
Douglas F. Fries

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THE FEDERAL SENTENCING GUIDELINES WEIGHT-LOSS PLAN: JUST HOW MANDATORY ARE THE "ADVISORY" GUIDELINES AFTER UNITED STATES V. BOOKER?

INTRODUCTION

Judge Hovland of the U.S. District Court for North Dakota recently observed that

The present ongoing debate throughout the country concerns the weight to be afforded the Sentencing Guidelines . . . . For example, in the District of Utah, Judge Cassell has adopted the view that the Sentencing Guidelines should be given "heavy weight" or "considerable weight" and should be followed in all but "the most unusual cases." . . . Judge Kopf [of the District of Nebraska] expressed the opinion that the Guidelines must be given "substantial weight." On the other hand, Judge Adelman in the Eastern District of Wisconsin held that the ... Guidelines are "just one of a number of sentencing factors" to be considered.

These judges are not contemplating weight classes in boxing or the latest trends in bariatric surgery, but rather the effects of the Supreme Court's recent decision in United States v. Booker. In a much anticipated holding, the Court declared that the Federal Sentencing Guidelines ("Guidelines"), as written, violated a criminal defendant's Sixth


Amendment right to trial by jury. But rather than requiring that the Court's reiterated Sixth Amendment standard be attached to the Guidelines, a different majority, led by Justice Breyer and joined only by Justice Ginsburg from the merits opinion, rendered the Guidelines "effectively advisory." This is not to say, however, that federal courts have regained much of the discretion they lost when Congress proclaimed the beginning of the Guidelines era two decades ago. A closer reading of Justice Breyer's remedy indicates that federal courts are still required to consider the Guidelines along with other factors when sentencing offenders.

A disparity has quickly developed among the various District Courts and Courts of Appeals over just how much weight should be given the now-advisory Guidelines. One view holds that the Guidelines are still the dominant factor in the federal sentencing scheme, and that sentencing judges should only stray from their suggested punishment ranges only in rare circumstances. The other school of thought sees the Guidelines as a much less significant concern compared to other factors listed in the Federal Sentencing Act that survive Booker.

This Comment advocates that the less restrictive reading of the Guidelines should be followed. Part I explains Booker, in which the Supreme Court held that while mandatory Sentencing Guidelines violate the Sixth Amendment, advisory Guidelines are not only permissible but required in future sentencing cases. Part II examines the history of federal sentencing practice and the development and reform of the Sentencing Guidelines. Part III reviews the case law underlying the Court’s Booker decision, focusing particularly on Apprendi v. New Jersey and Blakely v. Washington, which form the substance of Booker's constitutional analysis. Part IV analyzes how courts have begun to apply the Guidelines after Booker.

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3 Booker, 125 S. Ct. at 757. Justices Stevens, Scalia, Thomas, Souter and Ginsburg comprised the merits majority, while Justices Breyer, O'Connor, Kennedy, and Ginsburg, and Chief Justice Rehnquist made up the remedial majority.

4 The Guidelines have been in use since 1987, the Sentencing Reform Act of 1984 created the United States Sentencing Commission and authorized the Commission to promulgate these rules. Discussed infra at Part II.


7 See, e.g., United States v. Crosby, 397 F.3d 103 (2d Cir. Feb. 2, 2005), discussed infra at Part IV.

8 530 U.S. 466 (2000).

I. United States v. Booker: Mandating the Consultation of Advisory Guidelines

Booker is in many ways two cases in one. The Supreme Court chose to consolidate the defendant Booker’s appeal of his upward departure sentence with the government’s appeal of the defendant Fanfan’s downward departure sentence. Two entirely different majorities, of which Justice Ginsburg was the only member of the court to join both opinions, outlined the constitutionality and remedy of the Federal Sentencing Guidelines. And the court in one opinion managed to declare the Guidelines invalid and yet still require the use of the rules in their amended advisory form. These fundamental divisions make Booker a prime case for extended debate that lower courts and litigants now must decipher its impact.

A. United States v. Booker: Case Background

Freddie Booker, a drug dealer from Wisconsin, became the namesake of this decision after his conviction for crack cocaine possession. Booker and a customer were arrested at a third party’s house for criminal trespass. A search incident to Booker’s arrest produced a duffel bag belonging to Booker, which contained 92.5 grams of crack cocaine. Booker admitted to the police that he sold an additional 566 grams of crack cocaine, although this statement was not the basis of the jury’s decision. At trial in the District Court for Western District of Wisconsin, Booker was convicted on crack cocaine possession charges.


11 Booker, 125 S. Ct. at 746. Booker was officially charged with possession with intent to distribute at least 50 grams of cocaine base, an offense outlined at 21 U.S.C. § 814(a)(1). United States v. Edwards points out that Booker held cocaine base and crack cocaine to be definitionally the same substance. 397 F.3d 570, 572 (7th Cir. 2005) (explaining that Congress intended a difference between cocaine and crack cocaine/cocaine base in the statutory penalties).


13 Id.

14 Id.

15 Specifically, Booker was charged with possession with intent to distribute more than 50 grams of cocaine base, pursuant to 21 U.S.C. § 851(a)(1). Id.
The jury at Booker's trial based his conviction on evidence that Booker possessed 92.5 grams of crack cocaine. Factoring in Booker's criminal history, the Guidelines mandated a sentence of between 210 and 262 months in prison. The judge nonetheless held an additional sentencing hearing, finding by a preponderance of the evidence that Booker was responsible for the additional 566 grams of crack cocaine and had obstructed justice at his trial. These new findings produced a sentencing range of 360 months to life imprisonment. The judge sentenced Booker at the bottom of this new range, but the resulting 30 year sentence was an upward departure of almost a decade more of prison time compared to the initial range provided by the Guidelines.

On appeal, the Seventh Circuit Court of Appeals found that this extended sentence violated the holdings of Apprendi v. New Jersey and Blakely v. Washington. The majority interpreted those decisions to require a sentence within the original range, and that the trial judge's additional findings regarding evidence and obstruction of justice should have been submitted to a jury. The Guidelines impermissibly required judicial factfinding in violation of the Apprendi/Blakely requirement that such findings be submitted to a jury. While Judge Posner admitted that sentencing judges would always be allowed some discretion, he noted that "there is a difference between allowing [informal discretion] ... and commanding [a judge] to make factfindings. ..."

Holding that Booker was entitled to have a jury find the facts underlying the sentence enhancement by proof beyond a reasonable doubt, even if an additional jury was needed, Posner stated, "[t]here is no novelty in a separate jury trial with regard to the sentence, just as there is no novelty in a bifurcated jury trial" for determining liability and damages.

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16 Booker, 125 S. Ct. 738, 746.
17 Id. at 746. See 18 U.S.C. Appx. §§ 2D1.1(c)(4), 4Al.1 (2005).
18 Booker, 125 S. Ct. at 746.
19 Id.
20 Id.
21 United States v. Booker, 375 F.3d 508 (7th Cir. 2004). Apprendi and Blakely are discussed infra at Part III.
22 Booker, 125 S. Ct. at 747.
23 United States v. Booker, 375 F.3d 508, 512 (7th Cir. 2004).
24 Id. at 514. Posner also noted that separate juries were a feature of capital cases, first finding the defendant's guilt or innocence before deciding whether to recommend a death sentence. Id. The Supreme Court has separately addressed the jury trial requirement as applied to capital punishment cases. See Ring v. Arizona, 536 U.S. 584 (2002) (invalidating Arizona's death sentencing requirement of judicially-found aggravating factor); Walton v. Arizona, 497 U.S. 639 (1990).
Judge Easterbrook dissented from the Seventh Circuit's decision, claiming that a Circuit Court was not empowered to extend Blakely and find the Guidelines unconstitutional. Arguing that cases defending the Guidelines survived Blakely, Judge Easterbrook pointed out that "[j]ust as opera stars often go on singing after being shot, stabbed, or poisoned, so [to do] judicial opinions often survive what could be fatal blows." One might think of the Federal Guidelines in a similar light; despite being unconstitutional when they were mandatory, the Guidelines nonetheless survive even a significant impact.

B. United States v. Fanfan: Case Background

Duncan Fanfan, meanwhile, was participating in a cocaine conspiracy in Maine. He was arrested after an ongoing narcotics investigation caught one of his co-conspirators. Incident to the arrest, narcotics agents found 1.25 kilograms of powder cocaine and 281.6 grams of crack cocaine in Fanfan's vehicle. At trial in the Maine District Court, the jury found affirmatively that Fanfan had 500 or more grams of cocaine in his possession, and he was convicted of conspiracy and drug possession charges.

The jury's finding alone would have supported a maximum 78 month sentence under the Guidelines, but Blakely v. Washington caused the trial judge to reconsider. In a sentencing hearing only a few days after Blakely, the trial judge found by a preponderance of evidence that Fanfan had possessed 2.5 kilograms of powder cocaine, 261.6 grams of crack cocaine, and had held an organizing role in the criminal conspiracy. Once the judge calculated what Fanfan's sentence would be under the Guidelines, his findings regarding drug quantity and criminal history would have added an additional 10 years to Fanfan's sentence.

The judge declined to make the upward departure, reasoning that in light of Blakely—and despite Blakely's explicit statement that it expressed no opinion on the validity of the Federal Guidelines—imposing the higher sentence would violate Fanfan's

25 Booker, 375 F.3d at 516 (Easterbrook, J., dissenting).
26 Id.
28 Id.
29 Booker, 125 S. Ct. at 747. Specifically, Fanfan was charged with conspiracy to distribute and possession with intent to distribute at least 500 grams of cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(B)(ii).
30 See Booker, 125 S. Ct. at 747.
31 Id.
32 Fanfan faced an enhanced sentence of 15-16 years instead of the initial 5-6 years. Id.
right to have these facts found by a jury.\textsuperscript{33} Claiming that his decision was constrained by \textit{Blakely}, the judge explained, "perhaps the Supreme Court can find a way to explain away \textit{Blakely} in its language and its reasoning, but... I cannot. ... I will leave it to higher courts to tell me it does not mean exactly what it says."\textsuperscript{34} Fanfan was instead sentenced within the original Guidelines range. After the prosecution appealed the downward departure directly to the Supreme Court, the Court did exactly as Fanfan's trial judge had requested and explained \textit{Blakely}.

\section*{C. United States v. Booker at the Supreme Court}

\subsection*{1. Constitutionality}

Justice Stevens delivered the Court's substantive opinion, finding the Guidelines unconstitutional under the Sixth Amendment's jury trial requirement. Basing his analysis on the principle that criminal defendants may only be convicted "upon proof beyond reasonable doubt of every fact necessary to constitute the crime with which [they are] charged,"\textsuperscript{35} and those defendants' "right to demand that a jury find [them] guilty of all the elements of the crime with which [they] are charged,"\textsuperscript{36} Stevens examined the Guidelines and how they have been interpreted by the Court's most recent decisions.

The sticking point for the merits majority was the mandatory nature of the Guidelines, which rendered them functionally equivalent to the state guidelines the Court had just struck down in \textit{Blakely}. Stevens noted that if the Guidelines were suggestions for judges to follow, rather than requirements, the constitutionality question would be moot. "[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.\textsuperscript{37}

Stevens also discounted the proposal that the statutory language allowing "departures in specific, limited cases"\textsuperscript{38} was a solution to the Sixth Amendment violation. Stevens wrote, "[t]he availability of a departure in specified circumstances does not avoid the constitutional issue ... departures are not available in every case, and in fact are

\begin{itemize}
\item \textsuperscript{33} \textit{Id.}; United States v. Fanfan, 2004 WL 1723114, at *2 (D. Me. 2004).
\item \textsuperscript{34} \textit{Fanfan}, 2004 WL 1723114, at *5.
\item \textsuperscript{35} 125 S. Ct. 738, 748 (quoting \textit{In re Winship}, 397 U.S. 358, 364 (1970)).
\item \textsuperscript{36} \textit{Id.} at 748 (quoting United States v. Gaudin, 515 U.S. 506, 511 (1995)).
\item \textsuperscript{37} 125 S. Ct. at 750.
\item \textsuperscript{38} \textit{Id.}
\end{itemize}
unavailable in most."³⁹ When the Sentencing Commission had considered all relevant factors, a departure was impermissible.⁴⁰

The departure in Booker’s case was a manifestation of this problem. Stevens viewed this severe upward departure in a “run-of-the-mill drug case” as one that could only have been supported by additional fact finding after the jury verdict—a clear violation of Booker’s Sixth Amendment right to jury trial on all elements of the crime for which he had been convicted.⁴¹

2. Severability Analysis

The Court considered two possibilities for bringing the Guidelines into compliance with the Sixth Amendment: it could either attach the jury factfinding requirement embodied in the Apprendi rule to the Guidelines, or strike statutory references in the Federal Sentencing Act that made the Guidelines mandatory. To determine whether it could remove two sections of the statute that violated the Sixth Amendment, rendering the Guidelines “effectively advisory,” the Court engaged in a severability analysis.⁴²

Generally, courts will be able to sever provisions that they view as ancillary to the general purpose of the statute, leaving the remaining statute to function independently.⁴³ But if the questioned provision is central to the statute, the court will be less inclined to remove it.⁴⁴ Unlike a contract, the court cannot rewrite a statute as it sees fit, nor can it disregard otherwise valid statutes because of minor constitutional violations.⁴⁵ However, the court can excise portions of the statute to achieve constitutionality.⁴⁶ While the judiciary will look for evidence of legislative intent, this may be a frustrating exercise as the statute’s complexity grows.⁴⁷

³⁹ Id.
⁴⁰ Id.
⁴¹ Id. at 751.
⁴² Id. at 757.
⁴⁴ Id.
⁴⁵ Id. at 57-58.
⁴⁶ Id. at 58-59.
⁴⁷ Id. at 73; Michael D. Shumsky, Severability, Inseverability, and the Rule of Law, 41 HARV. J. LEGIS. 227, 230 (2004). Note that the Court treats the absence of these clauses as mere silence that does not create either presumption. Id. at 238, 242-43. See also Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. CAL. L. REV. 845, 856-61 (1991). Query whether congressional intent may just as well have been ascertained by examining the amicus brief submitted by Senators Hatch, Kennedy and Feinstein. See generally Brief of Amici Curiae for the Honorable Orrin G. Hatch, et al., United States v. Booker, 125 S. Ct. 738 (2004) (Nos. 04-104, 04-105).
In *Booker*, the Court relied heavily on *Alaska Airlines v. Brock*[^48] to justify its severability analysis.[^49] The Court in *Alaska Airlines* elucidated a preference for severing unconstitutional provisions rather than invalidating entire statutes; this kept more with legislative intent than outright nullification.[^50] A unanimous Court held in that case that unless Congress would not have enacted the statute without the invalidated provision(s), "the invalid part may be dropped if what is left is fully operative as a law."[^51] However, "[a] court should refrain from invalidating more of the statute than is necessary" and preserve the valid sections of the statute under review.[^52] The Court will look to the language and structure of the challenged Act of Congress, as well as legislative history, to determine intent.[^53]

3. The Guidelines Remedy

What makes *Booker* an unusual decision is that four of the justices who declared the Guidelines in violation of the Sixth Amendment dissented from the majority’s approved remedy. Justice Breyer, who dissented from the substantive portion of the opinion, and has arguably the most expertise on sentencing of all the Justices, chose to amend the Guidelines by removing two statutory provisions that made the sentencing rules mandatory.[^54] One stricken provision stated that trial courts "shall impose" sentences within the Guidelines range.[^55] Its companion granted automatic appeals of departures from the Guidelines under a *de novo* review standard.[^56]

After conducting a severability analysis, the remedial majority rejected the merits majority’s proposal to "engraft the [jury trial] requirement onto the sentencing statutes,"[^57] deciding that preserving the Guidelines as advisory would remain more true to original legislative intent.[^58] Since the jury trial requirement would reach every aspect of

[^49]: *Alaska Airlines* involved a challenge to employee protection laws resulting from airline deregulation.
[^50]: *Alaska Airlines*, 480 U.S. at 684.
[^51]: Id. (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam)).
[^52]: Id. at 685 (citation omitted).
[^53]: Id. at 687.
[^57]: *Booker*, 125 S. Ct. at 760.
[^58]: Id. at 757.
indictment, plea bargaining and trial, Breyer explained, "we must determine likely intent not by counting [affected] proceedings, but by evaluating the consequences of the [jury trial] requirement in light of the [Sentencing Reform] Act's language, its history, and its basic purposes."\textsuperscript{59}

The remedial majority argued that adding the jury trial language advocated by Stevens's dissent would require an unrealistic definition of "court" as implying "the judge working together with the jury," a case of semantics that "would be 'plainly contrary to the intent of Congress.'"\textsuperscript{60} Relying on the statutory goals underlying the Guidelines, Breyer wrote:

To engraft the Court's constitutional requirement onto the sentencing statutes . . . would destroy the system. It would prevent a judge from relying upon a presentence report for [relevant] factual information . . . uncovered after the trial . . . [It would] weaken the tie between a sentence and an offender's real conduct. It would thereby undermine the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways.\textsuperscript{61}

Breyer envisioned numerous hypothetical situations that the justice system would want to avoid: for instance, requiring prosecutors to charge every element of every potential crime in the indictment, forcing defendants to take contradictory positions to these elements in plea bargaining, and removing trial conduct like contempt or obstruction of justice entirely from the sentencing consideration.\textsuperscript{62} With some alarm, Breyer noted that "in a sentencing system with the Court's constitutional requirement engrafted onto it, any factor that a prosecutor chose not to charge at the plea negotiation would be placed beyond the reach of the judge entirely."\textsuperscript{63} These results would seem to underscore how amending the Guidelines in this way would have gone further astray from Congress' desire to achieve sentencing uniformity.

Defending the removal of the mandatory language, Breyer wrote that even absent these provisions, "the [Federal Sentencing] Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals."\textsuperscript{64} Despite removing the restrictive stan-

\textsuperscript{59} \textit{Id.} at 758.
\textsuperscript{60} \textit{Id.} at 759 (citation omitted).
\textsuperscript{61} \textit{Id.} at 759-60.
\textsuperscript{62} \textit{See id.} at 762-63.
\textsuperscript{63} \textit{Id.} at 763.
\textsuperscript{64} \textit{Id.} at 764.
standard of review with the appeals clause, the statute still functions "because . . . a statute that does not explicitly set forth a standard of review may nonetheless do so implicitly."\textsuperscript{65} Breyer read the history of the Guidelines to imply a standard of unreasonableness on appellate review; this was, in fact, the Federal Sentencing Act's standard until replaced with \textit{de novo} review in 2003.\textsuperscript{66}

Courts in the first month following \textit{Booker} have already widely disagreed on the interpretation of the new requirement that they consult the now-advisory Guidelines.\textsuperscript{67} Anticipating this uncertainty, and potential backlash from the legislative branch, Justice Breyer stated: "[o]urs, or course, is not the last word: The ball now lies in Congress' court. [Congress] is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that [it] judges best for the federal system of justice."\textsuperscript{68}

4. Internal Disagreement over Booker

That the Supreme Court was hardly in agreement over the holdings resulting from \textit{Booker} would be a substantial understatement. Justice Stevens strongly opposed the remedy chosen by the dissenter to his merits opinion, describing severability as an "extraordinary" remedy chosen for what he viewed as a problem of limited impact.\textsuperscript{69} Stevens argued that the court selectively applied the doctrine to invalidate the Guidelines based on "the Court's reading of 'likely' legislative intent."\textsuperscript{70}

By contrast, the remedial majority\textsuperscript{71} disagreed with the application of the \textit{Apprendi} rule, preferring to allow the traditional role of judicial factfinding prior to sentencing. Breyer's long-held approach was that the Guidelines address sentencing facts, rather than elements of a crime.\textsuperscript{72} Breyer disagreed with the originalist view of sentencing,

\textsuperscript{65} Id. at 765 (citing Pierce v. Underwood, 487 U.S. 552, 558-560 (1988)).
\textsuperscript{66} \textit{De novo} review for Guidelines sentences resulted from amendments to the PROTECT Act in 2003. Id. at 765. See infra at Part II for discussion of the PROTECT Act.
\textsuperscript{67} Discussed infra at Part IV.
\textsuperscript{68} \textit{Booker}, 125 S. Ct. at 768.
\textsuperscript{69} \textit{Booker}, 125 S. Ct. 738, 774 (Stevens, J., dissenting).
\textsuperscript{70} Id. at 777 (Stevens, J., dissenting). Stevens challenged Breyer's claim that the costs of administering justice under a system where the \textit{Apprendi} jury trial requirement was tied to mandatory Guidelines sentencing would be staggering. Stevens wrote, "[t]his may not be the most efficient system imaginable, but the Constitution does not permit efficiency to be our primary concern." Id. at 781 (Stevens, J., dissenting).
\textsuperscript{71} Excepting, of course, Justice Ginsburg.
writing that "[the Court] cannot look to the Framers for support, for they, too, enacted criminal statutes with indeterminate sentences, revealing their own understanding and acceptance of the judge’s fact-finding role at sentencing."\textsuperscript{73}

Justice Scalia was quite alarmed at the remedial majority’s interpretation of legislative intent and its decision to create a new standard of review after excising the appeals clause.\textsuperscript{74} Scalia described the remedy as "wonderfully ironic: In order to rescue from nullification a statutory scheme designed to eliminate discretionary sentencing, it discards the provisions that eliminate discretionary sentencing."\textsuperscript{75} The resulting void left by the removal of the \textit{de novo} standard of review was unnecessary, he reasoned, since it was illogical to discard an express standard in favor of an implied unreasonableness test. Scalia rhetorically asked: "when the Court has \textit{severed} [the explicit] standard of review \ldots does it make any sense to look for some congressional 'implication' of a \textit{different} standard of review in the remnants of the statute that the Court has left standing? Only in Wonderland."\textsuperscript{76}

As if the \textit{Booker} opinions weren’t already convoluted, Justice Thomas not only dissented from Breyer’s remedy, but disagreed with Stevens’ dissent.\textsuperscript{77} Simultaneously criticizing the removal of the mandatory language as overly narrow and overly broad,\textsuperscript{78} Thomas believed that "nothing except the Guidelines as written will function in a manner perfectly consistent with the intent of Congress, and the Guidelines as written are unconstitutional in some applications."\textsuperscript{79}

\textbf{D. The Fate of Booker, Fanfan and the Guidelines}

Amid all the discussion over the Sixth Amendment jury trial requirement and how to reform the Guidelines into compliance, one

\textsuperscript{73} \textit{Id.} at 804 (Breyer, J., dissenting) (citations omitted).

\textsuperscript{74} Justice Scalia would certainly be alarmed by Breyer’s criticism of the Framers in the prior paragraph as well. \textit{See} text accompanying \textit{supra} note 76.

\textsuperscript{75} \textit{Id.} at 790 (Scalia, J., dissenting).


\textsuperscript{77} Query whether dissenting from a dissent happens frequently in Wonderland. Or even in \textit{Apprendi-land}. \textit{See} supra note 76.

\textsuperscript{78} \textit{Booker}, 125 S. Ct. 738, 796 (Thomas, J., dissenting).

\textsuperscript{79} \textit{Id.} at 802 (Thomas, J., dissenting).
may wonder what happened to Booker and Fanfan. Neither one will be walking the streets any time soon as a result of the Court’s holdings. Since Booker’s sentence was a steep upward departure, the Court upheld the Seventh Circuit’s decision to vacate the sentence and remand the case for resentencing. But since Booker’s previous sentencing range was between 10-20 years, this decision probably only spared him a third decade of incarceration. Fanfan, meanwhile, was sentenced below the Guidelines range. The Court noted that since the lower range was supported by the jury’s finding, Fanfan’s sentence did not implicate the *Apprendi* rule. Still, the court vacated this sentence to allow the government—or Fanfan, in the unlikely event he would seek a higher sentence—to pursue resentencing.

As for the Guidelines, the *Booker* remedy directed judges to continue using the Guidelines for sentencing advice and factfinding for adjustment factors is expected to continue. The controlling rule, per *Apprendi*, is that facts underlying these adjustments must be found by a jury under the reasonable doubt standard. But how freely may sentencing courts disregard the Guidelines in favor of other sentencing concerns?

II. FEDERAL SENTENCING REFORM AND THE DEVELOPMENT OF MANDATORY GUIDELINES

The *Booker* decision could be viewed as the Supreme Court’s endorsement of the belief that the Federal Sentencing Guidelines are due for a major reassessment two decades after their conception. One view is that the guidelines were a failed experiment, and *Booker*’s merits decision points the judicial system back toward the days of largely “unfettered [judicial] discretion.” Observers taking a contrary position contend that the Guidelines will remain as the primary reference point for district judges to institute Congress’ sentencing objectives. The definitive answer to the problems *Booker* creates will have to come from Congress, especially now that Justice Breyer and the Court have passed the ball to the legislative branch. In the interim, practitioners, members of the judiciary and academic com-

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80 Id. at 769.
82 See United States v. Wilson, 35 F. Supp. 2d 1269 (D. Utah 2005), discussed infra at Part IV.
83 *Booker*, 125 S. Ct. at, 768.
mentators need to understand the history of federal sentencing rules in order to best proceed.

A. Sentencing Practice Leading to the Creation of the Sentencing Commission

While Congress has the constitutional authority to define crimes and punishments, it traditionally delegated that power to the trial judge, who was given discretion to interpret wide sentencing ranges. Federal criminal trials featured indeterminate sentencing; that is, judges imposed an indefinite sentencing period and prisoners were released only after the approval of a federal parole board. But this system produced a number of undesirable results, including sentences shortened by early parole, participants in identical crimes receiving radically different sentences, and, most important, sentences based on illegitimate or random factors such as race, gender or geography. As Justice Breyer phrased it, "[t]he length of time a person spent in prison appeared to depend on 'what the judge ate for breakfast' on the day of the sentencing. . . ."

Congress occasionally intervened with efforts like mandatory minimum sentences or increased statutory maximums, but sentencing reform did not move toward the Guidelines model until the 1970s. While Congress attempted to move judicial sentencing power to the U.S. Parole Commission, and progressively more restrictive models for advisory Sentencing Guidelines surfaced, these efforts were largely unsuccessful. In assessing these reforms, it was clear that Congress had rejected parole-based rehabilitation as a workable system, describing it as an "outmoded . . . model . . . [with] 'unjustifi[ed] and 'shameful' consequences."

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84 Hatch, supra note 81 at 186.
85 Blakely, 124 S. Ct. at 2553-54, (Breyer, J., dissenting); Booker, 125 S. Ct. at 783, (Stevens, J., dissenting).
87 Blakely, 124 S. Ct. at 2554 (Breyer, J., dissenting).
88 Hatch, supra note 90 at 186.
89 Senator Edward Kennedy is credited with the first legislative proposal for Guidelines-style sentencing reform. Interestingly enough, he appeared in an amicus brief on behalf on Congress in Booker. USSC Report, supra note 86, at 3.
91 Booker, 125 S. Ct. at 783 (Stevens, J., dissenting).
Once Congress moved toward the idea of mandatory guidelines, the measure passed overwhelmingly in the Sentencing Reform Act of 1984 (hereinafter “SRA”). The SRA created an independent entity in the judicial branch, the United States Sentencing Commission (hereinafter “Sentencing Commission”), to draft the sentencing regulations. Implementing the Guidelines was not a simple task, as the Sentencing Commission needed three years and a Supreme Court decision upholding its authority before the Guidelines were instituted. The Sentencing Commission’s task was not finished with the release of the initial Guidelines; it was given the authority to review the Guidelines and institute new rules.

The SRA also enacted a number of provisions that drastically reshaped federal sentencing practices. Congress abolished the parole system, allowing sentences to be later modified only for “extraordinary and compelling reasons.” In place of indeterminate sentencing, courts were ordered to abide by the Guidelines range unless they found a factor the Sentencing Commission had overlooked. Other relevant considerations imposed by the statute included the nature of the offense and the defendant, deterrence, just punishment, policy considerations promulgated by the Commission, and the avoidance of unwarranted sentencing disparities. Using an unreasonableness standard, appeals were originally allowed for sentences imposed due to misapplication of the Guidelines or as an upward departure from the Guidelines maximum.

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93 Booker, 125 S. Ct. at 784 (Stevens, J., dissenting).
94 Id. at 784-85 (Stevens, J., dissenting). The Sentencing Commission was organized as a bipartisan body, and originally was to include three federal judges in its membership. Brief of Amicus Curiae United States Sentencing Commission at *4-5, United States v. Booker, 125 S. Ct. 738 (2004) (Nos. 04-104, 04-105); 28 U.S.C. § 991 (2005).
95 See generally Mistretta, 488 U.S. at 361. Mistretta upheld the Sentencing Commission’s authority as a permissible delegation of legislative power, despite its placement in the judicial branch.
Justice Stevens believed it essential that Congress had rejected discretionary sentencing in its 1984 debates. Stevens observed, “the notion that Congress had any confidence that judges would reduce sentencing disparities by considering relevant conduct . . . either ignores or misreads the political environment in which the SRA passed.”

B. A Brief How-To Guide to the Guidelines

Application of the Guidelines is a step by step process that is designed to include individualized adjustments. Beginning with a base level offense of conviction, judges are directed to make upward and downward adjustments to the applicable sentencing range depending on certain factors such as the defendant’s role, acceptance of responsibility and criminal history. In order for judges to more easily apply the adjustments, the Guidelines’ drafters included a number of hypotheticals which were meant to illustrate what should happen under particular circumstances. As long as the judges make written justification, the Guidelines provide for departures based on factors like the defendant’s character.

Criminal history considerations can quickly result in a sizable upward adjustment. Similarly, the Guidelines’ reliance on drug quantity can produce a sentence much higher than the offender’s comparative culpability. This can exacerbate sentencing disparities; as Justice Breyer argued, “sentencing proportionality [is] a key element of sentencing fairness that demands that the law punish a drug ‘kingpin’ and a ‘mule’ differently.”

101 Booker, 125 S. Ct. at 785-86 (Stevens, J., dissenting).
102 Id. at 786 (Stevens, J., dissenting).
103 See Guidelines Compromises, supra note 96, at 6-7 (explaining the mechanics of the seven-step Guidelines application process).
104 18 U.S.C. Appx. §§ 1B1.1(c), (d), (e), (f), (i) (2005). The Guidelines ranges were designed to have a 25% range; the maximum was not to exceed the minimum by the greater of six months or 25% of the minimum. See Williams v. United States, 503 U.S. 193, 218 (1992) (White, J., dissenting).
105 See generally commentary to 18 U.S.C. Appx. § 1B1.2 (2005); the drafters were clear about what they expect to happen if a judge deviates from these hypotheticals, stating that failure to abide by the commentary would subject a sentence to appellate reversal. 18 U.S.C. Appx. § 1B1.7 (2005).
108 See generally 18 U.S.C. Appx. §§ 2D1.1 – 2D1.13 (2005) (this series lists the quantity tables for drug offenses). See also United States v. Nellum, No. 2:04-CR-30-PS, slip op. at 9 (N.D. Ind. Feb. 3, 2005), available at http://www.innd.uscourts.gov/opinions/Simon/204cr30USAvNellum.pdf (“The government is well aware that for every controlled buy that is made, the quantity of drugs is increased, and so is the sentence. . . .”).
109 United States v. Harris, 536 U.S. 545, 570-71 (Breyer, J., concurring); USSC Report,
The most frequently used device to deviate from a Guidelines sentence may be a downward departure for providing substantial assistance to authorities. Once the government makes a motion that the defendant provided assistance "in the investigation or prosecution of another [offender]," a downward departure is justified. The court then has wide discretion to decide how far to depart from the sentence range. Given the frequency of substantial assistance departures, some have argued that they are a way for the litigants and judge to manipulate the Guidelines as they find expedient. While numerous grounds exist for both types of departures, upward departures are far easier to justify.

C. Practical Effects of the Guidelines

Given the nature of the crimes they address and the sweeping changes they represent, the Guidelines began as a system of compromises and have drawn controversy throughout their existence. But the results produced by the Guidelines are not exactly what the SRA intended. Although numerous Supreme Court decisions have addressed the Guidelines' application relating to jury trials, over 97% of federal cases are resolved through plea bargaining. Plea bargaining is seen by the Sentencing Commission as a sort of necessary evil and there is not much disparity in its use nationwide. A Sentencing Commission retrospective on the Guidelines lamented

supra note 86, at 50.

111 Heaney, supra note 86, at 198.
112 Hatch, supra note 81, at 190. Senator Hatch refers to this practice as "hidden bargain-
ing." Cf. 18 U.S.C. Appx. § 5K2.0, comment 5 (2005) (stating that frequent departures lead to the very unwarranted disparities the Guidelines were supposed to avoid). Since the severity of drug crimes is so much higher compared to other Guidelines offenses, there have been accusa-
tions of collusion between the adversaries and the judge to avoid these very high minimums. Schulhofer, supra note 10, at 853.
113 For upward departures, the court may consider death, 18 U.S.C. Appx. § 5K2.1 (2005), physical injury, § 5K2.2, or extreme psychological injury, § 5K2.3, caused in the crime, abduction, § 5K2.4, property damage, § 5K2.5, weapons use, § 5K2.6, "extreme conduct," § 5K2.8, gang involvement, § 5K2.18, or uncharged conduct, § 5K2.21; a downward departure may be grounded upon the victim's conduct, § 5K2.10, coercion and duress, § 5K2.12, diminished mental capacity, § 5K2.13, or that the offense was an aberration by a defendant not disposed to recidivism.
114 Guidelines Compromises, supra note 96, at 9.
115 Discussed infra at Part III.
117 Plea rates range from 94.8% in the District of Columbia Circuit to 98.3% in the Ninth Circuit. Federal Sentencing Statistics, supra note 116, at 3-5.
that although plea bargaining can undermine uniform sentencing, "defendants . . . need some incentive to plead guilty if trial rates [are] to be kept within manageable limits." Plea bargaining helps to ease an already burdened justice system, and the Sentencing Commission admits that the Guidelines contributed to record incarceration rates.\textsuperscript{119}

Drug offenses have become a centerpiece of the Guidelines—it is no statistical fluke that both offenders in \textit{Booker} were charged with drug crimes—and Congress has responded by repeatedly increasing mandatory minimum sentences for these offenses.\textsuperscript{120} In drug sentencing, the use of probation has been virtually eliminated since the Guidelines became effective.\textsuperscript{121} The resulting incarceration rates actually prompted Congress to enact a "safety valve" in 1994 to waive mandatory penalties for first-time nonviolent offenders.\textsuperscript{122}

Incarceration rates have demonstrated that instead of reducing racial sentencing disparities as the Sentencing Commission hoped, this gap has widened greatly.\textsuperscript{123} It is evident that the Guidelines system had to absorb an increasing number of recidivist offenders.\textsuperscript{124} Regional disparities also continue to pervade the system, with an exaggerated difference in Guidelines departure rates at the District Court level.\textsuperscript{125}

\textsuperscript{118} USSC Report, \textit{supra} note 86, at 29.

\textsuperscript{119} Id. at 40.

\textsuperscript{120} Nationally, drug-related crimes accounted for 40.5\% of the sentencing workload in 2002. Federal Sentencing Statistics, \textit{supra} note 116, at 1. These percentages were even higher regionally, with 52.7\% of First Circuit sentences and 48.4\% of Eleventh Circuit sentences involving drug offenses. These disparities may be explained by the sheer volume of trafficking cases arising in Puerto Rico and Florida, both major importation sources from Central and South America. \textit{See id.} at 1; United States Sentencing Commission Federal Sentencing Statistics (Eleventh Circuit) at 1 (2002), \textit{available at} http://www.ussc.gov/judpack/jp2002/1lc02.pdf. \textit{Justice Breyer has been a harsh critic of mandatory minimums, arguing that "they transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring . . . [and] that they encourage subterfuge . . . thereby making them a comparatively ineffective means of guaranteeing tough sentences."} \textit{Harris,} 536 U.S. at 570-71 (Breyer, J., concurring).

\textsuperscript{121} USSC Report, \textit{supra} note 86, at 52.

\textsuperscript{122} Id. at 51. While 82.3\% of defendants sentenced in 2002 received prison terms, incarceration rates for the three most frequent offenses far exceeded the national average, as 89.1\% of firearms offenders, 93.5\% of drug traffickers, and 95.5\% of immigration violators received prison sentences. \textit{See Federal Sentencing Statistics, \textit{supra} note 116, at 7. Quantity-based sentencing has also been attacked as unreliable because the quantity of drugs involved in routine transactions has continued to increase. Under the so-called 100-1 ratio, 100 grams of powder cocaine would receive the same penalty as 1 gram of crack cocaine. \textit{See id.} at 131-32; Schulte, supra note 10, at 854.}

\textsuperscript{123} USSC Report, \textit{supra} note 86, at 115.

\textsuperscript{124} Breyer noted that in FY 1996, 20.3\% of all federal cases involved offenders whose criminal histories were in the three most severe classes, and 44.2\% of drug cases featured offenders with past offenses. \textit{Almendarez-Torres v. United States,} 523 U.S. 224, 230 (1998).

\textsuperscript{125} According to the Sentencing Commission's data, 65\% of defendants in 2002 were sentenced within the prescribed Guidelines range. Federal Sentencing Statistics, \textit{supra} note...
D. Subsequent Guidelines Reforms

Congress and the Sentencing Commission have been true to their pledge to update the Guidelines, although the result has been to gradually restrict judges’ ability to make departures.\(^{126}\) Much of this reform has been directed toward drug, firearms and sex offenses, especially with stricter mandatory minimums, focused toward marginal participants.\(^{127}\) At the very least, the Sentencing Commission has been prolific, more than doubling the Guidelines manual in length since the inaugural version.\(^{128}\)

The arguably most notorious of the changes applied to the Guidelines came in 2003 with the PROTECT Act.\(^{129}\) While the Act was designed to expand prosecutorial powers in crimes against children, a last minute, and barely noticed, amendment restricted available departures to the upward-slanted list already enumerated in the Guidelines and more importantly altered the standard of appellate review in the Guidelines.\(^{130}\) Whereas the original SRA had provided review for the

116, at 11. By contrast, 17.4% received downward departures for substantial assistance, 16.8% received other downward departures, and a mere 0.8% were given upward departures; as Booker received such an upward departure, he was clearly in the national minority. \(\text{Id.}\) There remains wide divergence in these rates by both Circuit and District grouping. At the low end of the spectrum for Guidelines compliance were the Second Circuit (61.3% sentenced within Guidelines range), the Third Circuit (58.9%) and the Ninth Circuit (48.8%). By contrast, The First (75.7% - mostly due to Puerto Rico), Fourth (76.6%), Fifth (71%) and Eleventh (70.2%) Circuits had much better \(\text{Id.}\) at 11-13. At the district level, the geographic disparity is even more apparent; while the busy districts of Arizona and Southern California sentenced their defendants within the Guidelines 30.9% and 37.4% of the time, respectively, the Eastern Virginia and Southern Florida districts, with comparable caseloads, returned 89.9% and 80.7% compliance rates. \(\text{Id.}\) Cf. Schulhofer, \textit{supra} note 10, at 857 (noting that departures are especially constrained in drug offenses, since upward adjustments are given a comparative free reign while downward departures are restricted).

\(^{126}\) \textit{Booker}, 125 S. Ct. 738, 786 (Stevens, J., dissenting).

\(^{127}\) USSC Report, \textit{supra} note 86, at 3.


\(^{130}\) The PROTECT Act, while aimed at enhancing prosecutorial power in crimes against children, has generated significant controversy through the "Feeney Amendment." This little-debated amendment from a conservative U.S. Representative restricted much of the independence of the Sentencing Commission, preventing new downward departures from being added to the Guidelines until 2005. \textit{Id.} at 669; USSC Report, \textit{supra} note 86, at 9. \textit{See also} Bowman, \textit{supra} note 143, at 245; Larry Kupers, \textit{Proposal for a Viable Federal Sentencing Scheme in the}
unreasonableness of departures, the PROTECT Act substituted de novo review of all departures, attempting to eliminate any semblance of judicial discretion. This standard required appellate courts to review "the district court’s application of the guidelines to the facts," and set aside sentences that it viewed as too high or too low. One district judge referred to these changes as "the saddest and most counterproductive episode in the evolution of federal sentencing doctrine." Justice Scalia may disagree with this assessment, since he once referred to the Sentencing Commission as a "junior-varsity Congress".

III. SUPREME COURT DECISIONS UNDERLYING BOOKER

The Supreme Court has reexamined both the Guidelines and the underpinnings of federal sentencing practices numerous times since the creation of the Sentencing Commission. Several cases in particular provide the foundation for the Booker decision, though, since the division between the merits and remedy majorities in that case has been evident for some time. These cases, and in many situations, their concurring and dissenting opinions, provide valuable insights on


As amended by the PROTECT Act, if the guidelines sentence did "not advance the objectives set forth in 3553(a)(2); or is not authorized under 3553(b)" or if "the sentence departs to an unreasonable degree from the applicable guidelines range, the court of appeals shall review de novo the district court’s application of the guidelines to the facts." 117 Stat. 650, 670 (2003).

Steven L. Chanenson, Hoist With Their Own Petard?, 17 FED. SENTENCING REPORTER 20 (2004).

the Booker result and just how it may apply to the expected deluge of appeals in its wake.

A. Apprendi v. New Jersey

Apprendi v. New Jersey has become the Supreme Court’s foundational statement on the Sixth Amendment jury trial requirement, giving rise to the rule that “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact . . . that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”

In Apprendi, the Court invalidated New Jersey’s hate crime statute, which had allowed trial judges to extend sentences if they found by a preponderance of the evidence that the offender had acted with racial animus. The defendant Apprendi had run afoul of this provision when he fired his gun into the home of an African-American family that had moved into a formerly all-white neighborhood. While Apprendi pled guilty to weapons offenses, the hate crime was not charged and only surfaced upon at his sentencing hearing; once the judge applied this statute, Apprendi’s sentence doubled from the maximum that would have been supported by his pleas.

The Court declared that the invalid statute clearly ran afoul of common law principles regarding the jury trial, since a jury trial required that “the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant’s] equals and neighbours. . . .” This history underscored how the invalid statute managed to “[remove] the jury from the determination of a fact that, if found, [exposed] the criminal defendant to a penalty exceeding the maximum” justified by the jury verdict on its own.

Disapproving of this lower evidentiary standard, the Court described such judicial factfinding as little more than “a tail which wags the dog of the substantive offense.” But the Apprendi majority was not ready to completely remove judicial discretion from the sentenc-

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137 530 U.S. 466 (2000).
138 Id. at 477.
139 Id. at 496-97.
140 Id. at 469.
141 Id. at 470, 474. Specifically, Apprendi was charged with 23 offenses and pled guilty to two counts of possession of a firearm for an unlawful purpose and one count of unlawful possession of an antipersonnel bomb. Id. at 469-70.
142 Id. at 466, 477, 478, 482-83.
143 Id.
144 Id. at 495 (quoting McMillan, 477 U.S. at 88).
ing calculus, as it allowed judges to use discretion as long as they "impos[ed] a judgment within the range prescribed by statute." Justice Breyer dissented, fearing that requiring every sentencing fact to be submitted to the jury would undermine the justice system. Such a requirement "could easily place the defendant in the awkward (and conceivably unfair) position of having to deny he committed the crime yet offer proof about how he committed it, e.g., 'I did not sell drugs, but I sold no more than 500 grams.'" Justice Scalia countered this view by maintaining that "the criminal will never get more punishment than he bargained for..." when his guilt is "determined beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens."

Justice O'Connor has consistently maintained that the Court has wrongly decided this line of cases. She observed in dissent that Apprendi "halt[ed] the current debate on sentencing reform in its tracks and [ ] invalidate[ed] with the stroke of a pen three decades' worth of nationwide reform..." O'Connor warned that "[t]he Court throws... caution to the wind and, in the process, threatens to cast sentencing in the United States into what will likely prove to be a lengthy period of considerable confusion." In fact, in only two years over 1,800 Apprendi challenges to sentences and convictions had reached the Circuit Courts of Appeals. O'Connor saw these statistics as the "tip of the iceberg," and a similar fear has pervaded Booker.

B. Blakely v. Washington

Blakely v. Washington set off a wave of panic among lower courts and academics who fretted that the similarly worded Federal Guidelines would soon be struck in the manner of Washington state's. In Blakely, the defendant had pled guilty to kidnapping his estranged

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145 Id. at 481.
146 Id. at 496 (Breyer, J. dissenting).
147 Id. at 498 (Scalia, J., concurring). At Fanfan's sentencing hearing, the judge restated, I quote [from the majority opinion of Blakely], "The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbors,' rather than a lone employee" that's me, the Judge, "of the State." End of quote.
148 United States v. Fanfan, 2004 WL 1723114 at *3 (D. Me. 2004). In case the reader is concerned that Scalia has personal issues with Breyer, he once assured us, "I am, as always, pleased to travel in Justice Breyer's company..." Ring v. Arizona, 536 U.S. 584, 612 (2002) (Scalia, J., concurring).
150 Id. at 552 (O'Connor, J., dissenting).
151 Ring, 536 U.S. at 619-20 (O'Connor, J., dissenting).
wife, but the trial judge found that he acted with "deliberate cruelty" and made a substantial upward departure.\textsuperscript{153} The Court applied the \textit{Apprendi} rule since the upward was clearly grounded on facts not submitted to a jury. Writing for the same majority as \textit{Apprendi}, Justice Scalia stated that the \textit{Apprendi} maximum sentence was what "a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant..."\textsuperscript{154} A sentence based on anything in excess of the jury's verdict exceeded proper judicial authority in the Court's view.\textsuperscript{155}

Justice O'Connor in dissent correctly predicted that the Court would extend \textit{Blakely} to the Federal Guidelines. She argued that the two systems were functionally the same, "for as residents of 'Apprendi-land' are fond of saying, 'the relevant inquiry is one not of form, but of effect.'"\textsuperscript{156} O'Connor's position, like Breyer's in \textit{Apprendi}, was that for instances such as defendants who obstruct justice during trial, it is simply impossible for these facts to be submitted to the same jury that tries the charged offense.\textsuperscript{157}

Justice Breyer identified a continuous reluctance among the \textit{Apprendi-Blakely} majority to acknowledge plea bargaining as an essential part of the sentencing system.\textsuperscript{158} Justice Scalia dismissed this proposal, though, arguing that "the Sixth Amendment was not written for the benefit of those who choose to forgo its protection. It guarantees the right to jury trial. It does not guarantee that a particular number of jury trials will actually take place."\textsuperscript{159}

IV. FEDERAL SENTENCING AFTER \textit{BOOKER}: HOW MUCH WEIGHT HAVE THE GUIDELINES LOST?

The response to \textit{Booker} has been rapid at the Circuit and District Court levels.\textsuperscript{160} In the first month following the Supreme Court's

\begin{itemize}
\item[\textsuperscript{153}] Id. at 2534. Under the jury verdict, Blakely would have been subject to a 53 month maximum, but the departure resulted in a 90 month sentence. Note that deliberate cruelty is one of the drafters' suggested departure justifications under Part V Fed Guidelines. 18 U.S.C. Appx. §5K2 (2005).
\item[\textsuperscript{154}] Blakely, 124 S. Ct. at 2537.
\item[\textsuperscript{155}] Id.
\item[\textsuperscript{156}] Id. at 2543 (O'Connor, J., dissenting). O'Connor, of course, means that Scalia is a proud resident of \textit{Apprendi}-land. Query how this compares to Wonderland, which Scalia somewhat eagerly implies as Breyer's residence.
\item[\textsuperscript{157}] Id. at 2546.
\item[\textsuperscript{158}] Blakely, 124 S. Ct. 2531, 2556 (Breyer, J., dissenting).
\item[\textsuperscript{159}] Id. at 2542.
\item[\textsuperscript{160}] Many sentences were postponed in the wake of \textit{Blakely}, and the resolution of these cases is rapidly emerging following \textit{Booker}. Linda Greenhouse, \textit{Supreme Court Transforms Use of Sentence Guidelines}, N.Y. TIMES, Jan. 13, 2005, at A4. The Author notes that by the time this Comment has made its way through the process of journal publication, some of the lower court decisions discussed in Part IV may be reversed or vacated.
\end{itemize}
decision, a number of District Courts and every Circuit Court except for the Fifth Circuit have addressed Booker in a sentencing decision. Clear divisions are already evident: some courts are seeing the Booker remedy as freeing them to take other sentencing issues into consideration, while others believe they are bound to the Guidelines in all must the most extreme exceptions. There is not always consensus within courts, either; for instance, different judges in the Nebraska District Court have already issued conflicting opinions interpreting Booker. This Comment advocates that the less restrictive position is preferable, since while the Guidelines are still an important sentencing consideration, they are not a magic machine into which judges feed sentencing factors and are given a perfectly tailored sentence.161

The volume of future cases affected is heavy enough to create concerns, as government estimates claim that approximately 1,200 federal defendants are sentenced every week.162

A. Giving the Guidelines Less Prominence

The Second Circuit has made the most compelling case to date for treating the Guidelines as just one of a number of sentencing factors to consider. In United States v. Crosby, the Second Circuit explained that it hoped its “explanation will be helpful to bench and bar alike.”163 The court argued that “sentencing judges remain under a duty with respect to the Guidelines – not the previously imposed duty to apply the Guidelines, but the continuing duty to ‘consider’ them, along with the other factors listed in § 3553(a).”164 Since the trial judge would still need to calculate a Guidelines range before determining a sentence, he would be “entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence.”165

Crosby proposed five principles to guide judges in applying Booker, noting that “[t]he Guidelines are no longer mandatory.”166 The trial judge must consider § 3553(a)’s sentencing objectives as

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163 397 F.3d 103,107 (2d Cir. Feb. 2, 2005).

164 Id. at 111.

165 Id. at 112.

166 Id. at 113.
well as the Guidelines. Applying the Guidelines requires determining “the applicable Guidelines range” and considering the Guidelines’ underlying policies. The sentencing judge then should decide whether or not to impose the resulting Guidelines sentence. Most importantly, “the sentencing judge is entitled to find all the facts appropriate for determining either a Guidelines sentence or a non-Guidelines sentence.”

The Second Circuit soon explained that the rationale for delegating such fact finding discretion to the district judges was for appellate courts to “exhibit restraint, not micromanagement.” The Second Circuit believed that district judges were more familiar with the trial record than appellate judges. Giving significant discretion to the trial courts, the Second Circuit indicated that it would uphold the lower court’s decision as long as the trial record showed awareness of the applicable Guidelines range and underlying statutory factors. Notably, the Eleventh Circuit rejected this proposal, explaining that such a system would place the impetus for reviewing errors with the District Courts which were the very source of the error; in other words, these courts would be “resentencing in order to determine whether resentencing is required.”

The Eastern Wisconsin District was the first court at the district level to take up the less restrictive reading of Booker. Challenging the view that the Guidelines should remain the centerpiece of the sentencing framework, the court proposed that when “a defendant’s history and character are positive, consideration of all the § 3553(a) factors might call for a sentence outside the guideline range.” While cautioning against a return to indeterminate sentencing, the judge reasoned that “courts are free to disagree [with the Guidelines range] so long as the ultimate sentence is reasonable and carefully supported by reasons tied to the § 3553(a) factors.” Further, “[d]istrict courts cannot just add up figures and pick a number within a narrow range. Rather, they must . . . sentence the person before them as an individual. Booker is not an invitation to do business as usual.”

167 Id. 168 Id. 169 Id. 170 Id. 171 United States v. Fleming, 397 F.3d 95, 100 (2d Cir. 2005). 172 Id. 173 Id. 174 United States v. Rodriguez, 398 F.3d 1291, 1305 (11th Cir. 2005). 175 United States v. Ranum, 353 F. Supp. 2d 984 (E.D. Wis. 2005). 176 Id. at 986. 177 Id. at 987. 178 Id.
ern District of Virginia urged a similar approach, viewing sentencing not as “a mere arithmetical exercise” but as a balance between the Guidelines and section 3553(a)’s five goals of “respect for the law,” “just punishment,” “adequate deterrence,” “protecting the public,” and rehabilitating the defendant.

The District Court for Southern Iowa soon followed this analysis. That court reasoned that if the Guidelines were “presumptive,” they would “[cause] an imbalance in the application of the statute to a particular defendant . . . making the Guidelines, in effect, still mandatory.” However, “[w]hile a greater degree of discretion has been returned to district courts post-Booker, that discretion is not unfettered or, perhaps a better word, unmoored.” The Southern District of New York also followed this advisory route, finding nothing in Booker that prevented judges from considering “facts not typically found by a jury nor admitted by a defendant at plea allocution” to determine an individualized sentence for the defendant.

B. Retaining the Guidelines with Central Importance

The Sixth Circuit is the only appellate court so far to have taken the position that its district courts are still required to apply the Guidelines much as they existed before Booker and has been very restrictive in what it will allow trial judges to consider. Most of the decisions taking the more restrictive approach to the Guidelines have actually come at the district level, particularly from the Utah District Court. Notorious for holding the federal Guidelines unconstitutional shortly after Blakely, Judge Cassell of that district has already interpreted Booker several times to allow Guidelines departures only in unusual circumstances.

For instance, in United States v. Duran, the Utah District turned to semantics while holding that the Guidelines were advisory for a defendant subject to the safety valve drug sentencing provisions. The judge reasoned that “[s]o long as the court consults the Guidelines in

180 Id. at 1028.
181 Id. at 1027.
determining an appropriate sentence, any resulting sentence is 'pursuant to' the Guidelines. Such a sentence would be 'in compliance with' or 'authorized by' the Guidelines, as Black's Law Dictionary defines 'pursuant to.' Continuing down this path in United States v. Wilson, Judge Cassell maintained that the Guidelines were the best indicia of societal expectations for sentencing because "Booker held that while the Guidelines are no longer mandatory, the rest of the Sentencing Reform Act is." The Utah District thus gave "heavy weight" to the Guidelines, departing only in "unusual cases for clearly identified and persuasive reasons." After criticism from numerous other courts, Judge Cassell reaffirmed his position in a memorandum to Wilson. The judge insisted that "[h]eavy reliance on the Guidelines is . . . the only way to implement the congressional directive for courts to avoid 'unwarranted sentencing disparities. . . ." The judge defended his decision, arguing that Congress had not rejected restrictions on considering individual characteristics of the offender, but had moved in the opposite direction.

Other courts have joined the Utah District in the call to give the Guidelines heavy weight. Contradicting the rest of his district, one of Nebraska's District judges took such a stance. That judge recast the debate as "not whether the Guidelines are advisory, but rather whether judges should, in the exercise of their newly minted discretion, normally follow the Guidelines . . . because that approach represents the best (though an imperfect) method of sentencing." Endorsing limited Guidelines departures, that judge also argued that to disregard the Guidelines "is to thumb our judicial noses at Congress."

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187 *Id.* at 4.
189 *Id.* at 913.
190 *Id.* at 925.
193 *Id.* at 1271.
194 *Id.* at 1275.
197 *Id.* at 1061.
The North Dakota District Court turned to the testimony of the Sentencing Commission to justify joining this side of the debate. That court argued that since the Sentencing Commission "firmly believes that sentencing courts should give substantial weight to the . . . Guidelines . . . Booker should be read as requiring such weight." The basis for this argument was the Sentencing Commission's claim that data in the three weeks of sentencing following Booker showed that sentencing was consistent with pre-Booker behavior by trial courts.

CONCLUSION

While Booker may have made the Guidelines advisory, they survive with as much vigor as Judge Easterbrook's wounded opera star. As for just how much weight to accord the Guidelines, the most logical application is to apply them as one of a number of sentencing factors. While the Guidelines do serve a valuable function in providing judges with a starting point for rational sentencing analysis, the Sentencing Commission's own statistics show that they are far from a perfect system. When considering that numerous sentencing disparities pervade today despite the Guidelines' nearly two-decade effort to eradicate them, surely it is worth seizing the opportunity to correct some of these inequities through more individualized sentencing assessment.

Taking the approach that the Guidelines should be given heavy weight and departures should only be made in limited circumstances turns a blind eye not only to the still valid considerations identified in the Federal Sentencing Act but ignores the practical environment in which the federal criminal courts operate. Rather than maintaining a system which has grown overweight with hundreds of amendments and additions, courts should view Booker as an opportunity to employ the Guidelines in a flexible way, considering the significance of the efforts that support these rules but not hesitating to depart from the suggested sentencing ranges in reasonable circumstances. Until Congress inevitably responds to Booker, sentencing courts cannot sit idly by; they must continue to promote the societal goals of the remaining sentencing scheme, as evidenced by section 3553(a). The best way to accomplish that is simply to weigh the post-Booker guidelines equally against these other sentencing objectives.

199 Id. at 1020-21 (citation, internal quotations, and court's emphasis omitted).
200 Id. at 1021.
201 See Booker, 375 F.3d at 516 (Easterbrook, J., dissenting).
J.D. Case Western Reserve University School of Law. The Author would like to thank Professor Lewis R. Katz for assistance in developing this topic.