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**THE RETURN OF FEDERAL JUDICIAL DISCRETION  
IN CRIMINAL SENTENCING**

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## Abstract

### The Return of Federal Judicial Discretion in Criminal Sentencing

To be published in "The Shifting Powers in the Federal Courts" symposium in 39 Valparaiso Law Rev. \_\_\_\_ (2005).

By Susan R. Klein, Baker & Botts Prof. in Law, Univ. of TX at Austin.

Federal judicial discretion in criminal sentencing has come full circle over the last 200 years. The English practice in colonial times for felony offenses consisted of a determined sentence for every crime, depending upon a finding beyond a reasonable doubt by a jury of all of the "essential ingredients" of that crime. America, on the other hand, switched to indeterminate sentencing during colonial times, giving state and federal judges the authority to impose any sentence they chose within the very wide penalty range established by the legislature.

Each judge was master of her courtroom upon receiving a conviction by jury verdict or guilty plea. She made all of the moral, philosophical, medical, penological, and policy choices surrounding what particular sentence to impose upon a particular offender, and her decision was virtually unreviewable by any higher court.

Judges ceded some of this enormous discretion by the early 1960s, as every state and the federal government permitted a parole board or probation agency to release a defendant after serving the minimum sentence imposed. Judges nonetheless, in the words of Judge Marvin Frankel, possessed discretion that was "terrifying and intolerable for a society that professes devotion to the rule of law." This discretion was abruptly and almost completely terminated shortly after Congress enacted the Sentencing Reform Act of 1984, which transferred power over federal criminal sentencing from district judges to the newly created United States Sentencing Commission. Needless to say, many federal trial court judges were not overly fond of this new arrangement. After many false starts, a successful attack was finally launched last term in *United States v. Booker* and *United States v. Fanfan*.

In Part I of this article, I will briefly recount the history of American criminal sentencing and describe the line of Sixth Amendment cases leading to *Booker*. I will offer some educated speculation as to why Justice Ginsburg inexplicably joined both competing majority opinions in *Booker*, and what the five Justices writing for the remedial majority hoped to gain by their tortured interpretation of the Sentencing Reform Act. I suggest that this five justice block hoped to revive judicial discretion in federal sentencing in the wake of what they considered the rude, disruptive, and unwise coup over criminal sentencing that Congress accomplished via the Sentencing Reform Act of 1984 and the Feeney Amendment of 2002.

In Part II, I will predict, based upon sentences imposed post-*Booker* and the structure of the U.S. Code and the Federal Rules of Criminal Procedure, the actual effect that *Booker* will have on federal sentencing. We will see a sharp, perhaps temporary surge of judicial discretion at the trial level in sentencing, used primarily to decrease the length of sentences, before federal prosecutors regain some (but not all) of their dominance. While there will thus be a shift in the balance of power from the prosecutor to the judiciary (at least until Congress supplants *Booker* by new legislation), the jury will continue to play a relatively minor role.

In Part III, I will describe what I anticipate will be *Booker's* effect on plea bargaining. This section is based in large part upon the admittedly unscientific method of questioning my contacts in various U.S. Attorney's and Federal Public Defender's Offices and at federal judicial chambers throughout the country. Though the substantive terms of bargains will shift in favor of defendants, the overall percentage of guilty pleas will ultimately remain quite high, and a sufficient number of trump cards will remain in the prosecutor's deck (coupled with institutional pressures from Federal Public Defender's Offices and the federal judiciary) to convince defendants to accept pleas in the vast majority of cases. The shift of fact-finding responsibility that does occur will again flow in most cases from the prosecutor to the judge, not to the jury. I conclude with a few thoughts about the likely duration of this new federal sentencing scheme, and what measures would actually be required to truly either expand the jury's role in criminal trials, or to more substantially shift sentencing discretion back to the judicial branch.

## The Return of Federal Judicial Discretion in Criminal Sentencing

"The Shifting Powers in the Federal Courts" symposium in 39 Valparaiso Law Rev. \_\_\_\_ (2005).

Susan R. Klein, Baker & Botts Prof. in Law, Univ. of TX at Austin. I thank Sam Beull, Jordan Steiker, and Kate Stith for their helpful comments. I appreciate the research assistance of Ashley Storm and Marwan Elrakabawy.

Federal judicial discretion in criminal sentencing has come full circle over the last 200 years. Federal trial judges enjoyed broad judicial discretion in criminal sentencing from the founding of our country. The English practice in colonial times for felony offenses, to the contrary, consisted of a determined, or fixed, sentence for every crime, depending upon a finding beyond a reasonable doubt by a jury of all of the "essential ingredients" of that crime.<sup>1</sup> The judicial role was largely a ministerial one - impose that sentence mandated by the jury verdict. America switched to indeterminate sentencing during colonial times, giving state and federal judges the authority to impose any sentence they chose within the very wide penalty range established by the legislature. Once the jury returned a verdict on a particular crime, the judge was free to sentence anywhere between, say zero to 20 years imprisonment, rather than a predetermined sentence of death or a fine measured at twice the value of the property stolen. Each judge was master of her courtroom upon receiving a conviction by jury verdict or guilty plea. She held a sentencing hearing if she wanted one, she heard whatever evidence she felt relevant, and she made all of the moral, philosophical, medical, penological, and policy choices surrounding what particular sentence to impose upon a particular offender.<sup>2</sup> There were no standards to assist or confine the judge in making her determination, she need not publicly state the reasons for her selection of a particular sentence, and her decision was virtually unreviewable by any higher court.<sup>3</sup>

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<sup>1</sup> Bishop, *infra* n. \_\_\_\_.

<sup>2</sup> See, generally, Marvin Frankel, "Lawlessness in Sentencing," 41 U.Cin. L. Rev. 1 (1972); *infra* nn. \_\_\_\_ - \_\_\_\_.

<sup>3</sup> The few exceptions were (1) a sentence imposed using unconstitutional criteria, such as race or political viewpoint, *United States v. Wayte*, 470 U.S. 598 (1985); (2) a vindictive sentence based upon a defendant's assertion of constitutional right to appeal his conviction, *North Carolina v. Pearce*, 395 U.S. 711 (1969); and a term of years or fine so excessively compared to the crime that it offended the Eighth Amendment's proportionality requirement, *Harmelin v. Michigan*, 501 U.S. 957 (1991); *United States v. Bajakajian*, 524 U.S. 321 (1998). I will not discuss capital sentencing, with its vast array of constitutional restrictions, in this essay.

Judges ceded some of this enormous discretion by the early 1960s, as every state and the federal government permitted a parole board or probation agency to release a defendant after serving the minimum sentence imposed. Judges nonetheless, in the words of Judge Marvin Frankel, possessed discretion that was "terrifying and intolerable for a society that professes devotion to the rule of law."<sup>4</sup> This discretion was abruptly and almost completely terminated shortly after Congress enacted the Sentencing Reform Act of 1984, which transferred power over federal criminal sentencing from district judges to the newly created United States Sentencing Commission. Once the Commissioners crafted the first Federal Sentencing Guidelines Manual in 1987, the judge was demoted from policy-maker to fact-finder. Rather than deciding which crimes were most serious, and what aggravating and mitigating characteristics regarding offenders and offenses she believed warranted a higher or lower sentence in the cases before her, the Commissioners made all of those decisions in advance, for every conceivable case, and listed the outcomes in the Manual. The judge then determined whether those aggravating or mitigating facts that mattered to the Commissioners existed, and plugged these findings into the formula provided in the Manual to reveal the appropriate sentence.

Needless to say, many federal trial court judges were not overly fond of this new arrangement. After many false starts, a successful attack was finally launched last term in *United States v. Booker* and *United States v. Fanfan*. This was the latest of a line of cases, starting in 1999, that attempted to define the role of the Sixth Amendment jury trial right in criminal sentencing. The newly articulated right that emerged prior to *Booker* required jury fact-finding on all statutory matters mandating an increase in the penalty a defendant would otherwise receive for an offense. Federal judges really didn't have a dog in that race, as they previously showed no inclination to jealously guard their fact-finding ability from outside incursion.<sup>5</sup> If this Sixth Amendment

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<sup>4</sup> Marvin. E. Frankel, "Criminal Sentences: Law Without Order" (Hill & Wang, 1973). Judge Frankel is widely regarded among scholars as the father of the modern sentencing movement.

<sup>5</sup> There was no negative judicial reaction to *United States v. Gaudin*, 515 U.S. 506 (1995) (holding that "materiality" is an element of the offense of tax fraud, and thus the Sixth Amendment requires that it be submitted to the jury for a beyond a reasonable doubt finding). Judges expect the jury to be the factfinder unless the right is waived by both parties. Similarly, there was little judicial reaction to placing large portions of the fact-finding required under the Federal Sentencing Guidelines with the Probation Department. Judges didn't look beyond the PreSentence Investigative Report unless the defendant challenged a particular finding. In finding the challenged facts, judges relied upon lax procedures, refusing to apply the Federal Rules of Evidence or the Confrontation Clause to the proceedings. See

rule was extended to mandatory sentencing guidelines, this would shift fact-finding as to offense and offender characteristics from the judge to the jury. While this would make trials more cumbersome and sentences slightly less uniform,<sup>6</sup> it would not affect federal judicial discretion in sentencing - there wasn't much to protect.<sup>7</sup>

Amazingly, two different 5-member majorities of the *Booker* Court managed to reaffirm the newly articulated jury right (in what I will call the "merits" majority), while at the same time greatly expand true federal judicial discretion in sentencing matters (in what I will call the "remedial" majority). The Sixth Amendment sentencing revolution, as it turns out, provided perfect cover for a judicial revolt from the constraints of Congress and the Commission in criminal sentencing policy. In Part I of this article, I will briefly recount the history of American criminal sentencing from our founding, and describe the line of Sixth Amendment cases leading to *Booker*. After analyzing the *Booker* and *Fanfan* cases, I will offer some educated speculation as to why Justice Ginsburg inexplicably joined both competing majority opinions in *Booker*, and what the five Justices writing for the remedial majority hoped to gain by their tortured interpretation of the Sentencing Reform Act. I suggest that this five justice block<sup>8</sup> hoped to revive judicial discretion in federal sentencing in the wake of what they considered the rude, disruptive, and unwise coup over criminal sentencing that Congress accomplished via the Sentencing Reform Act of 1984<sup>9</sup> and the Feeney Amendment of 2002.<sup>10</sup> For Justice Breyer, the architect of the Federal Sentencing Guidelines, the fifth attempt to make them advisory was the charm.<sup>11</sup>

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*United States v. Petty*, 982 F.2d 1365 (9th Cir. 1993) (collecting cases from circuits holding the confrontation clause inapplicable to sentencing proceedings).

<sup>6</sup> See Klein & Steiker, *The Search for Equality in Criminal Sentencing*, 2002 Supreme Court Rev. 223 (2003).

<sup>7</sup> Judicial discretion in federal sentencing was reduced to departure authority for exception cases outside the federal sentencing guidelines "heartland." See U.S. Sentencing Guidelines section 5K2.0 (authorizing departures).

<sup>8</sup> This block was composed of Justice Ginsburg plus the four dissenting Justices in the merits majority (who also dissented in every other Sixth Amendment case leading up to *Booker*).

<sup>9</sup> The Sentencing Reform Act of Oct. 12, 1984, Pub.L. 98-473, Title II, chap. II, sections 211-238, 98 Stat. 1987, was part of the Comprehensive Crime Control Act of 1984.

<sup>10</sup> PROTECT Act, Pub. L. No. 108-21, sections 41(b), (g), (i), 115 Stat. 650, 668-69, 671-73 (2003) (amending guidelines to increase penalties for child pornography, curb judicial discretion to depart downwards, and tighten appellate standard of review of criminal sentences).

<sup>11</sup> I owe this count to Prof. Kate Stith, in her e-mail to a

In Part II, I will predict, based upon sentences imposed post-*Booker* and the structure of the U.S. Code and the Federal Rules of Criminal Procedure, the actual effect that *Booker* will have on federal sentencing. We will see a sharp, perhaps temporary surge of judicial discretion at the trial level in sentencing, used primarily to decrease the length of sentences, before federal prosecutors regain some (but not all) of their dominance. While there will thus be a shift in the balance of power from the prosecutor to the judiciary (at least until Congress supplants *Booker* by new legislation), the jury will continue to play a relatively minor role.

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## **I. The Sixth Amendment and Criminal Sentencing**

A brief history of federal criminal sentencing from the founding of our nation through the Court's decision in *Booker* will illustrate the strange path by which the interplay of political institutions, social reform movements, and judicial desire brought about the return of judicial discretion in federal criminal sentencing.

### **A. Early History**

The English practice in colonial times for felony offenses consisted of a set or determined sentence for every offense, primarily the death penalty or a fine which varied according to the value of the property stolen.<sup>12</sup> A defendant knew from the

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Stanford Roundtable sentencing list-serve on 3/8/05 (on file with author). I had counted only three until receiving her greater insight.

<sup>12</sup> See King & Klein, *Essential Elements*, 54 VAND. L. REV. 1467,

face of the charging instrument precisely what sentence she would receive if convicted.<sup>13</sup> This regime soon gave way in America, as early as the 1780s, to the criticism that it did not allow for individuation of punishment, and the belief that death and corporal punishment were disproportionate penalties with little deterrent effect.<sup>14</sup> Thus, of the 22 federal crimes enacted by the First Congress in 1790, only six required a determinate sentence of hanging. The majority provided a maximum period of imprisonment only, leaving the determination of what sentence to impose to the discretion of the district judge.<sup>15</sup> The determinate sentence of death for felonies was likewise replaced in the states in the late eighteenth and early nineteenth century with incarceration in a penitentiary.<sup>16</sup> At roughly the same time as the decline of capital sentencing came the decline of mandatory penalties in favor of judicial discretion to impose any sentence within the range established by Congress or the state legislature.<sup>17</sup>

This regime granted judges enormous and essentially unbridled authority to impose a sentence anywhere within the legislatively prescribed range, as sentences could not be appealed.<sup>18</sup> Federal and state judges (except in those few states still assigning some role to the jury) possessed full discretion to consider any information about the offender and offense that she thought relevant and helpful in determining the appropriate sentence.<sup>19</sup> Juries, on the other hand, played no role in federal sentencing,<sup>20</sup>

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1472-77 (2001); Klein & Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 227-28 (2003); *Apprendi v. New Jersey*, 530 U.S. at 466, 477 (2000); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (Harvard 1977).

<sup>13</sup> 2 T. Bishop, *Criminal Procedure* 200 (1866).

<sup>14</sup> See, e.g., Adam J. Hirsch, *The Rise of the Penitentiary: Prisons and Punishment in Early America* 8-40 (1992); David Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* 49 (1999).

<sup>15</sup> See 1 Stat. 112 (1790).

<sup>16</sup> Rothman, *supra*, n. \_\_\_; Hirsch, *supra*, n. \_\_\_ (noting that Massachusetts began to rely on the penitentiary in 1785); Pestritto, *Founding the Criminal Law* 52-53 (2000) (noting that Virginia shifted from death to imprisonment in 1796).

<sup>17</sup> See, e.g., 1 Bishop, *supra* at 606 ("in some of our States the statutes fix only the maximum of punishment, leaving the court to go as low as it sees fit."); George Fisher, "Plea Bargaining's Triumph," 109 *Yale L.J.* 857, 913-14 (2000) (noting the broad discretion given to judges in sentencing during this period).

<sup>18</sup> cite.

<sup>19</sup> *Williams v. New York*, 337 U.S. 241, 244 (1949) (judge could overrule jury recommendation of life imprisonment and impose the death penalty based upon his conclusion from past uncharged conduct that the defendant possessed "a morbid sexuality" and was a "menace to society").

<sup>20</sup> See Charles O. Betas, *Jury Sentencing*, 2 *Nat'l Parole and*



and a declining role even in those few states practicing some form of jury sentencing.<sup>21</sup> It is true that many statutes during this time period designated a higher range of allowable penalties (raising the minimum and maximum potential sentence) upon proof of some aggravating fact, such as the value of the item stolen, that a burglary occurred at nighttime, or that the current offense was the defendant's second.<sup>22</sup> However, while that aggravating fact had to be plead in the charging instrument and proven to a jury beyond a reasonable doubt before triggering the higher statutory range, pure judicial discretion reigned supreme within the wide range authorized by any verdict.

The late nineteenth century brought the rehabilitation model of criminal sentencing to the fore - the public held the now quaint belief that experts in criminology and psychiatry could treat and correct offenders.<sup>23</sup> Overlaying judicial discretion in sentencing an offender to an indeterminate sentence between the statutory minimum and some greater number of years up to the maximum sentence, the parole board entered the fray.<sup>24</sup> These

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Probation Ass'n J. 369 (1956).

<sup>21</sup> The number of jurisdictions that permitted any jury role in non-capital sentencing shrank to thirteen by the middle of the twentieth century. Note, Statutory Structures for Sentencing Felons to Prison, 60 Colum. L. Rev, 1134, 1154-55 (1960); Comment, Consideration of Punishment by Juries, 17 U.Chi. L. rev. 400, 401 (1949). Even in those states, the jury was frequently could sentence for only a few of the most serious crimes, could not sentencing following a guilty plea, and its sentence could be modified by the judge. See, e.g., Statutory Structures, *id.* at 1154-55; *Blevins v. People*, 2 Ill. (1 scam) 172 (1835) (recognizing that juries at common law were not granted the power to determine the punishment, and interpreting an 1833 statute to authorize jury sentencing following verdict but not following guilty pleas).

<sup>22</sup> See, e.g., *Bishop, supra*; *State v. Kane*, 23 N.W. 488, 490-92 (Wis. 1885) (collecting cases); *Jones v. State*, 63 Ga. 141, 144 (1879) (government had to aver whether a burglary took place during the night or day when the penalty range - both the minimum and the maximum, increased based upon that fact).

<sup>23</sup> See, e.g., *Fisher, supra* n. \_\_\_, at 1055; Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts*, 18 - 21 (1998); King & Klein, *Essential Elements, supra*, at 1505 - 1513; Comment, *Consideration of Punishment by Juries*, 17 U. Chi. L. Rev. 400, 401 (1949) (noting that many states practicing jury sentencing in the early nineteenth century repealed or limited jury sentencing as inconsistent with the notion that correcting offenders "is a problem for specialists in criminology and psychiatry"); Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 Yale L.J. 1355, 1374 (1999).

<sup>24</sup> *Fisher, supra* n. \_\_\_, at 1055 (noting that six states by the end of the nineteenth century deprived the judge of the authority to set the sentence within the statutory minimum and maximum, and

federal and state agencies considered the prisoner's behavior during incarceration in determining her actual release date.<sup>25</sup> This made the sentence a defendant might receive doubly indeterminate - she could predict neither what the judge nor what a later parole board might do.

The indeterminate sentencing model began to unravel in the early 1970s, in response to criticism that the rehabilitation model was a failure,<sup>26</sup> and that indeterminate sentencing resulted in unwarranted disparities in similarly situated defendants based on such illegitimate considerations as geography, race, gender, socio-economic status, and judicial philosophy.<sup>27</sup> The sentencing reform movement, utilizing guidelines drafted by a legislature or commission to tightly cabin judicial discretion, was thus born at the state and federal levels.<sup>28</sup> Congress responded with the

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placing authority for release dates solely with the parole board); Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. Pa. L. Rev. 465, 473-74 (1961) (listing statutes from New York, Pennsylvania, and California that required judges to sentence offenders to indeterminate terms of between one year and life, and allowed the parole board to set the release date after the minimum sentence was served).

<sup>25</sup> Parole hearings would consider such things as an offenders participation in educational opportunities and therapy, any restitution she may have made to her victims, drug and alcohol treatment, relationships with the guards and other prisoners, and showings of remorse.

<sup>26</sup> See Klein & Steiker, 2002 SUP. CT. REV. at 228, nn. 14 & 15 (correcting sources).

<sup>27</sup> See, eg., Klein & Steiker, 2002 SUP. CT. REV. at 229, nn. 16-25 (collecting sources); *American Law Institute, Model Penal Code: Sentencing Report* (2003) (available at [www.ali.org](http://www.ali.org)); ARTHUR W. CAMPBELL *LAW OF SENTENCING* 1:3 at 9-10 (2d 1991); Breyer, *The Federal Sentencing Guidelines and the Key Compromised Upon Which They Rest*, 17 HOFSTRA L. REV. 18-9 (1988) (citing to the legislative history of the 1984 Sentencing Reform Act); Brief of the U.S. Senate as Amicus Curiae, *U.S. v. Mistretta*, 488 U.S. 361 (1999) (citing legislative history).

<sup>28</sup> By the time *Blakely* invalidated the Washington Sentencing Reform Act was rendered in 2004, at least 14 states had presumptive sentencing systems in place that were threatened by the Sixth Amendment ruling. See Jon Wool and Don Stemen, Vera Institute of Justice, "Aggravated Sentencing: *Blakely v. Washington*, Practical Implications for State Sentencing Systems, 17 FSR 60 (2004); Anne Skove, National Center for State Courts, *Blakely v. Washington: Implications for State Courts*, [http://www.ncsconline.org/WC/Publications/KIS\\_SentenBlakely.pdf](http://www.ncsconline.org/WC/Publications/KIS_SentenBlakely.pdf) (July 18, 2004). Not all of these regimes were determinate sentencing regime, as some still release offenders via parole before their full sentence is served. Where an offender cannot know after his sentencing hearing how much prison time he will actually serve, that sentence is by definition indeterminate.

Sentencing Reform Act of 1984, establishing the Federal Sentencing Commission, which in turn crafted the Federal Sentencing Guidelines.<sup>29</sup> These Guidelines, contained in the Federal Sentencing Manual, established a determinate sentence (within a 25% range) for each offender according to the offense of conviction, certain characteristics concerning the offender and how he committed his offense, and certain relevant conduct not accounted for by the indictment or conviction.<sup>30</sup> While a federal sentence pursuant to the Guidelines was thus based in large measure on the offense of conviction and the defendant's prior criminal history, it could be halved or doubled based upon such factors as whether the defendant played a leadership or minor role in the offense, whether a victim was injured or weapon was used, the quantity of controlled substances or amount of fraud, whether a defendant showed remorse or committed perjury during his trial, and what related misconduct he engaged in, regardless of whether that misconduct was noted in the indictment or found by the jury. Unlike the determinate sentencing system in place in England and very early American colonial times, where all essential elements necessary to a particular determinate sentence were found beyond a reasonable doubt by a jury, all facts mandating a particular enhanced sentence under the federal Guidelines were found by the judge using a preponderance of the evidence standard.<sup>31</sup>

In tandem with and even slightly prior to the advent of mandatory sentencing guidelines, Congress and state legislatures employed mandatory minimum sentences to cabin judicial discretion by limiting judicial opportunity to dispense leniency.<sup>32</sup> Unlike

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<sup>29</sup> Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 1987 (1984). The Sentencing Commission is codified at 28 U.S.C. §§ 991-94 and 18 U.S.C. section 3553(a)(2).

<sup>30</sup> See, e.g., U.S. Sentencing Manual (West 2004). The defendant's place on a 258-box sentencing grid is determined by a combination of judicial factual findings and the defendant's criminal history. The defendant's place along the horizontal axis, which consists of 43 offense level categories, is determined by selecting the appropriate offense level based on the offense of conviction and then adjusting upward or downward based upon aggravating and mitigating circumstances and relevant conduct. The defendant's place along the vertical axis is determined by the defendant's criminal history.

<sup>31</sup> See 18 U.S.C. section 3553(b) (providing that court make factual findings pursuant to the guidelines issued by the Sentencing Commission); 28 U.S.C. section 994(a)(1) (providing that the Commissioners will promulgate guidelines for use by the sentencing court in determining the sentence).

<sup>32</sup> The overwhelming bipartisan support for the Sentencing Reform Act had as much to do with Republican Senators and Representatives concerned over the perceived leniency of federal judges and the parole commission as it did with the Democratic representatives' desire to eliminate racial and other unwarranted disparities in sentencing. See Kate Stith and Steve Y. Koh, "The Politics of

the mandatory minimum penalties of the early nineteenth century, where both the minimum and the maximum sentence were increased based upon proof of the aggravating fact beyond a reasonable doubt to a jury,<sup>33</sup> these statutes raised the mandatory minima but not the statutory maxima, and were triggered by proof of the aggravating fact by a preponderance of the evidence to the judge.<sup>34</sup> On the state level, these devices proliferated in the latter part of the twentieth century.<sup>35</sup> On the federal level the Sentencing Reform Act of 1984, in addition to generating the federal sentencing guidelines, added numerous mandatory minimum penalties to the United States Code.<sup>36</sup> Some of these, like the amendments to the Controlled Substances Act, increased the statutory maximum and mandatory minimum based upon particular judicial findings (generally drug type and quantity).<sup>37</sup> Others,

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Sentencing Reform, *The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 227-66 (1993).

This odd combination of interests aligned Republican Orrin G. Hatch with Democrat Edward M. Kennedy as co-sponsors of the Sentencing Reform Act of 1984, and co-authors of an amicus brief in *Booker*. See Brief for the Honorable Orrin G. Hatch, Honorable Edward M. Kennedy, and Honorable Dianne Feinstein as Amici Curiae in Support of Petitioner, (Sept. 2004), *U.S. v. Booker*, cert. granted, 524 U.S. \_\_\_\_ (8/2/04).

<sup>33</sup> See King & Klein, "Essential Elements," 54 Vanderbilt Law Rev. at 1474 - 1477, nn. 21 - 28 and accompanying text (describing and collecting cases).

<sup>34</sup> *Id.* See also *McMillan v. Pennsylvania*, 477 U.S. 1986) (5-4) (due process not offended by statute providing for five-year mandatory minimum penalty based upon a judicial finding by a preponderance of the evidence of visible possession of a firearm, as this did not exceed the ten-year statutory maximum penalty for the underlying felony of aggravated assault).

<sup>35</sup> See George Fisher, "Plea Bargaining's Triumph," 109 Yale L.J. 857, 1072-73 (2000) (establishing that mandatory minimum sentences were a primary catalyst in the rise of plea bargaining when they became popular in the twentieth century); Note, *Statutory Structures for Sentencing Felons to Prison*, 60 Colum. L. Rev. 1134, 1140 (1960); Michael Tonry, *Sentencing Matters* 146-47 (1995) (noting that since 1975 mandatory minimum sentencing statutes have been one of America's most popular "innovation," and reporting that between 1975 and 1983, 49 states adopted mandatory sentencing laws for offenses other than murder or drunk driving).

<sup>36</sup> See Wright, King & Klein, *Federal Practice and Procedure*, sections 521 - 539 (West 2004). See also Michael Tonry, *Sentencing Matters* 146-47 (1995) (noting that by 1991 the United States had enacted 20 new mandatory minimum sentencing provisions).

<sup>37</sup> 21 U.S.C. section 941(b) (mandatory minimum sentence of 10 years to statutory maximum of life based upon judicial finding of 5 kilograms or more of cocaine; mandatory minimum sentence of 5 years to statutory maximum of 40-years based upon judicial finding of 500 grams or more of cocaine).

such as the firearms provision, increased only the mandatory minimum based upon judicial findings (generally type and use of weapon).<sup>38</sup> While the Federal Sentencing Guidelines permitted a federal district judge, in most cases, to depart downwards (below the presumptive guidelines sentence) based upon exceptional circumstances,<sup>39</sup> such statutory mandatory minima trumped the otherwise applicable Guidelines sentence, and prevented a judge from departing downwards below the mandatory minimum sentence,<sup>40</sup> unless the prosecutor requested such a departure based upon "substantial assistance, or the defendant fit into a very narrow "safety-valve" provision.<sup>41</sup>

The final nail in the coffin of federal indeterminate sentencing was the provision of the Sentencing Reform Act which abolished the Federal Parole Commission. The elimination of parole (and concomitant limit of good time credit to 15% of a sentence) promoted "honesty in sentencing," in that the judicially-imposed sentence was the true and determinate sentence.<sup>42</sup> Absent an appellate reversal or a Presidential pardon, the fixed sentence imposed by the district judge pursuant to the guidelines would be served, in full, by the offender.

The Sentencing Reform Act of 1984 effectively eliminated

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<sup>38</sup> 18 U.S.C. section 924(c) (providing for a 5 year mandatory minimum consecutive sentence for using/carrying a firearm during a crime of violence or drug trafficking, a 7 year mandatory minimum if the firearm is brandished, a 10 year mandatory minimum sentence if the firearm is discharged, a 50 year mandatory minimum sentence if the firearm is a machinegun or destructive device).

<sup>39</sup> U.S. Sentencing Guideline section 5K2.0 (authorizing downward departures where an aggravating or mitigating factor was not taken into account by the Sentencing Commission or was present to a degree not reflected in the Manual).

<sup>40</sup> *Neal v. United States*, 516 U.S. 284 (1996) (mandatory minimum sentence for possession with intent to distribute LSD trumps the lower sentence provided for by the guidelines).

<sup>41</sup> While a judge could not sentence below the statutory minimum *sua sponte*, the prosecutor could move for a sentence below the mandatory minimum based upon substantial assistance by the defendant, See U.S. Sentencing Guidelines section 5K; 18 U.S.C. section 3553(e). In 1994, Congress added a "safety valve" provision permitting a judge to sentence below the mandatory minimum in drug cases where a defendant is a first-time non-violent offender, without waiting for a motion by the government.

See 18 U.S.C. section 3553(f).

<sup>42</sup> Stephen Breyer, "The Federal Sentencing Guidelines and the Key Compromises Up Which They Rest, 17 Hofstra L. Rev. 1, 4-5 (1988) (Congress' twin goals in enacting the Sentencing Reform Act were to eliminate unwarranted disparity in criminal sentencing and to ensure that convicts served the entire term imposed by the district judge instead of being prematurely released by the Parole Commission).

judicial discretion in making the moral and policy choices regarding how a particular individual was to be sentenced in the case before her. This was accomplished by substituting a system of determinate sentences for the prior broad range provided for by each substantive offense statute, providing judges with explicit direction in the form of binding guidelines that prescribed the kinds and lengths of sentences appropriate for every class of federal offender, and ensuring compliance with these guidelines through appellate review.<sup>43</sup> All authority that had previously been exercised by the sentencing judge (and the parole commission) was consolidated into the United States Sentencing Commission. That agency made binding decisions about what facts regarding the offender were off limits (age, socio-economic status, community ties, health, and substance abuse), which facts concerning the manner in which an offense was committed made it more or less serious (amount of loss, vulnerability, defendant's leadership or minimal role in the offense), which characteristics of an offender were relevant (prior offenses, diminished capacity), what additional uncharged or unconvicted acts by the defendant (obstruction of justice, additional drug sales) warranted an increased sentence and by what amount it would increase, the effect of multiple counts of conviction on the ultimate sentence, and whether to run sentences consecutively or concurrently. The judge could not substitute her own moral judgment on any of these crucial issues for that of the Commission, and once she made the factual findings required by the Commission, she was limited to the largely mechanical role of calculating the Guideline sentence. Her only discretion in dispensing a sentence she believes just, aside from departure authority, is in selecting the sentence within the very narrow range offered by the defendant's place on the grid. Needless to say, most federal trial judges were less than enamored of this system.<sup>44</sup>

## **B. Supreme Court Precedent from 1999 to 2003**

The first direct constitutional challenge to the guidelines was quickly dispatched in the 1989 case *Mistretta v. United States*.<sup>45</sup> Only Justice Scalia opined that allowing the Sentencing

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<sup>43</sup> See, e.g., *Mistretta v. United States*, 488 U.S. 361, 366 (1989); legislative history of Sentencing Reform Act, such as Sen. Rpt. 98-225, 75, 78, 79 (Sept. 25, 1984) (reprinted in 1984 U.S.C.C.A.N. at 3258, 3262); 25 N.Y.U. Rev. L. & Soc. Change 65, 90-91.

<sup>44</sup> See, e.g., Stith and Cabranes, *Fear of Judging, The Sentencing Guidelines in the Federal Courts* (Chicago 1998); Federal Judicial Center, *The United States Sentencing Guidelines, Results of the Federal Judicial Center's 1996 Survey* (Federal Judicial Center 1997) (1997 survey concluding that more than two-thirds of federal judges wish to scrap the Guidelines).

<sup>45</sup> 488 U.S. 361 (1989) (upholding the constitutionality of the Federal Sentencing Guidelines against challenges based on the non-delegation doctrine and principles of separation of powers).

Commission to determine the relative seriousness of each federal offense, and the relevance and weight to assign to each offender and offense characteristic, violated the non-delegation doctrine and principles of separation of powers.<sup>46</sup> An indirect challenge to mandatory sentencing guidelines came 10 years later in *United States v. Jones*,<sup>47</sup> when the Court began to consider the Sixth Amendment's role<sup>48</sup> in limiting how legislatures could define substantive criminal offenses and how judges could sentence offenders for these crimes.<sup>49</sup> Justices Stevens, along with Justices Scalia, Thomas, Ginsburg, and Kennedy, held in the *Jones* majority opinion that provisions of the federal carjacking statute which established higher penalties for the offense when it resulted in serious bodily injury (raising the maximum penalty from 15 to 25 years) or death (raising the maximum penalty from 25 years to life in prison) were elements of the offense rather than sentencing factors, and must be proven to the jury beyond a reasonable doubt. Though dividing 18 U.S.C. sec. 2119 into three separate offenses was accomplished as a matter of statutory interpretation, this outcome was prodded by "constitutional doubt."<sup>50</sup>

This new constitutional rule crystallized the next year in *Apprendi v. New Jersey*,<sup>51</sup> a case which again concerned not mandatory sentencing guidelines but two state substantive criminal

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<sup>46</sup> *Id.* at \_\_\_\_ (Scalia, J., dissenting).

<sup>47</sup> 526 U.S. 227 (1999).

<sup>48</sup> In this essay, I will focus on the Sixth Amendment jury right triggered by the recent line of cases concerning the elements of substantive criminal offenses. However, those cases equally protect a suspect's Fifth Amendment rights to proof beyond a reasonable doubt in criminal cases (see *Apprendi, infra* n. \_\_\_\_), and to a grand jury indictment in federal criminal matters (see *United States v. Cotton*, 535 U.S. 625 (2002)).

<sup>49</sup> The Court first overrode a legislative label of an action as "civil," a designation which would have allowed the government to circumvent constitutional criminal procedural guarantees entirely, in 1886. *Boyd v. United States*, 116 U.S. 616 (1886). More recently, the Court permitted a state legislature to circumvent the Fifth and Fourteenth Amendments' due process right to proof beyond a reasonable doubt by labeling a fact an "affirmative defense." *Patterson v. New York*, 432 U.S. 197, 210 (1977). The application of the Sixth Amendment as a limit on legislative authority to define criminal offenses is more recent.

<sup>50</sup> *Id.* at 243, n. 6 (the constitutional principle implicated was whether "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact [other than a prior conviction] that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt").

<sup>51</sup> 530 U.S. 466 (2000), (Stevens, J., writing for majority, joined by Scalia, Souter, Thomas, and Ginsburg) (O'Connor, J., dissented joined by Breyer, J., Rehnquist, C.J., and Kennedy, J.).



statutes, one which imposed a 10 year statutory maximum penalty for felony weapons offense, and the other, a separate "hate-crime" statute, which allowed the trial judge to potentially double the maximum sentence based upon his determination, by a preponderance of the evidence, that the defendant "acted with a purpose to intimidate an individual ... because of race."<sup>52</sup> Upon Mr. Apprendi's plea to the weapons offense for firing shots into the home of an African-American family, the trial judge applied the enhancement and sentenced the defendant to 12 years. In vacating his sentence, the same five Justices comprising the majority in *Jones* declared that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum [other than the fact of a prior conviction] <sup>53</sup> must be submitted to a jury and proved beyond a reasonable doubt."<sup>54</sup> This significant new rule prohibited legislatures from "hiding" an element from a jury by labelling it a "penalty provision" and assigning its factual determination to a judge. Moreover, a narrow reading of the majority holding preserved the United States Sentencing Guidelines and is consistent with earlier Supreme Court cases analyzing the application of the Guidelines, so long as the sentences dictated by the guideline were within the maximum sentence authorized by statute for the offense.<sup>55</sup>

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<sup>52</sup> *Id.*, 120 S.Ct. at 2351 (quoting N.J. Stat. Ann. section 2C:44-3 (West Supp. 2000)).

<sup>53</sup> The recidivism exception stemmed from *United States v. Almendarez-Torres*, 523 U.S. 224 (1998) (5-4 split, consisting of the four Apprendi dissenters plus Justice Thomas) (upholding 8 U.S.C. section 1326(b)(2), authorizing a 20-year statutory maximum penalty for alien re-entry if the initial deportation was for the commission of an aggravated felony, despite an otherwise authorized two-year statutory maximum penalty). Though Justice Thomas has since renounced his decision in *Almendarez-Torres*, it now appears doubtful that there remains five justices committed to reversing it. See *Shepard v. United States*, No. 03-9169 (3/7/05) (holding that whether a prior burglary conviction was a "violent felony" within the meaning of the Armed Career Criminal Act, increasing defendant's sentence from 37 months to 15 years, is closer to the findings subject to Apprendi than the prior conviction exception subject to *Almendarez-Torres*, and that the rule of constitutional doubt requires that the Court limit judicial factfinding on this disputed issue). Only Justice Thomas, in a concurrence, opined that the government's reading of the statute was unconstitutional, and that *Almendarez-Torres* must be reversed. *Id.* at \_\_\_\_.

<sup>54</sup> *Apprendi*, 430 U.S. at 490.

<sup>55</sup> See, e.g., *Witte v. United States*, 515 U.S. 389 (1995) (providing an enhancement for uncharged drug conduct after judicial finding, where sentence is within the statutory sentence provided for by the crime of conviction); *Edwards v. United States*, 523 U.S. 511, 515 (1998) holding that judge may determine drug type and quantity of drugs at sentencing hearing where the



There was, however, much concern during oral argument that this rule might be applied to state and federal determinate sentencing guideline regimes. The majority simply punted the issue in a footnote.<sup>56</sup> Justice Thomas, in his concurrence, supported an broader rule that would have designated as elements all factual findings that increase "the range of punishment to which the prosecution is by law entitled."<sup>57</sup> He acknowledged the potential this rule would have for turning all Guideline facts which enhance a penalty into elements of the offense, but purported to reserve the issue of whether judicial factfinding under the Federal Sentencing Guidelines was constitutional.<sup>58</sup> However, it is quite clear that guideline enhancements are, using Justice Thomas' phrase, "by law the basis for imposing or increasing punishment"<sup>59</sup> and are therefore elements of a criminal offense which must be submitted to the jury.<sup>60</sup> Justice O'Connor, in a scathing dissent, accused the majority of undermining thirty years of sentencing reform.<sup>61</sup> She predicted that *Apprendi* would

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sentence imposed did not exceed "the maximum that the statutes permit[ted] for a cocaine-only conspiracy"); and *United States v. Watts*, 519 U.S. 148 (1997) (per curiam) (providing for enhanced sentence for acquitted conduct after judicial finding, where sentence was within the statutory range provided for by the crime of conviction); all cited by the Court approvingly in *Apprendi*, and discussed in King & Klein, *Essential Elements*, 54 *Vanderbilt Law Rev.* at 1479.

<sup>56</sup> "The Guidelines are, of course, not before the Court. We therefore express no view on the subject ...". *Apprendi*, 530 U.S. at \_\_\_, n. 21 (2001).

<sup>57</sup> *Apprendi*, 120 S.Ct. at 2348, 2368 (Thomas, J., concurring).

<sup>58</sup> *Apprendi*, at 2380, n. 11.

<sup>59</sup> *Id.* at 2268. Justice Thomas attempted to avoid overruling *Patterson v. New York*, 432 U.S. 197 (1977) (holding that a state may constitutionally place on defendant the burden of proof on the affirmative defense of extreme emotional disturbance, which mitigates murder to manslaughter), by distinguishing aggravating from mitigating facts.

<sup>60</sup> As Nancy King and I argued in 2001, "under the analysis of the concurring opinion in *Apprendi*, each one of the myriad facts that the United States Sentencing Guidelines and other presumptive sentencing schemes require a judge to take into account becomes an element that must go to the jury." King & Klein, "Essential Elements," 54 *Vanderbilt Law Rev.* at 1488 (2001).

<sup>61</sup> *Apprendi*, 120 S.Ct. at 2390 (O'Connor, J. dissenting). She further argued that *Apprendi* imposed a "meaningless and formalistic" rule because it could be easily circumvented by legislatures increasing statutory maxima sentences. Nancy King and I have argued elsewhere that the democratic process will likely prevent such wholesale avoidance of the rule, just as it has in the past, and that the Court has clearly signalled its intent to step in should the its clear statement rule combined with democratic constraints fail. See King and Klein, *Essential*

invalidate the Federal Sentencing Guidelines and the presumptive sentencing schemes, leading to "colossal" upheaval for the criminal justice system.<sup>62</sup>

While the mandatory Federal Sentencing Guidelines were retained, the *Apprendi* decision significantly affected state and federal criminal law practice in shifting fact-finding authority from judge to jury. Its rule affected charging, pleas, and trials in thousands of cases involving hundreds of similar state and federal statutes.<sup>63</sup> Two types of statutes were invalidated by the rule in *Apprendi* - "nested statutes,"<sup>64</sup> involving core conduct found by a jury with increasing levels of punishment depending on the presence of enhancing facts found by the judge;<sup>65</sup> and "add on" statutes, involving additional statutes authorizing an increased punishment for any crime depending on the presence of a fact found by the judge.<sup>66</sup> States and Congress had enacted dozens of this first type, such as the primary federal controlled substance statute, 21 U.S.C. section 841, which pegged enhanced penalties to drug quantity, and most states and the federal government had plenty of the second type, such as provisions authorizing increased penalties for any crime committed with a firearm or while on pretrial release.<sup>67</sup> In either case, facts enhancing the maximum sentence must now be plead in indictment and submitted to jury for a finding beyond a reasonable doubt.<sup>68</sup> Most state legislatures managed this by re-enacting these "penalty provisions" as substantive crimes, and thus codifying their

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Elements, 54 Vanderbilt Law Rev. at 1485 - 1495.

<sup>62</sup> *Apprendi*, 120 S.Ct. at 2395 (O'Connor, J., dissenting).

<sup>63</sup> See King & Klein, "Essential Elements," 54 Vanderbilt Law Rev. 1467, 1546 (Appendices B and C) (compiling list of selected state and federal statutes subject to *Apprendi* challenge) (2001); King & Klein, *Appre Apprendi*, 12 Fed. Sentencing Reporter 331 (2002), revised version at <http://www.fjc.gov> (suggesting that *Apprendi* has also thrown into doubt those decisions authorizing judges to make factual findings necessary for forfeiture and restitution awards).

<sup>64</sup> 2 T. Bishop, Criminal Procedure 327 (1866).

<sup>65</sup> An example of this is the carjacking statute in *Jones, supra* n. \_\_\_, where the jury had only to find that the defendant engaged in carjacking, leaving for judicial determination the aggravating facts of victim injury or death.

<sup>66</sup> *Apprendi* itself is an example of this type of statute.

<sup>67</sup> See King & Klein, "Essential Elements," 54 Vanderbilt Law. Rev. at 1492-93 and Appendix C for a description of these types of statutes, and a partial list of these state and federal statutes.

<sup>68</sup> See *King & Klein, Appre Apprendi, supra* n. \_\_\_. n. 36 (collecting United States Supreme Court "vacation and remand" orders on drug cases post-*Apprendi*); Fifth Circuit Pattern Jury Instructions, Criminal (West 2002) (redrafting pattern jury instructions to include all enhancing facts previously found by the district court.)

constitutional status as element.<sup>69</sup> Congress did not respond, so federal prosecutors simply began acting as if these penalty provisions were elements of enhanced offenses (despite relatively clear Congressional intent that they be penalty provisions passed on by the court),<sup>70</sup> charging these "elements" in indictments, and submitting them to juries.<sup>71</sup> Similarly, federal judicial committees redrafted pattern jury instructions to include these "penalty provisions" as elements.<sup>72</sup>

While this decision gave prosecutors and juries more work to do (or, in most cases, gave defendants an extra bargaining chip during plea negotiations),<sup>73</sup> it does not substantially affect

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<sup>69</sup> The New Jersey legislature, in response to *Apprendi*, re-enacted the hate-crime provision as a substantive statute, whose elements would be submitted to the jury. H.R. 1897, 209th Leg. Reg. Sess. (NJ 2000). Likewise the Kansas legislature amended its state mandatory sentencing guidelines to provide that all such facts "shall be presented to a jury and proved beyond a reasonable doubt". KAN. STAT. ANN. section 21-4718(b)(2) (Supp. 2002).

<sup>70</sup> This is clear from the structure of the controlled substances act. 21 U.S.C. section 841(a), entitled "Unlawful acts," prohibits possession with intent to distribute a controlled substance. 21 U.S.C. section 841(b), entitled "Penalties," prescribes the sentence for violation of 841(a), and pegs statutory minima and maxima based upon drug type, drug quantity, prior convictions, and injury to persons. See also *Nordby v. United States*, 225 F.3d 1053, 1058 (9th Cir. 2000) ("Existing precedent in this circuit states plainly that Congress did not intend drug quantity to be an element of the crime under 21 U.S.C. sections 841(a) and 846").

<sup>71</sup> The United States Supreme Court quickly began to reverse and remand sentences pursuant to the federal controlled substance act where quantity findings leading to penalty enhancements were found by the trial judge. CITES. Circuit courts responded by requiring quantity to be treated as an element whenever type and quantity of the drug triggered a higher statutory sentence. See, e.g., *Nordby v. United States*, 225 F.3d 1053 (9th Cir. 2000); *United States v. Doggett*, 230 F.3d 160 (5th Cir. 2000); *United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000).

<sup>72</sup> See, e.g., Fifth Circuit Pattern Jury Instructions, Criminal (West 2002). The author served on the judicial committee that redrafted these instruction in the wake of *Apprendi*.

<sup>73</sup> Whether the *Apprendi* rule assists or injures criminal defendants is open to some debate. Criminal defense attorneys uniformly believe the rule favors their clients. See brief of National Association of Criminal Defense Attorneys), cited by majority in *Blakely*). While Prof. Stephanos Bibas argued that *Apprendi* actually harms criminal defendants (Yale L.J., cited by Justice Breyer in *Blakely* dissent); Nancy King and I are convinced of just the opposite. See King & Klein, Stanford law rev. piece (cited by Scalia in his *Blakely* majority opinion).

judicial discretion at sentencing, if discretion is defined as the ability to make unconstrained choices regarding the appropriate penalties for the defendant's criminal conduct. This is because legislatures had already pegged the enhancing fact as having a particular significance in terms of number of years in prison. The identity of the factfinder may be important to the defendant (as he receives constitutional criminal procedural guarantees and is protected by the Federal Rules of Evidence if they are elements decided by juries), but the judge could not ignore that enhancing fact regardless of whether it is found by the jury or himself. Aggravating facts shifted from sentencing factors to elements by the *Apprendi* rule must be found by the jury (or the defendant must admit to that fact in her guilty plea), but the judge has no discretion once the factual decision is made by the factfinder - she must increase the sentence by a certain amount, regardless of whether she believes that result is just. Judges essentially had no discretion after the Sentencing Commission drafted the first Sentencing Manual in Nov. of 1987 - all policy decision were made *ex ante* by the Commissioners. The Guidelines eliminated all true judicial discretion and turned judges into factfinders applying mechanical formulas created by others in determining the sentence based upon those facts, and the *Apprendi* rule simply eliminated some remaining statutory judicial factfinding role.

There was, in fact, some hope prior to *Blakely* and *Booker*, that the Court might be willing to pretend that mandatory guidelines were not a series of statutory maximum penalties subject to *Apprendi*'s rule, since they were not listed as such in the substantive criminal code. The year after *Apprendi* was rendered a defendant again indirectly challenged the Federal Sentencing Guidelines in a case concerning judicial authority to find facts critical to imposing a statutorily defined mandatory minimum sentence. Not surprisingly, *Apprendi* had generated a Circuit split on the issue of whether facts triggering mandatory minimum sentences were subject to its element rule.<sup>74</sup> In *Harris v. United States*, a plurality held that the fact that defendant "brandished" a firearm in relation to a crime of violence or drug trafficking offense, triggering a seven year mandatory minimum sentence under 18 U.S.C. section 924(c), rather than the otherwise applicable five year mandatory minimum for "use" of the firearm. was not an element to be submitted to the jury for beyond a reasonable doubt finding under *Apprendi*.<sup>75</sup> Justice Thomas, in

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<sup>74</sup> See Klein and Steiker, *supra* n. \_\_\_, at 253, n. 124 (collecting cases).

<sup>75</sup> 122 S.Ct. 2406 (2002). 18 U.S.C. section 924(c) criminalizes the possession of a firearm in relation to a crime of violence or drug trafficking offense, including no statutory maximum but providing a minimum 5 year sentence. Moreover, it provide a series of additional mandatory minima based upon judicial findings that the defendant "brandished" his firearm (7 years), that the firearm was "discharged" (10 years), that the firearm was a machinegun (30 years).

his concurrence in *Apprendi*, had openly called for the reversal of the very similar *McMillan v. Pennsylvania*,<sup>76</sup> an earlier 5-4 decision which permitted a judge to find the fact which triggered a mandatory minimum sentence within the statutory maximum penalty.<sup>77</sup> Citing 17th century cases and treatises, the plurality opinion, comprised of the four *Apprendi* dissenters, noted the lack of historical evidence establishing that facts that increase a defendant's minimum sentence but do not effect the maximum sentence have been treated as elements.<sup>78</sup>

Justice Breyer, whose concurrence supplied the fifth vote needed to affirm Mr. Harris' sentence, appeared to agree with Justice Thomas' dissent in *Harris*. As in his *Apprendi* dissent, Justice Thomas noted again that mandatory minimum statutes limit the jury's role in exactly the same fashion as did the increased statutory maximum in *Apprendi*, by imposing mandatory higher penalties based upon facts not submitted for their consideration.

That these mandatory minimum penalties do not also raise the statutory maximum sentence is irrelevant, as a defendant in the federal system actually receives the mandatory minimum, never higher or lower.<sup>79</sup> Justice Breyer did not attempt to dispute Justice Thomas' reasoning, noting "I cannot easily distinguish *Apprendi v. New Jersey* from this case in terms of logic." However, because he believed "that extending *Apprendi* to mandatory minimums would have adverse practical, as well as legal, consequences I cannot yet accept its rule."<sup>80</sup> Professor Jordan Steiker and I have argued elsewhere that Justice Breyer's refusal to join Justice Thomas' dissent stemmed from his realization that, if the *Harris* dissenters prevailed, there would be no plausible way to distinguish and therefore save the Federal Sentencing Guidelines.<sup>81</sup>

Any hope that the Federal Sentencing Guidelines would survive were dashed two years later in *Blakely v. Washington*.<sup>82</sup> Mr.

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<sup>76</sup> 477 U.S. 79 (1986) (five-four).

<sup>77</sup> *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (5-4) (judicial finding of visible possession of firearm led to 5 year mandatory minimum penalty within statutory maximum of 10 years for the aggravated assault of conviction, though the trial judge had ruled the Mandatory Minimum Sentencing Act unconstitutional and imposed only 11 - 23 months).

<sup>78</sup> *Harris*, 122 S.Ct. at 2416. While this no doubt true, and in fact the Court cites our work in reaching this conclusion, we noted in *Essential Elements* that there is no historical evidence as to these types of statutes because they simply did not exist; a fact that increased the mandatory minimum also increased the statutory maximum.

<sup>79</sup> *Harris*, 122 S.Ct. 2406, 2424-25 (Thomas, J., dissenting) (citing to the U.S. Sentencing Commission, 2001 datafile).

<sup>80</sup> *Id.* at 2420-21 (Breyer, J., dissenting).

<sup>81</sup> Klein and Steiker, Sup. Court Rev. at 255 - 260 (2002).

<sup>82</sup> 124 S.Ct. 2531 (2004).

Blakely pled to second-degree kidnapping, a Class B felony which, pursuant to the statute setting the sentencing range for each class of felony offense in Washington, was punishable by no more than 10 years confinement. Washington's Sentencing Reform Act, on the other hand, specified in a separate statutory provisions a "standard range" of 49 to 53 months for Blakely's offense, a range that could not be exceeded absent a judicial finding of a "substantial and compelling reason" justifying the exceptional sentence. This "dueling statutory maximum sentencing statute"<sup>83</sup> enumerated several potential (but not exclusive) factors that would support a judicial decision to depart from the presumptive range. Though the state recommended the presumptive sentence as part of the plea agreement, the trial judge, after a three day bench trial, imposed an exceptional sentence of 90 months based upon the statutorily enumerated ground of "deliberate cruelty."

Mr. Blakely argued that after *Apprendi v. New Jersey*, the aggravating fact increases the penalty for his offense beyond the prescribed statutory maximum and therefore must be submitted to a jury and proven beyond a reasonable doubt. The state countered that *Blakely* was controlled by *McMillan v. Pennsylvania*<sup>84</sup> and *Harris v. United States*,<sup>85</sup> both of which allow a judge to make a factual finding - in both cases that the defendant had a weapon - that triggers a mandatory minimum sentence within the statutory maximum sentence permitted by the jury verdict or guilty plea. Justice Scalia, however, writing for the same five justices that comprised the majority in *Apprendi*, held that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant... In other words the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts but the maximum he may

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An earlier, less controversial case protecting the Sixth Amendment jury right against judicial infringement was the Court's six-three holding in *Ring v. Arizona*, 536 U.S. 584, 587 (2002), that a defendant found guilty by a jury of first degree murder could not be sentenced to death based upon a judge's additional factual finding as to one of several legislatively mandated aggravating factors. In a "foreshadowing" of *Blakely*, the Court held that "if the state makes an increase in the defendant's authorized punishment contingent on a finding of fact, that fact - - no matter how the state labels it -- must be found by a jury beyond a reasonable doubt." *Id.* at 602. Thus the prescribed statutory maximum sentence for purposes of *Apprendi*'s rule is that sentence which may be imposed by a judge without the finding of any additional legislatively mandated fact.

<sup>83</sup> King and Klein, *Beyond Blakely*, at 413.

<sup>84</sup> 477 U.S. 79 (1986). (The *Harris* opinion was written by the four *Apprendi* dissenters plus Justice Scalia.)

<sup>85</sup> 536 U.S. 545 (2002) (plurality opinion).

impose *without* any additional findings of fact."<sup>86</sup> The Fifth Amendment jury trial right is meant to ensure the people's "control in the judiciary,"<sup>87</sup> and thus a judge has no authority to impose any sentence other than that authorized by a jury finding.

Just as the legislature could not "hide" an element from a jury finding beyond a reasonable doubt by placing it in a separate statutory penalty provision, so a legislature could not "hide" an element and assign its determination to a judge by placing it in a statutory sentencing guideline.

This case was a natural and expected outgrowth of the collision between the sentencing reform movement and the newly invigorated (but always present) Sixth Amendment right to have a jury determine all facts essential to imposing a particular sentence. While the sentencing reform movement's grant of extra judicial fact-finding authority to judges didn't usurp any fact-finding authority previously possessed by juries (since the jury was finding only the basic elements necessary to impose a 0 to 20 year sentence, and the judge was using her true discretion to select what she believed to be the appropriate sentence within that range), it did usurp the jury's traditional (pre-Federal Sentencing Guidelines) role as factfinder. If a fact is so important to a legislature that its existence mandates a higher sentence, that fact is functionally an element of an offense, and would have been recognized as such from colonial times. There is simply no way, employing basic logic or a cursory knowledge of history, that the dissenters should have prevailed in *Blakely*. Justice O'Connor's prediction that the "legacy of today's opinion, whether intended or not, will be the consolidation of sentencing power in the State and Federal Judiciaries"<sup>88</sup> may turn out, I believe, to have little truth in the states. This is because her criticism hinges on a particular expected response from legislatures - a rejection of mandatory sentencing guidelines as too costly and a return to the good old days of full judicial discretion, that appears unlikely. Instead, most states are responding just as they did to facts treated as elements by the Court after *Apprendi*<sup>89</sup> - by sending such facts to the jury.<sup>90</sup>

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<sup>86</sup> *Blakely*, 124 S.Ct. at 2537 (emphasis in original).

<sup>87</sup> *Blakely*, slip opinion, at 9.

<sup>88</sup> *Blakely*, 524 U.S. at \_\_\_ (2004) (O'Connor, J., dissenting).

<sup>89</sup> See n. 69, *infra*.

<sup>90</sup> See, e.g., *Smylie v. Indiana*, No. 41S01-0409-CR-408, 2005 Ind. LEXIS 199 (Indiana 3/9/05) (Indiana mandatory sentencing guidelines allowing factual findings by judge violates the Sixth Amendment right to jury trial set out in *Blakely*, but remedy is not to make the guidelines advisory but to maintain determinate sentencing by treating aggravators as elements for submission to jury); Alaska hybrid legislation expanding penalty ranges for judges and providing for jury consideration of certain sentencing enhancing aggravators ("Criminal Sentencing Bill Signed into Law," press release for Senate Bill 56 on 3/22/05 and complete bill text, available at [www.akrepublicans.org/therriault/24/news/](http://www.akrepublicans.org/therriault/24/news/)



However, as we will see in Part II below, her criticism finds at least a short-term accurate target in the federal system.

### C. *United States v. Booker* and *United States v. Fanfan*

Not surprisingly, the Circuit Courts immediately split over the issue of whether *Blakely* applied to the Federal Sentencing Guidelines.<sup>91</sup> The Court reached this issue last term in the consolidated cases of *U.S. v. Booker* and *United States v. Fanfan*.<sup>92</sup> When the Court was forced to select between the protecting its newly articulated jury right and protecting Justice Breyer's primary legacy - the Federal Sentencing Guidelines, an irreconcilable pair of majority opinions were rendered that attempted to do both. Like the Washington Sentencing scheme described in *Blakely*, the Federal Sentencing Guidelines provide for a presumptive sentencing range, and the court may not sentence above that range without making specific factual findings. Unlike in *Blakely*, where both penalty ranges were contained in statutes, these federal "dueling maxima" are contained first in a substantive criminal code and second in a Manual produced by an administrative agency. The Court accepted expedited certiorari at the request of the Department of Justice to answer two questions: (1) whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based upon the sentencing judge's determination of a fact; and (2) if "yes," then whether the Guidelines as a whole is severable from the judicial factfinding provisions.<sup>93</sup>

Mr. Booker was convicted by a jury of possession with intent to distribute 92.5 grams of crack cocaine, which led to a 210 - 262 month sentence under the Guidelines. At the sentencing hearing, however, the judge found by a preponderance of the evidence that Mr. Booker actually possessed an additional 566 grams of crack, and he therefore imposed an enhanced 360 month

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ther2005032201p.php) ; *Shattuck* (Minnesota); *Dilts* (Oregon); *State v. Lowery*, 2005-Ohio-1181 (1st Dist. 3/18/05) (*Blakely* precludes judicial fact-finding necessary under Ohio's sentencing scheme to impose an enhanced penalty); *Brown* (Arizona. The Washington State Legislature is presently considering Senate Bill 5477, which would require a jury to determine whether aggravating circumstances exist in a separate sentencing phase in some tried cases and in all cases in which the defendant pleads guilty but contests an aggravated sentence. See "Punishment Should Fit the Crime," Seattle Post-Intelligencer, 3/29/05, available at [http://seattlepi.nwsource.com/opinion/217831\\_judged29.html](http://seattlepi.nwsource.com/opinion/217831_judged29.html).

<sup>91</sup> King & Klein, "Beyond *Blakely*," 16 Fed. Sentencing Reporter 413, nn. 21 - 26 (2004) (describing Circuit split and collecting cases).

<sup>92</sup> 543 U.S. \_\_\_\_ (2005).

<sup>93</sup> See *U.S. v. Booker* and *U.S. v. Fanfan*, cert. granted, 542 U.S. \_\_\_\_, 2004 WL 1713655 (Aug. 2, 2004).



sentence. The Seventh Circuit reversed the sentence after finding that it violated Mr. Booker's Sixth Amendment right to a jury trial on the aggravating fact. The facts authorized by the jury verdict in Mr. Fanfan's drug trafficking case led to a 78 month sentence under the Guidelines. At sentencing, the district judge found additional facts (additional quantities of cocaine and crack, and that the defendant had been a leader) authorizing a 188-235 month sentence. Like the Seventh Circuit, the trial judge found *Blakely* applicable to Guidelines and therefore sentenced Mr. Fanfan only to the lower 78 months, to avoid a Sixth Amendment violation.

It looked to many scholars at that point, myself included, that the writing was on the wall for the Federal Sentencing Guidelines.<sup>94</sup> In fact Justice Stevens, writing for the same five *Apprendi* and *Blakely* Justices, declared in the majority merits opinion that the Federal Sentencing Guidelines, implemented in this manner, violated Mr. Booker's Sixth Amendment right to have a jury determine the fact which increase his otherwise applicable statutory maximum penalty.<sup>95</sup> The Federal Sentencing Guidelines could not be distinguished from the Washington state scheme in *Blakely* - the Guidelines are mandatory and require judges to increase sentences based upon their own factfinding.<sup>96</sup>

The four *Apprendi* and *Blakely* dissenters, led by Justice Breyer and picking up fifth Justice Ginsburg, held in a second majority opinion that the remedy is not to treat these Guideline facts as element of the offense, which would require that the government charge them in indictments and submit them to juries, but rather to recast the Guidelines as advisory rather than mandatory.<sup>97</sup> Rather the remedy is to sever 18 U.S.C. sec. 3553(b)(1) (making the guidelines mandatory) and 3742(e) (requiring appellate courts to review for compliance with Guidelines) from the Sentencing Reform Act of 1984 (as well as any cross-references). Without the dueling sentence maxima contained

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<sup>94</sup> King & Klein, *Beyond Blakely* at \_\_\_\_ (arguing that the Department of Justice's distinction - that the Guidelines are not "legislatively enacted" but are rather a "unique product of a special delegation of authority" to an independent Commission in the judicial branch" - is hooey. Regardless of whether a legislature designed the Guidelines itself (as in *Blakely*), or first delegates them to a Commission before specifically endorsing them (as done by Congress), they have the force of law.

<sup>95</sup> *U.S. v. Booker and U.S. v. Fanfan*, 543 U.S. \_\_\_\_ (1/12/05). Joining Justice Stevens in the majority merits opinion were Justices Souter, Thomas, Scalia, and Ginsburg.

<sup>96</sup> *Id.*, citing 18 U.S.C. sec. 3553(b), directing that the court "shall impose a sentence of a kind, and within the range," established by the Guidelines (emphasis added).

<sup>97</sup> Justice Breyer, writing the remedial opinion for the Court in part with C.J. Rehnquist, J. O'Connor, J. Kennedy, plus Justice Ginsburg.

in the United States Code and the Guidelines Manual, Mr. Booker's statutory maximum penalty as authorized by the jury verdict is the life sentence provided by the substantive criminal offense.<sup>98</sup> By severing the provision of the Sentencing Reform Act making it binding on federal district judges, and capturing Justice Ginsburg's vote for his remedial majority, it appeared that Justice Breyer managed to preserve the jury right and the Federal Sentencing Guidelines while at the same time greatly expanding federal judicial discretion in sentencing matters.

So modified, the Federal Sentencing Guidelines are now advisory, the facts contained in the Manual are not elements and thus failure to submit them to juries does not violate the right to a jury trial protected by the Sixth Amendment. Now judges must consider guideline ranges under 18 U.S.C. sec. 3553(a)(4), but they can tailor sentences in light of the other statutory concerns listed in 18 U.S.C. section 3553(a). Since the majority has excised the appellate provision requiring review of sentences for conformity with the Guidelines, and there is thus no longer an explicit standard of review in the statute, the remedial majority insists that the Court infer appropriate standard of review from related statutory language. From here on, circuit courts will review sentences for "reasonableness."<sup>99</sup>

The two *Booker* majority decisions lack cohesion. Both majority Justices (Justice Stevens, for the merits majority, and Justice Breyer, for remedial majority) are also the authors of the two primary dissents! Only Justice Ginsburg signed onto both majority opinions, and she does not deign to tell us why. Justice Stevens merits majority result, finding mandatory guidelines with judicial factfinding violates the Sixth Amendment, is required by *Apprendi/Blakely*. Moreover his remedy - sending all aggravators to juries for beyond reasonable doubt findings, was the only logical one.<sup>100</sup> Though there is some chance that Congress would have reacted to Justice Steven's remedy (which scholars have termed "Blakelyizing" the Federal Sentencing Guidelines) by

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<sup>98</sup> 21 U.S.C. section 841(b) (possession of cocaine with intent to distribute).

<sup>99</sup> The majority argued that this was done for two decades with departures (see prior sec. 3742(e)(3), before the 2003 amendment changing standard to do novo). They further argued that appellate courts presently review sentences for "reasonableness" on the issue of whether a departure is to an unreasonable degree under 3742(3)(3), and where there is no applicable Guidelines range they review for whether the sentence is "plainly unreasonable" under 3742(e)(4). As Justice Scalia noted in his dissent, this argument is meritless. It is one thing to review for reasonableness against a backdrop of specific sentencing ranges established under mandatory Guidelines. Without these Guidelines, there is simply no baseline (besides the statutory minimum and maximum) for judges the reasonableness of any sentence.

<sup>100</sup> Stevens, J., dissenting.

returning to pure judicial discretion uncabined by any guidelines, it seems much more likely to me that Congress would have permitted the *Blakely* experiment to continue on the federal level (as did the Kansas, Indiana, and Washington legislatures in response to *Apprendi* and *Blakely*).<sup>101</sup> As I have argued elsewhere, while far from optimal,<sup>102</sup> it would not be impossible to submit most of the guideline aggravators to juries. Most of any resulting problems would be resolved by plea agreements (more favorable to defendants), and by the Commission simplifying the Guidelines.<sup>103</sup>

The remedial majority, on the other hand, is inexplicable on its face. In the name of respecting Congress' wishes (the legal standard for determining severance)<sup>104</sup> and retaining the federal guidelines, Justice Breyer rewrote the federal statute in a manner expressly rejected by Congress. Congress considered but rejected advisory guidelines in 1984, after determining that they had failed in the states that had tried them.<sup>105</sup> No doubt Congress also intended that judges find guideline facts, though there was no discussion on this point. "Blakelyizing" the guidelines, however, clearly best implements the twin goals of requiring transparency in sentencing and eliminating unwarranted disparity.<sup>106</sup> While jury factfinding is possible, without

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<sup>101</sup> See n. \_\_\_\_, *supra*.

<sup>102</sup> See Klein & Steiker, "The Search for Equality in Federal Criminal Sentencing," 2002 Supreme Court Rev. 223, 224-25 (2003) (arguing that judicial factfinding ensures similar treatment for similarly situated non-capital defendants, as judges - not juries - "view a sufficient number of cases to determine which defendants warrant harsher or more lenient sentences, and produce decisions that establish precedent provide a basis for factual and legal review on appeal").

<sup>103</sup> As per my Nov. 12, 2004 testimony before the U.S. Sentencing Commission (on file with author, and on the USSC website, and on Prof. Doug Berman's blog, <http://sentencing.typepad.com>) (predicting that the Court would apply *Blakely* to the Federal Sentencing Guidelines and treat all aggravators as elements, and recommending that the Commissioners eliminate the 43 offense levels in favor of selecting the five or ten most common aggravators, and permitting judges to make finer gradations by increasing the discretionary range within each offense level from 25 to 40%).

<sup>104</sup> *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) ("the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted").

<sup>105</sup> Brief for the United States in *U.S. v. Mistretta*, 488 U.S. 361 (1989) (citing legislative history).

<sup>106</sup> Relevant conduct, which Justice Breyer considers to be a linchpin of the Guidelines, could still constitute part of the defendant's sentence. However, prosecutors would have to charge relevant conduct in the indictment before a defendant could be sentenced for it. Enhancements for conduct occurring in the

mandatory guidelines defendants and society again cannot debate or even know *ex ante* what characteristics about an offense and offender are particularly blameworthy, and Congress cannot ensure that like defendants receive like sentences. Curiously, the remedial majority completely ignore the merits majority Sixth Amendment right that they are supposed to be remedying - they retain judicial factfinding, give judges additional discretion in sentencing decisions, and offer nothing to the jury - all in the name of protecting a defendant's jury trial right! This makes sense only when one remembers that four of the five Justices in the remedial majority dissented from the merits majority.

The rewritten standard of review on appeal contained in the remedial majority opinion was as nonsensical an action as the selecting a remedy for which no party had asked. The purpose behind enacting the appellate review provision of the Sentencing Reform Act was to enforce the mandatory nature of the guidelines - appellate courts were required to reverse all sentences imposed in contravention of those Guidelines.<sup>107</sup> The standard of "reasonableness" will either gut the guidelines entirely, or transform them back into (unconstitutional) mandatory guidelines. There was no appellate review of sentences before the Sentencing Reform Act, as there was no standard for determining the "right" sentence (assuming the sentence was within the statutory range and not selected for an unconstitutional reason such as race). Likewise, without mandatory guidelines, there is presently no base line for determining whether a particular sentence is "reasonable." I anticipate that all sentences within the statutory minima and maxima will be deemed reasonable, as so far most of the caselaw proves me right.<sup>108</sup> If judges attempt to give content to the standard, say by determining that all sentences outside the guideline range are presumptively unreasonable, or determining that certain facts should translate to an certain increased penalty, they run the risk of the Court declaring these Guidelines "mandatory" again, transforming the content of the appellate review into elements of the offense that must be submitted to the jury.<sup>109</sup>

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course of the trial, such as perjury, obstruction, or witness tampering, could be punished immediately via contempt orders or charged in a subsequent proceeding. See King & Klein, *Beyond Blakely* at \_\_\_\_.

<sup>107</sup> See 18 U.S.C. section 3742(a) and (b), requiring an appellate court to reverse a sentence imposed as a result of an incorrect application of the sentencing guidelines, or that is greater or lesser than the sentence specified in the applicable guidelines range.

<sup>108</sup> See *infra* nn. \_\_\_\_ - \_\_\_\_.

<sup>109</sup> Though there remains the fascinating issue of whether a judge-made common law of sentencing, even if mandatory, would be subject to the same Sixth Amendment constraints as legislatively-enacted sentencing law.

Why would five Justices hold this way? That the four-Justice *Apprendi* and *Blakely* minority block would wish to uphold the Guidelines (by dissenting from Justice Stevens merits opinion but joining Justice Breyer's remedial opinion) is perfectly consistent with their earlier pronouncements. They believe that nothing about the Sixth Amendment requires jury factfinding as to sentencing factors, so Blakelyizing the guidelines is not only a terrible idea, but is one not required by the federal Constitution. That the four Justices comprising the *Booker* remedial dissent would want to Blakelyize the guidelines is entirely consistent with their willingness to do the same thing to the Washington Sentencing Guidelines in *Blakely*. The \$64,000 question is "why did Justice Ginsburg defect?" She purports to believe that the Sixth Amendment requires jury factfinding of elements (the jury is, after all, the sole bulwark between a citizen and state power), as exhibited by her joining the *Apprendi*, *Blakely*, and *Booker* merits majorities. It may be the case that Justice Breyer convinced her that his enduring legacy - the Federal Sentencing Guidelines, would not survive if Blakelyized.<sup>110</sup> This scenario leaves sympathy and collegiality as the motive for Justice Ginsburg to switch sides on the remedial portion of the opinion. Perhaps hard cases (and good friends) make bad law. Equally plausible is that Justice Ginsburg believes that a federal judge with discretion engaging in meaningful adjudication can act as the fair and neutral point of recourse for a defendant in a dispute with the state. Under this due process vision of sentencing, mandatory guidelines contradict the core function of the judiciary. If writing on a clean slate, perhaps Justice Ginsburg would hold that judicial sentencing discretion is constitutionally required for reasons quite apart from the Sixth Amendment. Knowing that she could never get Justice Scalia to join such a movement, perhaps she abandoned her alliance-of-convenience with the Sixth Amendment camp in order to undo mandatory sentencing.

Whatever managed to persuade Justice Ginsburg, Justice Breyer long allegiance to guidelines, particularly advisory guidelines, has been crystal clear. While a young attorney, then-Mr. Breyer worked for the Senate Judiciary Committee when Congress considered sentencing reform, and worked as an author of the federal system in his role as chief counsel to the committee in the late 1970s.<sup>111</sup> After becoming an appellate judge on the First Circuit, then-Judge Breyer was an original member of the United States Sentencing Commission.<sup>112</sup> During these years, Breyer attempted four times to establish "advisory guidelines from which judges may

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<sup>110</sup> He argued quite strenuously (though I believe, erroneously) that the guidelines could not survive if juries had to make the myriad of factual findings required. *Apprendi* (Breyer, J., dissenting).

<sup>111</sup> 34 Loy. U. Chi. L.J. 359, n. 78; 26 U. Ark. Little Rock L. Rev. 719, n. 64.

<sup>112</sup> 25 N.Y.U. Rev. L. & Soc. Change 65, 90-91.

depart if they state good reasons." The first time was when he assisted writing the initial draft of the Guidelines as chief counsel. When Congress rejected advisory guidelines, he tried a second time in his role on the first Sentencing Commission. Failing to obtain a majority of the seven Commissioners on this point, he tried a third time in a number of First Circuit decisions interpreting the Guidelines as more advisory than mandatory.<sup>113</sup> His fourth try was joining the majority decision in *Koon*, holding that district courts should be free to depart from the Guidelines, subject only to abuse of discretion review.<sup>114</sup>

Congress roughly and immediately slapped down this last attempt by the Court to transform the Guidelines into "advice" that a judge could reject through upward and downward departure authority by enacting the Feeney Amendment in 2003.<sup>115</sup> This amendment was designed to remedy "the serious problem of downward departures from the Federal Sentencing Guidelines by judges across the country."<sup>116</sup> It does this through various means. First, the amendment mandates higher sentences for child-victim, sexual abuse, and obscenity cases. More importantly, it permits federal judges to depart upwards for these offenses, but effectively eliminates nine specified grounds for downward departure,<sup>117</sup> and prohibits judges from using their "residual" authority to depart downward on grounds not specified in the Guidelines.<sup>118</sup> Moreover, for all federal criminal cases (not just child, sexual abuse, and obscenity cases), it conditioned the four level "early disposition" departure and three-level "acceptance of responsibility" adjustment on a motion from the government.

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<sup>113</sup> See, e.g., *United States v. Diaz-Fillafane*, 874 F.2d 43 (1st Cir. 1989); *United States v. Wright*, 873 F.2d 437 (1st Cir. 1989); *United States v. Menez-Colon*, 15 F.3d 188, 191 (1st Cir. 1990).

<sup>114</sup> *Koon v. United States*, 518 U.S. 81 (1996).

<sup>115</sup> PROTECT Act, Pub. L. No. 108-21, section 41(b)(g)(i), 117 Stat. 650, 668-69, 671-73 (popularly known as the Feeney Amendment). An excellent discussion of the legislative history and substance of the Act can be found in Alan Vinegrad, "The New Federal Sentencing Law." 15 Fed. Sent. Repr. 310 (June 2003).

<sup>116</sup> 149 Cong. Rec. H3061 (March 27, 2003) (statement of Rep. Feeney, the sponsor and author of the bill). The amendment "put strict limitations on departures by allowing sentences outside the guidelines range only upon grounds specifically enumerated in the guidelines as proper for departure. This would eliminate ad hoc departures based upon vague grounds, such as 'general mitigating circumstances.'" *Id.* The Feeney amendment formally became law as part of the PROTECT Act in April of 2003.

<sup>117</sup> These grounds are aberrant behavior, family ties, military or charitable service, employment related contributions, and family ties.

<sup>118</sup> See section 5K2.0 (providing for a downward departure if the judge finds any other mitigating factor "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines").

Judges who depart downward in any class of case must state the reason for the lower sentence with "specificity in the written order of judgment and commitment."<sup>119</sup> The amendment purported to overturn *Koon* by requiring circuit courts to review all departures in federal criminal law cases using a *de novo* standard, and limited the district court's ability to downwardly depart on remand. Further, it included a mandate that the Sentencing Commission within six months review all downward departures and promulgate amendments which would "substantially" reduce the number of downward departures, and it prohibited the Commission from creating new downward departure guidelines for the next two years. Finally and perhaps most offensively, it changed the composition of the Commission and imposed new reporting requirements. The amendment changed the then-current law requiring that "at least three" of the seven non-voting members of the Commission be federal judges, to no "more than three" federal judges (and thus, conceivably, have a Commission with no judges at all). It required the Attorney General to report downward departures to Congress within 15 days (including the district judge's identity), or to submit a detailed report to the House and Senate Judiciary Committees, within 90 days, setting forth the procedures by which the Department will ensure that all federal prosecutors oppose unsupported downward departure and ensure the vigorous pursuit of appeals.

With a Congress intent on constricting judicial discretion in any way possible, despite numerous protest against mandatory minimum sentences, the Federal Sentencing Guidelines, and the Feeney Amendment from jurists as high ranking as the Chief Justice of the United States Supreme Court,<sup>120</sup> it is no wonder that the Court accepted the opportunity presented by *Booker* to strike back.

## **II. Federal Criminal Sentencing After Booker**

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<sup>119</sup> 18 U.S.C. section 3553(c).

<sup>120</sup> See, e.g., The American Bar Association's Justice Kennedy Commission Final Report, issued June 23, 2004 (access through ABA website); Rhonda McMillion, "ABA Supports Push to Restore Judicial Discretion in Sentencing," 90 A.B.A.J. 62 (Jan. 2004) (noting speech by Justice Anthony M. Kennedy stating that "prison sentences are too long, mandatory minimum sentences should be repealed, and sentencing guidelines should be reconsidered"); Gina Holland, "Justice Applauds Bucking Sentencing Law," at <http://news.findlaw.com> (March 17, 2004) (quoting Justice Kennedy's statement that courts should not have to "follow, blindly, these unjust guidelines"); Letters to Congress from Sentencing Commissioners, Judicial Conference, and Chief Justice William H. Rehnquist in opposition to Feeney Amendment, reprinted in 15 Fed. Sent. Repor. 471 (June 2003) (letter from Rehnquist to Senator Patrick Leahy warned that the amendment, "if enacted, would do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of courts to impose just and reasonable sentences").



In the short term, judicial discretion is hugely increased as appellate courts reverse and remand all sentences still on direct appeal after *Booker*, and trial judges impose post-*Booker* sentences in the absence of mandatory sentencing guidelines. I will first discuss what parts of the Sentencing Reform Act of 1984 and the Feeney Amendment of 2003 survive *Booker*, then review how trial courts are presently reacting to their new grant of authority, and finally discuss the extent to which this discretion can be reigned in by appellate review.

The remedial majority held that 18 U.S.C. section 3553(b)(1), making the Federal Sentencing Guidelines mandatory,<sup>121</sup> and 18 U.S.C. section 3742(e), requiring appellate courts to review sentences for compliance with the Guidelines,<sup>122</sup> are severed and excised from the Sentencing Reform Act of 1984 (as are all cross-references to the two severed provisions).<sup>123</sup> So modified, the guidelines are "effectively advisory" and thus judicial factfinding and employment of the policy decisions contained in the guidelines do not violate a defendant's Sixth Amendment right to a jury trial. Federal district judges must now consider the Commissioners' preferences as set out in the guideline ranges pursuant to 18 U.S.C. section 3553(a)(4), but can tailor sentences in light of the other statutory concerns as well. These statutory concerns, listed in 18 U.S.C. section 3553(a), include imposing a sentence "not greater than necessary, to comply with the purposes set in [the Sentencing Reform Act]."<sup>124</sup> These purposes are "the nature and circumstances of the offense and the history and characteristics of the defendant, ... the need for the sentence imposed ... to reflect the seriousness of the offense, to promote respect for the law, ... to provide just punishment for the offense ... to afford adequate deterrence to criminal conduct, ... to protect the public from further crimes of the defendant; ... to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the

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<sup>121</sup> 18 U.S.C. section 3553(b)(1) provided that the court "shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4)." (West 2004). Subsection (a)(4) directs the judge to apply the guidelines in effect on the date the defendant is sentenced.

<sup>122</sup> 18 U.S.C. section 3742(e) provided that the appellate court shall review the record to determine whether the sentence was "imposed as a result of an incorrect application of the sentencing guidelines." (West Supp. 2004).

<sup>123</sup> *Booker*, slip op. at 2.

<sup>124</sup> 18 U.S.C. section 3553(a) (emphasis added). Prof. Berman argues on his blog that what he labels this "parsimony provision" requires the judge to impose a sentence below the guidelines range because guidelines sentences are not parsimonious. See [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy](http://sentencing.typepad.com/sentencing_law_and_policy) (Jan. 12, 2005).



most effective manner, ...to avoid unwarranted sentence disparities among defendants with similar records ... and ... to provide restitution to any victims of the offense."<sup>125</sup> This authority, coupled with the admonition in 18 U.S.C. section 3661 that "no limitations shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the U.S. may receive and consider for purposes of imposing an appropriate sentence," allow trial judges free reign in gathering information and making discretionary sentencing decisions.

A quick glance at the above list of appropriate statutory concerns in 18 U.S.C. section 3553(a), which includes a smorgasbord of deterrence, rehabilitative, and retributive theories of justice, should alert the reader to the possibility of adequately justifying any conceivable sentence the judge should wish to impose. While federal judges were theoretically considering all of these factors prior to *Booker*, in reality the range provided for by the Guidelines Manual trumped alternatives the judge might prefer. In fact, many of the Commissioners' wishes, as reflected in the Guidelines, directly contradicted factors that judges were supposed to be considering. For example, much of the defendant's history and medical needs were expressly prohibited as grounds for reaching a particular sentence. The only mandatory sentences remaining are the mandatory minima enacted in the Crime Control Act that contained the Sentencing Reform Act of 1984. So long as *Harris* remains good law, judges cannot impose a sentence lower than a statutory minimum - everything else is fair game.

Though the remedial majority in *Booker* did not discuss the Feeney amendment, its logic should apply to render all mandatory provisions unconstitutional or advisory. For example, as part of the Feeney Amendment, Congress added 3553(b)(2), limiting downward departures in child sex offense cases to those grounds specifically identified as permissible grounds of downward departures in the sentencing guidelines manual. Will this prevent a judge from granting a downward departure based upon a defendant's age, his educational skills, substance abuse problems, aberrant behavior, family ties, or military service, all of which have been declared off-limits by the Commissioners?<sup>126</sup> If the guidelines are now truly advisory, if seems to me that a judge in a child sex offense case should have the same authority to consider and then reject the Commissioner's policy choices regarding the appropriate sentence and allowable departures as in any other type of case. Similarly, the Feeney Amendment purports

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<sup>125</sup> 18 U.S.C. section 3553(a)(1) - (7) (West Supp. 2004).

<sup>126</sup> See 5K2.2 (aberrant behavior); 5H1.6 (family ties and responsibilities); 5H1.11 (military or charitable services); 5H1.10 (socio-economic status), and 5H1.12 (lack of guidance as a youth), all declared to generally be impermissible grounds for a downward departure. (West 2004).

to restrict a judge from subtracting a third point from a defendant's base offense level for exceptional acceptance of responsibility (the ordinary award for pleading guilty and accepting responsibility for one's crime is a two-point deduction) except upon motion from the government. Likewise, it allows a judge to grant a four level decrease for early dispositions program, again only upon motion from the government. If the guidelines are advisory, then a judge could deduct the three points (or award any quantity of decrease she wishes) regardless of the government's request. Likewise, the judge could decide that the sentencing factor advocating the elimination of disparity warrants granting a four-level decrease to all defendants, even if they are not lucky enough to be charged in a fast track jurisdiction.

The same argument flows regarding substantial assistance and relevant conduct, as well as collateral issue such as criminal forfeiture and mandatory restitution.<sup>127</sup> Prior to *Booker*, a judge

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<sup>127</sup>While beyond the scope of this article, criminal forfeiture and mandatory restitution should also be subject to the *Apprendi/Booker* rule, despite Justice Breyer's unexplained declaration in *Booker* dicta that 18 U.S.C. sec. 3554, requiring criminal forfeiture in certain classes of cases, survives. Mandatory criminal forfeiture, pursuant to the RICO statute, 18 U.S.C. sec. 1963, requires that the judge to order forfeiture of any property constituting, or derived from, any proceeds obtained from racketeering activity. The factual finding that the property is proceeds is made by judge, not jury. Likewise, 21 U.S.C. sec. 853 requires forfeiture of proceeds and property used to facilitate drug offense; 18 U.S.C. sec. 982 forfeiture of money involved in money laundering. However, the mere inclusion of "forfeiture" as part of the penalty for a criminal offense does not authorize forfeiture of a defendant's estate as the penalty for committing his crime - the statutory maximum penalty is not everything the defendant owns. Rather, these statutes authorize the forfeiture only of those assets that meet certain criteria. This is similar to old larceny statutes that conditioned the amount of the fine on amount of loss sustained or value of property stolen. Since these facts must be established before the higher punishment is authorized, they should be elements after *Apprendi* and *Booker*. This especially true where forfeiture mandatory, so judge has no discretion to refuse to impose it. Nancy King and I first took this position in *Essential Elements*, 54 *Vanderbilt Law Rev.* 1481, n. 51 (2001), and expanded upon it in *Beyond Blakely*, 16 *FSR* 413 (2004). However, case law thus far is primarily to the contrary. See., e.g., *U.S. v. Messino*, 2004 WL 1925420 (7th Cir. 2004) (drug forfeiture findings of quantity and nexus are not elements of the offense after *Blakely* because there is no statutory maximum penalty); *United States v. Cianci*, 378 F.3d 71, 101 (1st Cir. 2004) (requesting additional briefing on whether *Blakely* disrupts RICO criminal forfeiture).

could grant a defendant a downward adjustment to their sentence for substantial assistance to law enforcement only upon motion from the government.<sup>128</sup> If the guidelines are advisory, it seems to me that a judge could grant a downward departure for substantial assistance if doing so furthers any of the factors set out in 18 U.S.C. section 3553(a), regardless of whether the prosecutor moves for the departure. This gives judges much more discretion in sentencing, at least up to the point where they run into a mandatory minimum penalty. If the *Harris* holding that mandatory minimum penalties are not covered by *Apprendi/Blakely* remains good law, then the judge cannot go below such a statutory mandatory minimum sentence based upon substantial assistance. This is because of an independent statute providing that a judge can sentence below a mandatory minimum based upon substantial assistance only upon the government's motion.<sup>129</sup> This statute

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Mandatory Victim Restitution is likewise now rendered advisory, or the facts necessary to establish the appropriate imposition of restitution must be submitted to a jury beyond a reasonable doubt. In 1996, Congress enacted the Mandatory Victim's Restitution Act, which requires that the court order restitution to the victim of the offense, after making necessary factual findings as to the amount of loss, any medical expenses, and lost income resulting from the defendant's crime. 18 U.S.C. sec. 3663A (West 2004). Again it seems to me that these factual findings increase the statutory maximum penalty for the offense from no restitution to a higher amount, and that therefore these facts should be submitted to the jury for a beyond a reasonable doubt finding (or the restitution should be interpreted as discretionary. Again although there is a split over whether restitution constitutes punishment for purposes of the Ex Post Facto Clause, most Circuit cases have taken the position that the *Apprendi/Blakely/Booker* line of cases do not apply because first, restitution is not punishment at all, and second, the restitution statute contains no maximum penalty. See, e.g., *U.S. v. Wooten*, 2004 WL 1776012 (10th Cir. 2004) (restitution under 18 U.S.C. section 3663A does not violate *Blakely* as the defendant did not contend that the forfeiture order exceeded the value of the damaged property). The *Wooten* court recognized the circuit split as to whether restitution is punishment for purposes of the Ex Post Facto Clause, with the Ninth and Third Circuits holding that it is punishment, and the Seventh holding to the contrary. See also *U.S. v. Syme*, 276 F.3d 131 (3rd Cir. 2002) (*Apprendi* does not apply to the Mandatory Victim's Restitution Act because 18 U.S.C. section 3663A has no statutory maximum amount), cert. denied, 123 S.Ct. 619 (2002); but see *U.S. v. LaMere*, 2004 WL 1737916 (9th Cir. 2004) (affirming defendant's conviction but vacating restitution portion of his sentence and ordering mandate held until the resolution of the application of *Blakely*).

<sup>128</sup> Sentencing Manual section 5K1.1 (West 2004).

<sup>129</sup> See 18 U.S.C. section 3553(e), providing that the court "may impose a sentence below a level established by statute as a minimum sentence" only "upon motion of the Government." (West

providing "get out of jail free" cards solely to prosecutors probably does not run afoul of the *Apprendi/Blakely* rule.

Prior to *Booker*, judges were compelled to impose increased sentences based upon their finding of "relevant conduct."<sup>130</sup> Relevant conduct includes all foreseeable acts of co-conspirators and any other criminal conduct that was part of the same "course of conduct or common scheme or plan" as the offense of conviction.<sup>131</sup> Under this scheme, prosecutors could force judges to sentence a defendant for conduct that was never charged, or even for conduct for which the defendant was acquitted.<sup>132</sup> Now that the guidelines are advisory, judges can ignore relevant conduct if they choose, giving them one more means to sentence below a guidelines recommendation.<sup>133</sup>

Federal judges have, for the most part, hated the federal sentencing guidelines since the first Manual was published, in equal measure because the Guidelines effectively eliminated their discretion and because they were widely perceived as draconian. Trial judges appear to be taking their new-found authority to heart, and the vast majority of these cases favor defendants with lower sentences. These judges are now sentencing in two classes of cases;<sup>134</sup> (1) "pipeline" cases that were still on direct appeal

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2004).

<sup>130</sup>USSG Manual 1B1.1 (providing that judges SHALL sentence for relevant conduct).

<sup>131</sup>Guidelines Manual sec. 1B1.3(a)(1)(B) provides that relevant conduct includes acts of co-conspirators, and 1B1.3(a)(2) provides that relevant conduct includes counts that would group under 3D1.3(d) and are part of the same course of conduct.

<sup>132</sup> *United States v. Watts*, 519 U.S. 148 (1997) (per curiam) (guidelines constitutionally provide for enhancements for acquitted conduct found by judge at sentencing by a preponderance of the evidence, so long as sentence is within the statutory maximum for the crime of conviction); *Witte v. United States*, 515 U.S. 389 (1995) (judge must impose enhancement under guidelines for uncharged drug conduct if the government establishes that conduct by a preponderance of the evidence at sentencing, and so long as the sentence is within the statutory maximum for the crime of conviction).

<sup>133</sup> See Stevens dissent to Breyer's remedial majority opinion in *Booker*.

<sup>134</sup> Sentences already final before *Booker* have no hope for reversals, as *Booker* will not be retroactive to cases on collateral review. See *Teague v. Lane*, 489 U.S. 288 (1989) (no relief under 2255 on basis of a "new" rule of criminal procedure announced after the prisoner's conviction became final); *Schriro v. Summerlin*, 2004 U.S. LEXIS 4574 (2004) (*Ring's* rule requiring jury determination of aggravating facts no retroactive because it was a new rule that did not fit into one of the exceptions for collateral review); *In re Anderson* (11th Cir. 1/21/05) (Judge Tjoflat) (second habeas petition denied because United States

when Booker was rendered on Jan. 25, 2005,<sup>135</sup> and new sentencing hearings occurring for the first time post-Booker. As to the first class of cases, almost all Circuit courts are reversing and remanding the vast majority of pre-Booker sentences, finding harmful and plain error below.<sup>136</sup> Even the Fourth Circuit, one of our nation's most conservative, reversed a sentence under plain error review.<sup>137</sup> Judge Wilkins found that where the jury verdict supported a 6-12 month sentence for bankruptcy fraud, but the judge imposed a 41-51 months sentence based upon additional factual findings regarding amount of loss, more than minimal planning, abuse of a position of trust, and obstruction of justice, there was plain error that affected the defendant's substantial rights, and that it would be a miscarriage of justice to fail to reverse and remand.<sup>138</sup>

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Supreme Court did not make *Blakely* or *Booker* retroactive on collateral review). *But see* Note, "Rethinking Retroactivity," 115 *Harvard Law Rev.* 1642 (2005) (arguing that *Booker* will be retroactive to cases pending on collateral review).

Likewise, where defendant has waived her *Apprendi/Blakely* rights in her plea agreement, these waivers will be upheld on appeal. *See, e.g., U.S. v. Rubbo*, 2005 WL 120507 (11th Cir. 2005) (appeal waiver valid even where agreement contains exception for sentence above statutory maximum, as "statutory maximum" in plea agreement meant the highest penalty listed in the U.S. Code, not the new "statutory maximum" as defined by *Booker*).

<sup>135</sup> The *Booker* majority, citing *Griffith v. KY*, held that the new Sixth Amendment rule would be applied to all cases pending on direct review. In the few months since *Booker* was rendered, the Supreme Court has granted certiorari, vacated the judgment, and remanded in light of *Booker* in over 500 cases. *See* SCOTUS.

<sup>136</sup> Pursuant to F.R. Crim. Proc. 52, when a defendant fails to object to an error, it is recognized only if plain. *See United States v. Cotton*, 535 U.S. 625, 631 (2002) ([B]efore an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights.

If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings."). Where a defendant does object to an error, it is recognized unless harmless beyond a reasonable doubt.

<sup>137</sup> *United States v. Hughes*, 396 F.3d 374 (4th Cir. 2005). The author of this opinion was Chief Judge William W. Wilkins, one of the original Commissioners.

<sup>138</sup> *See also U.S. v. Antonakopoulos*, 2005 WL 407365 (1st Cir. Feb. 22, 2005); *U.S. v. Boone*, 2005 WL 290204 (2nd Cir. Feb. 07, 2005); *U.S. v. Crosby*, 2005 WL 240916 (2nd Cir. Feb. 02, 2005); *U.S. v. D'Oliveira*, No. 04-2736 (2d Cir. 3/22/05); *U.S. v. Mortimer*, 2005 WL 318650 (3rd Cir. Feb 10, 2005); *U.S. v. Washington*, 2005 WL 326986 (4th Cir. Feb 11, 2005); *U.S. v. Hughes*, 396 F.3d 374 (4th Cir. Jan 24, 2005); *U.S. v. McDaniel*,

More importantly, those federal judges imposing criminal sentences post-Booker are almost uniformly employing their vast discretion in reaching their decisions. A few of the many available examples of judges essentially calculating the Guidelines sentence<sup>139</sup> and then sentencing otherwise shortly after Booker should suffice to make this point.<sup>140</sup> Many judges, after

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2005 WL 366899 (6th Cir. Feb 17, 2005); *U.S. v. Barnett*, 2005 WL 357015 (6th Cir. Feb 16, 2005); *U.S. v. Milan*, 2005 WL 309934 (6th Cir. Feb 10, 2005); *U.S. v. Harris*, 2005 WL 291521 (6th Cir. Feb 08, 2005); *U.S. v. Oliver*, 2005 WL 233779 (6th Cir. Feb 02, 2005); *U.S. v. Davis*, 2005 WL 130154 (6th Cir. Jan 21, 2005); *U.S. v. Re*, No. 03-2089 (7th Cir. 3/22/05); *U.S. v. Fellers*, 2005 WL 350959 (8th Cir. Feb 15, 2005); *U.S. v. Fox*, 2005 WL 195429 (8th Cir. Jan 31, 2005); *U.S. v. Coffey*, 395 F.3d 856 (8th Cir. Jan 21, 2005); *U.S. v. Adams*, No. 03-2138 (8th Cir. 3/22/05); *U.S. v. Ameline*, 2005 WL 350811, (9th Cir. Feb 10, 2005); *U.S. v. Seibert*, 2005 WL 281469, (9th Cir. Feb 07, 2005); *U.S. v. Ruiz-Alonso*, 2005 WL 326839 (9th Cir. Feb 11, 2005); *U.S. v. Lynch*, 2005 WL 327710 (10th Cir. Feb 11, 2005); *U.S. v. Rodriguez*, 2005 WL 272952 (11th Cir. Feb 04, 2005); *U.S. v. Garcia*, No. 03-10350 (11th Cir. 3/22/05); *U.S. v. Reese*, 2005 WL 172024 (11th Cir. Jan 27, 2005).

A much smaller number of sentences in pipeline cases are being affirmed based upon plain error analysis. See *U.S. v. Bruce*, 2005 WL 241254 at \*19, (6th Cir. 2005); *Rucker v. U.S.*, 2005 WL 331336 at \*10 (D.Utah Feb 10, 2005); *U.S. v. Rodriguez*, 2005 WL 272952 (11th Cir. 2005). It is only the Fifth and D.C. Circuits that seriously requires a defendant to establish prejudice before obtaining a remand for new sentencing. See *U.S. v. Infante*, No. 02-50665, 2005 U.S. App. LEXIS 4546 (5th Cir. 3/18/05); *U.S. v. Smith*, No. 03-3087 (D.C. 3/18/05) (per curiam).

<sup>139</sup> On Jan. 21, 2005, Judge Ricardo H. Hinojosa, the Chair of the U.S. Sentencing Commission, and Judge Sim Lake, the chair of the Criminal Law Committee of the Judicial Conference of the U.S., sent a memorandum to all U.S. judges reminding them of the "importance of continuing to submit sentencing documents to the Sentencing Commission in accordance with the requirements of 28 U.S.C. section 994(w)." (concerning specific sentencing documents such as the Presentence Report, information about offender and offense made relevant by the guidelines). It further reminded judges to comply with 18 U.S.C. section 3553(c) by giving specific reasons for sentences that vary from the guideline range.

<sup>140</sup> In addition to the cases discussed infra, instances of district judges sentencing quite differently from what the Federal Sentencing Guidelines Manual "advises" include *U.S. v. Myers*, 2005 WL 165314 (S.D.Iowa 2005). ("The Guidelines are not presumptive, but advisory, and should be treated as one factor to be considered in conjunction with other factors that Congress enumerated in section 3553(a)"). See also *U.S. v. Kelley*, 2005 WL 323813 at \*1 (D.Neb., Feb. 01, 2005) ("Post Booker, the Sentencing Reform Act

"considering" the advisory federal sentencing guidelines as required by *Booker*, are then relying on 18 U.S.C. section 3553(a), the federal statute allowing broad latitude in selecting relevant sentencing criteria, even where that criteria directly contradicts a policy decision made by the Commissioners.

For example, some judges are lowering sentences based upon a defendant's need for medical care, despite the Commissioner's rejection of this factor. In *United States v. Jones*,<sup>141</sup> Judge Hornby sentenced a mentally impaired defendant to probation rather than the 12-18 months "recommended" by the federal sentencing guideline for his weapon's possession offense. In employing his discretion to reject this range, the judge pointed to 18 U.S.C. section 3553(a)(2)(D), which provides that one sentencing factor is "to provide the defendant with needed ... medical care..." For Mr. Jones, that was best done by allowing him to continue to live with his sister and take his various medications. Judge Hornby further noted that 18 U.S.C. sec. 3553(a)(2)(C) provides that another sentencing factor is to "protect the public from further crimes of the defendant," which again is best accomplished by continuing in present treatment program, rather than disrupting his treatment by a prison term. The judge pointedly noted that his sentence would have been impossible before *Booker*, because neither mental and emotional conditions, diminished capacity, nor efforts toward rehabilitation would have entitled the defendant to a downward departure.<sup>142</sup>

Other judges are decreasing sentences, as Judge Hornby did in part, based upon rehabilitation concerns. For example, Chief

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(SRA) requires a sentencing court to regard the Guidelines ranges as one of many factors"); *U.S. v. Huerta-Rodriguez*, 2005 WL 318640 at \*1 (D.Neb. Feb. 01, 2005), ("Post-*Booker*, the Sentencing Reform Act (SRA) requires a sentencing court to regard the Guidelines ranges as one of many factors").; *U.S. v. \_\_\_\_\_* (government appeal of post-*Booker* sentence of probation in pornography case), Detroit News 3/23/05.

A very thorough and current list of all Post-*Booker* Federal Decisions was prepared by Frances H. Pratt for the Office of the Federal Public Defender in Alexandria, VA, and can be found on Prof. Doug Berman's excellent blog, <http://sentencing.typepad.com>.

<sup>141</sup> \_\_\_ F.Supp. 2d \_\_\_; 2005 WL 121730 (D. Maine, 2005) (per Judge Brock Hornby).

<sup>142</sup> *Id.* at \*1 (discussing Guideline 5H1.3, providing that "mental and emotional conditions are not ordinarily relevant in determining whether a departure is warranted," 5K2.13, which provides for a downward departure for reduced mental capacity only where it contributed to the commission of the offense, 5K2.19, which prohibits departures for post-sentencing rehabilitative efforts but makes no mention of pre-sentencing efforts, and 5K2.0, a catcall departure guidelines which is inapplicable).



Judge David Ezra of Hawaii used treatment concerns to justify a reduced sentence for a first time offender who had undergone sex-offender treatment after his conviction for downloading child pornography. Similarly, Judge Richard J. Arcara of New York reduced the sentence of a first-time non-violent offender based upon rehabilitation potential.<sup>143</sup>

More than a few judges are using their discretion to close the 100:1 crack to powder cocaine disparity in sentencing. Congress enshrined a 100:1 ratio into law in the Anti-Drug Abuse Act of 1985, such that to trigger the Act's ten-year mandatory minimum sentence, the offense had to either involve five kilograms of powder cocaine or a mere 50 grams of crack.<sup>144</sup> Numerous state jurists and academics have decried the disparate racial impact this penalty scheme imposes (as African-Americans comprise 90% of federal crack cocaine defendants),<sup>145</sup> and the Commission, with the blessing of the Clinton Department of Justice, has twice tried to modify this ratio, but Congress has rebuffed all such attempts.<sup>146</sup>

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<sup>143</sup> [http://sentencing/typepad.com/sentencing\\_law\\_and\\_policy/legislative\\_reactions\\_to\\_booker](http://sentencing.typepad.com/sentencing_law_and_policy/legislative_reactions_to_booker) (1/20/05). This informative blog is managed by Prof. Doug Berman from Ohio State.

<sup>144</sup> Pub. L.No. 99-570. 100 Stat. 3207 (1986); codified at 21 U.S.C. section 841(b).

<sup>145</sup> David A. Sklansky, "Cocaine, Race, and Equal Protection," 47 Stanford law rev. 1283, 1308-09 (1995) (concluding that equal protection analysis should be loosened to account for unconscious racism, especially where a criminal prohibition has a seriously disproportionate impact on black defendants); *U.S. v. Clary*, 846 F.Supp. 768 (E.D. Mo. 1994), rev'd 34 F.3d 709 (8th Cir. 1994); Kevin J. Cloherty & Dawn M. Perlman, *Powder vs Crack*, Fed. Law., March/April 2003, at 50. In 1994, blacks comprised 90.4% of all federal crack cocaine drug offenders. *U.S. v. Smith*, 73 F.3d 1414 (6th Cir. 1994) (Jones, J., concurring). In 1993, only 4% of federal crack cocaine offenders were white, and 88% of such defendants were black. *U.S. v. Armstrong*, 59 CrL 2090 (1996) (Stevens, J., dissenting) (citing to U.S. Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 1y 39, 161 (Feb. 1995)).

<sup>146</sup> On May 11, 1995, the Commission presented an amendment to Congress recommending that the 100:1 ratio be replaced with a 1:1 ratio equivalence between crack and powder cocaine, 60 Fed. Reg. 25,074 (1995). In 1997, the Commission recommended altering the penalties to reflect a 5:1 ration, on July 3, 1997, the Attorney General recommended adopting a similar 5:1 ratio, and on July 22, 1997, the Clinton Administration publicly proposed reducing the ratio to 10:1. U.S. Sentencing Comm'n, Special Report to the Congress: Cocaine and Federal Sentencing Policy 2 (1997). The text of the proposed amendments to the guidelines are reprinted at 57 Crim. L. Rep. 2095, 2096 (1995) and 10 Fed. Sent. Rep. 184 (1998). Congress refused to introduce a bill to implement any of these solutions. In 2002, the Commission again declared the 100-to-1 ration "unjustified," 2002 Report at 91. Congress again



Thus, federal judges, who had their hands tied until *Booker*, are now decreasing crack cocaine sentences below that formerly required by the Guidelines.<sup>147</sup> Similarly, some judges are availing themselves of the opportunity to reject what they consider draconian drug sentences for low-level "mules," as the Guidelines based the penalty upon the quantity of the drug possessed or the subject of the conspiracy, regardless of whether a particular defendant knew the quantity involved or was aware of the full scope of the conspiracy.<sup>148</sup>

In another category of cases, judges who disagree with various aspects of the Commissioner's policy choices regarding fraud sentences have used *Booker* as a means of voicing this disagreement. In *U.S. v. Ranum*,<sup>149</sup> Judge Lynn Adelman sentenced a loan officer conviction of misapplying bank funds to a year and a day in prison, rather than the recommended guideline range of 37-46 months.<sup>150</sup> Post-*Booker*, he "may no longer uncritically apply the guidelines" but must instead "consider all of the section

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refused to act. See Elizabeth Tison, *Amending the Sentencing Guidelines for Cocaine Offenses*, 27 S.Ill. U. L.J. 413, 429 (2003).

<sup>147</sup> See, e.g., *U.S. v. Smith*, No. 02-CR-163, 2005 WL 549057 (E.D. Wis., 3/3/05) (Judge Lynn Adelman) (granting below guideline sentence to defendant convicted of crack offense); *U.S. v. Simon*, 90 CR 216 (E.D.N.Y., 4/17/05) (Judge Charles Sifton) (holding that post-*Booker* courts do not have to follow the 100:1 crack to powder ratio, and sentencing defendant to 262 months rather than the guideline recommended 324 - 405 months); *U.S. v. Thomas*, 2005 U.S. Dist. LEXIS 3972 (D. Mass. 3/14/05) (Judge Ponsor); *U.S. v. Harris*, 2005 U.S. Dist. LEXIS 3958 (D.D.C., 3/7/05) (Judge Robinson); *U.S. v. Carvajal*, 2005 WL 476125 (S.D.N.Y. 2/22/05); *U.S. v. Nellum*, 2:04-CR-30, 2005 WL 300073, at \*3 (N.D. In. 2/3/05).

<sup>148</sup> *U.S. district Judge Arcara in Buffalo* gave 1 day to female drug mule rather than the Federal Sentencing Guideline range of 24 - 30 months. "Thanks to high court, drug defendant gets 2nd chance," *The Buffalo News*, 1/20/05, available at [republish@buffnews.com](http://republish@buffnews.com).

<sup>149</sup> *U.S. v. Ranum*, 2005 WL 161223 (E.D. Wis., Jan 19, 2005).

<sup>150</sup> Judge Adelman asserts that pursuant to *Booker*, he must impose a sentence "sufficient but not greater than necessary to comply with the purposes set forth" in 18 U.S.C. section 3553(a). Thus he must consider the nature of the offender, the nature of the offense, the need for avoid unwarranted disparities, the kind of sentences available, and the needs of the public and victim. He "may no longer uncritically apply the guidelines and, as one court suggested, 'only depart ... in unusual cases for clearly identified and persuasive reasons.'" Judge Adelman is convinced that the latter quoted approach, espoused by Judge Paul Cassell in *U.S. v. Wilson*, *infra* n. \_\_\_\_, is "inconsistent with the holdings of the merits majority of *Booker*".

3353(a) factors, many of which the guidelines either reject or ignore."<sup>151</sup> In Mr. Ranum's case, the victims will be more likely to receive restitution (as provided for by 18 U.S.C. section 3553(a)(7)) if the period of imprisonment is short and the defendant can get back to work. Most importantly, the defendant's offense level under the advisory guidelines was largely the product of the loss amount. Judge Adelman disagrees with this guideline choice in white-collar cases, preferring to assess "personal culpability," which may or may not correspond to loss amount depending upon "the nature of the case."<sup>152</sup> In this case, the "defendant's culpability was mitigated in that he did not act for personal gain or for improper personal gain of another," but rather made a series of reckless loan which went bad. That, coupled with the defendant's solid employment history, and his need to raise his daughters and care for his elderly depressed mother and Alzheimer's ridden father, supported the low sentence. Likewise, former Connecticut Governor John Rowland received only a year and a day in prison for his plea to conspiracy to steal honest service, despite a Guideline range of 15 - 21 months, and a prosecutorial recommendation of 30 - 37 months.<sup>153</sup>

At least some judges appear to be granting larger section 5K1.1 substantial assistance departures than requested by the government. For example Judge Presnell in *U.S. v. Blevett*<sup>154</sup> rejected the "government's philosophically one-sided bid to marginalize the judicial branch" by controlling the amount of downward departures, finding instead that judicial control over substantial assistance departures would better serve the goal of eliminating sentencing disparity.<sup>155</sup> Thus, the judge granted the defendant a five-level departure for cooperation with the authorities (Mr. Blevett immediately told the government who gave him the kilogram of powder cocaine he tried to smuggle from Jamaica to Florida), despite the government request for only a two-level departure (since the crew member who had given the drugs

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<sup>151</sup> *Id.* at 2.

<sup>152</sup> *Id.* at 12.

<sup>153</sup> New York Times and Hartford Courant, 3/19/05; AP service on 3/18/05. Thus, Judge Peter Dorsey either granted a downward departure under the Guidelines or a Booker variance, but because the opinion is not published it is impossible to say which one. The extra day was to the defendant's benefit, as he is eligible for the 15% "good time" reduction only if his sentence is over one year.

<sup>154</sup> No. 6:04-cr-199-Orl-31DAB (M.D. Fla. 3/17/05).

<sup>155</sup> This is because cooperation agreements allow more culpable defendants to receive shorter sentences than less culpable ones, and because there is much disparity among Districts in the application of Section 5K1.1. *Blevett* at 4 (citing Am. Coll of Trial Lawyers Report and Proposal on Sec. 5K1.1 of the U.S. Sentencing Guidelines," 38 Am. Crim. L. Rev. 1503, 1524-25 (2001)).

to the defendant had already absconded).<sup>156</sup> The Commentary to Section 5K1.1 provides that "substantial weight should be given to the government's evaluation of the extent of the defendant's assistance,"<sup>157</sup> and, prior to *Booker* it was a matter of course for the court to grant whatever decrease the government suggested.

Recent cases also show that a few judges are using their newfound discretion to increase sentences in particularly egregious cases, even beyond what the former mandatory federal sentencing guidelines would allow.<sup>158</sup> For example, Mr. Negron-Cabrera was sentenced to 114 months imprisonment for assaulting his wife with a deadly weapon, though his guideline range was a mere 46-57 months.<sup>159</sup> Judge Minaldi of Port Charles, Louisiana did not believe that the guidelines sentence accounted for the seriousness of the assault, during which the defendant threatened to kill the victim, and held her hostage for over two hours. In New Jersey, U.S. District Judge Dennis Cavanaugh sentenced a former federal immigration inspector to seven and one-half years in prison for smuggling, more than two years longer than the 51-71 months under the guidelines and the even lighter term prosecutors in that case recommended due to defendant's cooperation.<sup>160</sup>

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<sup>156</sup> Judge Presnell seemed less than thrilled with the government's argument that anything outside the guidelines range is per se unreasonable and that he would be put in a *Booker* report (referring to the Department's policy of placing judges who sentence below guidelines minimums or government-approved downward departures on a "*Booker* Sentencing Report Form," as described in a Memorandum from James P. Comey, Deputy Attorney General, U.S. Dept. of Justice, Department Policies and Procedures Concerning Sentencing, Jan. 28, 2005).

<sup>157</sup> U.S. Sentencing Guideline Manual section 5K1.1, comment note 3.

<sup>158</sup> See, e.g., Judge Gordon J. Quist's 80 months sentence for Norman David Somerville in Grand Rapids, Michigan for possession of a machinegun, despite the 51-63 months recommended by the guidelines ("former militia member sentenced," [www.cadillacnews.com/articles/2005/03/25/news01.txt](http://www.cadillacnews.com/articles/2005/03/25/news01.txt)); Judge Joel Pisano's 41 months sentence for Robert Janiszewski in New Jersey for taking bribes, despite the prosecutor's request for a lighter sentence due to the defendant's assistance as a cooperating witness in numerous other cases ("Janiszewski gets stiffest penalty despite calls for lenience," New Jersey Star-Ledger (3/25/05) at [www.nj.com/news/ledger/index/ssf?/base/news-21/111172998090850.xml](http://www.nj.com/news/ledger/index/ssf?/base/news-21/111172998090850.xml)).

<sup>159</sup> "Negron-Cabrera sentenced to over nine years in prison," Leesville Daily Leader (3/23/05), available at [www.leesvilledailyleader.com/articles/2005/03/23/news/news4.txt](http://www.leesvilledailyleader.com/articles/2005/03/23/news/news4.txt).

<sup>160</sup> The Star Ledger, "Irate judge throws book at smuggler," available at [www.nj.com/news/ledger/jersey/index.ssf?/base/news-9/1111561194122990.xml](http://www.nj.com/news/ledger/jersey/index.ssf?/base/news-9/1111561194122990.xml).

Not all judges are treating the guidelines so cavalierly. A few judges, like Judge Paul Cassell in Utah, have publicly embraced the position that they will sentencing defendants to the same term they would have received if the guidelines were mandatory.<sup>161</sup> Judge Cassell opined that trial judges should give "considerable weight" to the Guidelines in determining post-*Booker* sentences,<sup>162</sup> and thus he sentenced Mr. Wilson to 188 months in prison for armed bank robbery, in conformity with the guideline recommended range of 188-235 months in prison.

The United States Sentencing Commission has recently begun to collect information on post-*Booker* sentences, and a comparison of their new data with data from previous years confirms my suspicions that federal district judges will not be shy about using their new-found authority. A chart showing all reported decisions between January 12 and March 15, 2005 shows that only 62.1% of the over 5,000 cases were within the Guidelines range.<sup>163</sup> This is a marked decrease over the 71% of sentences that conformed to the Guidelines in 1995 and the 65% in 2002.<sup>164</sup> These statistics support the proposition that judges are willing to disregard the guidelines under the new system. The U.S. Sentencing Commission chart further shows that 1% of the 1.9% above guideline range sentences are directly attributable to *Booker*.<sup>165</sup> The 1.9% figure itself is a marked increase over the .9 % above Guideline range sentences in 1995 and the .8 % in 2002. Judges apparently feel free to give higher as well as lower sentences than those required by the old mandatory guideline regime. More significantly, 36% of post-*Booker* sentences are below the Guidelines range - larger than any other year between 1995 and 2002.<sup>166</sup> Of those lower-range sentences, 8.6% are directly attributable to *Booker*.<sup>167</sup>

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<sup>161</sup> See, e.g., *U.S. v. Wilson* (D. Utah) (Cassell, J); *U.S. v. Wilson*, 2005 WL 273168 at \*1 (D.Utah, Feb 02, 2005) (holding that the recommended Guidelines sentence should receive considerable weight); *U.S. v. Duran*, 2005 WL 395439 (D.Utah, Feb 17, 2005); *U.S. v. Wanning*, 2005 WL 273158 (D.Neb., Feb 03, 2005). See also *U.S. v. Peach*, 2005 WL 352636 (D.N.D., Feb. 15, 2005 ) (noting that "this Court is of the opinion that the proper methodology for sentencing in the post-*Booker* environment is that federal district courts should give the Sentencing Guidelines "substantial weight").

<sup>162</sup> *Id.* at 3 (emphasis not in original, and likewise not in the Supreme Court's command in the *Booker* case).

<sup>163</sup> Memorandum from the Office of Policy Analysis to Judge Hinojosa, Chair of the USSC, on 3/22/05, available on "[www.ussc.gov/Blakely/Booker\\_032205.pdf](http://www.ussc.gov/Blakely/Booker_032205.pdf)".

<sup>164</sup> Table 8 of the U.S.S.C.'s Federal Sentencing Statistics Report for Fiscal Years 1995 - 2002.

<sup>165</sup> The other .9 % were classified as an upward departure from the guideline range.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* The Commission report noted that this figure is reached

Once a federal district judge sentences below a formerly mandatory guideline range, there is not much prosecutor can do about it. Appellate courts are, for the most part, affirming post-Booker sentences as "reasonable."<sup>168</sup> So long as the district judge calculated the guidelines range and "considered" it, she need not give that factor any greater weight than any other factor that the Court is instructed to consider by 18 U.S.C. section 3553(a).<sup>169</sup> Reversals, thus far, seem to be instances where the district court miscalculated the guideline range.<sup>170</sup> I anticipate that sentences within federal sentencing guidelines range will be "presumptively reasonable." This will decrease the appellate workload, and is consistent with the demand from the Supreme Court that the guidelines be "considered." On the other hand, I doubt

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by subtracting those below-range sentences due to substantial assistance and fast track government motions, and subtracting those where the judge classified the sentences as a "downward departure." The remaining 8.6% either cite no reason, or cite *U.S. v. Booker* or 18 U.S.C. section 3553 as the reason for the low sentence.

<sup>168</sup>We review the sentence imposed for unreasonableness, judging it with regard to the factors in 18 U.S.C. section 3553(a). *U.S. v. Killgo*, 2005 WL 292503 at \*2 (8<sup>th</sup> Cir. Feb. 09, 2005); *U.S. v. Cramer*, 396 F.3d 960, 965 (8<sup>th</sup> Cir. 2005). See also *U.S. v. Yahnke*, 395 F.3d 823, 824 (8<sup>th</sup> Cir. 2005) ("The courts of appeals review sentencing decision for unreasonableness."); *U.S. v. Hughes* (4<sup>th</sup> Cir. 1/24/05) (trial judge should still consider the Federal Sentencing Guideline range under 3553(a)(4) as well as all other factors set forth in 3553(a), and he is required to state his reason for sentencing outside the guidelines under 3553(c)(2), and appellate court will affirm any sentence within statutory max. and "reasonable").

<sup>169</sup>District courts adopting this position include *Simon v. U.S.*, CR-90-216 (CPS) (E.D. N.Y. 3/17/05) (section 3553(a), which includes the calculation of the guidelines range in (a)(4), does not distinguish between the weight to be given to any of the factors listed); *U.S. v. Ranum*, 353 F.Supp. 2d 984 (giving "heavy weight" to the Guidelines may be in conflict with sections 3553(a)'s command to consider a multitude of factors); *U.S. v. Biheiri*, \_\_\_ F. Supp.2d \_\_\_, 2005 WL 350585 (E.D. Va. 2/9/05); *U.S. v. Huerta-Rodriguez*, \_\_\_ F. Supp. 2d \_\_\_, 2005 WL 318640 (D. Neb. 2/1/05); *U.S. v. Myers*, 353 F. Supp. 2d 1026 (S.D. Iowa 2005). But see the few judges giving "heavy weight" to the guidelines. *U.S. v. Wilson*, 350 F.Supp. 2d 910, 925 (D. Utah 2005); *U.S. v. Peach*, 2005 WL 352636 (D.N.D. 2005).

<sup>170</sup> See, e.g., *U.S. v. Villegas*, No. 03-21220 (5<sup>th</sup> Cir. 3/17/05) (where the trial court sentences under the guidelines, the appellate court will review *de novo* whether it properly interpreted and applied the Guidelines, but where the district court exercises its post-Booker discretion to impose a non-guidelines sentence, we review for reasonableness).

an appellate court could attach a "presumptively unreasonable" label to sentences outside the guidelines, as this would transform the guidelines into a *de facto* mandatory sentence.<sup>171</sup>

When will a sentence outside the Guideline range be "unreasonable"? My guess is essentially never, so long as the judge calculated, considered, and rejected the guideline sentence in favor of a competing factor from 18 U.S.C. section 3553(a), and so long as the sentence is within the statutory minimum and maximum penalty. A judge would need to act irrationally or with invidious discrimination before entertaining a realistic fear of reversal on appeal. As Justice Scalia so astutely noted in his *Booker* dissent, there is simply no benchmark for reasonability beyond what Congress prescribes as the statutory maximum. Just as there was no judicial review of sentences before the Sentencing Reform Act of 1984, I predict that eventually, after the kinks are worked out, there will essentially be no meaningful review of federal sentencing post-*Booker*.<sup>172</sup>

It is possible, however, that appellate courts may develop an enforceable federal law of sentencing through appellate opinions.

In the first published Circuit court opinion applying the reasonableness standard of review, the court reversed a sentence of probation for the offense of being a felon in possession of a firearm as unreasonable in light of the sentencing factors identified in 18 U.S.C. section 3553(a). In *United States v. Rogers*,<sup>173</sup> the trial judge had considered the 51-63 month sentence recommended by the Guidelines and departed downward on the bases of extraordinary rehabilitation - the defendant, though deer hunting while on parole in a state drug case, had managed to stay off drugs and had reunited with his family. The Eighth Circuit, though providing no discussion of the nature of the reasonableness standard or how it should be applied in other cases, opined that the sentence was unreasonably low in light of the defendant's criminal history and Congressional direction to protect the public

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<sup>171</sup> See *Simon v. U.S.*, *supra* n. \_\_\_\_, at 9 (the greater the weight given to the Guidelines, the closer the court draws to committing the act that *Booker* fords - a Guidelines sentence based on facts found by a preponderance of the evidence by a judge."). See also *U.S. v. Biheiri*, 2005 WL 350585 (E.D. Va. 2/9/05).

<sup>172</sup> See *Williams v. New York*, 337 U.S. 241 (1949) (judge could raise defendant's sentence from the life imprisonment recommended by the jury to death based upon his conclusion at sentencing that Mr. Williams possessed "a morbid sexuality" and was a "menace to society," and may consider any information he chooses to at sentencing). While there was reasonability review under guidelines prior to *Booker*, this was only for the length of departures and few instances where no guideline established for a crime. That worked only because there was a mandatory guidelines system as a backdrop.

<sup>173</sup> No. 04-1461 (3/16/05) (8th Cir.), <http://pub/bna.com/cl/01461.pdf>.

and deter defendants with similar record. Should the courts continue in this vein and develop set ranges for certain offenses based upon particular facts (such as "whether the defendant demonstrated respect for the law" or "admitted acts of drug use,")<sup>174</sup> these facts may well be elements of greater offenses under *Booker*. If so, defendants will argue that it violates the Sixth Amendment to allow judicial factfinding on these matters. On the other hand, the government may argue that these factors are not based upon legislative enactments (a requirement in *Blakely* and *Booker*), but upon a judicially created common law of sentencing that is exempt from the jury requirement. While a similar argument (that the guidelines were not legislative enactments because promulgated by the U.S. Sentencing Commission, an administrative body located in the judicial branch) failed in *Booker*, the disconnect between the sentence and the legislative enactment (here the sentencing factors set out in 18 U.S.C. section 3553(a)) is stronger here.

What are we to make of this data? For those whose believe that the primary purpose animating the Guidelines is uniformity, we probably already have sufficient data to conclude that Justice Breyer's experiment is failing. For those who also desire improved uniformity over the pre-1984 days, yet long for some judicial discretion to account for unusual cases, and especially for those who believe prosecutors possessed excessive power under the Guidelines, the experiment is somewhat of a success.

### **III. Plea Bargaining After Booker**

Most post-*Booker* sentencing, like most pre-*Booker* sentencing, will be based not upon jury trials but upon plea-agreements. The interesting post-*Booker* questions are whether the total percentage of guilty pleas will decrease, whether plea deals will get sweeter for defendants, and whether judges will have any more input into sentencing after accepting a guilty plea. My guess is that the answer to all of these questions will be in the affirmative.

The federal criminal justice system, as presently constructed, relies on upward of 93% of defendants pleading guilty and waiving their right to a jury trial.<sup>175</sup> The overall plea rate must remain constant - pressures from judges, prosecutors offices, and prison systems will ensure that this continues.<sup>176</sup> What can

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<sup>174</sup>Id. at \_\_\_\_.

<sup>175</sup>In 1998, 93.6% of federal defendants plead guilty. This statistic can be found on the Commission's web site: [www.ussc.gov/ANNRPT/1998/Sbtoc98.htm](http://www.ussc.gov/ANNRPT/1998/Sbtoc98.htm).

<sup>176</sup>Most scholars agree that resource and time constraints on the part of prosecutors, courts, and prison systems demand that the plea rate remain constant or increase. See, e.g., Wayne LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* section 21.1 (2d ed. 1999); William Stuntz, *Plea Bargaining as Contract*, 101



change, however, is the structure and outcome of the plea negotiations.

Prosecutors, who controlled the show pre-Booker through a combination of charge and fact bargaining, offering substantial assistance, agreeing to acceptance of responsibility adjustments, investigating additional misconduct to raise as a relevant conduct enhancement, and threatening mandatory minimum and consecutive sentences,<sup>177</sup> will do everything in their power to replicate this pre-Booker world. Immediately after *Washington v. Blakely* was rendered, the Department of Justice sent a memorandum to all United States Attorney's Offices instructing Assistants to agree to seek to obtain plea agreements that waived all rights under *Blakely*, and included the provisions that "the defendant agrees to have facts that determine his offense level under the Guidelines ... alleged in an indictment and found by a jury beyond a reasonable doubt, agrees that facts that determine the offense level will be found by the court at sentencing by a preponderance of the evidence and that the court may consider any reliable evidence, including hearsay; and agree to waive all constitutional challenges."<sup>178</sup> Now prosecutors can ask instead for *Booker* waivers. They will attempt to get defendants to contract into a plea agreement that stipulates that the federal sentencing guidelines are mandatory, or that stipulates to a particular guidelines sentence, and waives the defendant's right to petition the judge for a more lenient sentence.

There are three types of plea agreements under Fed.

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Yale L. J. 1909 (1992); George Fisher, Plea Bargaining's Triumph, 109 Yale L. J. 857 (2000); Sara Sun Beale and Norman Abrams, Federal Criminal Law and its Enforcement, 3d ed. 748 (2000) ("In order to keep the system from grinding to a halt, the Guidelines had to accommodate, and even encourage, plea bargaining.").

<sup>177</sup>See, e.g., Kate Stith & Jose A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 141 (1999) (noting that "the exercise of broad prosecutorial authority over sentencing within a system that severely limits the sentencing discretion of federal judges means that the power of prosecutors in onto subject to the traditional checks and balances that help prevent abuse of that power"); Albert W. Alschuler, Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for 'Fixed' and 'Presumptive Sentencing' 126 U. Pa. L. Rev. 550 (1976); Susan R. Klein, Double Jeopardy's Demise, 99 Cal. L. Rev. 1001 (2001) (suggesting that prosecutor's have inordinate power to charge and sentence in part because of the Court's current interpretation of the double jeopardy clause).

<sup>178</sup>Memorandum from James Comey, Dep. Atty. Gen., to all federal prosecutors, Departmental Legal Positions and Policies in Light of *Blakely v. Washington* at 4 (July 2, 2004) (copy online at Sentencing Law and Policy, <http://sentencing.typepad.com/sentencing-law-and-policy/files/deg-blakely-memo-7204.pdf>).



Rules of Criminal Procedure 11(c); agreements to dismiss one or more charges under (c)(1)(A); agreements to make a nonbinding sentencing recommendation under (c)(1)(B), and agreements for a specific sentence under (c)(1)(C).<sup>179</sup> A pre-Booker regime could be accomplished by using these so called 11(c)(1)(C) pleas to set term of years. Some U.S. Attorney's Offices have adopted plea policies that purport to agree only to those deals that allow the government to withdraw if the judge goes below an agreed-upon sentence (and allow the defendant to withdraw if the judge exceeds the maximum agreed upon sentence). At least some judges in Detroit, Michigan, have refused to accept such plea agreements in their courtrooms.<sup>180</sup> While judges need not accept such pleas, the incentive of moving cases along will drive many jurists to do so.

However, even if judges routinely accept such deals, defendants will have little incentive to agree to contract back to a pre-Booker world, or to agree to a Rule 11(c)(1)(C) plea containing a guideline sentence. As Nancy King and I argued immediately after the Court rendered *Apprendi*, plea deals will improve for defendants post-Booker.<sup>181</sup> Defendants have most of the chits in this new system. Prosecutors realize that many judges think the guidelines are too harsh, especially for white collar and drug cases, so deals should be to lower sentences than pre-Booker. Judges are now free to add the three point "acceptance of responsibility" decrease without waiting for government motion to do so, and even further can grant reductions for acceptance even if the government refuses to offer a plea agreement.<sup>182</sup> Judges can further depart downward or ignore the guidelines altogether, so long as they can articulate a "reason" for doing so.

I anticipate that we might also see more "open pleas" to indictment, an in fact many of my sources in various U.S. Attorney's Offices confirm that this is occurring. If a defendant is willing to plead guilty but government refuses to negotiate a deal (because the defendant won't agree on Booker waiver or a particular application of the guidelines), and this defendant wishes to assure that she obtains some credit for accepting responsibility and not unnecessarily taking up the court's time, she may wish to plead straight up to the indictment, without any formal plea agreement. Because the federal sentencing guidelines

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<sup>179</sup> See Fed. R. Crim. Pro. 11(e)(1)(A)-(C) (West 2004).

<sup>180</sup> See Detroit News article from 3/23/05, detailing new policy by Alan Gershel, chief of the Criminal Division for the U.S. Attorney's Office in Detroit.

<sup>181</sup> King and Klein, "Apprendi and Plea Bargaining, 54 Stanford Law Rev. 295 (2001) (*Apprendi* provides new elements that prosecutors must prove beyond a reasonable doubt after employing the Federal Rules of Evidence, if they want assurances that judge will increase sentence for those facts).

<sup>182</sup> King & Klein, "Conspiracy Sentencing," \_\_\_ Fed. Sentencing Reporter\_\_\_ (2003).

are not mandatory and guideline enhancements are not elements of greater offenses after *Booker*, prosecutors cannot charge these guideline aggravators in indictments and force a defendant to plead to the greater offense (thereby forcing the judge to enhance a sentence on that basis). These guidelines aggravators would constitute be surplusage, and defendants could insist that they be stricken.<sup>183</sup> This give the defendant the opportunity to convince the judge to sentence lower than recommended by the guidelines for the charged offense. There is simply no reason to agree to a sentence at the guideline range or higher without anything in exchange.

However, most defendants will still plead guilty. While the number of statutory enhancements the Supreme Court has left in effect are dwindling, a judge probably still cannot sentence below a statutory minimum without a government request for substantial assistance or safety valve application. Similarly, a defendant cannot get a concurrent sentence count (like weapons offenses pursuant to 18 U.S.C. section 924(c)) dropped without the prosecutor's approval.<sup>184</sup> In many cases where the government has no large clubs to hold over the defendant, there will still be agreements as defendants trade trial rights for better plea deals.

After a period of post-*Booker* sentencing, prosecutors and defense attorneys in every district will get a sense of how each particular judge sentences, and will bargain in shadow of that expected outcome. No defendant would sensibly agree to waive indictment and plead before his case was drawn out of the wheel and he saw what judge he drew. Most judges will establish a track-record of rewarding those who plea, and a record of which 18 U.S.C. section 3553(a) sentencing factors they favor. Therefore, though there may be more trials in certain districts depending upon busyness, I predict that pleas will remain at a relatively steady state of equilibrium nationwide.

### **Conclusion**

As one would expect, Federal district and appellate judges, and Supreme Court Justices, are all lobbying for the continuation of the advisory guidelines that the Court created in *Booker*. The

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<sup>183</sup>Case cites here on surplusage generally. Post-*Blakely*, a number of prosecutors living in Circuits that applied *Blakely* to the federal sentencing guidelines were adding all guideline enhancements to indictments and submitting these facts to petit juries. Cites. In those jurisdictions that held that *Blakely* did not apply to the guidelines, such facts were stricken as surplusage. Cites.

<sup>184</sup>Pursuant to the Ashcroft memorandum, Assistants are not supposed to use 924(c) as a bargaining chip, but are instead instructed to accept please only to "the most serious readily provable offense." Reprinted in 6 Fed. Sent. Rptr. 347 (1994).

Judicial Conference of the United States "urged Congress to take no immediate legislative action to alter the federal sentencing system in the wake of the Supreme Court ruling limiting the Sentencing Guidelines to an advisory role."<sup>185</sup> The Judicial Conference is the principle policy-making body for the federal court system, its presiding officer is Chief Justice William Rehnquist, and it is further comprised of the chief justices of the 13 courts of appeals and a district judge from each of the 12 geographic circuits. The Conference stated in a March 15, 2005 report that "it would oppose legislation that would respond to the Supreme Court's decision in *U.S. v. Booker/U.S. v. Fanfan* by raising directly the upper limit of each sentencing guideline range or expand the use of mandatory minimum sentences."<sup>186</sup>

Despite this heartfelt recommendation from the bench, we should not be surprised to see Congress continue its decades long trend of reducing rather than expanding judicial discretion in criminal sentencing.<sup>187</sup> Congress is unlikely to believe that voluntary guidelines will achieve sentencing uniformity or proportionality. Even if unwarranted disparity is held in check by stringent "reasonability" review on appeal, Congress will likely believe that only the elected legislature is the legitimate institution to make such normative and policy judgments as whether rehabilitation is effective, whether a defendant's drug-addiction or veteran status should decrease her penalty, and whether a white-collar offense is more or less serious than a drug or violent offense. One simple way Congress could impose mandatory guidelines is to enact legislation informing the Court that it divined legislative intent incorrectly in *Booker*. Of course Congress would have to pay the Sixth Amendment price for mandatory guidelines - enhancing facts would be submitted to a jury for a beyond a reasonable doubt finding. Congress could "Blakelyize" with the least amount of pain by simplifying the Guidelines - retaining only the few enhancements most regularly employed. I suggested in my testimony before the U.S. Sentencing Commission that Congress or the Commission should replace the present 258 box grid (based upon six criminal history categories and 43 offense levels) with 10 offense levels, retaining the same zero to life spread by increasing the judicial discretionary range within each grid from 25 to 40%.<sup>188</sup> This shifts some factfinding authority back to juries, and retains some judicial discretion.

Some commentators have gone much further, suggesting a return to jury sentencing.<sup>189</sup> Some of these scholars call for jury

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<sup>185</sup>SCOTOUS blog.

<sup>186</sup>News Release, Administrative Office of the U.S. Courts, available at [www.uscourts.gov](http://www.uscourts.gov), 3/15/05.

<sup>187</sup>See supra nn. \_\_\_\_.

<sup>188</sup>See Klein testimony, USSC Commission, 11/12/04, supra n. \_\_\_\_.

<sup>189</sup>Rachel Bartow, Penn. Law Rev. (2004) (recommending jury sentencing); Paul Kirgis, "The Right to a Jury Decision on Sentencing Facts After *Booker*: What the Seventh Amendment Can

findings of all facts leading to any difference in penalty, while some go much further and suggest that the jury actually set the ultimate sentence. Though a few states have chosen jury factfinding, and an even smaller subset, like my home state of Texas, allow jury sentencing, it is beyond the scope of this paper to explain all of the drawbacks associated with this idea. Suffice it to say here that this method of sentencing is highly unlikely to be embraced by Congress, at least as a first choice.

If advisory guidelines turn out to give too much leeway (and I believe Congress already considers this the case), and Congress rejects jury sentencing or my more modest compromise position, Congress may well turn to an updated version of the eighteenth century pure "charge offense" or "determinate sentencing." Rather than a set sentence for every crime, Congress may re-enact most of the Federal Sentencing Guideline as mandatory minimum penalties. Judge Paul Cassell, in the first published post-*Blakely* opinion, predicted that Congress might replace "the carefully-calibrated Guidelines with a series of flat mandatory minimum sentences."<sup>190</sup> Facts triggering mandatory minimum sentencing need not be submitted to the jury under *Booker*, so Congress could cabin judicial leniency by mandating judicial factfinding on all former Guideline enhancers (now statutory mandatory minimums) in this manner (retaining judicial discretion only to increase but never decrease sentences).

In fact, Congress is presently considering a proposal that does just that.<sup>191</sup> Such a fix is constitutional only so long as the Supreme Court refuses to overrule *Harris v. United States*.<sup>192</sup> If Justice Breyer supplied the fifth concurring vote in *Harris* only because he had not accepted that *Apprendi* would remain good law, it is possible that there may now be enough votes to overrule it. Those who scoff at the notion of the Court overruling a constitutional decision only a few years old should stop and consider that such a decision would give federal judges, once again, primacy and discretion in criminal sentencing.

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Teach the Sixth Amendment", \_\_\_ Ga. Law Rev. \_\_\_ (forthcoming 2005) (suggesting that the Sixth Amendment jury trial right in criminal cases match the Seventh Amendment jury right in civil cases, by requiring a jury decision on all fact questions, regardless of when those questions arise in the proceeding).

<sup>190</sup>Crossford, 2004 WL 1521560 at \*21 (D. Utah, July 7, 2004).

<sup>191</sup>See Section 12 of HR 1528, "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005, introduced by Rep. James Sensenbrenner (transforming the guidelines into a complex series of mandatory minimum penalties by prohibiting judges from using enumerated factors to sentence below the guidelines range but permitting 36 factors which a sentencing judge could consider in sentencing above the range).

<sup>192</sup>536 U.S. 545 (2002). Justice Scalia joined the four dissenters from *Blakely*, *Apprendi*, and now the merits majority in *Booker* to make up the plurality in *Harris*.