwise appear dissimilar in ways not visible on the bare record. Nevertheless, under a mandatory system, the judge was obligated to sentence them in the same category, an unwarranted result.

On the other hand, under a mandatory Guidelines sentencing structure, similarly situated defendants could actually end up in very different categories depending on whether the prosecutor favored one defendant over another.[185] The true difference between defendants is not always reflected by the scores in a sentencing grid. Similar cases could end up falling within very different ranges. Two defendants with different culpability and who caused different harms could end up in the same sentencing range, and this would still be consistent with the mandatory Guidelines structure. Judges were troubled by this confinement since it restricted the sentencing options, and many judges had great difficulty in getting a sentence outside of the range set by the Guidelines. Given discretionary freedom, many judges will choose to impose sentences tailored to each defendant. There is a greater likelihood of achieving justice in the post-*Booker* sentencing scheme than in the mandatory Guidelines system. As the Supreme Court emphasized in *Booker*, a one-size-fits-all sentence is not the goal. Rather, the focus should be on "similar relationships between sentence and real conduct."[186]

V. Section 3553(a) Mandates Individualized Sentencing

Although severing the mandatory section of the Guidelines, the Court left in place the adjoining section 3553(a). It reads:

> **(a) Factors To Be Considered in Imposing a Sentence.—**The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> **(1)** the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> **(2)** the need for the sentence imposed—

[185] *See Jaber*, 2005 WL 605787.
[186] 125 S. Ct. at 761 (2005).

> **(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;
> **(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;
> **(3)** the kinds of sentences available;
> **(4)** the kinds of sentence and the sentencing range established for—
> **(A)** the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or
> **(B)** in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994 (a)(3) of title 28, United States Code;
> **(5)** any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994 (a)(2) that is in effect on the date the defendant is sentenced;
> **(6)** the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
> **(7)** the need to provide restitution to any victims of the offense.[187]

Section 3553(a) will become the heart of discretionary sentencing after *Booker* and allow judges to avoid both the unduly harsh as well as the indefensibly light sentences.[188] Instead, sentencing should be reasoned, based on the exercise of sound discretion, producing more judicious outcomes. Even the DOJ recognized the importance of judicial discretion in sentencing when it directed all federal prosecutors in the wake of the *Blakely* decision to "urge the court to impose sentence, *exercising traditional judicial discretion*, within the applicable statutory sentence range," with

[187] 18 U.S.C. § 3553(a).

[188] In the interim between *Blakely* and *Booker*, some courts felt constrained to sentence as though the Guidelines never existed. One extreme example is the *Shamblin* case. United States v. Shamblin, No. 2-03-00217, 18-19 (D. W. Va. 2004). A judge sentenced Ronald Shamblin after he pled guilty to 18 U.S.C. § 846, which criminalized a wide ranging conspiracy to manufacture methamphetamine. The court held a resentencing hearing pursuant to Rule 35, and after considering all of the factors the defendant's sentence went from life under a pure Guidelines determination, to 240 months with the *Apprendi* filter, to 12 months in a post-*Blakely* analysis. In calculating the sentence, the court reached the highest offense level permissible on the Guidelines chart of 43. The maximum statutory sentence was 20 years. Thus, sentencing in light of *Apprendi* reduced that actual sentence that the judge could impose to 20 years or the statutory maximum. After *Blakely*, the judge considered the affects of both *Apprendi* and *Blakely*. Based only on the sentencing factors that the defendant admitted to during his plea, the court sentenced him to 6-12 months. Even the court found this to be an outrageous outcome. *Id.*

"recommendation in all such cases . . . that the court *exercise its discretion* to impose a sentence that conforms to a sentence under the Guidelines."[189] The *Booker* opinion restores the original impetus for sentencing overhaul. *Booker* validates the section 3553(a) factors that lay dormant under the mandatory guidelines system.

A. The Parsimony Provision

The "parsimony provision" of section 3553 reflects the philosophy that a sentence should be "sufficient, but not greater than necessary" to meet the objectives of section 3553(a). The four purposes of sentencing are those traditional goals of retribution,, deterrence, incapacitation and rehabilitation set forth in 3553(a)(2):

> **(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;
> **(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;

This section is critical because it is not simply another factor, but it overrides all of section 3553. Thus, this section sets forth an independent limit on what sentence a court may impose. As one court has stated:

> I believe that a refusal to depart from the applicable guideline range rises to the level of a violation of 18 U.S.C. § 3553(a). I base this conclusion in part on the expressly mandatory language of that provision, in part on well-settled administrative law principles imported into the sentencing context by *Mistretta v. United States,* 488 U.S. 361 (1989), and in part on the history, structure, and purpose of the SRA considered as a whole.
>
> Section 3553(a) *requires*--as a matter of law--that district courts impose a sentence sufficient, but not greater than necessary, to meet the four purposes of sentencing set forth in subsection 3553(a)(2)--retribution, deterrence, incapacitation, and rehabilitation. Imposition of a sentence greater than necessary to meet those purposes is therefore a violation of section 3553(a) appealable under subsection 3742(a)(1) and reversible under subsection 3742(f)(1). The question then becomes whether a sentence imposed pursuant to applicable guidelines could ever be greater than necessary to meet the four statutory purposes. I believe that it

[189] July 2, 2004, Memorandum from James Comey, Deputy Attorney General to all Federal Prosecutors. The government wanted to urge the continued use of the Guidelines and it continues to do so after *Booker*. This article argues that to simply continue to follow the Guidelines would be a violation of the principles of *Booker* (emphasis added).

could.[190]

One anticipated result from the *Booker* decision is that courts will view the Guidelines as just one of a number of sentencing factors. Courts can no longer robotically apply the Guidelines without considering the individual characteristics of a defendant the offense. The remedial majority in *Booker* directed sentencing courts to consider all of the sentencing factors contained in 3553(a). Under the prior mandatory Guidelines system, these factors were usually ignored in favor of the Guidelines range. After all, the judges could not consider any factors, with limited exceptions, since the sentence had to fall within the Guidelines range.

This point will become more evident as cases percolate through the post-*Booker* sentencing process. Under section 3553(b), departures are permissible only when "there [is] an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by . . . the Guidelines." Thus, under the mandatory scheme, courts could not consider factors that were already included in departure ranges and presumptively taken into consideration by the Commission in establishing the punishment ranges. Under U.S.S.G. § 5H, the Guidelines set forth many factors that courts were *not* permitted to consider in setting sentence.[191] This prohibition resulted from the interpretation of the Guidelines as inclusive of these characteristics and thus, a court did not need to go beyond the Guidelines. Judges hands were tied.

Applying section 3553(a)(1) requires that the court evaluate the "history and characteristics" of a defendant. A defendant's characteristics and history could include

[190] United States v. Denardi, 892 F. 2d 269, 276-77 (3d Cir. 1989) (Becker, J. concurring in part, dissenting in part).

[191] U.S.C.G. § 5H is titled Specific Offender Characteristics. This policy statement addresses the "relevance of certain offender characteristics to the determination of whether a sentence should be outside the applicable guideline range and, in certain cases, to the determination of a sentence within the applicable guideline range." *Id.* For the most part, § 5H details those sentencing factors that a court are "not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." *Id.* Notably, factors that might weigh in favor of a defendant are "not ordinarily relevant," such as: age; education and vocational skills; mental and emotional conditions; physical condition; including drug or alcohol dependence; gambling addiction; employment record; family ties and responsibilities; military, civic, charitable or public service; employment-related contributions; record of prior good works; and lack of guidance as a youth. Factors that usually weigh against a defendant are "relevant in determining the applicable guideline range," such as: role in the offense; criminal history; and dependence upon criminal activity for a livelihood. *Id*.

other factors such as the defendant's age,[192] education and vocational skills,[193] mental and emotional condition,[194] physical condition,[195] employment record,[196] family ties and responsibilities,[197] socio-economic status,[198] civic and military contributions[199] and his lack of guidance as a youth.[200] Mandatory Guidelines rejected or ignored these other factors as irrelevant to sentencing or already factored into the guideline ranges.[201] Rather, sentencing judges routinely considered a defendant's criminal history, the only aspect of the defendant's history permissible under the Guidelines.

Booker compels courts to broaden consideration of factors which are set forth in 3553(a). The court stated that "a sentencing judge would [] violate section 3553(a) by limiting consideration of the applicable Guidelines range to the facts found by the jury or admitted by the defendant, instead of considering the applicable Guidelines range, as required by subsection 3553(a)(4), based on the facts found by the court."

Restitution demonstrates the relevance of a sentencing factor that was virtually ignored under the determinate system. A defendant required to satisfy a restitution order will need to be employed. Section 3553(a)(7) specifies that a court consider "the need to provide restitution to any victims of the offense." Courts have interpreted this provision as allowing consideration as long as the departures for restitution are within the Guidelines range. Section 3553 did not allow a judge to depart from the Guidelines to achieve the purposes of restitution. Under the mandatory guideline scheme, a court was forbidden from departing from the Guidelines in order to facilitate restitution.[202] This was because the Guidelines had already factored restitution into the ranges set forth under

[192] U.S.S.G. § 5H1.1.
[193] *Id.* at § 5H1.2.
[194] *Id.* at § 5H1.3.
[195] *Id.* at § 5H1.4.
[196] *Id.* at § 5H1.5.
[197] *Id.* at § 5H1.6.
[198] *Id.* at § 5H1.10.
[199] *Id.* at § 5H1.11.
[200] *Id.* at § 5H1.12.
[201] At least one observer suggested some time ago that the Guidelines and their policies should be only factors to consider along with other factors in setting the appropriate sentence. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1701-02 (1992). *See also* U.S.S.G. § 5H.
[202] United States v. Seacott, 15 F.3d 1380, 1388-89 (7th Cir. 1994).

3E 1.1 acceptance of responsibility.[203] Now a judge can consider the need to make the victims whole when sentencing the defendant.

Other factors will be critical as well. In sentencing a defendant below the suggested guidelines range, a judge noted how some of these factors will bear upon the sentence:

> . . . under the circumstances of this particular case . . . the sentence called for by the guidelines, 168-210 months, was greater than necessary to satisfy the purposes of sentencing set forth in § 3553(a). In other words, while this sentence may be disparate from the sentence given to other defendants who are "found guilty of similar conduct," given the particular circumstances of this case – [his] age, the likelihood of recidivism, his status as a veteran, his strong family ties, his medical condition, and his serious drug dependency – the Court does not view that disparity as being "unwarranted." 18 U.S.C. § 3553(a)(6).[204]

The excessive sentences that have resulted in an overcrowded prison system will eventually even out as judges become more accustomed to being able to consider a wide range of sentencing factors.

Courts must now consider all of the § 3553(a) factors, not just the Guidelines, since the Guidelines are only one out of five sentencing factors. Where the guidelines conflict with other factors set forth in § 3553(a), courts will have to resolve the conflicts."[205] Some courts can conduct a detailed analysis of the weight to be afforded the section 3553 factors and ultimately diverge from the guidelines.[206] Courts, however, might conduct this analysis and come out with a sentence squarely within the guidelines range. This is the ultimate demonstration of judicial discretion: the ability to consult factors, determine their weight, balance them against a range, and determine an appropriate sentence.

B. Full Discretion and Voluntary Guidelines – State Court Precedents

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[203] The Commentary to § 3E1.1 "demonstrates that the Commission adequately considered restitution as a mitigating circumstance when formulating the Guidelines," *id.* at 323, and therefore it is not an appropriate ground for departure. *See* 18 U.S.C. § 3553(b) (departures are permissible only when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by . . . the Guidelines"). Thus, under the mandatory scheme, courts could not consider factors that were already included in departure ranges.

[204] United States v. Nellum, No. 2:04-CR-30 PS (N.D. Ind. 2005).

[205] United States v. Ranum, No. 04-CR-31 (E.D. Wis. Jan. 14, 2005).

[206] *Ranum*, No. 04-CR-31. The court offered a roadmap detailing the methodology of post-*Booker* sentencing factors.

Federal courts can benefit from a number of states that have operated under an advisory sentencing system with positive results. A common theme of these states' success is the flexibility inherent in the guidelines, the method of appellate review and the opportunity for all parties to place on the record the critical sentencing factors. The result in *Booker* can lead the federal government to a successful transition from a mandatory system to an advisory one, by referencing state systems.

For example, judges in Wisconsin sentence by reference to an advisory guidelines structure and their sentences are reviewed on appeal for reasonableness. Wisconsin judges must demonstrate the reasons for their sentences and connect these reasons with the goals of the sentencing process.[207] Thus, the Wisconsin sentencing process "contemplates a process of reasoning."[208] This includes a full explanation on the record of the reasons for the sentence imposed.[209] Courts must not, "merely utter[] the facts, invoke[] sentencing factors, and pronounc[e] a sentence. . . . Such an approach confuses the exercise of discretion with decision-making.[210] In this way, Wisconsin is similar to the post-*Booker* sentencing structure and provides a clue to the expected effectiveness and potential success.

Section 3553(c) requires district courts to continue to state the reasons for the sentence imposed because Booker left section 3553(c) in place.[211] A sentence that is supported by specific written justification will likely be found to satisfy the "reasonableness" requirement of *Booker*. "Post-*Booker* we continue to expect district judges to provide reasoned explanation for their sentencing decisions in order to facilitate appellate review."[212]

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[207] See Hunt & Connelly, *supra* note 99, at F-21. The authors review advisory sentencing states and explain the perceived strengths of advisory sentencing systems.
[208] State v. Gallion, 678 N.W.2d. 197 (2004).
[209] "In all Anglo-American jurisprudence a principal obligation of the judge is to explain the reasons for his actions. His decisions will not be understood by the people and cannot be reviewed by the appellate courts unless the reasons for decisions can be examined. It is thus apparent that requisite to a prima facie valid sentence is a statement by the trial judge detailing his reasons for selecting the particular sentence imposed." McCleary v. State, 182 N.W.2d 512 (1971).
[210] *Gallion*, 678 N.W.2d at 200. The *Gallion* court explained a "truth-in-sentencing" environment, where it is necessary for sentencing courts to state on the record their reasons for the sentence, not just for the benefit of the defendant, but for the appellate record. In Wisconsin, both the legislative mandate and the judicial precedent require courts to justify sentences on the record.
[211] See United States v. Webb ___ F. 3d ___, 2005 WL 763367 n. 8 (6th Cir. April 6, 2005).
[212] Id.

The success of Wisconsin and other advisory state systems bodes well for the new federal approach to advisory guidelines. For one thing, Wisconsin and other states have succeeded in utilizing guidelines to inform, not replace, judicial discretion. The "end result . . . was a state system of advisory guidelines with comparative data and of appellate review of sentences for reasonableness that can serve as proof that such systems can effectively operate."[213]

With the decision in *Booker*, many judges are expected to take the opportunity to exercise full discretion in sentencing in order to achieve a just punishment. In his dissent, Justice Scalia reasoned that "logic compels the conclusion that the 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."[214] Viewed as legitimate advisory Guidelines, a court could sentence a defendant as if operating an indiscriminate sentencing scheme."[215] No sentencing scheme should exist without a serious reconsideration of ways in which to blend the positive aspects of individualized sentencing without the risks associated with its predecessor system.

The federal system can survive as an advisory system as have other states with advisory sentencing schemes. At least ten states have an advisory sentencing system.[216] The results under an advisory sentencing scheme can accomplish the goals of the SRA, if the states are good evidence of successful advisory schemes. In fact, there are many

[213] Hunt & Connelly, *supra* note 99, at F-21.
[214] 125 S. Ct. at 47 (2005) (Scalia, J., dissenting).
[215] The Sixth Circuit sentenced a defendant to a probationary period for bank fraud with the expectation that she serve her time in a halfway house as was the tradition for the last 15 years. When the Department of Justice changed the policy, the defendant appealed and this allowed the court to reconsider not only the original sentence, but the impact of *Blakely* which was decided in the interim. As the Sixth Circuit stated,

> . . . in order to comply with *Blakely* and the Sixth Amendment, the mandatory system of fixed rules calibrating sentences automatically to facts found by judges must be displaced by an indeterminate system in which the Federal Sentencing Guidelines in fact become "Guidelines" in the dictionary-definition sense ("an indication or outline of future policy," [citation omitted]). The "Guidelines" will become simply recommendations that the judge should seriously consider but may disregard when she believes that a different sentence is called for.

United States v. Montgomery, No. 03-5256 (6th Cir. 2004).
[216] Hunt & Connelly, *supra* note 99, at F-21.

aspects of a voluntary system that suggest it is more likely to can address the original goals of the SRA as effectively as can a mandatory system.[217]

Conclusion

Booker has uprooted the sentencing procedures in federal court once again. Not since the passage of the Sentencing guidelines in 1987 has there been so much upheaval in a sentencing scheme. While some defense observers view *Booker* as the long awaited decision returning the system to the pre-Guidelines era, this view would be premature. Courts are going to continue to reference the Guidelines since, as a practical matter, most of the federal judiciary has only had experience with a mandatory Guidelines system. The key question will be what amount of deference *should* be afforded. Courts that are resisting the change announced in *Booker*, by continuing to give great weight to the Guidelines are missing the point of *Booker*. They are quite possibly sentencing in violation of the constitutional principles announced in the case and continuing the" rote" sentencing that was at issue in *Booker*.

The Sentencing Commission will continue to monitor appellate opinions and make recommendations on the workings of sentencing policies. They collect and analyze data, prepare reports and offer training to the 94 federal judicial districts. As they follow their natural amendment cycle and maintain a working relationship with Congress, sentencing policies can actually achieve the original intent of the SRA.

Clearly, sentencing issues will evolve as the lower and appellate courts continue to interpret *Booker*. A welcome dialogue resulting from this decision is the common law of sentencing contemplated by the SRA.

> An advisory guidelines system would promote some degree of sentencing uniformity because (1) judges would still be required to "take account of" and "consult" the guidelines in determining a sentence, and (2) sentences would still be subject to the harmonizing effect of appellate review, with the Sentencing Commission able, in turn, to make guideline amendment decisions based on appellate case law."[218]

[217] Id. The authors review advisory sentencing states and explain the perceived strengths of advisory sentencing systems.

[218] Booker Litigation Strategies Manual, A Reference for Criminal Defense Attorneys Distributed February 17, 2005, Revised April 15, 2005, p. 4 (2005).

As appellate courts interpret sentences under the reasonableness standard, lower courts will refine and mold sentencing policies, something expected when the SRA was first enacted. In this article the author suggests two modest outcomes: that*Booker* mandates that the judiciary consider factors outside of the guidelines range and that the reasonableness standard allows for full consideration and deference to the sentences imposed, something that has been lacking in sentencing for almost 20 years. In this time of sentencing reconsideration, the courts and the legislature must take this opportunity to honestly examine the reforms of the last years and make adjustments that reflect the true balance of power. If the advisory guidelines give true meaning to section 3553, then judges have fully restored discretion to consider both the guidelines and other valid, relevant factors.

The current practices have failed to achieve the reasoned sentencing that was the initial goal of the SRA. Now, at this juncture, all interested parties can urge Congress to take a wait-and-see approach to the post-*Booker* world. As is evident from many of the cases thus far, the courts are not blindly avoiding the guidelines. Rather, they are giving reasoned consideration to the guidelines ranges and setting a sentence both within and without the ranges. This is true discretion and, after all, the SRA had hoped to achieve this result initially in 1984.