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## Booker and Our Brave New World: The Tension among the Federal Sentencing Guidelines, Judicial Discretion, and a Defendant's Constitutional Right to Trial by Jury

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*BOOKER AND OUR BRAVE NEW WORLD*<sup>1</sup>: THE TENSION  
AMONG THE FEDERAL SENTENCING GUIDELINES, JUDICIAL  
DISCRETION, AND A DEFENDANT’S CONSTITUTIONAL  
RIGHT TO TRIAL BY JURY

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I. INTRODUCTION

“I wasn’t even thinking that day. I just made a very immature and quick decision. I didn’t even think twice about it.”<sup>2</sup> Nineteen-year-old Brenda Valencia

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<sup>1</sup> ALDOUS HUXLEY, *BRAVE NEW WORLD* (1946).

<sup>2</sup>Ed Bradley, *More Than They Deserve*, <http://www.cbsnews.com/stories/2003/12/31/60minutes/main590900.shtml> (Jan. 4, 2004) (last visited Jan. 17, 2005).

gave this response when asked why she agreed to give a ride to her roommate's stepmother to pick up money from a cocaine dealer.<sup>3</sup> As a result of her hasty decision, Valencia, who had never previously been in trouble with the law, received a 12 year, 7 month prison sentence for conspiracy to sell cocaine.<sup>4</sup> At the sentencing hearing, the district court judge said, "This case is the perfect example of why . . . the sentencing guidelines are not only absurd, but an insult to justice."<sup>5</sup>

In another district court, Judge Gerard Lynch lamented the "Draconian remedy" he had to impose on an 18-year-old college freshman, and he described the case as "the worst of [his] judicial career."<sup>6</sup> Pursuant to the Federal Sentencing Guidelines (Guidelines), Judge Lynch sentenced Jorge Pabon-Cruz (Pabon) to the mandatory minimum sentence of ten years in federal prison for use of the Internet in advertising to receive and distribute child pornography.<sup>7</sup> Pabon had no criminal history and no evidence indicated that he created the images or had any contact with the children in the images.<sup>8</sup> Judge Lynch noted the astounding fact that if Pabon had been convicted of having sex with a 12-year-old, he would likely have received only five years in prison.<sup>9</sup> At sentencing, Judge Lynch explained that he had "some difficulty imagining that ten years in prison is going to do either [Pabon] or society much good."<sup>10</sup>

The landmark case of *United States v. Booker*<sup>11</sup> transformed the Guidelines from a binding and mandatory determinate sentencing system to one that is now advisory in nature. So long as the Guidelines remain advisory, district court judges may exercise a greater degree of judicial discretion and avoid assigning unduly harsh sentences, such as the ones imposed on Brenda Valencia and Jorge Pabon-Cruz. Judges and juries have welcomed *Booker* because the mandatory Guidelines often restricted their roles in criminal proceedings.<sup>12</sup> Judges were forced to impose preordained sentences that limited their ability to consider the special circumstances surrounding each defendant's case, as illustrated by the unsettling situation Judge Lynch faced when sentencing Jorge Pabon-Cruz.<sup>13</sup> When the Guidelines did allow for increased judicial discretion in sentencing, it was often at the expense of the role

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<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>American College of Trial Lawyers, *United States Sentencing Guidelines 2004: An Experiment That Has Failed* 32 (2004), available at [http://www.actl.com/pdfs/Sentencing\\_Guidelines\\_3.pdf](http://www.actl.com/pdfs/Sentencing_Guidelines_3.pdf) [hereinafter *Trial Lawyers*] (quoting Bradley, *supra* note 2).

<sup>6</sup>Benjamin Weiser, *A Judge's Struggle to Avoid Imposing a Penalty He Hated*, N.Y. TIMES, Jan. 13, 2004, at A1 (quoting *United States v. Pabon-Cruz*, 255 F. Supp. 2d 200 (S.D.N.Y. 2003)).

<sup>7</sup>*See id.*

<sup>8</sup>*See id.*

<sup>9</sup>*See id.*

<sup>10</sup>*See id.*

<sup>11</sup>125 S. Ct. 738 (2005).

<sup>12</sup>*Trial Lawyers*, *supra* note 5, at 2.

<sup>13</sup>*Id.*

of the jury.<sup>14</sup> Fortunately, recent case law has begun to clarify the constitutional role of the judge and jury in sentencing and in doing so has paved the way for meaningful federal sentencing reform.

This Note examines the inherent conflict among the Federal Sentencing Guidelines, judicial discretion, and a defendant's Sixth Amendment right to a trial by jury.<sup>15</sup> Part two of this Note will provide a historical overview of the Guidelines. Part three will discuss the application of the Guidelines and the role of juries and judges at sentencing hearings. Part four will highlight criticisms relating to how the Guidelines often usurp power from juries and judges. Part five will examine the milestone cases of *Blakely v. Washington*,<sup>16</sup> *United States v. Booker*,<sup>17</sup> and *United States v. Fanfan*<sup>18</sup> (hereinafter "*Booker*" refers to the combined cases of defendants Booker and Fanfan). These cases illustrate the constitutional problem created by mandatory determinate sentencing schemes. Although the Guidelines currently function in an advisory capacity, it remains unknown what the future holds for determinate sentencing in the federal system.

Part six of this Note will consider reform proposals Congress may adopt to remedy the Sixth Amendment violation caused by application of mandatory Guidelines. This section evaluates the Bowman proposal, the Kansas System, and advisory Guidelines. Congress should resist the temptation to respond immediately to *Booker*. Instead, Congress should permit the advisory Guidelines to remain in place. Only advisory Guidelines will provide the time needed to collect post-*Booker* sentencing data that will reveal the strengths and weaknesses of our current system, especially when compared to our previous system. This data will enable Congress to develop a viable sentencing scheme that embraces the role of the jury while also allowing for greater judicial discretion, which in turn will advance individualized justice. Finally, part seven urges Congress not to race towards legislative amendments. Congress must deliberate to arrive at forward-thinking sentencing reform addressing not only constitutional issues, but policy concerns as well.

## II. HISTORICAL OVERVIEW

Prior to the implementation of the Guidelines, federal judges enjoyed great leeway in sentencing defendants.<sup>19</sup> Pursuant to a discretionary "medical" model of sentencing, judges tailored sentences in light of defendants' prospects of

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<sup>14</sup>*Blakely v. Washington and the Future of the Federal Sentencing Guidelines*, 108th Cong. (2004) (testimony of Rachel Barkow, Assistant Professor of Law, New York University School of Law), available at [http://judiciary.senate.gov/testimony.cfm?id=1260&wit\\_id=3684](http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=3684) (last visited Feb. 17, 2005) [hereinafter Barkow Speech]. I found Professor Barkow's work to be an invaluable source throughout my work on this note. She has conducted thorough research on the history of the jury in America, and I recommend her writing to anyone examining sentencing policy and the Sixth Amendment.

<sup>15</sup>U.S. CONST. amend. VI.

<sup>16</sup>124 S. Ct. 2531 (2004).

<sup>17</sup>125 S. Ct. 738 (2005).

<sup>18</sup>125 S. Ct. 12 (2004).

<sup>19</sup>CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 526.1 (3d ed. Supp. 2004).

rehabilitation.<sup>20</sup> Interestingly, however, judges did not have to state their legal reasons for the sentences they imposed and appellate review of sentences usually did not occur as long as sentences did not exceed the statutory maximum for the offense(s) committed.<sup>21</sup> In effect, federal judges rarely had “to justify or explain the substantive law and procedural rules [that] shaped sentences.”<sup>22</sup> As a result, extreme disparities in judicial sentencing of similarly situated offenders became a routine occurrence.<sup>23</sup>

#### A. *The Reform Movement Emerges*

Throughout the 1970s, members of the legal community started to criticize unfettered judicial discretion and a sentencing reform movement emerged.<sup>24</sup> Reform advocates believed that unwarranted sentence disparities among similar offenders stemmed from two sources: (1) judges who possessed unlimited discretion in assigning sentences and (2) parole officials who wielded power to determine actual prison release dates.<sup>25</sup> Judge Marvin Frankel emerged as a leader of the sentencing reform movement.<sup>26</sup> He pushed for the development of a code of penal law.<sup>27</sup> His vision for a revised federal system consisted of a sentencing commission with the job of crafting a uniform sentencing scheme.<sup>28</sup> The scheme proposed by Frankel took into account the severity of the offense committed, an offender’s criminal history, and various mitigating and aggravating factors.<sup>29</sup>

In response to Judge Frankel and other campaigners who called for reform to a system allowing for capricious sentences in district courts across the country, Congress enacted the Sentencing Reform Act of 1984.<sup>30</sup> The Act established the United States Sentencing Commission, an independent agency within the judicial branch, and assigned to the Commission the task of devising a determinate

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<sup>20</sup>Douglas Berman, *The Roots and Realities of Blakely*, CRIMINAL JUSTICE, Vol. 19, No. 4, Winter 2005, at 5.

<sup>21</sup>Benjamin J. Priester, *Sentenced For A “Crime” the Government Did Not Prove: Jones v. United States and the Constitutional Limitations on Factfinding by Sentencing Factors Rather Than Elements of the Offense*, 61 LAW & CONTEMP. PROBS. 249, 252 (1998).

<sup>22</sup>Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL’Y REV. 93, 94 (1999) [hereinafter Berman, *Common Law*].

<sup>23</sup>*Id.*

<sup>24</sup>Mark T. Bailey, Note, *Feeney’s Folly: Why Appellate Courts Should Review Departures from the Federal Sentencing Guidelines with Deference*, 90 IOWA L. REV. 269, 275 (2004).

<sup>25</sup>*Id.* at 276.

<sup>26</sup>*Id.*

<sup>27</sup>Berman, *Common Law*, *supra* note 22, at 95.

<sup>28</sup>Bailey, *supra* note 24, at 277; *see also* Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

<sup>29</sup>Bailey, *supra* note 24, at 278.

<sup>30</sup>U.S. SENTENCING GUIDELINES MANUAL §1A1.1, cmt. 1. (2004).

sentencing scheme to be implemented in all federal courts.<sup>31</sup> The Commission completed its undertaking, and by late 1987 the Guidelines took effect.<sup>32</sup> They functioned as a modified version of “real offense sentencing,” a system in which punishment reflects the actual conduct in which a defendant engaged, and thus allows a judge to increase penalties based on acquitted and uncharged conduct.<sup>33</sup>

### B. Laudable Goals—The Sentencing Reform Act

The policy statement for the Sentencing Reform Act identified three primary goals for sentencing: honesty, uniformity, and proportionality.<sup>34</sup> Honesty refers to the elimination of a sentencing system in which defendants serve significantly less prison time than the penalty imposed. Under the previous indeterminate system, because of “good time” credit reductions and the role of the parole commission in determining the remainder of a prisoner’s sentence, a federal inmate typically served only one-third of the original sentence imposed by the sentencing judge.<sup>35</sup> In response to this issue, the Commission abandoned parole and instead adopted a “truth-in-sentencing” policy mandating that offenders serve at least 85% of their sentence.<sup>36</sup> “Truth-in-sentencing” promotes honesty by eliminating the uncertainty surrounding how much time a defendant will actually serve.

The goals of uniformity and proportionality must be viewed together. Uniformity seeks to narrow the disparity in sentences imposed by different federal judges for similar crimes by similar offenders.<sup>37</sup> Unguided sentencing resulted in notable sentencing disparities. Studies have confirmed that race often affected sentencing such that an African-American offender often received a longer sentence than a white offender who committed the same offense.<sup>38</sup> In contrast to uniformity, proportionality pursues more individualized justice by imposing different sentences for crimes of varying degrees of severity.<sup>39</sup> Together, honesty, uniformity, and proportionality aim to deter crime and to provide just criminal sentences.

Today, the Commission claims to have met its goals.<sup>40</sup> Enactment of the Guidelines by district court judges, however, has resulted in a significant increase in the length of federal sentences, a shift away from probation in favor of incarceration,

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<sup>31</sup>*Id.*

<sup>32</sup>Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1212 (2004).

<sup>33</sup>Letter from John Sands, Federal Public Defender, to United States Sentencing Commission (July 9, 2004) [hereinafter Sands Letter], available at 16 FED. SENT. R. 361 (2004).

<sup>34</sup>U.S. SENTENCING GUIDELINES MANUAL §1A1.1, cmt. 3. (2004).

<sup>35</sup>*Id.*

<sup>36</sup>See The Sentencing Project, *New Incarceration Figures: Growth in Population Continues*, at <http://www.sentencingproject.org/pdfs/1044.pdf> (last visited Feb. 17, 2005).

<sup>37</sup>*Id.*

<sup>38</sup>Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377 (2005).

<sup>39</sup>U.S. SENTENCING GUIDELINES MANUAL §1A1.1, cmt. 3. (2004).

<sup>40</sup>Miller, *supra* note 32, at 1218.

and a dramatic rise in the size of the federal prison population.<sup>41</sup> When the Guidelines took effect, experts predicted that over the first ten years of implementation, the Guidelines would cause a 10% increase in the federal prison population.<sup>42</sup> In fact, the population of inmates in federal prisons doubled between 1987 and 1997.<sup>43</sup> The Commission's 15-year study of federal sentencing, released in November 2004, revealed that the typical federal felon sentenced in 1984 spent approximately 25 months in prison, while the average defendant sentenced in 2002 will spend nearly 50 months incarcerated.<sup>44</sup> In 2008, the federal government is expected to spend \$4.6 billion on inmates who serve 87% of their sentences.<sup>45</sup> Even if inmates serve only half of their sentences, the government is still expected to spend at least \$2.9 billion.<sup>46</sup> These statistics clearly exhibit how punishment under the Guidelines has grown increasingly severe. One commentator has aptly noted, "This system loves punishment."<sup>47</sup>

### III. APPLICATION OF THE GUIDELINES

#### A. *How the Guidelines Operate*

A basic understanding of how the Guidelines function is required in order to understand how the Guidelines infringe upon the role of the judge and the jury in criminal sentencing and why mandatory Guidelines violate the Sixth Amendment. In applying the Guidelines to determine a defendant's punishment, a judge must impose a sentence that falls somewhere within a prescribed Guideline range.<sup>48</sup> To arrive at the appropriate Guideline range, a judge engages in several levels of analysis. First, a judge must determine the defendant's total offense level and criminal history.<sup>49</sup> A total offense level takes into account two factors: (1) the "base offense level," which is determined by "relevant conduct," and (2) the "specific offense characteristics."<sup>50</sup> "Relevant conduct" includes all acts "that occurred during . . . in preparation for . . . or in the course of attempting to avoid detection" for the

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<sup>41</sup>*Id.* at 1212.

<sup>42</sup>WRIGHT & MILLER, *supra* note 19.

<sup>43</sup>*Id.* The United States Sentencing Commission recently published a fifteen-year study on federal sentencing. The report included the following statistics, which reflect data collected through 2002: the use of imprisonment for federal offenders reached 86%, the use of simple probation was one-third of what it had been in 1987, and federal offenders sentenced in 2002 will spend nearly twice as long in prison as offenders sentenced in 1984. U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING (2004).

<sup>44</sup>U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING (2004).

<sup>45</sup>The Sentencing Project, Truth-in-Sentencing in the Federal Prison System, at <http://www.sentencingproject.org/pdfs/tis-federal.pdf> (last visited Feb. 17, 2005).

<sup>46</sup>*Id.*

<sup>47</sup>Miller, *supra* note 32, at 1212.

<sup>48</sup>U.S. SENTENCING GUIDELINES MANUAL §1A1.1, cmt. 2. (2004).

<sup>49</sup>Trial Lawyers, *supra* note 5, at 12.

<sup>50</sup>Chanenson, *supra* note 38, at 398.

offense, even if the conduct was uncharged or charged and acquitted.<sup>51</sup> Next, a judge considers relevant departure factors such as behavior of the victim or offender, and he applies any dictated adjustments to the total offense level and criminal history.<sup>52</sup> The final step in arriving at a Guidelines sentence requires a judge to plot values on the Sentencing Grid.<sup>53</sup> One axis consists of 43 offense levels, and 6 categories of criminal history comprise the other axis.<sup>54</sup> The intersection of the offense level and criminal history on the Sentencing Grid determines the Guideline range. Although plugging numbers into a grid may appear relatively straight-forward, application of the Guidelines is exceedingly complex, as indicated by the fact that the manual for the Federal Sentencing Guidelines spans over 500 pages.<sup>55</sup>

### B. *The Importance of a Label*

With respect to the proper role of the judge and jury in the application of the Guidelines, the central issue relates to the classification of facts as either “offense elements” or “sentencing factors.”<sup>56</sup> Labeling facts as “offense elements” elicits certain procedural protections: namely, proof beyond a reasonable doubt, inclusion in the indictment, and trial by jury.<sup>57</sup> Unlike “offense elements,” “sentencing factors” do not receive strict procedural protection even though they affect the severity of punishment.<sup>58</sup> The prosecution must prove “sentencing factors” by only a preponderance of the evidence. Judge Nancy Gertner explained that

once a fact is safely in the sentencing category, as opposed to the trial category . . . no matter what its impact on the sentence, that fact is litigated with the lowest burden of proof, the preponderance standard . . . and the court may even consider counts on which the jury acquitted the defendant.<sup>59</sup>

The label attached to a fact in a criminal hearing retains tremendous importance because it determines not only the burden of proof, but also whether the judge or jury addresses the fact.

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<sup>51</sup>*Id.*; see also U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(b).

<sup>52</sup>Bailey, *supra* note 24, at 277-78.

<sup>53</sup>*Id.* at 278.

<sup>54</sup>*Id.*

<sup>55</sup>*Id.*

<sup>56</sup>Nancy King and Susan Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1469 (2001).

<sup>57</sup>*Id.* (citing *Patterson v. New York*, 432 U.S. 197, 210 (1977) (holding that the government must prove all elements beyond a reasonable doubt); *Hamling v. United States*, 418 U.S. 87, 117 (1974) (holding that all elements must be included in the indictment); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding that the government must prove all elements to the jury)).

<sup>58</sup>*Id.*

<sup>59</sup>Judge Nancy Gertner, *What Has Harris Wrought*, 15 FED. SENT. R. 83, \*2 (2002).



## C. “Elements” v. “Factors” Case Law

Case law relating to sentencing procedure and the distinctions between “offense elements” and “sentencing factors” has been unfolding unpredictably in recent years. At no point in time has the Supreme Court clearly identified how to determine whether facts are “offense elements” or whether particular facts comprise “sentencing factors.” For example, in *Almendarez-Torres v. United States*,<sup>60</sup> the Court deemed recidivism a “sentencing factor” rather than an “element” of an aggravated offense, and thus held that recidivism may be determined by a judge and used to increase a defendant’s sentence.<sup>61</sup> Yet one year later, in *Jones v. United States*,<sup>62</sup> the Court interpreted a federal carjacking statute so as to avoid judicial determination of a “sentencing factor” that would increase a defendant’s punishment.<sup>63</sup> The Court interpreted the statute to contain three separate offenses, each carrying separate penalties depending on the extent of the harm to the victim.<sup>64</sup> As such, the Court held that serious bodily injury to the victim is an aggravating factor that creates a separate carjacking offense, and thus, it must be charged in an indictment and proven to a jury beyond a reasonable doubt.<sup>65</sup> These two cases demonstrate the Court’s vacillation when it must apply labels to facts. Over the years, precedent relating to sentencing procedure has failed to provide comprehensive guidance on how to decide upon labels and what to do with facts after labels have been attached.

Not until the seminal case of *Apprendi v. New Jersey*, did the Court finally extend Sixth Amendment protections to “sentencing factors.”<sup>66</sup> In *Apprendi*, the trial judge found that the defendant acted “with purpose to intimidate an individual . . . because of race.”<sup>67</sup> As a result of this finding, the judge applied a New Jersey statute increasing jail sentences for hate-crimes.<sup>68</sup> The application of the statute more than doubled the defendant’s sentence.<sup>69</sup> After commenting on the “novel and elusive distinction between ‘elements’ and ‘sentencing factors,’” the Court stated that “the relevant inquiry is one not of form, but of effect—does the required finding expose

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<sup>60</sup>*Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

<sup>61</sup>*Id.* The Court did not outline the requisite standard of proof that a judge must apply when engaging in factfinding.

<sup>62</sup>*Jones v. United States*, 526 U.S. 227 (1999).

<sup>63</sup>*Id.*

<sup>64</sup>*Id.* at 229, 243-44.

<sup>65</sup>*Id.* at 251 (“[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”).

<sup>66</sup>530 U.S. 466 (2000). In this case, defendant Charles Apprendi fired shots into the home of an African-American family. *Id.* At trial Apprendi pled guilty to various weapons offenses, which carried a ten-year maximum sentence. *Id.* Recidivism is the one sentencing factor that does not receive Sixth Amendment protections. *Almendarez*, 523 U.S. at 224.

<sup>67</sup>*Apprendi*, 530 U.S. at 469.

<sup>68</sup>*Id.* at 471.

<sup>69</sup>*Id.*

the defendant to a greater punishment than that authorized by the jury's guilty verdict?"<sup>70</sup> The Court noted that sentence enhancements have the potential to become "the functional equivalent of an element of a greater offense."<sup>71</sup> Consequently, the Court held that aside from a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and prove[n] beyond a reasonable doubt."<sup>72</sup> *Apprendi* announced a new principle in federal sentencing.

In the pivotal case of *Ring v. Arizona*,<sup>73</sup> the Court extended the reasoning from *Apprendi* to capital sentencing. Overruling precedent, the majority held that because statutory aggravating factors necessary for the imposition of the death penalty operate as the functional equivalent of an element of a greater offense, the Sixth Amendment mandates that they be found by a jury.<sup>74</sup> Both *Apprendi* and *Ring* paved the way for the holding in *United States v. Booker*, which has incited a new wave of discussion relating to federal sentencing reform.

A remarkable anomaly in this line of cases examining application of the Guidelines is *Harris v. United States*.<sup>75</sup> Decided on the same day as *Ring*, *Harris* explained that *Apprendi* did not invalidate mandatory minimum sentencing where a judge found, by a preponderance of the evidence, a sentencing factor triggering a minimum sentence.<sup>76</sup> According to the Court, *Apprendi* only applied to facts increasing the statutory maximum.<sup>77</sup> Facts found by a judge may determine the bottom-end of a presumptive sentencing range.<sup>78</sup> Thus, in a plurality opinion, the Court held that factors increasing the mandatory minimum sentence "need not be alleged in the indictment, submitted to the jury, or proven beyond a reasonable doubt."<sup>79</sup> Defense attorneys throughout the country stoutly criticize *Harris* and urge the Court to overturn the decision.<sup>80</sup>

The line between "offense elements" and "sentencing factors" is not always predictable. Ambiguities still exist, and the exceptions set forth in *Almendarez-Torres* and *Harris* remain good law. Despite these inconsistencies, *Jones*, *Apprendi*,

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<sup>70</sup>*Id.* at 494.

<sup>71</sup>*Id.*

<sup>72</sup>*Apprendi*, 530 U.S. at 490.

<sup>73</sup>536 U.S. 584 (2002).

<sup>74</sup>*Id.* at 609 (quoting *Apprendi*, 530 U.S. at 494 and overruling *Walton v. Arizona*, 497 U.S. 639 (1990) (holding that statutory aggravating factors could be found by a judge without violating a defendant's Sixth Amendment right to a jury trial)).

<sup>75</sup>536 U.S. 545 (2002).

<sup>76</sup>*Id.* at 557. In this case, the judge found that Harris had brandished a firearm while selling illegal narcotics. *Id.*

<sup>77</sup>*Id.* at 567.

<sup>78</sup>*Id.* at 565.

<sup>79</sup>*Id.*

<sup>80</sup>Testimony of Jon Sands to United States Sentencing Commission (Nov. 16, 2004), available at [http://www.ussc.gov/hearings/11\\_16\\_04/Sands.pdf](http://www.ussc.gov/hearings/11_16_04/Sands.pdf) (last visited Feb. 17, 2005).

and *Ring* make clear one leading principle about sentencing: when considering sentence enhancements, the statutory maximum 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.

#### IV. CRITICISMS OF THE GUIDELINES

“The Guidelines have made few friends in their two decades of existence.”<sup>81</sup> Ever since the Guidelines took effect, legal literature has been replete with criticisms. Some critics accuse the Guidelines of “micro-managing” judges.<sup>82</sup> Others find the system overly rigid.<sup>83</sup> In an August 2, 2003 speech, Justice Kennedy lamented that “our resources are misspent, our punishments too severe, our sentences too long.”<sup>84</sup> This examination focuses on the how the Guidelines usurp power from both the jury and the judge at sentencing.

##### A. *The Jury*

Whether the Guidelines infringe upon the role of the jury is important for several reasons. First, the Constitution codifies the jury’s power. Article III states that “the Trial of all Crimes . . . shall be by Jury,”<sup>85</sup> and the Sixth Amendment guarantees “the right to . . . an impartial jury.”<sup>86</sup> At the Constitutional Convention, without debate, Federalists and Antifederalists agreed upon a criminal defendant’s right to a jury trial.<sup>87</sup> Moreover, the framers of the Constitution regarded a criminal jury as more than a mere “utilitarian fact-finding body.”<sup>88</sup> Although a jury’s primary function is to act as a fact finder and to apply law to facts through the issuance of verdicts, a jury also instills the community’s morals into criminal proceedings.<sup>89</sup> A jury helps to

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<sup>81</sup>Rachel Barkow, *The Devil You Know: Federal Sentencing After Blakely*, 16 FED. SENT. R. 312, 312 (2004).

<sup>82</sup>*Id.*

<sup>83</sup>*Blakely v. Washington* and the Future of the Federal Sentencing Guidelines, 108th Cong. (2004) (testimony of Mr. Ronald Weich, partner in the law firm of Zuckerman Spaeder, LLP), available at [http://judiciary.senate.gov/testimony.cfm?id=1260&wit\\_id=3685](http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=3685) (last visited Feb. 17, 2005).

<sup>84</sup>The Sentencing Project’s Comments and Recommendations Submitted to the Justice Kennedy Commission of the American Bar Association, Nov. 5, 2003, available at <http://www.sentencingproject.org/pdfs/tsp-kennedy.pdf> (last visited Feb. 17, 2005).

<sup>85</sup>U.S. CONST. art. III, § 2, cl. 3.

<sup>86</sup>U.S. CONST. amend. VI.

<sup>87</sup>Rachel Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 54 (2003). In Federalist No. 83 Alexander Hamilton wrote that “the friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury.” The Federalist No. 83, at 499 (Clinton Rossiter ed., 1961).

<sup>88</sup>Barkow, *Recharging the Jury*, *supra* note 87, at 55 (quoting Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1249 (1995)).

<sup>89</sup>*Id.* at 35-36, 59.

ensure that a defendant is not convicted if it would be in gross opposition to the community's sense of justice and blameworthiness.<sup>90</sup> Overall, the jury system provides a cornerstone in our justice system, and it illustrates our nation's regard for community values.<sup>91</sup>

The Guidelines affront the role of the jury at sentencing by shifting the jury's responsibilities to the judge.<sup>92</sup> In terms of "sentencing factors," the Guidelines allow district court judges to engage in fact-finding that frequently results in increased sentences for defendants.<sup>93</sup> Furthermore, as a modified "real offense system," the Guidelines require judges to consider facts not included in the jury's conviction.<sup>94</sup> In effect, a "real offense system" has the potential to transform a jury's acquittal of particular counts into a meaningless exercise.<sup>95</sup> For these reasons, sentencing reform must occur.

### B. The Judge

In addition to impeding the function of the jury, the Guidelines hamper judicial discretion. One law professor explained that "the formal structure and strict language of specific guideline provisions led judges to complain that the Guidelines converted them into 'rubber-stamp bureaucrats' and 'judicial accountants' in the sentencing process."<sup>96</sup> Prior to *Booker*, the Guidelines constrained a district court judge when the case before the judge consisted of facts and circumstances considered by the United States Sentencing Commission in developing the Guidelines.<sup>97</sup> The Guidelines prohibited a judge from departing from a dictated sentencing range due to considerations such as race, sex, national origin, creed, and religion.<sup>98</sup> Only in exceptional cases could a judge consider "not ordinarily relevant"

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<sup>90</sup>*Id.*

<sup>91</sup>Barkow Speech, *supra* note 14.

<sup>92</sup>Barkow, *Recharging the Jury*, *supra* note 87, at 90.

<sup>93</sup>*Id.*

<sup>94</sup>*Id.* at 92.

<sup>95</sup>*Id.* at 93. Professor Barkow provides an illustrative example from *United States v. Manor*, 936 F.2d 1238 (11th Cir. 1991). In this case, the prosecution charged the defendant with one count of conspiracy to distribute 250 grams of cocaine and with other counts involving the distribution of 19 grams of cocaine. *Id.* The jury acquitted the defendant of the conspiracy charge and convicted him of intent to distribute the 19 grams. *Id.* However, the judge at sentencing regarded the conspiracy count as relevant conduct, which significantly increased the defendant's sentence. *Id.* Ultimately, the defendant faced the same sentence he would have faced if he had been convicted of the conspiracy count. *Id.*

<sup>96</sup>Berman, *Common Law*, *supra* note 22, at 101.

<sup>97</sup>Trial Lawyers, *supra* note 5, at 9-10. A district court judge may depart from the Guidelines' prescribed sentence range only when "the court finds that there exists an aggravating or mitigating circumstance of a kind of to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2002).

<sup>98</sup>U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.10, 5H1.12.

factors relating to the defendant's non-criminal life.<sup>99</sup> These factors include age, educational and vocational skills, mental and emotional conditions, history of substance abuse, employment record, family or community ties, socioeconomic status, and lack of guidance as a youth.<sup>100</sup> Because a judge could consider facts such as those listed above in only limited circumstances, the *person* on trial became obscured by a web of Guideline provisions. Judges had to set aside their discretion and mechanically calculate sentences on a grid.

In 2003, Congress further limited judicial discretion in sentencing by passage of the Feeney Amendment, which restricts judges' downward departure power.<sup>101</sup> Pursuant to the Feeney Amendment, district court judges must justify their departure decisions in written statements,<sup>102</sup> and appellate courts must engage in *de novo* review of departures.<sup>103</sup> Naturally, district court judges have responded to the Amendment by regarding it as an unwarranted seizure of their ebbing discretion.<sup>104</sup>

On the whole, the Guidelines limit judges' ability to rely on their experience. While uniformity and proportionality are certainly desirable, pursuit of those goals should not exclude individualized justice. Professor Steven Chanenson eloquently stated "sentencing systems should have a normative goal of striving for equilibrium between uniformity and individualization in such a way that is likely to yield a fair and just result. Judges need the ability to genuinely consider 'all ethically relevant differences between cases.'"<sup>105</sup> Unlike Congress and the United States Sentencing Commission, district court judges interact with the defendant and therefore have a greater understanding of the human realities of sentencing.<sup>106</sup> Judges are situated to "bring humanity to the project of sentencing,"<sup>107</sup> and mandatory binding Guidelines intrude upon judges' capacity to do so.

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<sup>99</sup>*Id.* §§ 5H1.1-5H1.6, 5H1.10, 5H1.12.

<sup>100</sup>*Id.*

<sup>101</sup>The Feeney Amendment is contained in the Prosecutorial Remedies and Other Tools Against the Exploitation of Children Today Act (PROTECT Act). Pub. L. No. 108-21, 117 Stat. 650 (2003). The Feeney Amendment is located at 117 Stat. 667.

<sup>102</sup>"The court . . . shall state . . . the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment." 18 U.S.C. 3553(c)(2); *see also* Michael Goldsmith, *Reconsidering the Constitutionality of Federal Sentencing Guidelines After Blakely: A Former Commissioner's Perspective*, 2004 BYU L. REV. 935, 950 (2004).

<sup>103</sup>18 U.S.C.A. 3742(e) (LexisNexis 2003); *see also* Goldsmith, *supra* note 102, at 950.

<sup>104</sup>Goldsmith, *supra* note 102, at 950 ("[F]ederal judges understandably viewed it as a frontal assault on the limited sentencing discretion they retained under the Federal Sentencing Guidelines.").

<sup>105</sup>Chanenson, *supra* note 38, at 386 (quoting MICHAEL TONRY, *SENTENCING MATTERS* 195 (1996)).

<sup>106</sup>Berman, *Common Law*, *supra* note 20, at 110.

<sup>107</sup>*Id.*

## V. WHERE WE ARE TODAY

Throughout the past 12 months, federal sentencing has undergone meticulous scrutiny. Some scholars have contemplated a complete restructuring of the system's design.<sup>108</sup> The sharp rise in interest in federal sentencing is attributable to two leading cases: *Blakely v. Washington* and *United States v. Booker*.

A. *Blakely v. Washington*<sup>109</sup>

The Supreme Court's ruling in *Blakely v. Washington* regarding the state of Washington's sentencing guidelines confirmed fears that the Federal Sentencing Guidelines affront the Sixth Amendment. *Blakely* illustrates the tension among determinate sentencing systems, judicial discretion, and a defendant's right to a trial by jury. At his trial, defendant Ralph Blakely, Jr. pled guilty to kidnapping.<sup>110</sup> The facts admitted in his plea warranted a 53-month sentence.<sup>111</sup> However, the trial judge felt that Blakely had acted with "deliberate cruelty," and so the judge imposed a 90-month sentence, nearly three years beyond the prescribed penalty range.<sup>112</sup> In a 5-4 majority decision, the Court held that Blakely's exceptional sentence<sup>113</sup> violated his Sixth Amendment right to a trial by jury because the facts supporting the exceptional sentence were neither admitted by Blakely, nor found by a jury.<sup>114</sup>

*Blakely* has received extensive attention because it provided an impetus for reform of the federal sentencing system.<sup>115</sup> Some rightly suggested that *Blakely* signaled the end of the federal government's twenty-year experiment with mandatory determinate sentencing.<sup>116</sup> Judge Nancy Gertner commented that while

*Blakely* has gone a long way to make the sentencing system more fair and to reinvigorate the role of the juries in the process, it is inconceivable that the system now required by the decision is at all consistent with anything contemplated by the drafters of the Sentencing Reform Act . . . or the Guidelines.<sup>117</sup>

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<sup>108</sup>See, e.g., Mark Osler, The 3X Solution, 16 FED. SENT. R. 344 (2004); Frank Bowman, Memorandum Presenting a Proposal for Bringing the Federal Sentencing Guidelines into Conformity with *Blakely v. Washington*, 16 FED. SENT. R. 364, 365-66 (2004) [hereinafter Bowman Memo].

<sup>109</sup>124 S. Ct. 2431.

<sup>110</sup>*Id.* at 2534.

<sup>111</sup>*Id.*

<sup>112</sup>*Id.*

<sup>113</sup>An exceptional sentence is analogous to an upward departure in the federal system. Chanenson, *supra* note 38, at 404.

<sup>114</sup>*Blakely*, 124 S. Ct. at 2537.

<sup>115</sup>Douglas Berman, *Conceptualizing Blakely*, 17 FED. SENT. R. 89, 93 (2004).

<sup>116</sup>*Blakely*, 124 S. Ct. at 2543 (O'Connor, J. dissenting).

<sup>117</sup>*United States v. Muffleman*, 327 F. Supp. 2d 79, 82 (D. Mass. 2004).

Following *Blakely*, the legal community around the country entered into extensive dialogue examining whether the decision would impact the Guidelines. As academics began to predict that the *Blakely* decision would apply to the Guidelines,<sup>118</sup> nationwide commentary about restructuring the Guidelines quickly emerged.

B. United States v. Booker<sup>119</sup>

The Court's opinion in *Booker* settled the vigorous debate about whether the Sixth Amendment as construed in *Blakely* applies to the Guidelines. The Court answered in the affirmative.<sup>120</sup> In *Booker*, respondent Freddie J. Booker faced a charge of possession with intent to distribute at least 50 grams of cocaine base.<sup>121</sup> At trial, the jury found Booker guilty of possessing 92.5 grams of cocaine.<sup>122</sup> Based on the jury's finding and Booker's criminal history, the Guidelines dictated a maximum sentence of 262 months in prison.<sup>123</sup> At sentencing, however, the judge found by a preponderance of the evidence that Booker had possessed an additional 566 grams of cocaine and that he had obstructed justice by lying during his trial testimony.<sup>124</sup> The judge's findings resulted in a sentence of 360 months.<sup>125</sup> On appeal, the Seventh Circuit overturned the sentence, stating that it conflicted with *Apprendi*.<sup>126</sup>

Ducan Fanfan's case raised the same constitutional issue regarding the Guidelines as Booker's, and so the Court combined the two cases. A grand jury in Maine charged Fanfan with conspiracy to distribute at least 500 grams of cocaine, a crime that carries a penalty of five to six years in prison.<sup>127</sup> During sentencing, the judge made additional findings that required an enhanced sentence of fifteen to sixteen years.<sup>128</sup> Despite his findings, in the aftermath of *Blakely*, the judge determined that he could not enhance Fanfan's sentence based solely on judicially found facts.<sup>129</sup> To avoid potential constitutional problems, the judge imposed a sentence that did not implicate the Sixth Amendment.<sup>130</sup> After denial of its motion to

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<sup>118</sup>Professors Frank Bowman, Albert Alschuler, and Rachel Barkow were some of the leading academics to predict that *Blakely* would apply to the Guidelines.

<sup>119</sup>125 S. Ct. 738 (2005).

<sup>120</sup>*Id.*

<sup>121</sup>*Booker*, 125 S. Ct. at 746 (opinion of Stevens, J.).

<sup>122</sup>*Id.*

<sup>123</sup>*Id.*

<sup>124</sup>*Id.*

<sup>125</sup>*Id.*

<sup>126</sup>*Booker*, 125 S. Ct. at 746 (opinion of Stevens, J.).

<sup>127</sup>*Id.* at 747.

<sup>128</sup>*Id.*

<sup>129</sup>*Id.*

<sup>130</sup>*Id.*

amend Fanfan's sentence, the government filed a petition for a *writ of certiorari* before the Supreme Court and the Court granted the petition.<sup>131</sup>

The first issue the Court addressed in *Booker* was whether imposition of an enhanced sentence under the Guidelines based on the judicially found facts violates the Sixth Amendment. To begin its analysis, the Court examined whether *Blakely* applies to the Guidelines. Even though *Blakely* involved the Washington Sentencing Reform Act, Washington's sentencing guidelines and the Federal Sentencing Guidelines are indistinguishable for Sixth Amendment purposes.<sup>132</sup> In *Booker*, the government attempted to distinguish between the two systems by arguing that the "statutory maximum" for the state of Washington stemmed from Title 18 of the United States Code, while the "statutory maximum" for purposes of the Guidelines was dictated by rules created by the United States Sentencing Commission.<sup>133</sup> This argument failed for several reasons, all of which elevate substance over form. Both Washington's system and the Guidelines (prior to *Booker*) are mandatory sentencing schemes that impose binding requirements on all sentencing judges.<sup>134</sup> The fact that the Guidelines are administratively promulgated is immaterial.<sup>135</sup> In practice, Washington's sentencing system and the Guidelines serve the same purpose and do so in the same manner. They authorize judges to enact sentence enhancements based on facts neither admitted by the defendant, nor proven to a jury beyond a reasonable doubt.<sup>136</sup> Both schemes begin with a "base offense level" and "criminal history," and then they allow for sentence departures based on judicial fact-finding.<sup>137</sup> The systems permit a judge to impose a sentence above that dictated by the "base offense level" and the defendant's criminal history by finding facts proven only by a preponderance of the evidence.<sup>138</sup> All of these similarities led to the conclusion that the Sixth Amendment, as construed in *Blakely*, applies to the Guidelines.

In further examining the constitutionality of sentence enhancements based on judicial fact-finding, the Court articulated the following rationale. To begin, the Court reiterated its position in *Apprendi*: any fact, other than a prior conviction, that is necessary to support a sentence exceeding the maximum authorized by a plea of guilty or a jury verdict must be admitted by the defendant or proven to a jury beyond a reasonable doubt.<sup>139</sup> Whenever a judge assigns a sentence that takes into account facts beyond those reflected in the jury verdict or admitted by the defendant, the

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<sup>131</sup>United States v. Fanfan, 125 S. Ct. 12 (2004).

<sup>132</sup>*Booker*, 125 S. Ct. at 755 (opinion of Stevens, J.); see also *Blakely*, 124 S. Ct. at 2549 (O'Connor, J. dissenting).

<sup>133</sup>Reply Brief for Petitioner United States, *United States v. Booker*, 125 S. Ct. 738 (2005).

<sup>134</sup>*Booker*, 125 S. Ct. at 750 (opinion of Stevens, J.).

<sup>135</sup>*Id.* at 752.

<sup>136</sup>Brief of Amicus Curiae New York Council of Defense Lawyers in Support of Respondents, *United States v. Booker*, 125 S. Ct. 738 (2005) (Nos. 04-104 & 04-105), 2004 WL 2097157.

<sup>137</sup>*Id.* at \*12.

<sup>138</sup>*Id.*

<sup>139</sup>*Booker*, 125 S. Ct. at 748 (opinion of Stevens, J.).



Sixth Amendment is implicated.<sup>140</sup> This proposition applies regardless of whether the facts relevant to the sentence are labeled as “sentencing factors” or as “elements” of the crime.<sup>141</sup> Thus, the Guidelines violate the Sixth Amendment to the extent that they provide for judicial fact-finding of sentence-enhancing facts.<sup>142</sup>

Because the Court concluded that the Guidelines unconstitutionally permit a judge to find sentence-enhancing facts, the second issue in *Booker* contemplated a remedy for the violation. Justice Breyer, writing for the majority on this question, reasoned that when faced with the choice, Congress would have preferred severing the portions of the Sentencing Reform Act necessary to bring it into conformity with the Sixth Amendment rather than invalidating the Act as a whole.<sup>143</sup> Therefore, the Court excised 18 U.S.C. § 3553(b)(1), mandating that judges impose sentences within the applicable Guidelines range, and § 3742(e), which contained cross-references.<sup>144</sup> Severance of these provisions of the Act renders the Guidelines advisory.<sup>145</sup> A district court judge must “consult the Guidelines and take them into account when sentencing,” but may modify the sentence to address the unique circumstances of the case.<sup>146</sup> By making the Guidelines advisory, the Court removed the Act from the reach of the *Apprendi* jury requirement.<sup>147</sup>

In addition to transforming the Guidelines into advisory law, excision of the cited statutory provisions also altered the standard of review for sentencing appeals. Instead of engaging in de novo review, appellate courts will now review sentences for reasonableness.<sup>148</sup> Reasonableness will be determined with reference to the remaining factors set forth in 18 U.S.C. § 3553(a).<sup>149</sup> According to the Court, “[r]easonableness standards are not foreign to sentencing law. The Act has long required their use in important sentencing circumstances—both on review of departures and on review of sentences imposed where there was no applicable

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<sup>140</sup>*Id.* at 749.

<sup>141</sup>*Id.* at 748.

<sup>142</sup>*Id.* at 756.

<sup>143</sup>*Booker*, 125 S. Ct. at 759 (opinion of Breyer, J.).

<sup>144</sup>*Id.* at 756. § 3742(e) sets forth the standards of review for appeals, including de novo review of departures from the applicable Guidelines range. 18 U.S.C. § 3742(e) (2005).

<sup>145</sup>*Booker*, 125 S. Ct. at 757.

<sup>146</sup>*Id.* at 767.

<sup>147</sup>*Id.* at 764.

<sup>148</sup>*Id.* at 765.

<sup>149</sup>*Id.* at 766; *see also* 18 U.S.C. § 3553(a) (2005). The Act still requires judges to consider sentencing goals, pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims of the offense. *Id.* Furthermore, in determining a sentence, the court must consider the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; the need for the sentence imposed to afford adequate deterrence to criminal conduct; the need for the sentence imposed to protect the public from further crimes of the defendant; and the need for the sentence imposed to provide the defendant with needed educational or vocational training. *Id.* at 765.

Guideline.”<sup>150</sup> Because of these two examples, the Court claims judicial familiarity with the reasonableness standard of review.<sup>151</sup> Unlike the majority, Justice Scalia fears that review for reasonableness “will produce a discordant symphony of different standards, varying from court to court and judge to judge.”<sup>152</sup> Only time will tell how the newly imposed standard of review for sentence enhancements under the Guidelines will function in appellate courts across the country.

### C. Responses to Booker

Responses to the outcome of *Booker* have been abundant and wide-ranging. Criminal defense attorneys agree that *Booker* in no way creates a windfall for criminal defendants.<sup>153</sup> Although judges may no longer enhance sentences based on their own fact-finding, *Booker* retains the Guidelines method of evaluating facts not in evidence and proven only by a preponderance of the evidence. It remains to be seen whether the ruling will ameliorate the harshness of federal sentencing.<sup>154</sup>

Amidst the clamor following the release of the opinion, Carmen Hernandez, vice president of the National Association of Criminal Defense Lawyers, said “I don’t think the prison cells are going to be empty after today.”<sup>155</sup> Attorney Rosemary Scapicchio, counsel for Ducan Fanfan, fears that defendants who appear before sympathetic judges may fare better, while those in front of harsh judges may face sentences more severe than the Guidelines dictate.<sup>156</sup> Scapicchio told the press, “I think we’ve won the battle, [but] who wins the war remains to be seen.”<sup>157</sup> Jon Sands, chairman of the Federal Defender Guideline Committee, best captured defense attorneys’ sentiments when he called the opinion “bittersweet” because “the Sixth Amendment was vindicated, but then it was undercut again, all in one day.”<sup>158</sup>

<sup>150</sup>*Booker*, 125 S. Ct. at 766. (citations omitted). See 18 U.S.C. § 3742 (e)(3)(1994 ed.); 18 U.S.C. §§ 3742(a)(4), (b)(4), (e)(4) (Supp. 2004).

<sup>151</sup>*Booker*, 125 S. Ct. at 766.

<sup>152</sup>*Id.* at 795 (Scalia, J. dissenting).

<sup>153</sup>See, e.g., Shelley Murphy, *Two Boston Jurists Hail Return of Discretion*, BOSTON GLOBE, Jan 13, 2005, at A20 (statement of Rosemary Scapicchio) (“I think we’ve won the battle, and whoever wins the war remains to be seen.”); Jeff Zent, *Ruling Has F-M Law Field Buzzing*, THE FORUM OF FARGO, Jan 15, 2005 (statement of Drew Wrigley) (“Felons shouldn’t expect shorter sentences because of the ruling. Nor will prisoners systematically get their sentences reduced on appeal.”).

<sup>154</sup>Cindy Culp & Tommy Witherspoon, *Area Well Poised in Wake of Supreme Court Sentencing Decision*, WACO-TRIBUNE HERALD, Jan.12, 2005, at A1.

<sup>155</sup>Luiza Savage, *Chaos Ahead After Sentencing Guidelines Decision*, N.Y. SUN, Jan. 13, 2005, at 1. The National Association of Criminal Defense Lawyers (NACDL) is a professional bar association with over 11,000 direct members and considerably more affiliate members. This national organization is the leading voice in furthering the goals of criminal defense lawyers. The NACDL filed amicus curiae briefs in *Blakely* and *Booker*.

<sup>156</sup>Charlie Savage, *High Court Overturns Sentencing Guidelines*, BOSTON GLOBE, Jan. 13, 2005, at A1.

<sup>157</sup>Murphy, *supra* note 153.

<sup>158</sup>Telephone Interview by Mary Price, Families Against Mandatory Minimum, with Jon Sands (Jan. 12, 2005) (on file with author).

Naturally, prosecutors have responded differently to the *Booker* outcome. Christopher Wray, Assistant Attorney General, explained that government officials were pleased that the Court did not strike down the Guidelines, but also disappointed that the Guidelines are no longer mandatory and binding on district court judges.<sup>159</sup> Now that the Guidelines have been deemed advisory, concern has spread that sentences across the country will become inconsistent and unpredictable.<sup>160</sup> Because the Department of Justice believes that the Guidelines produce fair and uniform sentences, it has urged federal prosecutors to “take all steps necessary to ensure adherence to the Sentencing Guidelines.”<sup>161</sup> In a recent policy memorandum, James Comey, Deputy Attorney General, instructed prosecutors to do the following: to continue to charge and pursue the most serious readily provable offenses, to seek sentences pursuant to the Guidelines in all but the most extreme cases, to oppose all sentences below the Guidelines range, and to adhere closely to the reporting requirements set forth in the United States Attorney’s Manual relating to unfavorable decisions.<sup>162</sup> In the aftermath of *Booker*, the Department of Justice is fighting to preserve adherence to the Guidelines.

Judges have generally embraced *Booker* because they are no longer constrained by the Guidelines, and they may impose sentences they believe to be more fitting. Although judges must continue to calculate sentences pursuant to the Guidelines and comply with the factors set forth in 18 U.S.C. §3553(a), judges have gained considerable discretion because they may decide whether to impose Guidelines sentences or modified penalties.<sup>163</sup> Following *Booker*, a district court judge praised the fact that “the ruling gives judges the discretion to sentence the individual and not just the crime.”<sup>164</sup> Judge Nancy Gertner explained that she welcomes the decision because “so many times [she] found [her]self in a situation where the Guideline sentence made no sense in light of the facts.”<sup>165</sup> *Booker* allows federal judges to

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<sup>159</sup>Stephen Henderson, *Supreme Court Says Judges Not Bound by Sentencing Guidelines*, KNIGHT RIDDER NEWSPAPERS, Jan. 13, 2005.

<sup>160</sup>*Id.*

<sup>161</sup>Memorandum from James Comey, Deputy Attorney General, to all federal prosecutors, Department Policies and Procedures Concerning Sentencing, Jan. 28, 2005 [hereinafter Memorandum from James Comey]. Interestingly, in its *Booker* briefs, the DOJ endorsed advisory Guidelines in the event that the Court found *Blakely* applicable to the federal system. Reply Brief for the United States, *United States v. Booker*, 125 S. Ct. 738 (2005) (Nos. 04-104 & 04-105), 2004 WL 1732451 at \*9.

<sup>162</sup>Memorandum from James Comey, *supra* note 161. In order to aid prosecutors in adhering to reporting requirements, the Executive Office for United States Attorneys has distributed a form entitled “Booker Sentencing Report Form,” which replaces the “Blakely Sentencing Report Form” but not the “Standard Form for Reporting Adverse District Court Sentencing Guidelines Decisions.”

<sup>163</sup>*Booker*, 125 S. Ct. at 756 (opinion of Breyer, J.).

<sup>164</sup>Henry Weinstein & David Rosenzweig, *How Judges Will Use Discretion Is the Big Question*, LOS ANGELES TIMES, Jan. 13, 2005, at A24 (citing Judge Dickran Tevzian).

<sup>165</sup>Murphy, *supra* note 153.

escape the straightjacket created by the Guidelines. What has yet to be determined is how these same judges will exercise their regained sentencing discretion.<sup>166</sup>

## VI. PROPOSALS FOR LEGISLATIVE REFORM OF THE GUIDELINES

While the Guidelines currently function in an advisory capacity, observers expect Congress to enact legislation reverting the Guidelines back into a mandatory system, but one that honors the mandates of the Sixth Amendment. For this reason *Booker* has reinvigorated discussions about meaningful sentencing reform. A sense of opportunity pervades the criminal justice forum. Barry Scheck, president of the National Association of Criminal Defense Lawyers, remarked that “[t]his opportunity must not be squandered. Congress must not react with a ‘quick fix’ and miss a chance to solve a lingering and serious national problem.”<sup>167</sup> Instead, Congress must engage in extensive deliberation about the merits of various proposals to amend the Guidelines. One cannot help being reminded of the sentencing reform movement that emerged in the 1970s as the Guidelines took shape.<sup>168</sup> Once again, our criminal justice system finds itself on the brink of something new.

### A. *The Bowman Proposal*

#### 1. Description

The Bowman proposal, which is supported by the Department of Justice, is one of the leading proposals harmonizing the Guidelines with *Booker*.<sup>169</sup> This proposal

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<sup>166</sup>Extreme views have emerged on how much weight to give to advisory Guidelines. At one end of the spectrum is the view espoused by Utah District Court Judge Paul Cassell who treats the Guidelines as essentially mandatory. Just days after *Booker* Judge Cassell issued an opinion in which he stated “the Guidelines are the only standard available to all judges around the country today. For that reason alone the Guidelines should be followed in all but the most exceptional cases. . . . [T]he court [should] give heavy weight to the recommended Guidelines sentence in determining what sentence is appropriate.” *United State v. Wilson* 350 F. Supp. 2d 910, (D. Utah 2005). Clearly, this position discourages judges from exercising their discretion and instead promotes mechanical adherence to the Guidelines.

At the other end of the spectrum lies Wisconsin District Court Judge Lynn Adelman, who regards the Guidelines as far more advisory. Judge Adelman agrees that judges must seriously consider the Guidelines, but she believes that “courts are free to disagree, in individual cases and in the exercise of discretion, with the actual range proposed by the Guidelines, so long as the ultimate sentence is reasonable and carefully supported by reasons tied to the [28 U.S.C.] § 3553(a) factors.” *United States v. Ranum*, 2005 353 F. Supp. 2d. 984 (E.D. Wis. 2005). Unlike Judge Cassell, Judge Adelman urges judges to consider all the unique circumstances surrounding particular defendants, and thus to sentence defendants as individuals.

<sup>167</sup>Jerry Seper, *High Court Voids “Mandatory” Sentencing*, WASH. TIMES, Jan. 13, 2005, at A01.

<sup>168</sup>*See, e.g.*, Marvin Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

<sup>169</sup>Bowman Memo, *supra* note 108; *see also Blakely v. Washington* and the Future of the Federal Sentencing Guidelines: Hearing Before the Senate Comm. on the Judiciary, 108th Cong. (2004) (testimony of Frank Bowman) [hereinafter *Bowman Speech*], available at [http://judiciary.senate.gov/testimony.cfm?id=1260&wit\\_id=647](http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=647) (last visited Feb. 17, 2005).

has been named after its creator, Professor Frank Bowman.<sup>170</sup> The Bowman proposal preserves the basic structure of the Guidelines, but raises the top of each Guideline range to the statutory maximum set forth in the federal criminal code for the crime(s) of conviction.<sup>171</sup> As a consequence of raising the sentencing ranges, a judge may make post-conviction findings of fact without having to involve the jury since the findings will not increase the sentence beyond the statutory maximum.<sup>172</sup> In effect, this plan transforms the Guidelines into a system of mandatory minimum sentences.<sup>173</sup> The Guidelines will operate just as they previously did, except that the sentencing range created by the Guidelines will retain the same minimum value, while the range maximum will mirror the statutory maximum.<sup>174</sup> The primary appeal of this plan lies with the fact that it does not require significant alterations to existing pleading requirements or trial procedures.<sup>175</sup> It brings the Guidelines into accord with *Blakely* without significantly changing their structure. Interestingly, both the attractiveness and the weakness of the Bowman proposal relates to the fact that it leaves the Guidelines virtually unchanged.

## 2. Why Congress Should Reject this Plan

Without question, the Bowman proposal resolves constitutional concerns about the role of the jury in the application of the Guidelines; nonetheless, the plan remains undesirable and Congress should not adopt it as a long-term legislative solution. The Bowman proposal creates a loophole that allows for the exclusion of the jury.<sup>176</sup> Shrewd legislative design enables this plan to evade the mandates of the Sixth

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<sup>170</sup>Professor Bowman is M. Dale Professor of Law at Indiana University School of Law. He is a former prosecutor, and worked as a trial attorney for the U.S. Department of Justice (1979-82). Professor Bowman also served as Special Counsel to the United States Sentencing Commission (1995-96). On February 10, 2005 Professor Bowman testified before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary. Ironically, at the hearing he repudiated his own reform proposal. He said:

Today, in the wake of *Booker*, I find myself in the curious position of recommending that Congress not do what I recommended that it should do after *Blakely*. In short . . . I urge Congress to be cautious, to monitor the effects of the *Booker* decision on the operation of federal sentencing, and not to legislate unless and until it is clear that legislation is absolutely necessary.

Testimony of Frank Bowman to Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, United States House of Representatives (Feb. 10, 2005) [hereinafter Bowman Subcommittee on Crime Testimony], available at <http://judiciary.house.gov/media/pdfs/Bowman021005.pdf> (last visited Feb. 17, 2005).

<sup>171</sup>Bowman Memo, *supra* note 108.

<sup>172</sup>*Id.*

<sup>173</sup>Frank Bowman, *Train Wreck? Or Can the Federal Sentencing System be Saved?*, 41 AM. CRIM. L. REV. 217, 262 (2004).

<sup>174</sup>Bowman Subcommittee on Crime Testimony, *supra* note 170.

<sup>175</sup>Bowman Speech, *supra* note 169. One modification of the plan would necessitate, however, is an amendment to the “25% Rule.” See *infra* note 183.

<sup>176</sup>Barkow Speech, *supra* note 14.

Amendment.<sup>177</sup> Under the Bowman proposal, a judge can bypass the jury because no matter how much he increases a defendant's sentence, the penalty will not exceed the statutory maximum.<sup>178</sup> In *Apprendi*, the Court clearly explained that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."<sup>179</sup> Because Congress has the duty to uphold and honor the Constitution,<sup>180</sup> Congress cannot legitimately adopt the Bowman proposal—to do so would repudiate *Booker* and the Sixth Amendment.

The fact that the Bowman proposal creates unduly broad sentencing ranges further undermines its ability to provide effective sentencing reform.<sup>181</sup> Raising the top of each sentencing range to the maximum penalty set forth in the United States Code will produce sentence ranges that exceed twenty years in some instances.<sup>182</sup> Creation of broad sentencing ranges ignores the purpose of the 25% Rule, which narrowed sentencing ranges because people regarded existing ranges as excessively broad and as a factor contributing to sentencing disparity.<sup>183</sup> Furthermore, while broad sentencing ranges theoretically permit judges to exercise greater discretion in sentencing, this argument lacks merit because judicial discretion will remain fettered by mandatory minimum sentences.<sup>184</sup> Unresolved tension among the Bowman proposal's wide sentencing ranges, the 25% Rule, and appropriate judicial discretion indicates the need for a more workable determinate sentencing scheme.<sup>185</sup>

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<sup>177</sup>*Id.*; see also Letter from E.E. Edwards, President, and Barry Scheck, President-Elect, National Association of Criminal Defense Lawyers, to Senators Orrin Hatch and Patrick Leahy (July, 12, 2004) (on file with author) [hereinafter NACDL Letter].

<sup>178</sup>Barkow Speech, *supra* note 14.

<sup>179</sup>*Id.* (quoting *Apprendi*, 530 U.S. at 490).

<sup>180</sup>U.S. CONST. art. VI, § 1, cl. 3.

<sup>181</sup>Michael Goldsmith, Remarks Before the United States Sentencing Commission 1 (Nov. 16, 2004), available at [http://www.ussc.gov/hearings/11\\_16\\_04/goldsmith.pdf](http://www.ussc.gov/hearings/11_16_04/goldsmith.pdf) (last visited Feb. 17, 2005).

<sup>182</sup>*Id.*

<sup>183</sup>The 25% Rule states that the maximum sentence for each range cannot exceed the minimum sentence by more than six months or 25%, whichever is greater. 28 U.S.C. § 994(b)(2) (2004). This rule resulted in the creation of forty-three offense levels on the federal Sentencing Table.

<sup>184</sup>Barkow Speech, *supra* note 14.

<sup>185</sup>Report on Advisory Federal Sentencing Guidelines, Jan. 2005 A.B.A. SEC. PUB. CRIM. JUST. at 8, available at <http://www.abanet.org/crimjust/policy/my05301.pdf> [hereinafter ABA Report]. The American Bar Association recognizes the tension to which I alluded. As a remedial measure, the ABA has urged Congress to repeal the 25% Rule. *Id.* at 1. In its place, the ABA recommends an altered sentencing table consisting of ten offense levels instead of forty-three. The levels are as follows: 1.) 0 - 1 year, 2.) 1 - 2 years, 3.) 2 - 3 years, 4.) 3 - 4.5 years, 5.) 4.5 - 6.75 years, 7.) 10 - 15 years, 8.) 15 - 22.5 years, 9.) 22.5 - 30 years, 10.) 30 years - life. *Id.* at 11.

Another reason why Congress must refuse to enact the Bowman proposal relates to the precarious fate of *Harris v. United States*.<sup>186</sup> The viability of the Bowman proposal depends on *Harris* remaining good law, which is questionable. Only by a plurality did *Harris* uphold mandatory minimum sentences against *Apprendi* challenges. Justice Breyer concurred in the *Harris* judgment simply because he disagreed with the majority in *Apprendi* and could not accept its rule.<sup>187</sup> Now that the Court has applied *Apprendi* and *Blakely* to the Guidelines, the logic of *Harris* has grown suspect and the possibility lingers that Justice Breyer may change his vote if faced with a mandatory minimum issue again.<sup>188</sup> As long as speculation surrounds the future of *Harris*, Congress should not implement a legislative plan that has the potential to become unconstitutional.

Lastly, Congress must not adopt the Bowman proposal because it embodies an unbalanced approach to sentencing. The Bowman proposal lacks symmetry insofar as it allows for discretionary upward departures without providing for similar downward departures.<sup>189</sup> Guidelines restrictions will continue to control mitigating departures, but no similar restrictions will regulate aggravating departures.<sup>190</sup> In effect, the Bowman proposal shifts the balance of a system designed to operate as a unified whole. According to Utah District Court Judge Paul Cassell, the Guidelines are a “holistic system, calibrated to produce a fair sentence by a series of both upward and downward adjustments.”<sup>191</sup> Judge Cassell warns that federal sentences will grow increasingly severe if Congress enacts a sentencing plan that considers “only one half of the equation.”<sup>192</sup> The American Bar Association criticizes the Bowman plan for implicitly sending the message to the legal community that so long

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<sup>186</sup>Letter from Susan Klein, Professor of Law, to United States Sentencing Commission (Nov. 12, 2004) (on file with author), available at [http://www.ussc.gov/hearings/11\\_16\\_04/klein.pdf](http://www.ussc.gov/hearings/11_16_04/klein.pdf); see Testimony of Carmen Hernandez, Nat’l Ass’n of Criminal Def. Lawyers, to the United States Sentencing Commission 7 (Nov. 16, 2004), available at [http://www.ussc.gov/hearings/11\\_16\\_04/hernandez.pdf](http://www.ussc.gov/hearings/11_16_04/hernandez.pdf) [hereinafter Hernandez Testimony]; Barkow Speech, *supra* note 14.

<sup>187</sup>*Harris v. United States*, 536 U.S. 545, 569. In *Harris*, Justice Breyer stated as follows: I cannot easily distinguish *Apprendi v. New Jersey* from this case in terms of logic. For that reason, I cannot agree with the plurality’s opinion insofar as it finds such a distinction. At the same time, I continue to believe that the Sixth Amendment permits judges to apply sentencing factors—whether those factors lead to a sentence beyond the statutory maximum (as in *Apprendi*) or the application of a mandatory minimum (as here). And because I believe that extending *Apprendi* to mandatory minimums would have adverse practical, as well as legal, consequences, I cannot yet accept its rule.

*Id.* (Breyer, J. concurring in part, and concurring in the judgment).

<sup>188</sup>ABA Report, *supra* note 185, at 8.

<sup>189</sup>Sands Letter, *supra* note 33.

<sup>190</sup>See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 5K2.0; see also Chanenson, *supra* note 38, at 422

<sup>191</sup>*United States v. Croxford*, 324 F. Supp. 2d. 1230, 1245 (C.D. Utah 2004)(quoted in Barkow Speech, *supra* note 14).

<sup>192</sup>*Id.*

as criminal punishments do not become too lenient, no cause for concern exists.<sup>193</sup> Ultimately, raising the top of each sentencing range constitutes an asymmetric exploitation of the Guidelines and this manifest misuse brands the Bowman proposal highly objectionable.

Extensive examination of the Bowman proposal reveals its unattractiveness as a legislative response to amend the Guidelines. Congress must refrain from adopting this plan for sentencing reform. The Bowman proposal eludes the directives of the Sixth Amendment and does little to address policy-based sentencing concerns. Regrettably, the Bowman proposal adopts a backdoor approach to *Booker*-based sentencing reform and does little more than employ clever language to manipulate the Guidelines.

### B. The Kansas System

#### 1. Description

Another leading plan to harmonize the Guidelines with *Booker* is the Kansas System. This proposal has been named the “Kansas System” in reference to the system currently used in Kansas.<sup>194</sup> The Kansas System, widely supported by the defense bar,<sup>195</sup> provides for bifurcated sentencing. Bifurcated sentencing consists of an initial hearing to determine guilt, followed by a second hearing to decide on the existence of sentencing factors triggering a sentence beyond the range ordered by the Guidelines.<sup>196</sup> A jury must find all facts essential to the sentence beyond a reasonable doubt.<sup>197</sup>

The Kansas System emerged following *State v. Gould*,<sup>198</sup> a case in which the Kansas Supreme Court held that the state’s determinate sentencing scheme for upward departures violated the Sixth Amendment.<sup>199</sup> After *Gould*, the state legislature codified the language of *Apprendi* so that the pertinent Kansas sentencing statute reads as follows: “Any fact that would increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, shall be submitted to a jury and proved beyond a reasonable doubt.”<sup>200</sup> Pursuant to the statute, to seek an

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<sup>193</sup> ABA Report, *supra* note 181, at 8-9.

<sup>194</sup> See KAN. STAT. ANN. § 21-4716 (Supp. 2003).

<sup>195</sup> See, e.g., Sands Letter, *supra* note 33. In his majority opinion in *Blakely*, Justice Scalia mentioned the Kansas System as a plausible option for federal sentencing. *Blakely*, 124 S. Ct. at 2541.

<sup>196</sup> Steven G. Kalar et al., *A Blakely Primer: An End to the Federal Sentencing Guidelines?*, 28 CHAMPION 10, 14 (2004).

<sup>197</sup> KAN. STAT. ANN. § 21-4716(b) (Supp. 2003).

<sup>198</sup> *State v. Gould*, 23 P.3d 801 (Kan. 2001).

<sup>199</sup> *Id.* at 814. In this case, defendant Crystal Gould was convicted of three counts of child abuse, each count subject to a sentence of between 31 and 34 months. *Id.* The prosecution filed a motion for an upward departure, and the court granted the motion, citing the existence of three aggravating factors. *Id.* As a result of these factors, Gould received a sentence of 68 months for two of the three counts. *Id.*

<sup>200</sup> KAN. STAT. ANN. § 21-4716(b) (Supp. 2003).



upward sentence departure, the state must file a motion thirty days prior to the start of the trial.<sup>201</sup> The trial court may permit a jury to decide on the existence of aggravating factors during the guilt phase or during a separate sentencing hearing.<sup>202</sup> Only if the jury unanimously finds the existence of aggravating factors may the trial judge impose an enhanced sentence.<sup>203</sup> Clearly, the Kansas System solves the Sixth Amendment violation created by the pre-*Booker* Guidelines.

## 2. Unpersuasive Criticisms

The most common criticism of the Kansas System relates to the administrative burdens created by bifurcation.<sup>204</sup> This argument remains unpersuasive because federal cases tend to involve only a limited number of enhancements.<sup>205</sup> For example, a typical drug offense sentence pursuant to United States Sentencing Guidelines §2D1.1 does not involve findings other than the quantity of drugs implicated.<sup>206</sup> Weapon possession is the second most common enhancement factor, and this issue arises in only 13% of drug cases.<sup>207</sup> In terms of the various Chapter Three enhancements, application notes serve as an illustrative source for model jury instructions.<sup>208</sup> Furthermore, these enhancements occur in only a limited number of cases.<sup>209</sup> “Aggravating role,” the most common Chapter Three enhancement, arises in only 5.6% of all cases. According to the Sentencing Commission’s 2002 Sourcebook, other Chapter Three enhancements take place in a mere 1% of cases.<sup>210</sup> These statistics plainly indicate that enhancements that may implicate bifurcation do not occur with great frequency; thus, it appears unlikely that bifurcated sentencing will inundate and slow the federal criminal justice system.

The language of *Blakely* further discounts efficiency criticisms. *Blakely* clearly asserts that administrative concerns relating to the length and complexity of trials

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<sup>201</sup>KAN. STAT. ANN. § 21-4718(b)(1) (Supp. 2003).

<sup>202</sup>KAN. STAT. ANN. § 21-4716(b)(2), (3) (Supp. 2003).

<sup>203</sup>KAN. STAT. ANN. § 21-4716(b)(7) (Supp. 2003).

<sup>204</sup>*See, e.g.*, Testimony of Stephanos Bibas to United States Sentencing Commission 7-8 (Nov. 16, 2004) (describing bifurcation as “cumbersome and very expensive”), available at [http://www.ussc.gov/hearings/11\\_16\\_04/Bibas.pdf](http://www.ussc.gov/hearings/11_16_04/Bibas.pdf) (last visited Feb. 17, 2005).

<sup>205</sup>Hernandez Testimony, *supra* note 186, at 5.

<sup>206</sup>*Id.* at 6 (citing United States Sentencing Commission, Sourcebook of Federal Sentencing Statistics (2002)).

<sup>207</sup>*Id.*

<sup>208</sup>Sands Letter, *supra* note 31. The following list includes the frequency of other Chapter Three enhancements: Vulnerable Victim — 0.4%, Official Victim — 0.3%, Terrorism — <0.1%, Abuse of Position of Trust — 2.2%, Obstruction of Justice — 3.4%, Hate Crime — <0.1%, Restraint of Victim — 0.2%, Use of a Minor — 0.8%, Reckless Endangerment — 0.3%. UNITED STATES SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2002), available at <http://www.ussc.gov/ANNRPT/2002/SBTOC02.htm>.

<sup>209</sup>UNITED STATES SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2002).

<sup>210</sup>*Id.*; see also Sands Letter, *supra* note 33; Hernandez Testimony, *supra* note 186, at 6.

may not infringe upon a defendant's Sixth Amendment right.<sup>211</sup> Justice Scalia emphasized that "decision[s] cannot turn on whether or to what degree trial by jury impairs the efficiency . . . of criminal justice."<sup>212</sup> A defendant's jury trial rights cannot be sacrificed to achieve "administrative perfection."<sup>213</sup>

Opponents of the Kansas System also claim that the complexity of the Guidelines renders them incompatible with bifurcation. This argument fails for two reasons. First, bifurcation already takes place in arguably some of the most difficult criminal cases—capital cases.<sup>214</sup> Under the Federal Death Penalty Act, capital juries must determine the presence of aggravating and mitigating factors before deciding if the aggravating factors "sufficiently outweigh" the mitigating factors so as to "justify a sentence of death."<sup>215</sup> A second point belying the amenability argument comes from the Department of Justice's charging policies after *Blakely*.<sup>216</sup> In a July 2, 2004 memorandum to federal prosecutors, Deputy Attorney General James Comey instructed prosecutors "to include in indictments all readily provable Guidelines upward adjustments and upward departure factors."<sup>217</sup> This directive makes clear the ability of prosecutors to adapt to bifurcated sentencing proceedings. The Guidelines and bifurcation can be successfully intermingled.

### 3. Why Congress Should Reject This Plan

Despite the fact that efficiency and complexity-based criticisms of the Kansas System are not compelling, several reasons lend support the proposition that Congress should not adopt the proposal. A principal failing of the Kansas System is its tendency to distort the sentencing process as a whole. By codifying the formalistic requirement that a jury find all facts related to an enhanced sentence, the Kansas System removes the judge from sentencing.<sup>218</sup> Only a jury may engage in fact-finding, and after a jury finds facts, a judge is constrained to sentence within the range provided by the Guidelines.<sup>219</sup> In effect, the Kansas System would transform the federal system into jury sentencing, as opposed to judicial sentencing. Moreover, the plan skews the Guidelines by limiting a judge's ability to depart in the presence or absence of facts found by a jury.<sup>220</sup> The ability for a judge to depart from the Guidelines is critical in light of the Sentencing Commission's inability to take into

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<sup>211</sup>*Blakely*, 124 S. Ct. at 2543.

<sup>212</sup>*Id.*

<sup>213</sup>*Id.*

<sup>214</sup>NACDL Letter, *supra* note 177.

<sup>215</sup>18 U.S.C.A. § 3593(c)-(e) (West Supp. 2005).

<sup>216</sup>NACDL Letter, *supra* note 177.

<sup>217</sup>Letter from James Comey, Deputy Attorney General, to All Federal Prosecutors (July 2, 2004), 16 FED. SENT. R. 357 (2004).

<sup>218</sup>Telephone Interview by Mary Price, Families Against Mandatory Minimums, with Frank Bowman, Professor of Law, Moritz College of Law at Ohio State Univ. (Jan. 12, 2005) (on file with author).

<sup>219</sup>*Id.*

<sup>220</sup>Chanenson, *supra* note 38, at 422.

account every possible factor relevant to criminal sentencing.<sup>221</sup> Judges must be able to depart in order to implement individualized justice when appropriate. Lastly, the Kansas System alters the balance of Guidelines sentencing by placing restrictions on upward departures, but not on downward departures.<sup>222</sup> When judges may exercise only a narrow degree of discretion, unwarranted sentencing leniency or severity becomes a very real possibility and individualized justice may be sacrificed.<sup>223</sup>

Another basis for opposition to the Kansas System relates to the uncomplicated manner by which judges can bypass juries to impose longer sentences. The primary appeal of the Kansas System—that a judge may only impose an enhanced sentence based on jury findings—is undermined by the fact that current procedural rules permit judges to impose longer sentences simply by ordering sentences to run consecutively as opposed to concurrently.<sup>224</sup> A consecutive sentence is the functional equivalent of an enhanced sentence because in either situation the defendant faces a longer punishment. By imposing a consecutive sentence on a defendant convicted of multiple counts, a trial judge can circumvent the jury and bifurcation.<sup>225</sup> Besides manipulating the system to exclude the jury, the practice of enhancing sentences by imposing consecutive sentences is undesirable because it shields a sentence from appellate review since the sentence will technically lie within the Guidelines range.<sup>226</sup>

Admittedly, judges could engage in such a practice prior to *Apprendi*; yet, the heightened administrative requirements of the Kansas System create greater temptation to do so. Courts have not been inclined to reprimand judges for bypassing juries, as demonstrated by *State v. Bramlett*.<sup>227</sup> In *Bramlett*, the Kansas Supreme Court rejected the defendant's claim that the trial judge improperly avoided *Apprendi*-based jury fact-finding by imposing consecutive sentences.<sup>228</sup> Thus far, courts have chosen form over function, a fact that should deter Congress from adopting the Kansas System.

On the whole, the Kansas System distorts Guidelines sentencing and fails to establish a proper degree of judicial discretion. Judge Paul Cassell's statement again comes to mind: the Guidelines function as a "holistic system, calibrated to produce a

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<sup>221</sup>*Id.*

<sup>222</sup>*Id.* at 423.

<sup>223</sup>Once a jury has found certain facts and essentially approved an enhanced sentence, Professor Chanenson noted "it is asking a great deal of any judge . . . to exercise her discretion and deny that departure. No doubt judges denied these kinds of upward departures regularly under the previous system despite the existence of judicially found facts, but in that system, the judge was in control of the entire process." This observation supports the claim that sentences may grow increasingly severe under the Kansas System. Chanenson, *supra* note 38, at 425.

<sup>224</sup>Chanenson, *supra* note 38, at 428.

<sup>225</sup>*Id.*

<sup>226</sup>*Id.* at 429.

<sup>227</sup>41 P.3d 796 (Kan. 2002) (cited by Chanenson, *supra* note 38, at 428).

<sup>228</sup>*Bramlett*, 41 P.3d at 797.

fair sentence by a series of both upward and downward adjustments.”<sup>229</sup> The distortion created by the Kansas System permits too much judicial discretion in some instances and too little in others. Bifurcation creates additional administrative requirements while also lending itself to manipulation by the various actors involved. In his remedial opinion in *Booker*, Justice Breyer chose not to adopt bifurcation,<sup>230</sup> and Congress must as well.

### C. Advisory Guidelines

“Crafting a measured and appropriate response to *Blakely* [and *Booker*] calls for studied deliberation, not hasty action.”<sup>231</sup> The Guidelines have been functioning in an advisory capacity for only a brief period of time.<sup>232</sup> Despite predictions of tremendous disruption and turmoil in the event that the Court found the Guidelines to violate the Constitution,<sup>233</sup> the federal system has been carefully adapting to the new sentencing landscape created by *Booker*. Most certainly, judges have struggled to interpret and apply *Booker* at this watershed moment in criminal law, but predictions of insurmountable upheaval have largely proved superfluous. For this reason, Congress must refrain from taking premature legislative action.

#### 1. The Need to Collect Data

The most appropriate congressional response to *Booker* is an investigation of the efficacy of advisory Guidelines. *Booker* created “a workable system whose strengths and weaknesses have yet to be determined.”<sup>234</sup> Although application of *Booker* is rapidly unfolding in district courts around the country, the exact implications of the case have yet to be determined.<sup>235</sup> For example, judges have demonstrated various interpretations of just how “advisory” the Guidelines are.<sup>236</sup> Furthermore, precisely because *Booker* casts a shadow on 20 years of calculated sentencing reform, Congress must avoid rushing to enact new legislation. Congress must ensure that whatever plan it adopts, the system will survive constitutional challenge.<sup>237</sup> The American Bar Association recommends that Congress not reject advisory Guidelines until it appears essential and advantageous to do so.<sup>238</sup> At this point in time, it

<sup>229</sup>*Croxford*, 2004 U.S. Dist. LEXIS 12156, at \*10.

<sup>230</sup>*Booker*, 125 S. Ct. at 759-64 (opinion of Breyer, J.).

<sup>231</sup>Go Slow: A Recommendation for Responding to *Blakely v. Washington* in the Federal System, 108th Cong., at 2 (2004) (written testimony of Douglas Berman, Marc Miller, Nora Demleitner, and Ronald Wright) (on file with author).

<sup>232</sup>The Guidelines became advisory on January 12, 2005, the day the Court released *Booker*.

<sup>233</sup>*See, e.g., Blakely*, 124 S. Ct. at 2543 (O’Connor, J. dissenting). In his remedial dissent in *Booker*, Justice Scalia referred to the majority’s remedy as a “Wonderland.” *Booker*, 125 S. Ct. at 793 (Scalia, J., dissenting).

<sup>234</sup>Bowman Subcommittee on Crime Testimony, *supra* note 170.

<sup>235</sup>*Id.*

<sup>236</sup>*See supra* text accompanying note 166.

<sup>237</sup>*Id.*

remains unknown whether advisory Guidelines will produce results contrary to the goals of the Sentencing Reform Act of 1984, including unwarranted sentencing disparity. Therefore, until advisory Guidelines show signs of potentially jeopardizing the objectives of the Act, swift legislative action need not occur.

Mechanisms exist to assist Congress in the collection of reliable sentencing data in order to evaluate the effectiveness of advisory Guidelines. To begin, the *Booker* remedial majority emphasized the continuing role of the United States Sentencing Commission.<sup>239</sup> A day after the release of *Booker*, Commission Chair Judge Ricardo Hinojosa issued a statement acknowledging the call of *Booker* and noting that “the Commission will work with Congress, members of the federal judiciary’s Committee on Criminal Law, the Department of Justice, the defense bar . . . and other interested individuals to ensure that we have a fair and just sentencing system within the bounds of our Constitution.”<sup>240</sup> The Commission is properly situated to develop detailed information about post-*Booker* sentencing world.

Several statutory reporting requirements will aid the Commission and Congress in the collection of sentencing data to determine the impact of advisory Guidelines. *Booker* did not affect the Feeney Amendment, which requires a judge who prescribes a sentence outside of the Guidelines range to explain his reasons in writing “with specificity.”<sup>241</sup> Also, the reporting requirements of 28 U.S.C. § 994(w) remain unchanged.<sup>242</sup> This statute requires the Chief Judge of every district to submit a report to the Commission within thirty days of judgment.<sup>243</sup> The report must include five specific sentencing documents: (1) the judgment and commitment order, (2) the statement of reasons, (3) any plea agreement, (3) the indictment or other charging document, and (3) the presentence report.<sup>244</sup> Information collected by means of statutory reporting requirements will help uncover the problems inherent in advisory sentencing. Only after data has been collected can Congress effectively address the weaknesses of advisory sentencing and work to improve and simplify the system. Simplified Guidelines will undoubtedly garner support from all actors involved in the administration of criminal justice.

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<sup>238</sup>See ABA Report, *supra* note 185.

<sup>239</sup>*Booker*, 125 S. Ct. at 766 (opinion of Breyer, J.).

<sup>240</sup>Press Release, United States Sentencing Commission, U.S. Sentencing Commission Chair Comments on High Court Ruling (Jan. 13, 2005), *available at* <http://www.ussc.gov/PRESS/rel011305.htm> (last visited Feb. 17, 2005).

<sup>241</sup>18 U.S.C. § 3553(c) (2004), quoted in ABA Report, *supra* note 185.

<sup>242</sup>28 U.S.C. § 994(w) (2004), noted in Memorandum from Ricardo Hinojosa and Sim Lake, to Chief Judges, United States Courts of Appeals; Judges, United States District Courts; United State Magistrate Judges; Circuit Court Executives; District Court Executives; Clerks, United States Courts of Appeals; Clerks, United States District Courts; Chief Probation Officers (Jan. 21, 2005), *available at* <http://www.ussc.gov/Blakely/DIR5-014.PDF> (last visited Feb. 17, 2005).

<sup>243</sup>28 U.S.C. § 994 (2004).

<sup>244</sup>28 U.S.C. § 994(w) (2004).

## 2. A Viable Solution

Opponents of advisory Guidelines fear that nonbinding Guidelines will create unwarranted sentencing disparity in the federal system.<sup>245</sup> Appellate review of sentences dispels this concern. Even though *Booker* altered the appellate review standard set forth in 18 U.S.C. §3742 (e), the criteria of subsections (a), (b), and (f) remain unchanged. A defendant or the government may appeal a sentence and have it reviewed for reasonableness.<sup>246</sup> Because a sentencing judge must consult the Guidelines when imposing a sentence, it seems entirely likely that the Guidelines will play a large role in determining reasonableness in the average case.<sup>247</sup> In fact, the U.S. Attorney's Office has taken this position.<sup>248</sup> Unlike sentencing in the days before the Guidelines existed when appellate review rarely occurred, today appellate review regularly takes place and serves to control egregious sentencing.

Compliance rates in states with advisory guidelines further refute the allegation that advisory Guidelines will exacerbate sentencing disparity. According to Carmen Hernandez, President of the National Association of Criminal Defense Lawyers, "for defendants facing sentences under state advisory guideline systems, 85% of the sentences imposed in those systems end up being the sentences that would have been imposed under the [G]uidelines."<sup>249</sup> A recent report compared the compliance rates of the ten states with advisory guidelines to the compliance rates in states with presumptive guidelines.<sup>250</sup> The authors of the report concluded that presumptive guideline systems do not produce unwarranted sentencing disparity.<sup>251</sup> For example, Virginia achieved an 81% compliance rate, while the federal system's compliance

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<sup>245</sup>See, e.g., Memorandum from James Felman, to the United States Sentencing Commission (Sept. 16, 2004), available at [http://www.uscc.gov/hearings/11\\_16\\_04/felman.pdf](http://www.uscc.gov/hearings/11_16_04/felman.pdf) (last visited Feb. 17, 2005).

<sup>246</sup>18 U.S.C.S § 3742(e); see also Testimony of Judge Lewis Kaplan, United States District Court Judge for the Southern District of New York, to Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, United States House of Representatives (Feb. 10, 2005), available at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/files/judge\\_kaplan\\_on\\_booker\\_nysbalawjournal.pdf](http://sentencing.typepad.com/sentencing_law_and_policy/files/judge_kaplan_on_booker_nysbalawjournal.pdf) (last visited Feb. 17, 2005) [hereinafter Kaplan Testimony].

<sup>247</sup>Kaplan Testimony, *supra* note 246.

<sup>248</sup>See, e.g., Doug Berman, *So, What Is Reasonable?*, Sentencing Law and Policy, available at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2005/01/so\\_what\\_is\\_reas.html](http://sentencing.typepad.com/sentencing_law_and_policy/2005/01/so_what_is_reas.html) (last visited Feb. 17, 2005).

<sup>249</sup>Adam Liptak, *Judges' New Leeway in Passing Sentence May Change Little*, N.Y. TIMES, Jan. 18, 2005, at A14.

<sup>250</sup>Kim Hunt and Michael Connelly, *Advisory Guidelines in the Post-Blakely Era*, 17 FED. SENT. R. 233 (Apr. 2005). The states with advisory guidelines include Arkansas, Delaware, District of Columbia, Louisiana, Maryland, Missouri, Rhode Island, Utah, Virginia, and Wisconsin.

<sup>251</sup>*Id.* The authors note, however, that no controlled experiment isolating the influence of sentencing variables on advisory guidelines has ever been conducted. The typical research design consists of a "before-after" model that focuses on the state enacting advisory guidelines.

rate in 2002 only reached a mere 65%.<sup>252</sup> Virginia's system has been endorsed as an illustrative model of a successful advisory guidelines scheme.<sup>253</sup> Thus far, advisory guidelines have been operating with success in state systems, and research indicates that advisory guidelines do not necessarily produce unwarranted sentencing disparity. Of course, advisory guidelines have the greatest chance for success in a single geographic area. This variable does not, however, preclude success of advisory guidelines in the federal system.<sup>254</sup>

Statistics released by the United States Sentencing Commission also discredit the claim that advisory Guidelines will produce unwarranted sentencing disparity. As of February 4, 2005, the Commission received sentencing documents from 74 of the 94 federal districts.<sup>255</sup> Of the reported cases, 692 contained complete sentencing documentation, as required by the Feeney Amendment.<sup>256</sup> Among those 692 cases, judges sentenced within the relevant Guidelines range 63.9% of the time. This statistic closely mirrors range compliance under mandatory Guidelines, which stood around 65%. Only 7.8% of the post-*Booker* cases involved sentences below the Guidelines range, and only 1.3% involved sentences above the Guidelines range.<sup>257</sup> Overall, the Commission reports that among cases analyzed since *Booker*, courts have sentenced in accord with the Guidelines system as a whole 90% of the time.<sup>258</sup> Although the compiled data is preliminary, it provides evidence that district court judges are sentencing pursuant to the Guidelines. Unwarranted sentencing disparity has not inundated the post-*Booker* advisory sentencing world. For this reason, Congress should allow the advisory Guidelines to remain in place until a future point in time when more information has been collected to provide an accurate picture of federal sentencing.

## VII. CONCLUSION

The Federal Sentencing Guidelines continuously pursue the laudable goal of shaping reasonable and fair criminal sentencing in the United States. Despite this commendable objective, the Guidelines remain flawed for the reason that they often usurp power from key judicial actors—the judge and the jury. In *United States v. Booker*, the Court held that mandatory Guidelines violate the Sixth Amendment. To effectuate a remedy, the Court transformed the Guidelines into an interim advisory sentencing scheme.

*Booker* has created an unprecedented opportunity for meaningful reform of a deteriorated federal sentencing system. Although Congress is expected to devise a

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<sup>252</sup>Liptak, *supra* note 249.

<sup>253</sup>*Id.*

<sup>254</sup>Hunt and Connelly, *supra* note 250.

<sup>255</sup>Testimony of Judge Ricardo Hinojosa, Chair, United States Sentencing Commission, to Subcommittee on Crime, Terrorism, and Homeland Security, House of Representatives (Feb. 10, 2005), available at <http://judiciary.house.gov/media/pdfs/Hinojosa021005.pdf> (last visited Feb. 17, 2005).

<sup>256</sup>*Id.*

<sup>257</sup>*Id.*

<sup>258</sup>*Id.*

new federal sentencing scheme, Congress must first engage in deliberative debate to ensure that it adopts a reform proposal that will withstand constitutional challenge. Leading reform plans include the Bowman proposal, the Kansas System, and simply allowing the Guidelines to continue to function in an advisory capacity.

Because the precise meaning and impact of *Booker* remain unclear, advisory Guidelines will most suitably address the needs of our criminal justice system. Only as judges interpret and apply *Booker* will its implications become evident, at which point in time Congress can adopt an appropriate long-term reform measure. To act any sooner would be premature. Congress stands in a place to bring about beneficial and necessary reform to an exceedingly complex system. The reform Congress enacts should not only address the Sixth Amendment issue examined in *Booker*, but should also advance policy goals. Federal sentencing reform based on careful examination of sentencing data can create a system with an optimal balance of power among the Guidelines, the judge, and the jury.

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