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Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After *Booker*

Frank O. Bowman, III*

The federal criminal sentencing system is changing. The Supreme Court ensured that much with its decisions in *Apprendi v New Jersey*,¹ *Blakely v Washington*,² and *United States v Booker*.³ The Court invalidated a critical procedural component of the original mandatory Federal Sentencing Guidelines by holding that juries, not judges, must find any fact that increases a defendant's maximum guidelines exposure.⁴ The only question is whether the guidelines system will change only a little, a lot, or something in between. This Article lays out a proposal for something in between.

The proposal advanced here rests on six premises. First, sentencing guidelines are a good idea and an improvement on systems that rely on unguided judicial sentencing discretion. Sec-

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* This article is the second in a series of three articles about the federal sentencing system. The first piece in this series analyzed the failure of the Federal Sentencing Guidelines. Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum L Rev 1315 (2005). The article that appears below proposes a new system to replace the failed Guidelines. The final piece in the series analyzes the prospects for the enactment of this sentencing model, given the politics and political science of the current federal sentencing system. Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 Stan L Rev (forthcoming 2005). Because this article builds on the analysis first advanced in *The Failure of the Federal Sentencing Guidelines*, the key components of that analysis are reiterated, and sometimes expanded upon, here.

¹ 530 US 466 (2000).

² 124 S Ct 2531 (2004).

³ 125 S Ct 738 (2005).

⁴ Id at 756 (“Accordingly, we reaffirm our holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”).

ond, the Federal Sentencing Guidelines (the “Guidelines”) have failed of their promise because of flaws in their basic design. Third, despite the Supreme Court’s ruling in *Booker*, the Guidelines system could survive either virtually unchanged (if Congress removes or declares advisory the tops of the existing guideline ranges⁵) or with relatively modest changes (if the courts interpret *Booker* to give the now-“advisory” guideline ranges presumptive status⁶ or if the Sentencing Commission were to slightly simplify the Guidelines and subject aggravating Guidelines factors to proof by plea or jury trial⁷). Fourth, while each of these modest legislative or judicial alterations to the original Guidelines design has some immediate appeal as a response to the systemic disruption caused by *Blakely* and *Booker*, all of them are undesirable as permanent measures precisely because they would reinstitute a fundamentally flawed regime that needs a major redesign. Fifth, all of the other suggested permanent replacements for the current Guidelines (such as voluntary or purely advisory guidelines, a system of presumptive maximum sentences, or increased use of hard mandatory minimum sentences) suffer from crippling flaws, either in design or political viability. Sixth, and finally, what is required in a long-term replacement for the current federal guidelines is a system which: (a) is consistent with the Supreme Court’s new Sixth Amendment jury trial jurisprudence; (b) is workable by lawyers and judges; (c) addresses the most fundamental design defects of the current system, particularly those relating to institutional imbalances between sentencing actors; and (d) has some reasonable prospect of political viability.

This Article proposes a simplified sentencing table consisting of nine base sentencing ranges, each subdivided into three sub-ranges. The base sentencing range would be determined by combining offense facts found by a jury or admitted in a plea with the defendant’s criminal history. A defendant’s placement in the sub-ranges would be determined by post-conviction judicial findings of sentencing factors. No upward departures from the base sentencing range would be permissible, but defendants could be sentenced below the low end of the base sentencing range as a

⁵ See notes 202–05 and accompanying text (describing the “topless guidelines” proposal).

⁶ See notes 168–82 and accompanying text (describing the remedial portion of the opinion in *Booker*).

⁷ See notes 165, 192–200 and accompanying text (describing the option of “*Blakely*-izing” the Guidelines).

result of an acceptance of responsibility credit or due to a downward departure motion. Both the government and the defendant would retain rights of appeal of post-conviction judicial findings of fact and of misapplications of the law.

This revised sentencing guidelines system would increase the role of the jury in setting federal criminal sentences while retaining a role for post-conviction judicial fact-finding. It would reduce the number of legally consequential decision points necessary for individual sentencings while incorporating the work done by Congress and the Sentencing Commission over the past several decades in identifying aggravating and mitigating factors thought to be relevant to punishment. Most importantly, it would promote a healthier institutional balance between Congress, the Sentencing Commission, the judiciary, and the Department of Justice.

The Article proceeds in five parts. Part I briefly describes the history and operation of the Federal Sentencing Guidelines. Part II explains why the Guidelines have failed. Part III discusses the effect of the Supreme Court's recent Sixth Amendment jurisprudence on the constitutionality of the Guidelines. Part IV outlines the reform options available in the wake of *Blakely* and *Booker*. Part V describes my proposal and why it is preferable to other possible options.

I. A BRIEF INTRODUCTION TO THE FEDERAL SENTENCING GUIDELINES

A. The Federal Sentencing Reform Movement

The current Guidelines-centered federal sentencing system we now have that emerged from the Sentencing Reform Act of 1984 ("SRA")⁸ is both a rejection of certain prior practices and understandings and an endorsement of a new set of objectives and sentencing structures. Beginning in the late 1970s, reformers largely rejected the then-dominant rehabilitative or medical model of sentencing as the central organizing and justifying principle of criminal sentencing⁹ (although rehabilitation re-

⁸ Pub L No 98-473, 98 Stat 1837 (1984).

⁹ For more complete discussions of the fall of the rehabilitative model and the rise of the Federal Sentencing Guidelines, see Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 Wis L Rev 679, 685-89; Pamala L. Griset, *Determinate Sentencing: The Promise and the Reality of Retributive Justice* at 11, 25-37 (SUNY 1991).

mains a stated objective of the SRA¹⁰). They were skeptical that rehabilitation was possible,¹¹ or at least that the existing criminal justice institutions knew how to rehabilitate any substantial fraction of offenders.¹² It seemed unclear that the judges and probation officers operating at the front end of the criminal justice system had any special skill in prescribing the proper amount and type of punishment most likely to rehabilitate offenders, or that the parole boards operating at the back end had any demonstrable insight into when rehabilitation had been accomplished. Some reformers also sought “truth in sentencing”—rules ensuring that defendants served all or a very substantial portion of the sentence announced by the judge in the first place, rather than the much lower sentence generally produced by the exercise of the parole power.¹³ Indeed, Justice Stephen Breyer, who, while a circuit court judge was one of the original Sentencing Commissioners, has identified what he called “honesty in sentencing” as one of Congress’ two primary purposes in enacting the SRA.¹⁴

The other congressional purpose, according to Justice Breyer, was reducing unjustifiable sentencing disparities.¹⁵ Federal sentencing reformers were concerned that the nearly unreviewable discretion afforded judges in the pre-Guidelines era made sentencing a lawless process inasmuch as no law governed a judge’s choice of penalty.¹⁶ Unreviewable judicial sentencing

¹⁰ 18 USC § 3553(a)(2)(D) (2000) (stating that the sentencing judge “shall consider . . . the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”).

¹¹ See Griset, *Determinate Sentencing* at 28–29 (cited in note 9) (“Penal treatment was said to be empirically invalid, as measured by recidivism rates.”).

¹² See Steven S. Nemerson, *Coercive Sentencing*, 64 Minn L Rev 669, 685–86 (1980) (“In part, the massive professional and academic disillusionment with the therapeutic model stems from the simple practical inability of the criminal justice system to reform serious offenders effectively through incarceration.”); Andrew von Hirsch, *Recent Trends in American Criminal Sentencing Theory*, 42 Md L Rev 6, 11 (1983) (“[N]o serious researcher has been able to claim that rehabilitation routinely could be made to work for the bulk of the offenders coming before the courts.”) (emphasis in original). See also Michael Vitiello, *Reconsidering Rehabilitation*, 65 Tulane L Rev 1011 (1991) (urging that rehabilitation be revisited as a dominant rationale for criminal sanctions).

¹³ See, for example, Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L Rev 1, 4 (1988) (“[The parole] system sometimes fooled the judges, sometimes disappointed the offender, and often misled the public.”).

¹⁴ *Id.*

¹⁵ *Id.* (“Congress’ second purpose was to reduce ‘unjustifiably wide’ sentencing disparity.”).

¹⁶ One of the first and most influential critics of pre-guidelines sentencing on the ground of unjustifiable sentence disparity was Judge Marvin E. Frankel. He said of the

discretion was thought to produce unjustifiable sentencing disparities and undeniably made the sentencing process opaque.¹⁷ The second point is of almost equal importance to the first; that is, since under the former system judges had no obligation to explain their sentences, it was impossible to determine whether and to what degree sentencing outcomes were unjustifiably disparate.¹⁸ Liberal critics of the old regime were particularly concerned that a system of lawless, unreviewable judicial discretion might be hospitable to hidden racial disparities.¹⁹

There was also concern in some quarters that sentences for some classes of federal offenders were unduly lenient,²⁰ and that judges and prosecutors were colluding, through the practice of plea bargaining, to produce inappropriately low sentences in individual cases.²¹ Many of those expressing these concerns believed that the objective of improved crime control could be achieved through the imposition of more and longer sentences of incarceration, providing lengthier periods of incapacitation and, assertedly, greater deterrence.²²

The collapse of the rehabilitative model and a fortuitous alignment of political forces from the congressional right and left

indeterminate sentencing system in the federal courts that “the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.” Marvin E. Frankel, *Criminal Sentences: Law Without Order* 5 (Hill & Wang 1973). See also Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U Cin L Rev 1, 1 (1972) (“[Sentencing] is by and large a bizarre ‘nonsystem’ of extravagant powers confided to variable and essentially unregulated judges, keepers and parole officials.”); The President’s Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* 23 (GPO 1967) (finding sentencing disparity to be pervasive); National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 142–43 (GPO 1973) (same); Peter B. Hoffman and Barbara Stone-Meierhoefer, *Application of Guidelines to Sentencing*, 3 L & Psych Rev 53, 53–56 (1977) (describing criticisms of then-extant sentencing practices on the ground of “unwarranted sentencing disparity”). Peter Hoffman later became the principal draftsman of the Guidelines.

¹⁷ See Frankel, *Criminal Sentences* at 39–45 (cited in note 16) (discussing the effects of unreviewable sentencing decisions).

¹⁸ *Id.*

¹⁹ See William W. Wilkins, Jr., Phyllis J. Newton, and John R. Steer, *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 Crim L F 355, 359–62 (1991) (discussing the public perception of biased sentences and reviewing empirical studies on the disparate treatment of minority defendants and victims).

²⁰ See Kate Stith and Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L Rev 223, 278 (1993) (describing Congressional distrust of judges and prosecutors).

²¹ *Id.*

²² See Barbara S. Barrett, *Sentencing Guidelines: Recommendations for Sentencing Reform*, 57 Mo L Rev 1077, 1079 (noting that during the 1970s “the perception that crime rates were out of control led some officials to demand surer and stiffer sanctions against criminals as a means of preventing crime”).

produced the SRA and three years later, in 1987, the Federal Sentencing Guidelines.²³ The Guidelines were written, and continue to be studied and amended, by the United States Sentencing Commission. The Sentencing Commission is an “independent commission in the judicial branch of the United States,” whose members are nominated by the President and confirmed by the Senate.²⁴ It consists of seven voting members, no more than four of whom may be members of the same political party.²⁵ The law originally required that at least three commissioners be federal judges,²⁶ but, in 2003 the so-called PROTECT Act restricted the number of judges on the Commission to no more than three.²⁷ The Attorney General, or his designee, has since the inception of the Commission been an ex officio and non-voting member.²⁸

Congress created the Sentencing Commission for three basic reasons. First, substantive federal criminal law was a ghastly mess, with hundreds of overlapping and often oddly-drafted provisions and no system for classifying the relative seriousness of offenses.²⁹ Congress tried and repeatedly failed throughout the 1970s to bring order to this chaos by writing a rationalized federal criminal code.³⁰ Fresh from this frustration, the legislators recognized that a body of experts was needed to draft reasonable sentencing rules.³¹

Second, Congress realized that the first set of rules would certainly be imperfect and would require monitoring, study, and modification over time.³² A body of experts was required as well.³³

²³ Probably the best historical description of the genesis of the SRA and the Guidelines is Stith and Koh, 28 Wake Forest L Rev 223 (cited in note 20).

²⁴ 28 USC § 991(a) (1993 & Supp 2004).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub L No 108-21, 117 Stat 650 § 401(n)(1) (amending 28 USC § 991(a) (1984)).

²⁸ 28 USC § 991(a).

²⁹ For example, Appendix A to the Federal Sentencing Guidelines Manual lists more than 1,000 separate federal statutory crimes subject to guidelines sentencing. United States Sentencing Commission, *Guidelines Manual*, App A (2004).

³⁰ See Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 Buff Crim L Rev 45, 92–135 (1998) (reviewing historical efforts to revise the federal criminal code).

³¹ *Mistretta v United States*, 488 US 361, 379 (1989) (“Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate.”).

³² Breyer, 17 Hofstra L Rev at 7–8 (cited in note 13) (“[T]he Commission remained aware throughout the drafting process that Congress intended it to be a permanent body that would continuously revise the Guidelines over the years. Thus, the system is ‘evolutionary’—the Commission issues Guidelines, gathers data from actual practice, analyses

Third, Congress concluded that making sentencing rules required not only expertise, but insulation from the distorting pressures of politics.³⁴ Thus, the Sentencing Commission was situated outside both of the political branches of government, and even made independent of the normal chain of command in the judicial branch in which it formally resides.³⁵ The Commission's anomalous independent status was one of the primary grounds for challenges to the Guidelines' legality, but the Supreme Court held that the Commission and the Guidelines were constitutional.³⁶

B. A Primer on the Federal Sentencing Guidelines

The Federal Sentencing Guidelines³⁷ are, in a sense, simply a long set of instructions for one chart—the Sentencing Table.³⁸ The goal of Guidelines' calculations is to arrive at numbers for the vertical (“offense level”) and horizontal (“criminal history category”) axes on the Sentencing Table grid, which in turn generate an intersection in the body of the grid. Each such intersection designates a “sentencing range” expressed in months.³⁹ Ordinarily, the bottom of the range will be above the statutory minimum sentence prescribed for the offense or offenses of conviction and the top of the range will be below the statutory maximum sentence prescribed for the offense or offenses of conviction.⁴⁰ Statutory minima and maxima trump the Guidelines.⁴¹

the data, and revises the Guidelines over time.”).

³³ 28 USC § 994(o) (1993) (establishing that the Commission shall periodically review and revise the Guidelines, and consult with experts and institutional representatives regarding these revisions).

³⁴ 28 USC § 991(a) establishes that no more than four Commission members may belong to the same political party, and that members are subject to removal from office only for good cause. See also *Mistretta*, 488 US at 408–11 (discussing the Sentencing Commission's independence and the President's limited power of removal).

³⁵ See *Mistretta*, 488 US at 393 (noting that the Sentencing Commission “is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch.”). In dissent, Justice Scalia argued that the Commission's law-making power combined with the lack of control over it by any official of the judicial branch rendered the Commission an unconstitutional body. *Id.* at 422–27.

³⁶ *Id.* at 412.

³⁷ United States Sentencing Commission, *Guidelines Manual* (2004) (“USSG”).

³⁸ USSG Ch 5, Pt A (1996).

³⁹ *Id.* By statute, the top end of the range can be no more than 25 percent higher than the bottom end. 28 USC § 994(b)(2) (1993); USSG Ch 1, Pt A (2) (1996 & Supp 2004). For a discussion of the “25 percent rule,” see Bowman, 1996 Wis L Rev at 691 n 49, 712–13 (cited in note 9).

⁴⁰ The terms “statutory minimum sentence” and “statutory maximum sentence” are used here in the pre-*Blakely* sense of the minimum or maximum sentence to which a defendant is exposed by statute as a result of a conviction by plea or trial.

⁴¹ USSG § 5G1.1 (1996). For example, a defendant subject to a 60-month statutory

The “criminal history category” reflected on the horizontal axis of the Sentencing Table is a rough effort to quantify the defendant’s disposition to criminality, as reflected in the number and nature of his prior contacts with the criminal law.⁴² The “offense level” reflected on the vertical axis of the Sentencing Table is a measurement of the seriousness of the present crime. The offense level customarily has three components: (1) a “base offense level,” (2) a set of “specific offense characteristics,” and (3) additional adjustments under Chapter Three of the Guidelines.⁴³ The base offense level is a seriousness ranking based purely on the fact of conviction of a particular statutory violation. For example, most fraud convictions now carry a base offense level of 7.⁴⁴ The “specific offense characteristics” are an effort to categorize and account for commonly occurring factors that cause us to think of one crime as worse than another, and thus they “customize” the crime.⁴⁵

Most American state sentencing guidelines systems use some form of sentencing grid or table similar to the federal model, insofar as they employ measurements of offense seriousness and criminal history to place defendants within a sentencing range.⁴⁶ The federal system, however, is unique in the complexity of its Sentencing Table, which has forty-three levels on its vertical axis and six levels on its horizontal axis.⁴⁷ Consequently,

minimum sentence whose guideline range is 57-71 months must be sentenced to no less than 60 months, while a defendant convicted of only one count of a crime with a statutory maximum sentence of 60 months cannot be sentenced to more than 60 months even if his guideline range is 57-71 months.

⁴² See USSG Ch 4 (2004) for the rules regarding the calculation of criminal history category. The basic unit of measurement in this calculation is prior sentences imposed for misdemeanors and felonies.

⁴³ USSG § 1B1 (2004).

⁴⁴ USSG § 2B1.1(a)(1) (2004).

⁴⁵ For instance, the Guidelines differentiate between a mail fraud in which the victim loses \$1,000 and a fraud with a loss of \$1,000,000. A loss of \$1,000 would produce no increase in the base offense level for fraud of 6, while a loss of \$1,000,000 would add sixteen levels and thus increase the offense level from 6 to 22. The amount of the “loss” is not the only specific offense characteristic for fraud offenses. Section 2B1.1 also provides adjustments for the specific offense characteristic of the use of “sophisticated means” to commit the fraud, USSG § 2B1.1(b)(8)(C) (2004), jeopardizing the soundness of a financial institution, USSG § 2B1.1(b)(12)(B) (2004), and many other factors.

⁴⁶ See Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 *Judicature* 173, 176 (1995) (“Most states have promulgated guidelines in the form of a two-dimensional grid, but a few employ narrative rules for each offense or offense group.”); Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 *SLU L J* 425, 427 (2000) (noting that among states that have sentencing guidelines, Delaware, Florida, and Ohio do not use sentencing “grids,” but “their ‘narrative’ or ‘point-system’ guidelines could be translated into a grid”).

⁴⁷ USSG Ch 5, Pt A (1996).

a federal defendant can be placed in any one of 258 possible sentencing range boxes.

The large number of Guideline offense levels stems from two causes. First, one of Congress's primary aims in passing the SRA was to restrict judicial sentencing discretion. The architects of the SRA understood the obvious point that a guidelines system with very wide sentencing ranges would impose little restraint on judicial discretion. To prevent the Sentencing Commission from conferring too much discretion on judges, the drafters of the SRA included a provision known among federal sentencing practitioners as the "25 percent rule."⁴⁸ The "25 percent rule" requires that the top of a guideline sentencing range can be no more than the greater of six months or 25 percent higher than the bottom of the range.⁴⁹ Given this statutory constraint, the Sentencing Commission could not have constructed a sentencing table with any fewer than eighteen offense levels on its vertical axis.⁵⁰ And if the Guidelines were to accord reasonable significance to criminal history, six criminal history categories were probably at or close to the desirable minimum number the Commission could have adopted. Thus, given statutory constraints, the Commission could not have constructed a sentencing grid much simpler than 18 by 6, with 108 sentencing ranges.

The fact that the Commission adopted a Sentencing Table with 43 offense levels rather than 18, and 258 sentencing ranges rather than 108, was a result, not of statutory necessity, but of several decisions by the Commission itself. The most important of these was the Commission's conclusion that offender culpabil-

⁴⁸ 28 USC § 994(b)(2) (1993).

⁴⁹ The "25 percent rule" provides:

If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

Id.

⁵⁰ At least it could not have done so if the table was to provide continuous coverage from zero months to 30 years-to-life and provide for sentences of 30 or more years for first offenses such as murder, highjacking, and the like. To see why eighteen levels is the mathematical minimum, start with an Offense Level 1 with a sentencing range of 0–6 months, then add offense levels with the maximum possible sentencing range until you reach a range with a minimum sentence of 360 months (30 years) or more. The result is that Levels 1 through 5 have six-month sentencing ranges (0–6 months, 6–12 months, and so on), then, beginning at Level 6, the top of the range is increased by 25 percent over the top of the next lower range (30–37 months, 37–46 months, and so on), until thirty years is reached. At least eighteen offense levels are required to cover the entire range.

ity could be measured in fairly small, discrete increments.⁵¹ Examples of this approach include the drug quantity table of the drug guideline,⁵² the loss table of the economic crime guideline,⁵³ and the robbery guideline, which identifies five different levels of enhancement for possession or use of a weapon and five levels of enhancements for different degrees of bodily harm to a victim.⁵⁴ In addition, the Commission wanted to create overlapping sentencing ranges so that the high end of each sentencing range was at roughly the midpoint of the range above it. The idea was to diminish the impact of one-level differences in Guideline calculations and so reduce the likelihood of litigation over these differences.⁵⁵

Chapter Three of the Guidelines provides for additional adjustments to the offense level. These include increases in the offense level based on factors such as the defendant's role in the offense,⁵⁶ whether the defendant engaged in obstruction of justice,⁵⁷ commission of an offense against a government official⁵⁸ or particularly vulnerable victim,⁵⁹ and the existence of multiple counts of conviction.⁶⁰ There are also possible reductions in offense level based on a defendant's "mitigating role" in the offense⁶¹ or on so-called "acceptance of responsibility."⁶²

⁵¹ Peter B. Hoffman, *Simplifying the U.S. Sentencing Commission's Offense Scale*, 44 SLU L J 365, 365-66 (2000).

⁵² USSG § 2D1.1(c) (2004) (assigning offense level increases based on drug amount in two-level increments from 6 to 38).

⁵³ USSG § 2B1.1(b) (2004). The current economic crime guideline contains a loss table with fifteen two-offense-level enhancements. This actually represents a simplification of the previous loss table, which contained eighteen one-offense-level enhancements. USSG § 2F1.1(b) (1989).

⁵⁴ USSG § 2B3.1(b)(2) and (b)(3) (2004).

⁵⁵ USSG § 1A1.1 n 4(h) (1998).

⁵⁶ USSG § 3B1.1 (2004). The defendant's offense level can be enhanced by either 2, 3, or 4 levels depending on the degree of control he exercised over the criminal enterprise and on the size of that enterprise.

⁵⁷ USSG § 3C1.1 (2004). Obstruction of justice includes conduct such as threatening witnesses, suborning perjury, producing false exculpatory documents, destroying evidence, and failing to appear as ordered for trial. See also, USSG § 3C1.1, cmt 3 (2004).

⁵⁸ USSG § 3A1.2 (2004).

⁵⁹ USSG § 3A1.1 (2004) (creating an enhancement when a victim was selected based on "race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation" and in the case of a victim "unusually vulnerable due to age, physical or mental condition").

⁶⁰ USSG Ch 3, Pt D (2004).

⁶¹ USSG § 3B1.2 (2004) (allowing decreases in offense level of 2 or 4 levels if defendant is found to be a "minor participant" or "minimal participant" in the criminal activity).

⁶² USSG § 3E1.1 (2004) (allowing reduction of 2 offense levels where defendant "clearly demonstrates acceptance of responsibility," and 3 offense levels if otherwise applicable offense level is at least 16 and defendant has "assisted authorities in the investigation or prosecution of his own misconduct" by taking certain steps). Despite the euphe-

A unique and controversial aspect of the Guidelines is “relevant conduct.”⁶³ The Guidelines require that a judge calculating the applicable offense level and any Chapter Three adjustments must consider not only a defendant’s conduct directly related to the offense or offenses for which he was convicted, but also the foreseeable conduct of his criminal partners,⁶⁴ as well as his own uncharged, dismissed, or sometimes even acquitted conduct⁶⁵ that was part of the same transaction, common scheme, or plan as the offense of conviction.⁶⁶ The primary purpose of the relevant conduct provision is to prevent the parties (and to a lesser degree the court itself) from circumventing the Guidelines through charge bargaining or manipulation.⁶⁷

Just as a characteristic feature of pre-Guidelines sentencing was the nearly unfettered authority of the judge to set the initial sentence, the defining characteristic of the pre-*Booker* Guidelines regime is its systematic restraint of district court sentencing discretion. Once a district court has determined the final offense level on the vertical axis and the criminal history category on the horizontal axis, the Sentencing Table designates the sentencing range. The judge retains effectively unfettered discretion to sentence *within that range*.⁶⁸ However, by design, the SRA and the Sentencing Guidelines make it very difficult to “depart”—that is, to impose a sentence above or below the designated sentencing range. In order to depart, the judge must justify the departure, on the record, by reference to factors specified in the Guidelines as appropriate grounds for departure,⁶⁹ or by finding “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consid-

mism “acceptance of responsibility,” § 3E1.1 is nothing more nor less than an institutionalized incentive for guilty pleas.

⁶³ USSG § 1B1.3 (2004). For a thorough discussion of the relevant conduct concept see Roger W. Haines, Jr., Frank O. Bowman, III, and Jennifer C. Woll, *Federal Sentencing Guidelines Handbook* 143–58 (West 2004).

⁶⁴ USSG § 1B1.3(a)(1)(B) (2004).

⁶⁵ A judge may consider acquitted conduct if the government proves its occurrence at sentencing by a preponderance of the evidence. *United States v Watts*, 519 US 148, 157 (1997) (holding that the sentencing court was not barred from considering acquitted conduct by the jury’s verdict because the burden of proof at sentencing is a preponderance of the evidence, rather than the trial standard of beyond a reasonable doubt).

⁶⁶ USSG § 1B1.3(a)(2) (2004).

⁶⁷ See William W. Wilkins, Jr. and John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 SC L Rev 495, 499–500 (1990) (discussing how the relevant conduct provision limits the parties’ powers to shape the Guideline sentencing range through bargaining). For further discussion of the use of charge bargaining to circumvent Guidelines rules, see notes 159–61 and accompanying text.

⁶⁸ USSG § 5C1.1(A) (2004).

⁶⁹ See USSG Ch 5, Pt K (2004).

eration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.⁷⁰ Moreover, except in unusual circumstances, the Guidelines specifically *exclude* from consideration for purposes of departing outside the Guidelines range most of those factors, such as age, employment record, or family ties, which judges formerly used to “individualize” sentences.⁷¹ Critically, all of these limitations on the discretion of the sentencing judge are made enforceable by a right of appeal given to both parties.⁷²

Finally, the SRA eliminated parole and with it the discretionary authority of correctional officials and the Parole Commission to shorten the nominal sentence announced by the judge in court.⁷³ The SRA decrees that, absent very unusual circumstances, a defendant must serve at least 85 percent of his announced sentence, with only a 15 percent reduction possible for good behavior in prison.⁷⁴ Before the Guidelines, offenders generally served 40 to 70 percent of their stated prison term, depending in part on the length of the term originally imposed.⁷⁵

II. THE FAILURE OF THE FEDERAL SENTENCING GUIDELINES SYSTEM

For most of the last decade, I supported the Federal Sentencing Guidelines and wrote extensively in their defense,⁷⁶ while

⁷⁰ This language appears in the Guidelines’ enabling legislation, 18 USC § 3553(b) (2004), and is repeated in the Guidelines themselves, USSG § 5K2.0 (2004).

⁷¹ Chapter 5, Part H of the Guidelines lists factors the Commission determined to be “not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.” USSG Ch 5, Pt H. These include age, § 5H1.1; educational and vocational skills, § 5H1.2; mental and emotional conditions, § 5H1.3; physical condition, § 5H1.4; history of substance abuse, § 5H1.4; employment record, § 5H1.5; family or community ties, § 5H1.6; socio-economic status, § 5H1.10; military record, § 5H1.11; history of charitable good works, § 5H1.11; and “lack of guidance as a youth,” § 5H1.12. In theory, most of these factors nonetheless can justify a departure, but pre-*Booker*, such a departure was permissible only where the excluded factor was present to a degree so unusual that the Commission would not have anticipated its impact and thus did not “adequately [take it] into consideration” when formulating the Guidelines. 18 USC § 3553(b) (2004).

⁷² 18 USC § 3742 (2004).

⁷³ Sentencing Reform Act of 1984, Pub L No 98-473, 98 Stat 2027 (1984).

⁷⁴ 18 USC § 3624(b) (2004) (allowing a good behavior sentence reduction of up to 54 days at the end of each year of the prisoner’s sentence, beginning at the end of the first year of the term).

⁷⁵ Paul J. Hofer and Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980–1998*, 12 Fed Sent Rptr 12, 13 (1999).

⁷⁶ See Bowman, 1996 Wis L Rev at 680 (cited in note 9) (“[The Guidelines] are, at worst, a marked improvement over the system they replaced and are, on balance, a notable, albeit certainly imperfect, success.”); Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 SLU L J 299, 300 (2000) (“At worst, the Guidelines are a predictably flawed work-in-progress and a

chronicling their defects.⁷⁷ In the past year, I have reluctantly concluded that the federal sentencing system centered on the Guidelines has failed because it too often produces bad outcomes in individual cases and sometimes in whole classes of cases, but more importantly because the basic structure of the system has evolved in a way that makes self-correction virtually impossible. This conclusion has not been altered by the Supreme Court's *Booker* decision rendering the Guidelines "advisory." I have laid out a detailed analysis of the Guidelines' failure elsewhere,⁷⁸ and so will give only a synopsis of that analysis here.

A. The Successes (or Near-Successes) of the SRA and the Guidelines

The current federal sentencing system is by no means without its accomplishments. In many important respects it fulfills the objectives of its framers.

First, the SRA set out to, and did, abandon the rehabilitative or medical model of punishment as the primary organizing principle of federal sentencing. Instead, the SRA and the Guidelines are actuated by something like Norval Morris's idea of "limiting retributivism,"⁷⁹ even if they are not a perfect fulfillment of that idea.⁸⁰ Moreover, while the current system gives more prominence to the ideas of just deserts as a limiting principle and crime control as a utilitarian objective than had previously been

notable improvement over the system they replaced."); Frank O. Bowman, III, *Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 Stetson L Rev 7, 42-63 (1999) (responding to common criticisms of the Guidelines' substantial assistance departure mechanisms, while criticizing Department of Justice practice regarding such departures).

⁷⁷ Bowman, 1996 Wis L Rev at 740-45 (cited in note 9) (criticizing the length of federal drug sentences under the Guidelines).

⁷⁸ Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum L Rev 1315 (2005).

⁷⁹ See Norval Morris, *Madness and the Criminal Law* 179-208 (Chicago 1982) (noting that the term "limiting retributivism" describes a theory of justification for criminal punishment which holds that "just deserts is an appropriate general justifying aim of punishment, but that it sets fairly broad bounds within which a range of not-unjust punishments may be chosen according to other principles, both utilitarian and nonutilitarian."). See also Marc Miller, *Purposes at Sentencing*, 66 S Cal L Rev 413, 432 (1992) (discussing Congressional intent and Morris' just deserts theory).

⁸⁰ See Paul J. Hofer and Mark Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am Crim L Rev 19 (2003); Bowman, 44 SLU L J at 316 (cited in note 76) (describing the Guidelines as being guided by the moral imperative of proportionality and two "pragmatic generalizations about human behavior").

the case, it does not explicitly abandon the goal of rehabilitation.⁸¹

Second, the SRA accomplished its goal of achieving “truth in sentencing.” Parole is abolished and the law now requires that federal defendants sentenced to a term of incarceration serve 85 percent of the period imposed by the court before becoming eligible for release.⁸²

Third, the SRA addressed the problem of unwarranted disparity by mandating the creation of sentencing guidelines and a commission to write, study, and amend them. The available evidence suggests that the Guidelines have succeeded in reducing judge-to-judge disparity within judicial districts.⁸³ On the other hand, researchers have found significant disparities between sentences imposed on similarly situated defendants in different districts and different regions of the country,⁸⁴ and interdistrict disparities appear to have grown larger in the Guidelines era, particularly in drug cases.⁸⁵ Moreover, there is reason to be concerned that developments such as the legitimization of “fast-track” programs under the PROTECT Act will increase interdistrict disparity by giving the Justice Department discretion to create geographic zones in which special sentencing rules are adopted

⁸¹ 18 USC § 3553(a)(2)(D) (2000) (stating that the sentencing judge “shall consider . . . the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”).

⁸² See note 75.

⁸³ See Paul J. Hofer, Kevin R. Blackwell, and R. Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J Crim L & Criminol 239, 241 (1999) (“[T]he guidelines have significantly reduced overall inter-judge disparity in sentences imposed”); James M. Anderson, Jeffrey R. Kling, and Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J L & Econ 271, 273 (1999) (finding a decrease in sentencing disparity between randomly selected judges during the early years of the guidelines).

⁸⁴ See Hofer, Blackwell, and Ruback, 90 J Crim L & Criminol at 241 (cited in note 83); Jeffrey T. Ulmer, John H. Kramer, and Brian Johnson, *District Matters: An Analysis of Inter-District Variation in Federal Sentencing*, Presented at the American Society of Criminology (2001); United States Sentencing Commission, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 94, available at <https://www.ussc.gov/15_year/chap3.pdf> (last visited May 26, 2005) (“The results of the latest analyses indicate that the guidelines have significantly reduced inter-judge disparity compared to the preguidelines era. . . . The available evidence suggests that regional disparity remains under the guidelines, and some evidence suggests it may have even increased among drug trafficking offenses.”). See also Frank O. Bowman, III and Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 Iowa L Rev 477, 530–34 (2002) (discussing the wide variation in average drug sentences between federal circuits).

⁸⁵ See Hofer, Blackwell, and Ruback, 90 J Crim L & Criminol at 241 (cited in note 83).

to facilitate case management concerns of prosecutors and courts.⁸⁶

There is ongoing dispute about the effect of the Guidelines on racial disparity. African-American and Hispanic defendants are significantly over-represented in the federal prison population in comparison with their percentage in the general population. For example, in 2001, 41 percent of all defendants sentenced under the Guidelines were Hispanic, while 24.6 percent were African-American.⁸⁷ The difficult question is determining whether this over-representation is simply a consequence of the distribution of federally prosecutable criminal behavior among racial and ethnic groups, or whether it results wholly or in part from racial discrimination in the enforcement of federal criminal law, or in the design and operation of federal sentencing rules.

Fourth, the SRA and the Guidelines brought law and due process to federal sentencing. Not all forms of guidelines accomplish this end. Some states have voluntary guidelines systems in which judges need not apply the rules at all.⁸⁸ Other states have guidelines systems that are advisory in the sense that judges are required to perform guidelines calculations, but are not required to sentence in conformity with what the guidelines suggest should be the result of those calculations.⁸⁹ In neither voluntary

⁸⁶ "Fast-track" programs are created to speed processing in high-volume or in high-volume districts by offering extraordinary sentencing discounts in return for early pleas. See Robert Howell, *Sentencing Reform Lessons: From the Sentencing Reform Act of 1984 to the Feeney Amendment*, 94 J Crim L & Criminol 1069, 1079-80 (2004). They require an initiative by the prosecution to create the program and make the plea offers, and the cooperation of judges in accepting the resulting pleas. Such programs were formerly not sanctioned by the Guidelines and were a source of friction between local United States Attorney's Offices and Justice Department. The PROTECT Act confers power on the Attorney General to authorize such programs and mandates a special guidelines provision for them. *PROTECT Act* § 401(m)(2)(B), 117 Stat at 675. See Attorney General John Ashcroft, *Memo Regarding Policy On Charging Of Criminal Defendants* (Sept 22, 2003), available at <http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm> (last visited Apr 7, 2005) (describing circumstances under which the Attorney General will authorize the creation of local fast-track programs). In response to this mandate, the Sentencing Commission created an "early disposition" departure. USSG § 5K3.1 (2004). For a discussion of fast-track programs in a number of Mexican border districts, see Hearing of United States Sentencing Commission, *Implementing Requirements of the PROTECT Act, Testimony of Frank O Bowman, III to U.S. Sentencing Commission*, (Sept 23, 2003), at 117-119, available at <http://www.uscc.gov/hearings/9_23_03/092303PH.pdf> (last visited Apr 7, 2005).

⁸⁷ United States Sentencing Commission, *2002 Sourcebook of Federal Sentencing Statistics* at 14, Table 4 (2003).

⁸⁸ See, for example, Va Code Ann § 17.1-803 (1950 & Supp 2004) (creating a sentencing commission with the power to develop, maintain, and modify a system of discretionary sentencing guidelines).

⁸⁹ Ark Stat § 16-90-801 et seq (1987 & Supp 2003) (establishing a sentencing commission and advisory sentencing guidelines or standards). See also Frase, 44 SLU L J at

nor advisory guidelines systems is the judge's sentencing decision subject to meaningful appellate review. To say that the Guidelines brought "law" to federal sentencing is to say: (1) that sentencing judges must find facts and apply the Guidelines' rules to those findings; and (2) that the Guidelines are legally binding and enforceable through a process of appellate review.

In theory, bringing law to sentencing makes sentencing outcomes more predictable and gives the parties a fair opportunity to present and dispute evidence bearing on legally-relevant sentencing factors. Likewise, bringing law to sentencing promotes transparency. That is, one can now ascertain from the record many, if not all, of the factors which were dispositive in generating the final sentence.

B. The Failures of the Guidelines System

Despite its real successes, the federal sentencing regime has only partially achieved the laudable objectives of the SRA and suffers from serious substantive defects calling for significant reform.

1. Severity.

At or near the root of virtually every serious criticism of the Guidelines is the concern that they are too harsh—that federal law requires the imposition of prison sentences too often and for terms that are too long. It is notoriously difficult to determine how much punishment is enough, either in individual cases or across an entire population of offenders, but one can say three things with assurance. First, the current federal sentencing regime has dramatically increased federal inmate populations and the length of the sentences federal inmates are serving.⁹⁰ Second, the severity of federal sentences has been widely criticized.⁹¹ Third, the frontline sentencing actors in the federal system—judges, defense attorneys, and prosecutors—have behaved as if they believe that federal sentences are often longer than necessary.⁹²

446 (cited in note 46) (describing the degree to which particular state guideline systems are mandatory).

⁹⁰ See Kate Stith and José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 59–65 (Chicago 1998) (discussing the Guidelines' role in increasing average sentences).

⁹¹ See, for example, *id.*

⁹² See Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 *Yale L J* 1681, 1718–27 (1992) (describing

From 1980-2002, the number of federal prison inmates increased by more than 600 percent, from 24,363⁹³ to 163,528.⁹⁴ The percentage of federal defendants sentenced to a purely probationary sentence declined from roughly 48 percent in 1984,⁹⁵ to 15.5 percent in 1990,⁹⁶ to 9.1 percent in 2002.⁹⁷ From 1984 to 1990, the mean sentence length imposed by judges for all federal crimes in which a prison sentence was imposed nearly doubled from 24 months to 46 months.⁹⁸ By 1992, the mean sentence imposed increased by almost another 50 percent to 66.9 months.⁹⁹ Interestingly, the mean federal sentence leveled off in 1993-94,¹⁰⁰ and has declined slowly to 55.4 months in 2002.¹⁰¹ Despite the modest retreat in mean sentence length, in 2002, 85.9 percent of federal defendants received prison sentences,¹⁰² compared to 52 percent in 1984,¹⁰³ and the mean sentence of imprisonment in 2002 remained more than double what it had been in 1984.

The figures in the preceding paragraph measure the sentences imposed by judges. The SRA's abolition of parole and embrace of truth in sentencing also dramatically increased the proportion of imposed sentences actually served. For example, a federal defendant sentenced to ten years in 1986 would, on average, have served slightly less than six years before release on parole. Under the Guidelines, a defendant sentenced to ten years must serve at least 87 percent of that term, or slightly more than 8.5 years, before release.¹⁰⁴

The severity of federal criminal sentences has been persistently criticized by the media, academics, the defense bar, former federal prosecutors, and the federal judiciary.¹⁰⁵ Even conserva-

ways in which sentencing actors attempt to avoid the Guidelines).

⁹³ Bureau of Justice Statistics, *Prisoners in 1994* 1 (1995).

⁹⁴ Bureau of Justice Statistics, *Prisoners in 2002* 1 (2003).

⁹⁵ United States Sentencing Commission, 2 *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* 376 Fig 14 (1991).

⁹⁶ United States Sentencing Commission, *Annual Report: 1990* 52 Fig 4 (1991).

⁹⁷ United States Sentencing Commission, *2002 Sourcebook* at 27 Fig D (cited in note 37).

⁹⁸ United States Sentencing Commission, 2 *The Federal Sentencing Guidelines* 378.

⁹⁹ United States Sentencing Commission, *Annual Report: 1995* 61 Fig F (1996).

¹⁰⁰ *Id.*

¹⁰¹ United States Sentencing Commission, *2002 Sourcebook* 30 Table 14 (cited in note 37). The mean federal sentence declined to 54.9 months in 2001 before ticking back up to 55.4 months in 2002. *Id.* at 27 Fig D.

¹⁰² *Id.* at 28 Table 12.

¹⁰³ United States Sentencing Commission, 2 *The Federal Sentencing Guidelines* 378.

¹⁰⁴ See Hofer and Semisch, 12 *Fed Sent Rptr* at 13 (cited in note 75).

¹⁰⁵ See, for example, Aaron Rappaport, *The State of Severity*, 12 *Fed Sent Rptr* 3

tive law-and-order jurists such as Justice Anthony Kennedy have argued that federal law requires imposition of prison sentences too often and for terms that are too long.¹⁰⁶

The behavior of federal judges and prosecutors also suggests that, as a group, they may see federal sentences as being unduly stringent, or at least as being longer than necessary to achieve the ends of justice. For example, in contrast to state guideline systems—in which rates of upward and downward departures from guidelines or presumptive ranges are generally comparable—more than 34 percent of all federal cases receive downward departures,¹⁰⁷ while less than 1 percent receive upward departures.¹⁰⁸ And at least one study has found that judges, prosecutors, and other frontline sentencing actors exercised their discretion throughout the 1990s to gradually reduce average sentences in drug cases.¹⁰⁹ It is, of course, misleading to treat all federal sentences as an undifferentiated lump. Not even the harshest critics of the Guidelines view sentences for all classifications of

(1999); Michael Tonry, *Sentencing Matters* 78–79 (Oxford 1996); Kevin Blackwell, *A Comparison of State and Federal Guidelines: The Resentencing Project* 24 (United States Sentencing Commission) (finding that in thirty-six of fifty sentencing comparisons, defendants faced more severe penalties under federal law than in the four state systems compared); Frank O. Bowman, III, *Playing “21” with Narcotics Enforcement: A Response to Professor Carrington*, 52 Wash & Lee L Rev 937, 981–83 (1995) (criticizing the severity of federal drug sentences).

In addition, there is a substantial body of literature noting that American criminal sentences, both federal and state, are substantially higher than is the case in most other Western democracies. See, for example, James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (Oxford 2003); Bureau of Justice Statistics, *German and American Prosecutions: An Approach to Statistical Comparison* 27–35 (GPO 1998); Richard S. Frase, *Sentencing in Germany and the United States: Comparing Apfel with Apples* 51–52 (Max Planck Inst 2001); Richard S. Frase, *Sentencing Laws & Practices in France*, 7 Fed Sent Rptr 275 (1995); James P. Lynch, *A Comparison of Prison Use in England, Canada, West Germany, and the United States: A Limited Test of the Punitive Hypothesis*, 79 J Crim L & Criminol 180, 198 (1988). Consider Michael Tonry and Richard S. Frase, eds, *Sentencing and Sanctions in Western Countries* (Oxford 2001); Michael Tonry and Kathleen Hatlestad, eds, *Sentencing Reform in Overcrowded Times: A Comparative Perspective* (Oxford 1997).

¹⁰⁶ Anthony M. Kennedy, *Speech at the American Bar Association Annual Meeting* (Aug 9, 2003), available at <http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html> (last visited Apr 2, 2005) (observing that because federal sentences are often too long the “Federal Sentencing Guidelines should be revised downward,” and that “[i]n too many cases, mandatory minimum sentences are unwise and unjust”).

¹⁰⁷ United States Sentencing Commission, *2002 Sourcebook* 51 Fig G (cited in note 37). Roughly half of these downward departures are “substantial assistance” departures awarded on motion of the government for cooperation in the investigation or prosecution of others. The other half are downward departures ordered by judges for some other reason.

¹⁰⁸ *Id.*

¹⁰⁹ Bowman and Heise, 87 Iowa L Rev 480 (cited in note 84).

federal crime as being too severe. But sentence severity is undoubtedly a common theme in many critiques of the Guidelines.

2. Rigidity.

The severity critique is customarily intertwined with the complaint that the current federal sentencing system is too rigid because it provides too little flexibility for the sentencing judge to account for circumstances unique to the defendant or peculiar to the case.¹¹⁰ “Rigidity” is one of the trickiest points about the current system to assess because what appears to one observer as undue rigidity may appear to another as nothing more than a necessary incident of bringing law to a previously lawless sentencing regime. Nonetheless, several themes customarily emerge in discussions of this issue.

First, one common complaint is directed not at the SRA or the Sentencing Guidelines, but at the framework of statutory mandatory minimum sentences Congress has overlaid onto the Guidelines system for certain classes of offenses, most notably drug and firearm crimes.¹¹¹ For example, the enactment in 1986 of tough statutory quantity-based mandatory minimum drug sentences¹¹² influenced the shape and severity of the drug guidelines promulgated in 1987.¹¹³ These mandatory minimums also block the exercise of the otherwise available judicial departure power in cases to which they apply.

Second, some have argued that even without mandatory minimums, the existing guidelines are too rigid.¹¹⁴ This sort of rigidity arises from a combination of the complexity of the Guidelines and the relatively tight constraints placed on judicial authority to depart from the sentencing range generated by the Guidelines. The complexity of the sentencing grid and the accompanying rules forces judges to make detailed factual and le-

¹¹⁰ See, for example, Frase, 78 *Judicature* at 178 (cited in note 46) (“[S]tate guidelines generally appear to be more balanced than the federal version. Offender characteristics receive more weight in most state systems, departures are more common, sentencing is less severe, and sentencing power, at both the policy-making and individual case level, is shared more broadly.”).

¹¹¹ See, for example, Kennedy, *Speech at the American Bar* (cited in note 106).

¹¹² Anti-Drug Abuse Act of 1986 (ADAA), Pub L No 99-570, 100 Stat 3207-2 (1986), codified in 21 USC § 801 et seq (2000).

¹¹³ For discussion of how the mandatory minimum sentences of the ADAA affected the structure of guideline drug sentences, see Bowman, 105 *Colum L Rev* at 1329–32 (cited in note 78).

¹¹⁴ See, for example, Freed, 101 *Yale L J* at 1752–53 (cited in note 92) (“[T]he Commission elected the wrong policies for federal sentencing reform. . . . It has opted for rigidity rather than flexibility in its approach.”).

gal determinations that generate a fairly narrow range of possible sentences within which the judge must impose a sentence, unless he or she “departs” based on yet another set of factual findings.

Some Guidelines critics have contended that the rules governing a judge’s power to depart from the range are too restrictive. One common complaint has been that, with respect to awarding departures, the Guidelines bar consideration of many of the characteristics of a defendant or circumstances of his background that have traditionally been considered to mitigate punishment.¹¹⁵ In addition, Congress and the courts have disagreed about the degree to which appellate courts should police the award of downward departures. In *Koon v United States*,¹¹⁶ the Supreme Court tacitly encouraged departures by holding that the applicable standard of appellate review should be abuse of discretion.¹¹⁷ In the PROTECT Act of 2003, Congress took a different and more restrictive view of departures, mandating changes in Guidelines rules governing departures, legislatively repealing *Koon*, and mandating de novo appellate review of departures.¹¹⁸

3. Complexity.

Many critics have contended that the Guidelines are too complex to understand or apply,¹¹⁹ but I am skeptical that this has very often been the case when, as was true prior to *Blakely*, the persons applying and interpreting the Guidelines were lawyers and judges.¹²⁰ The Guidelines’ complexity, however, may indeed prove to be a barrier to their application in the context of jury trials, a point to which we will return later.

The Guidelines’ complexity is at the root of their failure, but not because the Guidelines are too hard to understand. Complex-

¹¹⁵ Id at 1715 (“Perhaps no provisions in the guidelines evoke more dismay from the federal judiciary, the probation service, and the bar than the policy statements assembled in chapter 5H.”).

¹¹⁶ 518 US 81 (1996).

¹¹⁷ Id at 99.

¹¹⁸ PROTECT Act § 401(m), 117 Stat at 675.

¹¹⁹ See, for example, Stith and Cabranes, *Fear of Judging* at 3, 33, 91–93 (cited in note 90) (contending that the Guidelines are too complex and suggesting that they may usefully be compared to the Internal Revenue Code); R. Barry Ruback and Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psych Pub Pol & L 739 (2001) (arguing that the complexity of the Guidelines undermines the purposes of sentencing reform).

¹²⁰ See Bowman, 44 SLU L J at 328–29 (cited in note 76) (rejecting arguments that the Guidelines are too complex to understand or apply).

ity has had more subtle, but also more profound, effects on the evolution of federal sentencing policy in the twenty years since the enactment of the SRA. In particular, the Guidelines' complexity has contributed to their unreasonable rigidity and has been a primary cause of an increasing institutional imbalance in both the rulemaking and individual case.

4. Institutional balance in sentencing.

The Guidelines system was supposed to remedy the former system's excessive reliance on judicial discretion by distributing sentence authority between the relevant institutional actors. At the rulemaking level, the SRA created the Sentencing Commission, which was to serve as an expert, neutral rulemaker, reasonably insulated from direct political pressure,¹²¹ and equally importantly, serve as a forum for policy debate among other institutional actors—judges, prosecutors, the defense bar, probation officers, and interested community groups.¹²² Congress was to have ultimate authority over Commission rules, but would in theory stay out of the details of sentencing policy, or would at least give substantial deference to the Commission's judgment. The Department of Justice would have a seat at the Sentencing Commission table in order to express its position, but would be only one among a number of important voices.¹²³

At the individual case level, trial judges lost their former plenary authority of front-end sentencing. But appellate judges gained an unprecedented role in sentencing through the review function. And even trial judges retained significant discretionary power through their unfettered authority to sentence anywhere within the applicable range, through the power to depart from the range upon appropriate grounds, and through the hidden, but very real, *de facto* discretionary authority to find sentencing facts. Prosecutors gained the authority inherent in being masters

¹²¹ Dale G. Parent, *What Did the United States Sentencing Commission Miss?*, 101 *Yale L J* 1773, 1775 (1992) (noting that the Minnesota Sentencing Commission, in contrast to the United States Sentencing Commission, realized that "[t]he creation of a guidelines commission merely shifted the politics of sentencing reform from the legislature to a commission").

¹²² In the late 1990s, various commentators noted that the Sentencing Commission was intended to serve as a forum for policy debate, and suggested improvements in the Commission's procedures and institutional approach to better achieve that result. See Marc L. Miller and Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 *Buff Crim L Rev* 723 (1999); Frank O. Bowman, III, *Practical Magic: A Few Down-to-Earth Suggestions for the New Sentencing Commission*, 12 *Fed Sent Rptr* 101, 103–04 (1999).

¹²³ 28 USC § 991(a) (1993 & Supp 2004).

of the facts in a fact-driven guidelines system, but were supposed to be prevented from achieving total dominance by the relevant conduct rules and their obligation as officers of the court to report all potentially relevant sentencing facts to the court.¹²⁴

The hoped-for institutional balance has broken down. The former unwarranted judicial and parole board hegemony over federal sentences has been replaced by an alliance of the Department of Justice and Congress at the rulemaking level, and excessive control by prosecutors at the individual case level. I have explained these trends in detail elsewhere,¹²⁵ but they can be summarized as follows:

a) *Institutional imbalance in sentencing rulemaking.* Congress has plenary authority to make sentencing rules; however, the SRA was supposed to create a system in which the direct exercise of that authority would be rare. The Justice Department, for its part, will perennially be subject to the temptation to ask for higher penalties, both because that is the instinctive disposition of prosecutors and because the Department knows that it can always refrain from enforcing the law to its full extent if doing so seems too harsh.¹²⁶ But the SRA created a Sentencing Commission on which the Justice Department is represented only in a non-voting, ex officio capacity, plainly to ensure that the views of prosecutors would not control the Commission's choices. Yet the Congress/DOJ alliance now dominates sentencing rulemaking. Why?

¹²⁴ See Bowman, 1996 Wis L Rev at 724-32 (cited in note 9); Frank O. Bowman, III, *To Tell the Truth: The Problem of Prosecutorial "Manipulation" of Sentencing Facts*, 8 Fed Sent Rptr 324 (1996).

¹²⁵ See Frank O. Bowman, III, *Pour encourager les autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 Ohio St J Crim L 373, 435-40 (2004); Bowman, 105 Colum L Rev 1315 (cited in note 78).

¹²⁶ Prosecutorial charging and plea bargaining discretion is subject to few legally enforceable limits. See *Wayte v United States*, 470 US 598 (1985). The central administration of the Department of Justice has attempted to maintain some administrative control over the exercise of this discretion by local United States Attorney's Offices. See, for example, Attorney General Janet Reno, *Memorandum to Holders of the United States Attorney's Manual, Title 9* (Oct 12, 1993), reprinted in 6 Fed Sent Rptr 352 (1994) (emphasizing that one of the purposes of the Principles of Federal Prosecution is to assure that charging and plea bargaining practices do not undermine the SRA's goal of reducing unwarranted sentencing disparity); Ashcroft, *Charging of Criminal Defendants* (cited in note 86) (stating the Department of Justice policy on plea bargaining) However, the fact remains that the Department of Justice as a national institution and both local U.S. Attorney's Offices and Assistant United States Attorneys acting in their individual capacity retain significant discretion to *refrain* from enforcing the criminal law in its full rigor. For a discussion of prosecutorial practice and the Reno memorandum, see generally Sara Sun Beale, *The New Reno Bluesheet: A Little More Candor Regarding Prosecutorial Discretion*, 6 Fed Sent Rptr 310 (1994).

First, the complexity of the Guidelines and the federal sentencing table tends to encourage continuing congressional intervention in the particulars of federal sentencing law. Indeed, it is only the complexity of the table that makes repeated, detailed congressional intervention politically useful and therefore likely.

In the pre-Guidelines era, Congress could not readily translate its concern about a class of high-profile crimes into specific sentencing outcomes. Faced with a real or perceived outbreak of criminal activity, Congress had four basic legislative options: (1) it could increase appropriations to law enforcement agencies so that more offenders could be caught and prosecuted, which might prove effective, but which is inevitably expensive and thus requires raising taxes or the deficit, or reallocating resources currently dedicated to fighting other crimes; (2) it could create a new crime covering the activity causing concern, but given the breadth of existing federal criminal law, there are few crimes not already covered by the federal code; (3) it could raise the statutory maximum penalty for existing statutory crimes covering the activity, but neither before nor after the Guidelines did an increased statutory maximum have any necessary effect on actual sentences (and in any case one can only raise statutory maximums so many times); and (4) it could legislate a statutory minimum sentence for the activity, but Congress has been reluctant to impose minimums except in drug and gun cases (and, once again, one can only impose mandatory sentences so many times).

Once the Sentencing Commission gave birth to a 258-box sentencing table with detailed instructions for placing defendants in those boxes, the options available to Members of Congress seeking a legislative response to a specific type of crime mushroomed. The proliferation of fact-dependent and legally enforceable decision points created by overlapping guidelines and statutory mandatory minimum sentences has given Congress a mechanism to micro-manage sentencing policy.

Perhaps unsurprisingly, given the obvious political incentives for appearing tough on crime, almost all recent congressional intervention in the details of sentencing policy has been in the direction of raising sentences.¹²⁷ Still, neither the short-term

¹²⁷ See Marc Mauer, *Lessons of the "Get Tough" Movement in the United States*, The Sentencing Project at 2, available at <<http://www.sentencingproject.org/pdfs/mauer-icpa.pdf>> (last visited Apr 7, 2005) ("88% of [the rise in inmate populations from 1980–96] was a result of changes in sentencing policy, and just 12% due to changes in crime."); Bowman, 1 Ohio St J Crim L at 392–416, 431–35 (cited in note 125) (describing congress-

political incentives favoring sentencing increases nor the complexity of the Federal Sentencing Guidelines can entirely explain the behavior of Congress in the sentencing field. The political incentives favoring sentence increases operate in state legislatures as well, and many states have guidelines systems, albeit less complex ones, which their legislatures can amend.¹²⁸ Yet over the last twenty years, states have both raised and lowered sentences and the current trend in the states is toward moderation of penalties.¹²⁹ Why the difference?

The most obvious difference is budgetary. State legislatures operate under two constraints that Congress lacks. First, states are customarily obliged to balance their budgets, usually by command of state law.¹³⁰ Second, the proportion of state budgets devoted to law enforcement and corrections expenditures is far higher than the equivalent proportion of the federal budget.¹³¹ Consequently, state legislators can only pursue a course of ever higher sentences, ever more prisoners, and ever larger corrections costs for so long before the pure economic cost of such a program begins to force unpleasant choices between building more prisons and either cutting budgets for public goods—such as education, health care, and road construction—or raising taxes. In part for this reason, state sentencing guidelines systems have increasingly been used “to gain better control over

sional activity in the area of white collar crime sentencing).

¹²⁸ See Frase, 44 SLU L J at 425 (cited in note 46) (surveying the structures and purposes of state sentencing guideline systems).

¹²⁹ See Jon Wool and Don Stemen, *Changing Fortunes or Changing Attitudes? Sentencing and Corrections Reforms in 2003*, Vera Inst of Just (Mar 2004) (discussing how state budget shortfalls have translated into reduction of criminal penalties); Daniel F. Wilhelm and Nicholas R. Turner, *Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?*, Vera Inst of Just (June 2002) (same).

¹³⁰ See Ronald K. Snell, *State Balanced Budget Requirements: Provisions and Practice*, available at <<http://www.ncsl.org/programs/fiscal/balbuda.htm>> (last visited Apr 7, 2005) (outlining the nature of balanced budget requirements in all fifty states and Puerto Rico).

¹³¹ From 2002–2004, corrections expenditures alone, not counting the costs of police and courts, averaged roughly 7% of the general fund expenditures of the states. National Association of State Budget Officers, 2003 State Expenditure Report 60, Table 34 (2004), available at <<http://www.nasbo.org/Publications/PDFs/2003ExpendReport.pdf>> (last visited May 26, 2005). By contrast, in 2001, the Federal government spent approximately \$25 billion on direct expenditures for criminal and civil justice, including corrections, courts, law enforcement, and civil justice costs. United States Department of Justice Bureau of Justice Statistics, *Expenditure and Employment Statistics*, available at <<http://www.ojp.usdoj.gov/bjs/eande.htm>> (last visited Apr 7, 2005). In 2001, the Federal budget was \$1.8 trillion, meaning that the federal expenditures for all criminal and civil justice constituted approximately 1.4% of the federal budget in that year. Executive Office of the President of the United States, *A Citizen's Guide to the Federal Budget: Budget of the United States Government Fiscal Year 2001* at iii, available at <<http://www.gpoaccess.gov/usbudget/fy01/pdf/guide.pdf>> (last visited Apr 7, 2005).

rapidly escalating prison populations and correctional expenses.”¹³² By contrast, because the federal government need not balance its budget and federal correctional spending is such a tiny fraction of the budget, Congress does not perceive itself to be faced with the same stark choice between prisons or schools that has begun to haunt their colleagues in America’s statehouses.

The lack of perceived economic constraint on federal sentencing policy has led to a failure by Congress to perform its role of balancing national priorities. Legislatures are supposed to make resource allocation choices. But because Congress has never worried about the costs of the criminal laws it passes, it tends to see criminal legislation purely in term of political effects—and increasing penalties is almost always perceived as conferring political benefit.¹³³

Congress thus has little reason to scrutinize Justice Department requests or its own members’ initiatives seeking higher sentences, and as a result, there is no restraint on the gradual upward ratcheting of penalties made attractive by politics, and made possible by the Guidelines’ complex structure. This institutional imbalance has caused the feedback from front-line sentencing professionals to be ignored and prevented the Sentencing Commission from adjusting the guidelines in response to experience.

b) *Institutional imbalance in the imposition of individual sentences.* Since the advent of the Guidelines in 1987, local United States Attorneys and their Assistants have exercised an increasing amount of power over sentencing outcomes in individual cases. This development is a direct consequence of a fundamental attribute of guidelines systems: increasing the complexity of a sentencing guidelines system tends to confer power on prosecutors while limiting the power of judges. This is particularly true if the guidelines are overlaid on a complex criminal code containing an array of fact-dependent statutory minimum sentence provisions. As the number of fact-

¹³² Frase, 78 *Judicature* at 175 (cited in note 46). See also, Richard S. Frase, *Sentencing Guidelines in the States: Lessons for State and Federal Reformers*, 10 *Fed Sent Rptr* 46, 46 (1997) (“[S]tate guideline reforms are increasingly motivated by a desire to gain better control over escalating prison populations; several states (and the ABA Standards) directly link recommended sentences to available correctional resources.”).

¹³³ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *Mich L Rev* 505 (2001) (illustrating how political aspects of criminal legislation tend to yield over-broad statutes that allow politicians to reap political benefits without making difficult decisions over implementation).

dependent rules potentially applicable to the sentence of each defendant increases, so too does the number of opportunities for a prosecutor to control each defendant's sentence—by charging or not charging crimes or statutory enhancements, proving or not seeking to prove facts determinative of guideline adjustments, or moving or not moving for various types of departures. Because the Federal Sentencing Guidelines and associated statutory provisions are, taken together, one of the most complex sentencing regimes ever devised, the effect is to confer on prosecutors a very high degree of control over sentencing outcomes.

5. Relevant conduct.

One of the issues facing the designers of the Federal Sentencing Guidelines was whether, when assessing offense seriousness, the sentencing judge would be allowed to consider only facts directly and intimately related to the particular offense or offenses of which a defendant was convicted by trial or plea, or whether a judge could consider all facts about what a defendant really did in relation to those offenses.¹³⁴ The concern of the drafters was that a pure offense-of-conviction system would allow the parties, and more particularly the prosecutor, to control sentencing outcomes by limiting the scope of a defendant's sentencing liability through charge manipulation and bargaining.¹³⁵ To take but one simple example, a defendant who engaged in a series of five drug transactions with an undercover officer, each involving 100 grams of powder cocaine, could be charged with or permitted to plead to possession with intent to distribute 100, 200, 300, 400, or 500 grams. Given the Guidelines' reliance on quantity to set drug sentence lengths, the parties could effectively decide between them what sentence the defendant received, and the judge would have no meaningful ability to override that decision even if she were fully aware of all facts about the defendant's conduct. If outcomes were freely negotiable between the litigants, the objective of reducing unwarranted disparity would be undermined. The Guidelines sought to solve this problem through the "relevant conduct" rule that permits, indeed

¹³⁴ See Wilkins and Steer, 41 SC L Rev at 497–500 (cited in note 67) (discussing the Sentencing Commission's choice between an offense-of-conviction system and a relevant-conduct system).

¹³⁵ See Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L Rev 83, 93–95 (1988) (discussing the problems that plea bargaining presents for application of the Guidelines).

requires, judicial consideration of a broad array of conduct related to the offense of conviction.

Of course, the ability to manipulate the system in this way remains under the existing system, but only insofar as the government is willing to conceal evidence from the court (or the court is willing to blink at evidence it knows of, but which the parties exclude from the terms of their plea agreement). There is at least anecdotal evidence that “fact-bargaining” of this sort does occur.¹³⁶

The Guidelines drafters not only felt that relevant conduct was necessary to limit prosecutorial control over sentencing outcomes, but also argued that judges had always been able to consider all facts about both the crime(s) of conviction and related incident(s) in setting a sentence within the statutory range.¹³⁷ Those concerned about the effect of relevant conduct note that, while pre-Guidelines judges could consider facts not directly within the ambit of the crime(s) of conviction, they were never required to do so.¹³⁸ Moreover, the complexity of the Guidelines plays a role in increasing the effects of relevant conduct. The fact that the Guidelines assign mandatory weight to so many facts increases the opportunities for relevant conduct not directly implicated by the offense of conviction to influence the sentence. The combination of the wider factual net thrown by the relevant concept rule, the complexity of the Guidelines, and the requirement that sentencing facts be proven only to a preponderance in a proceeding with reduced procedural protections, has been thought to give relevant conduct disproportionate weight in the sentencing process.¹³⁹ This argument is captured in the metaphor of “the tail which wags the dog,” discussed by the Supreme Court in *Blakely*¹⁴⁰ and a number of previous sentencing cases.¹⁴¹

¹³⁶ See Stephen J. Schulhofer and Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 *Nw U L Rev* 1284, 1292 (1997) (finding that the Guidelines are circumvented or evaded in roughly 20–35 percent of the cases resolved through guilty pleas).

¹³⁷ See Breyer, 17 *Hofstra L Rev* at 10–11 (cited in note 13) (“Typically, courts have found post-trial sentencing facts without a jury and without the use of such rules of evidence as the hearsay or best evidence rules, or the requirement of proof of facts beyond a reasonable doubt.”).

¹³⁸ Frankel, *Criminal Sentences* at 26–38 (cited in note 16) (discussing the pre-Guidelines trial judge’s broad discretionary power over pre-sentencing hearings). For a wide-ranging critique of the relevant conduct feature of the Guidelines, see American College of Lawyers, *Proposed Modifications to the Relevant Conduct Provision of the United States Sentencing Guidelines* (2001), reprinted in 38 *Am Crim L Rev* 1463 (2001).

¹³⁹ See *Blakely*, 124 *S Ct* at 2539.

¹⁴⁰ *Id.*

¹⁴¹ See *Apprendi*, 530 *US* at 563 (Breyer dissenting); *Almendarez-Torres v United*

In sum, the basic critique of the federal sentencing system as it existed in June 2004 was that it tended to produce unduly severe sentences, was too rigid and too complex, was institutionally imbalanced at both the rulemaking and individual case levels, and tended to rely too heavily on sentencing factors not found by juries or admitted as part of pleas. Whatever the force of this critique, there seemed little immediate prospect of fundamental reform of a system so well-entrenched and so advantageous to Congress and federal prosecutors. Then the Supreme Court reared back and hurled a high, hard one in the form of *Blakely v Washington*, followed in short order by *Booker v United States*, a jurisprudential knuckleball that would make Phil Niekro jealous.¹⁴²

III. THE IMPACT OF *BLAKELY* AND *BOOKER*

A. *Blakely v Washington*

Blakely involved a challenge to the Washington State Sentencing Guidelines.¹⁴³ In Washington, pre-*Blakely*, a defendant's conviction of a felony produced two immediate sentencing consequences. First, the conviction rendered the defendant legally subject to a sentence within the upper boundary set by the statutory maximum sentence for the crime of conviction, and second, the conviction placed the defendant in a presumptive sentencing range set by the state sentencing guidelines within the statutory minimum and maximum sentences.¹⁴⁴ Under the Washington State Sentencing Guidelines, a judge was empowered to adjust this range upward, but not beyond the statutory maximum, upon a post-conviction judicial finding of additional facts. For example, *Blakely* was convicted of second degree kidnapping with a firearm, a class B felony that carried a statutory maximum sentence of ten years.¹⁴⁵ The fact of conviction generated a "standard range" of 49 to 53 months;¹⁴⁶ however, the judge found that

States, 523 US 224, 243 (1998); *United States v Watts*, 519 US 148, 157 n 2; *McMillan v Pennsylvania*, 477 US 79, 88 (1986).

¹⁴² Phil Niekro was one of the most famous knuckleball pitchers of the modern era. Baseball Almanac, *Phil Niekro*, available at <<http://www.baseball-almanac.com/players/player.php?p=niekrph01>> (last visited Apr 7, 2005).

¹⁴³ 124 S Ct at 2531.

¹⁴⁴ See id at 2535.

¹⁴⁵ See Wash Rev Code Ann §§ 9A.40.030(3), 9A.20.021(1)(b) (West 2003).

¹⁴⁶ See id at § 9.94A.515 (seriousness level V for second-degree kidnapping); id at App 27 (offender score two based on § 9.94A.525); id at § 9.94A.510(1) box 2-V (standard range of thirteen to seventeen months); id at § 9.94A.510(3)(b) (thirty-six month firearm en-

Blakely had committed the crime with “deliberate cruelty”—a statutorily enumerated factor that permitted imposition of a sentence above the standard range¹⁴⁷—and imposed a sentence of 90 months.¹⁴⁸ The United States Supreme Court found that imposition of the enhanced sentence violated the defendant’s Sixth Amendment right to a trial by jury.¹⁴⁹

In reaching its result, the Court relied on a rule it first announced four years before in *Apprendi*: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”¹⁵⁰ In the years since *Apprendi*, many observers (including myself) assumed that *Apprendi*’s rule applied only if a post-conviction judicial finding of fact could raise the defendant’s sentence higher than the maximum sentence allowable by statute for the underlying offense of conviction.¹⁵¹ For example, in *Apprendi* itself, the maximum statutory sentence for the crime of which Apprendi was convicted was ten years, but under New Jersey law the judge was allowed to raise that sentence to twenty years if, after the trial or plea, he found that the defendant’s motive in committing the offense was racial animus.¹⁵² The Supreme Court held that increasing Apprendi’s sentence beyond the ten-year statutory maximum based on a post-conviction judicial finding of fact was unconstitutional.¹⁵³

In *Blakely*, however, the Court found that the Sixth Amendment can be violated even by a sentence below what has always before been considered the statutory maximum. Henceforward, “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”¹⁵⁴ Any fact that increases a defendant’s “statutory maximum,” as newly defined in *Blakely*, must be found by a jury.

hancement).

¹⁴⁷ See *id.* at § 9.94A.535(2)(a).

¹⁴⁸ See *Blakely*, 124 S Ct at 2535.

¹⁴⁹ *Id.* at 2543.

¹⁵⁰ *Apprendi*, 530 US at 490.

¹⁵¹ See Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 Yale L J 1097, 1102–23 (2001) (discussing Supreme Court cases regarding the distinction between elements of a crime and sentencing factors); Nancy J. King and Susan R. Klein, *Après Apprendi*, 12 Fed Sent Rptr 331 (2000) (discussing the appeals of sentences affected by *Apprendi*).

¹⁵² *Apprendi*, 530 US at 468–69.

¹⁵³ *Id.* at 491–97.

¹⁵⁴ *Blakely*, 124 S Ct at 2537 (emphasis in original).

Thus, the *Blakely* model of constitutional sentencing practice seems to run as described below.

First, any fact, the proof of which exposed a defendant to a higher theoretical maximum sentence than he could have been subject to absent proof of that fact, was an “element” of a crime (or at least something like an “element”)¹⁵⁵ and had to be proven to a jury beyond a reasonable doubt or admitted by the defendant. It did not seem to matter whether the rule correlating the fact with increased possible punishment was enacted by a legislature or an administrative body like a sentencing commission. Most importantly, the concept of a maximum sentence appeared to include the tops of fact-based presumptive sentencing ranges situated below what had previously been understood to be statutory maximum sentences.

Second, the Supreme Court held in *McMillan v Pennsylvania*,¹⁵⁶ and reaffirmed in *Harris v United States*,¹⁵⁷ that a post-conviction judicial finding of fact can increase a defendant’s minimum sentence, so long as that finding of fact does not increase the statutory maximum. Because *Blakely* did not overrule the holding of *Harris*, a fact which, if proven, subjects a defendant to a minimum sentence, even a real and inescapable mandatory minimum sentence, is not considered to be an element of the offense. Such a fact can be found by a judge post-conviction, and is subject to a lower standard of proof, so long as the resultant minimum sentence is below the legislatively established maximum sentence for the same crime.

Third, *Blakely* did not deny the power of a legislature to specify a single punishment for a crime. Conversely, *Blakely* confirmed that if a legislature chooses to assign a range of punishments to proof of a crime, it may allow judges to impose a sentence anywhere within that range in the unchecked exercise of their discretion. Thus, *Blakely* apparently permits legislatures or

¹⁵⁵ Whether the facts that before *Blakely* would have been called “sentencing factors” are now “elements” in every sense of the word remains an open question. For example, it is clear that “elements” of a federal crime must be alleged in the indictment, but it is so far unclear whether these new element-like sentencing factors must be alleged in the indictment or whether due process might be satisfied by information or some other form of pre-trial pleading. Similarly, if a pre-*Blakely* “element” was not proven beyond a reasonable doubt, the trial court would have an obligation under FRCP 29 to dismiss the charge containing the unproven element. But failure to prove a post-*Blakely* element-like sentencing factor seems unlikely to require dismissal of the underlying charge. Rather, the failure of proof would probably only bar the sentencing enhancement associated with the unproven element.

¹⁵⁶ 477 US 79 (1986).

¹⁵⁷ 536 US 545 (2002).

sentencing commissions to create entirely advisory guidelines suggesting additional non-element facts that judges should take into account in imposing sentences below the statutory maximum. But *Blakely* does not seem to permit a system in which a post-conviction judicial finding of non-element facts could generate even a presumptive sentencing range with a maximum sentence lower than the statutory maximum.

Fourth, Justice Scalia believed that the *Blakely* result was necessary “to give intelligible content to the right of jury trial.”¹⁵⁸ Exactly what Justice Scalia meant by this is not entirely clear; however, it is fair to surmise that he intended *Blakely* as a partial response to the argument about the tail of relevant conduct wagging the sentencing dog.¹⁵⁹ That is, at a minimum he intended jury fact-finding to set meaningful limits on a defendant’s maximum sentencing exposure.

Accordingly, the Guidelines seemed to fall afoul of the *Blakely* rule. The Guidelines are essentially indistinguishable from the Washington guidelines struck down in *Blakely*. In both systems, the fact of conviction generates a guideline sentencing range bounded at the top by a maximum sentence, which is below the absolute statutory limit for the crime, but cannot be legally exceeded in the absence of post-conviction judicial findings of fact.¹⁶⁰ And in both systems, post-conviction judicial findings of fact raise both the bottom and top of the guideline range, and by raising the top of the range increase the length of a defendant’s possible guideline sentence.

¹⁵⁸ *Blakely*, 124 S Ct at 2538.

¹⁵⁹ Indeed, Justice Scalia expressly invokes the metaphor in his opinion. He says of that those who criticize the *Apprendi* decision must either grant legislatures the unfettered right to designate elements and sentencing factors, or conclude that “legislatures may establish legally essential sentencing factors within limits—limits crossed when, perhaps, the sentencing factor is a ‘tail which wags the dog of the substantive offense.’ What this means in operation is that the law must not go too far—it must not exceed the judicial estimation of the proper role of the judge. The subjectivity of this standard is obvious.” *Blakely*, 124 S Ct at 2539.

¹⁶⁰ For example, conviction of bank robbery exposes the defendant to a statutory maximum sentence of twenty years imprisonment. 18 USC § 2113 (2004). The fact of conviction generates a base offense level of 20 under USSG § 2B3.1(a) (2004). Standing alone, a base offense level of 20 generates a sentencing guideline range of 33–41 months, assuming that the defendant is a first-time offender. USSG § 5A (2004) (Sentencing Table). However, if the sentencing judge finds, post-conviction, that the defendant used a firearm in the commission of the robbery or injured a victim, the offense level can be increased by up to eleven levels, USSG §§ 3B3.1(b)(2), (3) (2004) pushing the defendant’s guideline range up to 108–135 months. USSG § 5A (Sentencing Table). Further increases are possible for judicial findings of amount of loss and other factors. USSG § 3B3.1(b)(7).

Although in *Blakely* the Supreme Court reserved ruling on the applicability of its holding to the federal guidelines,¹⁶¹ the obvious implications of the opinion caused immediate consternation. Within weeks after *Blakely*, dozens of federal trial and appellate courts issued opinions on whether it affected the federal sentencing system, and if so how.¹⁶² A legion of commentators added their voices to the conversation.¹⁶³ From this cascade of analysis, three basic possibilities seemed to emerge.

First, the Department of Justice and a number of courts of appeals contended that the federal sentencing system should survive *Blakely* intact.¹⁶⁴ They attempted to distinguish the federal system from the Washington state system at issue in *Blakely* because Washington's guideline sentencing ranges were set by statute while the federal guidelines were drafted by a sentencing commission.

Second, some courts and commentators suggested that the Supreme Court could "*Blakely-ize*" the Guidelines by holding that their sentencing rules survive, but requiring substitution of a system of jury trials and jury waivers for the structure of post-conviction judicial fact-finding and appellate review created by the SRA.¹⁶⁵

Third, other courts and commentators argued that the Guidelines' sentencing rules could not be severed from the procedure of post-conviction judicial fact-finding contemplated by the SRA and formalized in the Guidelines.¹⁶⁶ In this view, *Blakely* rendered the Guidelines unconstitutional *in toto*. The practical

¹⁶¹ *Blakely*, 124 S Ct at 2538 n 9.

¹⁶² See Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 Am Crim L Rev 217, 226-49 (2004) (describing and analyzing the opinions issued during July and August 2004 by federal courts applying *Blakely* to the Guidelines).

¹⁶³ For a general discussion, see *Considering the Post-Blakely World*, 17 Fed Sent Rptr 1 (2004) (containing articles discussing *Blakely* by Frank O. Bowman, III, Albert W. Alschuler, Steven L. Chanenson, Larry Kupers, Jane L. McClellan and Jon M. Sands, Aaron Rappaport, Ian Weinstein and Nathaniel Z. Marmor, Jon Wool and Don Stemen, Rory K. Little and Teresa Chen, and the Minnesota Sentencing Guidelines Commission).

¹⁶⁴ Bowman, 41 Am Crim L Rev at 227-28 (cited in note 162). See also, *United States v Reese*, 382 F3d 1308 (11th Cir 2004); *United States v Mincey*, 380 F3d 102 (2d Cir 2004); *United States v Hammoud*, 378 F3d 426 (4th Cir 2004) (en banc); *United States v Koch*, 383 F3d 436 (6th Cir 2004).

¹⁶⁵ Bowman, 41 Am Crim L Rev at 228-29 (cited in note 162); *United States v Booker*, 375 F3d 508 (7th Cir 2004); *United States v Ameline*, 376 F3d 967 (9th Cir 2004).

¹⁶⁶ Bowman, 41 Am Crim L Rev at 239-41 (cited in note 162). See also, Albert W. Alschuler, *To Sever or not to Sever? Why Blakely Requires Action by Congress*, 17 Fed Sent Rptr 11 (2004); *United States v Croxford*, 324 F Supp 2d 1230 (D Utah 2004); *United States v Mueffelman*, 327 F Supp 2d 79 (D Mass 2004); *United States v King*, 328 F Supp 2d 1276 (M D Fla 2004).

effect of such a ruling was thought to be that the Guidelines would become either wholly void and legally nugatory or at most advisory.

B. *Booker v United States*

And then, just as the legal world was digging in its spikes and preparing to deal with some post-*Blakely* heat from Justice Scalia, it looked up to find Justice Breyer on the mound and the *Booker* opinion giggling toward the plate.¹⁶⁷ In *United States v Booker*,¹⁶⁸ the same five-member majority that had prevailed in *Blakely*¹⁶⁹ found that the Guidelines process of post-conviction judicial fact-finding was unconstitutional under the Sixth Amendment,¹⁷⁰ but an almost completely different five-member majority¹⁷¹ wrote the opinion describing the proper remedy for the constitutional violation. Justice Breyer, writing for the remedial majority, did not require juries to find all sentence-enhancing guidelines facts, nor did he invalidate the Guidelines *in toto*. Instead, he merely excised two short sections of the SRA,¹⁷² leaving the remainder of the SRA in place, and thus keeping the guidelines intact but rendering them “effectively advisory.”¹⁷³ Perhaps even more importantly, the remedial opinion found that both the government and defendants retained a right to appeal sentences, and that appellate courts should review sentences for “reasonableness.”¹⁷⁴

The *Booker* opinion stunned and amazed the sentencing world for at least three reasons. First, the Court’s selective editing of the text of the SRA is, at the least, an arresting spectacle. Justices Scalia and Stevens argue that this approach to severability analysis is unprecedented and illegitimate,¹⁷⁵ while Justice Breyer disclaims any novelty.¹⁷⁶ Whoever is correct, the Court’s approach was certainly a surprising assertion of judicial power.¹⁷⁷

¹⁶⁷ It was said of pitcher Phil Niekro’s knuckleball that it “actually giggles at you as it goes by.” Baseball Almanac, *Phil Niekro* (cited in note 142).

¹⁶⁸ 125 S Ct 738 (2005).

¹⁶⁹ Justices Scalia, Stevens, Thomas, Souter, and Ginsburg.

¹⁷⁰ 125 S Ct at 755–56.

¹⁷¹ Only Justice Ginsburg joined both halves of the Court’s opinion.

¹⁷² 18 USC § 3553(b)(1) (2004) and 18 USC § 3742(e) (2004).

¹⁷³ 125 S Ct at 756.

¹⁷⁴ 125 S Ct at 765–66.

¹⁷⁵ 125 S Ct 776–79 (Stevens dissenting); 125 S Ct 792–95 (Scalia dissenting).

¹⁷⁶ 125 S Ct at 757 (“To say this is not to create a new kind of severability analysis.”).

¹⁷⁷ Writing after *Blakely* but before *Booker*, I discussed the possibility that the Court might excise § 3553(b) and judicially amend and reinterpret § 3742, but dismissed this

The second puzzlement is figuring out what *Booker* means. The remedial opinion lends itself to different interpretations. Some have been tempted to read “advisory” to mean that the Guidelines are no longer legally binding on trial judges and that the Guidelines are now merely useful suggestions to sentencing courts.¹⁷⁸ However, a closer reading of the opinion suggests something quite different. First, because the opinion leaves virtually the entire SRA and all of the Guidelines intact, the requirement that judges find facts and make Guideline calculations based on those facts survives. Second, because the remedial opinion retains a right of appeal of sentences and imposes a reasonableness standard of review, appellate courts will have to determine what is reasonable. The remedial opinion left undisturbed 18 USC § 3553(a), which lists the factors a judge must consider in imposing a sentence and includes on that list the type and length of sentence called for by the Guidelines. Thus, the determination of “reasonableness” under the statute will necessarily include consideration of whether a sentence conforms to the Guidelines. The unresolved question is the weight that will be accorded to the Guidelines sentence—will it be considered at least presumptively correct or will it be reduced to the status of only one among many other factors?

The third mystery about the *Booker* remedial opinion is how it can possibly be squared with either the announced black-letter rule or the underlying theory of the *Blakely* opinion it purports to apply. Writing after *Blakely*, but before *Booker*, I considered the approach ultimately adopted in *Booker*, but dismissed it as fatally inconsistent with *Blakely*.

Only two possibilities seem to exist [if the Court judicially edits out Section 3553(b) and creates its own version of judicial review]. Either a judge’s findings of fact and con-

idea as improbable because it “would require the Court to declare that it has the power to selectively invalidate subsections of statutory provisions to create the federal sentencing system it would prefer in place of the system Congress enacted.” Bowman, 41 Am Crim L Rev at 246 (cited in note 162).

¹⁷⁸ Justices Stevens and Scalia adopt this view in their *Booker* dissents. 125 S Ct at 787 (Stevens dissenting) (“[J]udges must still *consider* the sentencing range contained in the Guidelines, but that range is now nothing more than a suggestion that may or may not be persuasive to a judge when weighed against the numerous other considerations listed in 18 USC § 3553(a).”) (emphasis in original); id at 179 (Scalia dissenting) (“Thus, logic compels the conclusion that the sentencing judge, after considering the recited factors (including the Guidelines), has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range. If the majority thought otherwise—if it thought the Guidelines not only had to be ‘considered’ (as the amputated statute requires) but had generally to be followed—its opinion would surely say so.”).

clusions of law leading to determination of a guideline range would create some presumption of the propriety of a sentence in that range, or the determination of a range would create no such presumption and the guideline calculation would have no legal significance. In the former case, meaningful appellate review of the district court's final sentencing decision would presumably require examination of the correctness of the guideline calculation that generated the presumptively correct range and an evaluation of any decision to sentence outside the resultant range. If so, regardless of the standard used by the appellate court to review the trial court's legal determinations and its ultimate sentencing choice, the resultant regime looks very much like both the current Guidelines and the Washington scheme struck down in *Blakely*. In the latter case, the Guidelines would create no greater legal constraint on district court sentencing discretion than if no guidelines existed at all, and there would be nothing for an appellate court to review. In short, the options seem to be either purely advisory guidelines subject to no appellate review or Guidelines subject to appellate review that cannot survive *Blakely*.¹⁷⁹

Justice Breyer was plainly unimpressed by this line of argument. Of course, there is no inconsistency between *Booker* and *Blakely* if the "effectively advisory" guidelines given to us by *Booker* are advisory in the sense of being useful, but legally non-binding, suggestions. But, as noted above, *Booker* not only salvages the Guidelines rules and the system of judicial fact-finding necessary to apply them, but strongly intimates that the guideline ranges produced by applying the rules to the facts continue to constrain judicial discretion. If that is so, *Booker* cannot be squared with *Blakely*, although it requires some careful analysis to see exactly why.

Consider the position of a post-*Booker* sentencing judge who has found the facts and made the Guideline calculations necessary to generate a Guideline range. Assume that the judge wants to impose a sentence outside the guideline range. The judge must provide an explanation for such a sentence because under *Booker*, a court of appeals will review that sentence for its reasonableness and because the SRA requires an explanation of a

¹⁷⁹ Bowman, 41 Am Crim L Rev at 246-47 (cited in note 162).

sentence outside the Guideline range.¹⁸⁰ Although the number of possible reasons for imposing a sentence outside the Guidelines might seem endless, the explanations for doing so must fall into one of two categories. Either the sentencing judge must explain that he disagrees with the policy choices by the Commission and Congress that produced the sentencing range at issue, or the judge must explain that one of the factors listed in 18 USC § 3553(a) other than compliance with the Guidelines should trump the policy judgments embodied in that range. An example of the first sort of explanation would be a judge who sentenced a crack defendant below the Guideline range because he disagreed with the policy setting the crack-powder ratio at 100-1,¹⁸¹ or a judge who sentenced an environmental crime defendant above the guideline range because he believed that the Guidelines systematically under-punish such offenses. An example of the second sort of explanation would be a judge who found that the circumstances of a defendant's life and upbringing made it particularly likely that he could be rehabilitated with a non-incarcerative sentence lower than that called for by the guidelines, or a judge who imposed an above-range sentence on a white collar defendant after finding that the defendant's uniquely visible position in his industry would generate special deterrent value for a high sentence.

The critical point about post-*Booker* sentences imposed outside the Guidelines is the place of appellate review. If district courts can freely disregard the Guidelines based on disagreement with Congress or the Commission, and if courts of appeals cannot

¹⁸⁰ 18 USC § 3553(c)(2) (2004) requires that the sentencing court set forth "the specific reason for the imposition of a sentence different from that described" by the Guidelines range.

¹⁸¹ The Anti-Drug Abuse Act of 1986 ("ADAA") created different quantity-based mandatory minimum sentences for crack and powder cocaine; the amount of powder cocaine required to trigger the five-year and ten-year minimum mandatory sentences prescribed by the ADAA is one-hundred times greater than the amount of crack cocaine required to trigger those sentences. 21 USC §§ 841(b), 963 (2004). Moreover, the quantities of crack required to trigger mandatory sentences are quite small. See, for example, 21 USC § 841(b)(1)(A)(3) (2004) (ten-year minimum mandatory sentence for possession of fifty grams of cocaine base); 21 USC § 841(b)(1)(B)(3) (2004) (five-year minimum mandatory sentence for possession of five grams of cocaine base). The crack-powder differential has proven controversial for two reasons. First, there has long been heated debate over whether the differences in pharmacological potency or socially destructive effects of the two chemical cousins are sufficient to justify their differential sentencing treatment. United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* 90-91 (May 2002). Second, doubts about the desirability of the crack-powder distinction have been exacerbated by the fact that the overwhelming majority of crack defendants are black, while the overwhelming majority of powder cocaine defendants are white or Hispanic. *Id.* at 62.

find a sentence imposed on that basis “unreasonable,” then the Guidelines become nothing more than suggestions. But as noted above, the *Booker* remedial opinion does not endorse the Guidelines-as-suggestions rule. Rather, the marriage of reasonableness review to the § 3553(b) factors seems to mean that district court judges may now sentence outside the Guidelines only if they determine that other factors listed in § 3553(b) outweigh the guideline calculation. The function of the court of appeals will be (a) to verify the accuracy of the Guidelines calculation, and (b) to make a legal judgment about whether the district court has properly balanced the non-Guidelines factors of § 3553(b) against the weight accorded by the SRA to a properly determined guideline range. The only real difference from the situation pre-*Booker* would be an overlay of appellate case law delineating permissible and impermissible grounds for a new class of departures that might be christened “§ 3553(b) departures.”

If this analysis is correct, then *Booker* preserves the Guidelines with the force of law. Even more importantly for purposes of determining whether *Booker* squares with *Blakely*, it means that the tops of the guideline ranges are effectively legally enforceable maximum sentences *unless* the sentencing judge determines that one or more § 3553(b) factors trumps the Guidelines. Implicit in any such determination is a factual finding—in order for a § 3553(b) factor to trump the Guidelines range, the judge must find that the facts triggering the application of the factor exist. For example, a judge who wanted to impose an above-range sentence on a white collar defendant because the defendant’s uniquely visible position in his industry would generate special deterrent value would have to make factual findings about this defendant’s position in the industry and why exemplary punishment would have particularly salutary effects. But a system that makes Guidelines ranges, or at least the tops of Guidelines ranges, binding absent some additional finding of fact is functionally indistinguishable from the Washington state guidelines voided by *Blakely*.

Not only does *Booker* seem inconsistent with the rule formulated by Justice Scalia in *Blakely*, it seems equally inconsistent with the rationale of that rule. Justice Scalia wished to assure that juries play an important role in determining those facts essential to setting criminal sentences. So long as both *Blakely* and *Harris* were good law, the resulting constitutional sentencing order was weirdly lopsided—juries were required to find only

facts that increased theoretical maximum sentences, but not required to find facts that increased actual minimum sentences.¹⁸² But, in this system, the jury did assume a heightened role. By contrast, *Booker* effectively restores federal juries to their pre-*Blakely* position of sentencing impotence, while reasserting the sentencing authority of judges. Whatever one may think about the formalism of the rule enunciated by Justice Scalia, his concern about the decreasing connection between criminal punishment and facts found by juries or admitted by plea is surely legitimate and *Booker* leaves it unaddressed.

IV. THE POST-*BOOKER* OPTIONS SO FAR

This section of the Article analyzes the options advanced to date for post-*Blakely/Booker* revisions of the federal sentencing system, and suggests that all of them suffer from significant defects, either substantively or because they stand little chance of adoption in the current political environment. The next section will suggest an alternative model that melds features of several existing proposals to form a whole that, it is hoped, combines substantive soundness with political viability.

A. Advisory Guidelines

In the immediate aftermath of *Blakely*, perhaps the most commonly suggested response to the apparently impending invalidation of the Guidelines was that the Guidelines should be made advisory, either permanently or for an interim period while a permanent replacement for the Guidelines was devised.¹⁸³ As it turned out, in *Booker* the Supreme Court gave us “effectively

¹⁸² Bowman, 41 Am Crim L Rev at 253–55 (cited in note 162) (discussing the directional bias in the Sixth Amendment jury trial right created by *Blakely*).

¹⁸³ See, for example, Testimony of Ronald Weich, *Blakely v Washington and the Future of the Federal Sentencing Guidelines*, Hearing Before the Committee on the Judiciary, United States Senate, 108th Cong (2004), available at <http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=3685> (last visited Apr 7, 2005) (advocating a switch to advisory Guidelines as a short-term solution); Testimony of Frank O. Bowman, III, *Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004*, Hearing on HR 4547 Before the Subcommittee on Crime, Terrorism, and Homeland Security, House Committee on the Judiciary, United States House of Representatives, 108th Cong (2004) (“Bowman House Testimony”), available at <<http://judiciary.house.gov/media/pdfs/bowman070604.pdf>> (last visited Apr 7, 2005) (suggesting advisory guidelines as an interim measure); Testimony of Frank O. Bowman, III, *Blakely v Washington and the Future of the Federal Sentencing Guidelines*, Hearing Before the Senate Committee on the Judiciary, US Senate, 108th Cong (2004) (“Bowman Senate Testimony”), available at <http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=647> (last visited Apr 7, 2005) (same).

advisory” guidelines without the need for legislation. However, we do not yet know exactly what “effectively advisory” means. Are the guidelines now only useful suggestions, or has Justice Breyer restored the guidelines to the status of legally enforceable rules, albeit rules with somewhat more room for the exercise of judicial discretion than was previously the case? Unfortunately, neither of these possible interpretations is either sustainable or desirable over the long term.

1. Purely advisory guidelines.

Having purely advisory guidelines could be quite useful for a short period of time. It would be extraordinarily informative to know how judges would apply the Guidelines if they were not legally obliged to follow them; data on judicial behavior in such an interim period would be of great help in revising the current rules. That said, the Guidelines would not function well as a purely advisory system over the long term.

In the first place, purely advisory guidelines in the sense of useful, non-binding suggestions are simply a bad idea, at least in the federal criminal courts. A system with no legal constraint on judicial sentencing discretion would confer even more discretion on federal district judges than they possessed before the SRA. Prior to the SRA, although judges had largely untrammelled discretion to impose sentences, the Parole Commission retained substantial authority over actual release dates. But the SRA abolished parole,¹⁸⁴ and in a post-*Booker* world with neither legally enforceable sentencing guidelines nor a Parole Commission, judicial sentencing authority would be absolute.

Some will argue that even purely advisory guidelines would constrain judicial discretion by establishing norms to which most judges would adhere. While this might be true in the short term, if for no other reason than that the federal bench has become acculturated to the Guidelines over the last seventeen years, the Guidelines structure cannot long be maintained except as a system of legally enforceable rules. The essential problem stems from the Guidelines’ complexity and the detailed fact-finding they require. The participants in the current system develop and present sentencing facts, perform intricate guideline calculations, litigate and adjudicate sentencing appeals, report and analyze guideline data, and revise guideline rules because these ac-

¹⁸⁴ See Bowman, 1996 Wis L Rev at 680–90 (cited in note 9) (discussing pre-Guidelines parole release authority).

tivities matter in the sense of having necessary meaningful effects on sentencing outcomes. If the Guidelines ceased to be binding rules and became optional suggestions, fewer and fewer judges would feel obliged to engage in the detailed fact-finding process the Guidelines require. Even if the courts of appeals read *Booker* to require judges to go through the formalities of fact-finding as a procedural prerequisite for imposition of a valid sentence, facts without necessary legal consequence lose their importance and the rigor of the fact-finding process would undoubtedly degrade. As the process of degradation continued, it would soon be difficult to determine the true relationship between the facts of the case and the sentence imposed.

More importantly, the sentencing disparity the Guidelines were designed to address would inevitably flourish in a system of purely advisory guidelines. Some commentators have suggested that advisory guidelines could achieve a high degree of judicial compliance, pointing to the examples of states with both advisory guidelines and a high judicial compliance rate.¹⁸⁵ The comparison is inapt. The federal court system is far larger and more geographically dispersed than any state judiciary, thus rendering inoperative the sort of informal peer compliance mechanisms that can arise in a smaller, geographically concentrated state judiciaries. Federal judges, unlike most of their state colleagues, have life tenure¹⁸⁶ and are thus far less amenable to the political controls that exist in states where judges are customarily either elected or appointed subject to periodic retention decisions by voters.¹⁸⁷ Finally, I strongly suspect that the relative severity of the Guidelines in comparison to state sentencing laws¹⁸⁸ would exert greater pressure on federal judges to deviate from the nominally correct sentence than is true in states.¹⁸⁹ After a few

¹⁸⁵ See, for example, Testimony of Amy Baron-Evans, Co-Chair, Practitioners Advisory Group, Hearing before the United States Sentencing Commission at 9 (Feb 16, 2005), available at <http://www.ussc.gov/hearings/02_15_05/Baron-Evans_testimony.pdf> (last visited Apr 7, 2005).

¹⁸⁶ See F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J Legal Stud 205, 211–15 (1999).

¹⁸⁷ Judges in about half of the states are appointed by either the governor or the legislature, while judges in the other half of the states are directly elected. Id at 213–15. “Most appointed judges . . . remain on the bench through what are called ‘retention elections,’ where the incumbent is unopposed and voters simply determine whether the judge should be kept in office.” Id at 212.

¹⁸⁸ See note 128.

¹⁸⁹ To expand on the point slightly, I suspect that sentences in states with advisory guidelines correspond somewhat more closely to the judiciary’s intrinsic sense of appropriate outcomes than is the case in the federal system. If so, there will inevitably be less

years of purely advisory guidelines, the federal sentencing landscape would be an odd patchwork, with some judges and some entire jurisdictions adhering reasonably closely to the Guidelines, while other judges and other jurisdictions according the Guidelines only lip service or ignoring them altogether. Those who loathe the current system might find a balkanized advisory regime preferable inasmuch as it would give far more sentencing power to judges and far more room for sentencing advocacy to defendants and their counsel. Most neutral observers, however, would see this outcome as a total abandonment of the goals of the SRA.

In any event, it is clear to me from discussions with representatives of the Justice Department and members of Congress that neither institution is likely to accept purely advisory guidelines as either a short or long term replacement for the current system. Despite the façade of complex rules, such a system would confer on the judiciary a degree of sentencing discretion that neither Congress nor the executive is likely to find palatable.¹⁹⁰ Hence, there is little or no chance that Congress would legislate purely advisory guidelines, and if *Booker* is ultimately interpreted as rendering the Guidelines purely advisory, Congress will surely legislate to change that outcome.

2. Advisory guidelines á la *Booker*.

If, on the other hand, *Booker's* “effectively advisory” guidelines are really guidelines with strongly presumptive force, the picture is much different, but no happier from the perspective of meaningful federal sentencing reform. The problem is that judicial transformation of the old guidelines into advisory-presumptive guidelines leaves virtually all of the undesirable features of the old system intact. The Guidelines would still be too complex, would still provide multiple levers for prosecutorial control of sentencing outcomes, and would still provide the same incentives and mechanisms for congressional micromanagement, thus ensuring the survival of the upward ratchet effect. The only difference would be that judges would have some as-yet-

tension between judges' desire to adhere to officially-sanctioned norms, on the one hand, and the desire to do justice in the individual case, on the other.

¹⁹⁰ See, for example, Testimony of Christopher A. Wray, Assistant Attorney General, *Federal Sentencing After Booker*, Before Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives at 9–11 (Feb 10, 2005), available at <<http://judiciary.house.gov/media/pdfs/Wray021005.pdf>> (last visited Apr 7, 2005).

undefined amount of additional discretion to vary from the guideline sentence. While the exercise of this added discretion might secure better outcomes for some defendants, it would also inevitably create more inter-judge and inter-district disparity. Over time, as Congress and the Justice Department continued to nudge up the Guidelines sentences for crimes in the news, while judges grow increasingly confident in their power to adjust sentences in individual cases, the gap between the sentences the law declared to be presumptively correct and the sentences actually imposed on real people would grow.

The prospect of some measure of added judicial discretion seems to have mesmerized the judiciary, the defense bar, and a good many commentators into believing that *Booker's* "effectively advisory" guidelines might be nurtured into a viable, long-term federal sentencing system. They may be right, but I doubt it. In the end, the *Booker* regime teeters unsustainably between two unpalatable outcomes. The more "advisory" the Guidelines become, the less they achieve the goals of the SRA and the more likely it becomes that Congress will intervene to reassert control over judicial discretion. The more "presumptive" the system becomes, the more it replicates the undesirable features of the existing federal guidelines.¹⁹¹ In theory, the additional increment of judicial discretion available under a presumptive-advisory system could help not only in individual cases, but with the larger project of reforming the federal sentencing system, if Congress and the Justice Department were prepared to treat judicial variation from existing guideline rules as a form of valuable feedback useful in crafting sentencing reforms. But the blockage of that feedback loop is one of the primary reasons that the Guidelines have evolved in the undesirable ways they have, and there is no indication whatever that Congress or the Justice Department has experienced any change of heart on this question.

B. "*Blakely*-ization"

Before *Booker*, many observers thought the Guidelines' anticipated invalidation could be addressed by keeping the Guidelines as a system of binding substantive sentencing rules, but

¹⁹¹ For an excellent discussion of the instability of the post-*Booker* sentencing regime, see Testimony of Paul Rosenzweig, *Sentencing in a Post-Booker World—It's Deja Vu All Over Again*, Hearing before the United States Sentencing Commission (Feb 15, 2005), available at <http://www.ussc.gov/hearings/02_15_05/Rosenzweig-testimony.PDF> (last visited Apr 7, 2005).

requiring that all facts triggering an upward offense level adjustment be found by a jury or admitted by the defendant as part of his plea. In effect, all Guidelines rules whose application would increase the maximum of a defendant's sentencing range, probably excluding rules relating to calculation of criminal history,¹⁹² would be treated as "elements" of a crime for purposes of indictment, trial, and plea. This approach, which many members of the defense bar advocated,¹⁹³ was the preferred remedy of Justices Stevens, Scalia, Souter, and Thomas,¹⁹⁴ and was referred to as "*Blakely*-ization" of the Guidelines. The term "*Blakely*-ization" has been used to refer to three rather different ideas.

1. *Blakely*-ize the Guidelines as they are.

The first possibility is simply to leave the substantive sentencing rules of the current Guidelines untouched, but require that all aggravating offense facts be resolved by trial or plea. If the *Booker* remedial minority had its way, this result would have been imposed by judicial fiat through a declaration that the Guidelines' rules are severable from the procedure of post-conviction judicial factfinding. In the wake of *Booker*, at least one district court judge has proclaimed the authority to impose a requirement of jury findings on all aggravating sentencing guideline factors,¹⁹⁵ however, it seems somewhat unlikely that this view will survive appellate scrutiny or that many judges would adopt the approach even if it were legally possible to do so. Alternatively, Congress might respond to the *Blakely* and *Booker* decisions by legislatively authorizing this outcome. While full *Blakely*-ization of the Guidelines may still have adherents, the consensus view is that the Guidelines as now written are simply too complex and confusing to operate through juries.¹⁹⁶

¹⁹² The Court has previously held that sentence-enhancing facts relating to criminal history need not be proven to a jury. See *Almendarez-Torres*, 523 US 224. However, it is unclear whether *Almendarez-Torres* will ultimately survive *Blakely*.

¹⁹³ See, for example, Testimony of David M. Porter, Assistant Federal Defender, United States Sentencing Commission (Nov 16, 2004) ("Porter Senate Testimony"), available at <http://www.ussc.gov/hearings/11_16_04/111604-panelthree.pdf> (last visited Apr 7, 2005) (endorsing the so-called "Kansas plan" for revising the federal guidelines).

¹⁹⁴ *Booker*, 125 S Ct at 779; id at 795 (Thomas dissenting).

¹⁹⁵ *United States v Barkley*, Case No 04-CR-119-H (N D Okla 2005), available at <http://sentencing.typepad.com/sentencing_law_and_policy/files/cj_holmes_barkley_opinion.pdf> (last visited Apr 7, 2005).

¹⁹⁶ See Bowman, 41 Am Crim L Rev at 235-37 (cited in note 162). The ABA has formed a task force to propose responses to *Blakely*. The non-Justice Department members of the task force concluded that, "It is unworkable to present the federal sentencing guidelines in their present form to juries because they are unduly complex for that pur-

2. *Blakely*-ize the Guidelines with modest changes.

Because of the general agreement that the Guidelines are too complex to submit to juries as they stand, some have suggested making the Guidelines more jury-friendly by modifying only the most complex and problematic aspects of the Guidelines, such as the relevant conduct rules and the loss definition in economic crime cases. The idea is to simplify the Guidelines slightly while leaving their structure fundamentally intact.¹⁹⁷ I have some doubt that the current Guidelines could be simplified enough to make them a desirable instrument in the jury setting. But even if this were possible, *Blakely*-izing the current system is still subject to at least three disqualifying objections.

First, treating all facts triggering Guidelines sentencing enhancement as elements of the offense would markedly alter the plea bargaining environment. Negotiation between the parties over sentencing facts would no longer be presumptively illegitimate “fact bargaining,” but would become charge bargaining. Because charge bargaining is the historical province of the executive branch, the government would be legally free to negotiate every sentence-enhancing fact, effectively dictating whatever sentence the government thought best within the broad limits set by the interaction of the evidence and the Guidelines. The government would no longer have any obligation to inform the court of all the relevant sentencing facts and the only power the court would have over the negotiated outcome would be the extraordinary, and extraordinarily rare, remedy of rejecting the plea altogether.¹⁹⁸

A plea bargaining system that operated in this way might benefit some defendants, such as those with particularly able

pose.” ABA Blakely Task Force, *Consensus of Non-DOJ Members on Long-Term Solution, 12/8/2004 Draft* (on file with author).

¹⁹⁷ The Sentencing Commission reportedly began the process of drafting a simplified set of *Blakely*-compliant guidelines before the *Booker* decision was handed down; by all accounts, that project has been suspended, at least for now.

¹⁹⁸ Even this remedy would be of little practical use. If the judge rejected a plea because she felt it was unduly punitive, she could not prevent the government from presenting its case to a jury. If a judge were to reject a plea on the ground that it did not adequately reflect the full extent of the defendant’s culpability under Guidelines, the judge could not force the government to “charge” the defendant with additional Guidelines sentencing elements. The most the court could do is force the case to trial on whatever combination of statutory and Guidelines elements the government was willing to charge—a weak and self-defeating remedy because the two possible outcomes of a trial on such charges are a guilty verdict on the charges the judge thought inadequate in the first instance or a not guilty verdict on some or all of the charges, which would produce even less punishment.

counsel practicing in districts with particularly malleable prosecutors. On the other hand, making sentence factor-bargaining legitimate would dramatically increase the leverage of prosecutors over individual defendants and the sentencing process as a whole, leading to worse results for some individual defendants and a systemic tilt in favor of prosecutorial power.

Even if one believes that *Blakely*-ized guidelines would confer a net bargaining advantage on defendants, any such benefit would inevitably be uneven, varying widely from district to district and case to case. To the extent that the Guidelines have made any gains in reducing unjustifiable disparity, a system in which all sentencing factors can be freely negotiated would surely destroy those gains. Prevention of this outcome was, after all, the point of the Guidelines' "relevant conduct" rules.¹⁹⁹

It might be suggested that the Justice Department's own internal policies regarding charging and accepting pleas to only the most serious readily provable offense would protect against disparity. However, the experience of the last decade, during which variants of the same policy have always been in place, strongly suggests that the Justice Department cannot meaningfully restrain local United States Attorney's Offices from adopting locally convenient plea bargaining practices.²⁰⁰ Once previously illegitimate "fact bargaining" becomes legally permissible charge bargaining, no amount of haranguing from Washington will prevent progressively increasing local divergence from national norms.

Second, if Guidelines enhancements were transformed into a set of "elements" to be proven to a jury or negotiated by the parties, the effect would be to markedly reduce judicial control over the entire federal sentencing process. Not only would district court judges be stripped of the power to determine sentencing facts and to apply the Guidelines to their findings, but appellate courts would be stripped of any power of review. Neither jury findings of fact nor the terms of a negotiated plea are subject to appellate review in any but the rarest instances. Thus, *Blakely*-ization of the Guidelines would have the perverse effect of exacerbating one of the central judicial complaints about the current

¹⁹⁹ See USSG § 1B1.3 (2004); Wilkins and Steer, 41 SC L Rev 495 (cited in note 67).

²⁰⁰ A number of studies have found evidence of significant local variation in plea negotiation and other sentencing practices among different districts and circuits. See, for example, Bowman and Heise, 87 Iowa L Rev at 531-34, 560 (cited in note 84) (noting inter-district and inter-circuit disparities in average drug sentences and discussing the "stubborn localism of judicial and prosecutorial behavior").

federal sentencing system: the increase of prosecutorial control over sentencing outcomes at the expense of the judiciary. A *Blakely*-ized guidelines system would be a system of administrative justice in which private agreements between the executive and defendants would determine sentences that courts would merely rubber stamp.

Third, and in my view decisive, is the fact that a *Blakely*-ized, but slightly simplified, version of the current guidelines does nothing to address the dysfunctional character of rulemaking under the present regime. Without radical simplification of the sentencing table and attendant rules, the new system, like strongly presumptive advisory guidelines, would preserve all the features that give Congress and the Justice Department incentive to intervene in the details of sentencing rulemaking. Moreover, a *Blakely*-ized version of the guidelines, even if slightly simplified, would reduce the ability of the judiciary to influence either sentencing rules or sentencing outcomes in individual cases even further than was the case before *Blakely* and *Booker*.

3. Radically simplify the Guidelines

Some have used the term “*Blakely*-ization” to refer to proposals to radically simplify the Guidelines, eliminating all but a few of the current sentencing factors as legally binding considerations.²⁰¹ In my view, this approach is the only one which holds any promise; it will be discussed in detail in Part V below.

C. Topless Guidelines

Shortly after the *Blakely* decision in June 2004, I proposed an interim measure by which the Guidelines could be brought into compliance with *Blakely* and preserved essentially unchanged by amending the sentencing ranges on the Chapter 5 Sentencing Table²⁰² to increase the top of each guideline range to the statutory maximum of the offense(s) of conviction. *Blakely* necessarily affects only cases in which post-conviction judicial findings of fact mandate or authorize an increase in the *maximum* of the otherwise applicable sentencing range, while

²⁰¹ James Felman, *How Should Congress Respond If the Supreme Court Strikes Down the Federal Sentencing Guidelines?*, 17 Fed Sent Rptr 97 (2004); Jim Felman, *Legislative solutions to Blakely*, Memo to the United States Sentencing Commission (Sept 16, 2004), available at <http://www.ussc.gov/hearings/11_16_04/felman.pdf> (last visited Apr 7, 2005).

²⁰² USSG § 5A (2004) (Sentencing Table).

McMillan and *Harris* hold that a post-conviction judicial finding of fact can raise the *minimum* sentence, so long as that minimum is itself within the legislatively authorized statutory maximum. Therefore, so long as facts found by judges applying the sentencing guidelines increase only the minimum sentence to be served by a defendant, and not the maximum sentence to which he was exposed, there would be no constitutional violation. In effect, the “topless guidelines” approach would convert the Guidelines into a system of permeable mandatory minimums. That is, the Guidelines would continue to function exactly in the way they always have, except that the sentencing range produced by guidelines calculations in any given case would have the same lower value now specified by the Chapter Five sentencing table, while the upper value would be set at the statutory maximum. Judges would still be able to depart downward using the existing departure mechanism, but would not have to formally “depart” to impose a sentence higher than the top of the ranges now specified in the sentencing table.

This proposal would require legislation because the expanded sentencing ranges produced by the proposal would fall afoul of the so-called “25% rule,” 28 USC § 994(b)(2), which mandates that the top of any guideline range be no more than six months or 25% greater than its bottom. I have explained this approach in more detail elsewhere, including refinements designed to provide protections against judges abusing the additional discretion the plan would afford for sentences at the high end.²⁰³ The *Booker* decision has changed the probable configuration of a “topless guidelines” proposal in at least one key respect. It now appears that post-*Booker* guidelines would no longer have to be entirely topless. Instead, the Guidelines could be brought back into constitutional compliance by retaining the old ranges and making the bottoms of the ranges mandatory but the tops merely “advisory.”

The advantages of “topless guidelines” as an interim solution to the chaos created by *Blakely* were that they appeared to be

²⁰³ The proposal in its original form would have made any sentence above the guideline minimum appealable on an abuse of discretion standard. The fact that a judge imposed a sentence higher than that suggested by the policy statement for a typical case would be a factor in the determination of whether the judge had abused his or her discretion. I also recommended that legislation creating “topless guidelines” sunset after eighteen months. See Frank O. Bowman, III, *Memorandum Presenting a Proposal for Bringing the Federal Sentencing Guidelines into Conformity with Blakely v. Washington*, 16 Fed Sent Rptr 364 (2004); Bowman House Testimony (cited in note 183); Bowman Senate Testimony (cited in note 183).

constitutional and would have restored the federal criminal system to full function with minimal disruption. Aside from the risk that some judges would abuse their high-end sentencing discretion,²⁰⁴ the plan's disadvantages were, in the eyes of its critics, almost identical to its advantages. It would restore the flawed federal guidelines virtually intact and could easily be adopted as a permanent solution, thus strangling any *Blakely*-spawned reform effort.²⁰⁵

D. Guidelines Turned Upside Down

Because *Blakely* applies only to factors that raise sentences and not to sentence mitigators, it would appear that one could reconfigure the federal sentencing system by decreeing that all defendants are presumptively subject to the maximum sentence

²⁰⁴ The evidence of judicial sentencing practice during the Guidelines era suggests that few judges would impose greater sentences than they now do under a system in which the top of the range was removed. See Bowman, 16 Fed Sent Rptr at 367 (cited in note 203); Bowman House Testimony (cited in note 183); Bowman Senate Testimony (cited in note 183).

²⁰⁵ For critiques of the proposal, see Testimony of Rachel Barkow, *Blakely v. Washington and the Future of the Federal Sentencing Guidelines*, Hearing Before the Senate Committee on the Judiciary, United States Senate (2004), available at <http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=3684> (last visited Apr 7, 2005); Weich, *Senate Testimony* (cited in note 183); Porter Senate Testimony (cited in note 193). See also Douglas Berman, *The "Bowman Proposal": White Knight or Force of Darkness?*, Sentencing Law & Policy, available at <http://sentencing.typepad.com/sentencing_law_and_policy/2004/07/white_knight_or.html> (last visited Apr 7, 2005), and other critiques posted or referenced on Professor Berman's invaluable blog, Sentencing Law & Policy, available at <<http://www.sentencing.typepad.com>> (last visited Apr 7, 2005).

I have never advocated "topless guidelines" as a permanent solution to the *Blakely/Booker* problem precisely because they would reinstitute a fatally flawed system. And since the disruption that might have been avoided through rapid legislation in July 2004 has already happened, cannot be undone, and may be compounded by over-hasty legislation, the time for passing topless guidelines as an interim measure has passed. For a more complete explanation of the evolution of my position on "topless guidelines," see Testimony of Frank O. Bowman, III, *A Counsel of Caution*, Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, US House of Representatives (Feb 10, 2005), available at <<http://judiciary.house.gov/media/pdfs/Bowman021005.pdf>> (last visited Apr 7, 2005).

The "topless guidelines" concept as a permanent replacement for the pre-*Blakely/Booker* guidelines has been the subject of favorable comments from the Justice Department for some time, but DOJ has not yet supported any legislative response to *Blakely* and *Booker*. See, for example, Testimony of Christopher A. Wray, Deputy Attorney General, *The Future of Federal Sentencing*, United States Sentencing Commission (Nov 17, 2004), available at <http://www.ussc.gov/hearings/11_16_04/Wray-testimony.pdf> (last visited Apr 7, 2005); Testimony of Christopher A. Wray, Deputy Attorney General, *Implications of the Booker/Fanfan Decision for the Federal Sentencing Guidelines*, Subcommittee on Crime, Terrorism & Homeland Security, Committee on the Judiciary, US House of Representatives (2005), available at <<http://judiciary.house.gov/media/pdfs/Wray021005.pdf>> (last visited Apr 7, 2005).

prescribed by statute absent proof of mitigating factors. Under this plan, which was suggested by Justice Breyer as one theoretically possible method of constructing a sentencing system to comply with *Blakely*,²⁰⁶ the Guidelines would be rewritten to work downward from the statutory maximum. This scheme seems so counterintuitive that one can hardly believe that it would be seriously contemplated. Among other peculiarities, it would seem to require that the ordinary burdens of proof be reversed, with the government enjoying a presumption of the statutory maximum sentence and the defendant assuming the burden of proving facts reducing the sentence. As odd as it may seem, it was for some time following *Blakely* the favored option of important decisionmakers in the Justice Department and among some key congressional staff. At present, it seems to be receiving less attention.

E. More Mandatory Minimums

If Congress decided not to reinstate the Guidelines regime by removing the tops of the ranges, and was dissuaded from the bizarre experiment of turning the Guidelines upside down, it might well move toward a regime that relied far more heavily on statutory mandatory minimum sentences. House Republicans have already demonstrated their affinity for this approach with the introduction of House Bill 1528, a bill that would transform the Sentencing Guidelines into a complex system of mandatory minimum sentences for all crimes and would also create a host of new statutory mandatory minimum sentences for drug crimes.²⁰⁷ Whether the facts triggering the minimums would be found by judges or juries would depend on the ultimate fate of *Harris*, but the determination of many in Congress to not relax their grip on the sentencing practices of “soft” federal judges is patent.

²⁰⁶ 124 S Ct at 2558.

²⁰⁷ Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005, HR 1528, 109th Cong, 1st Sess (Apr 6, 2005). For analyses of the provisions of this bill, see Letter from Frank O. Bowman, III, to Cong. Howard Coble and Cong. Robert Scott (Apr 11, 2005), available at <http://sentencing.typepad.com/sentencing_law_and_policy/files/bowman_judiciary_letter_41105_on_booker_fix.doc> (last visited May 26, 2005); Letter of United States Sentencing Commission to Congressman Howard Coble and Congressman Robert Scott (Apr 19, 2005), available at <<http://www.ussc.gov/HR1528.pdf>> (last visited May 26, 2005); Letter of Criminal Law Committee of United States Judicial Conference to Cong. James F. Sensenbrenner, Jr. (Apr 25, 2005) (on file with author).

V. A NEW PROPOSAL

There is a fourth respect in which *Booker* conjures up a knuckleball—its effect on would-be reformers of the federal sentencing system. Whatever one's views of the merits of Justice Scalia's *Blakely* opinion, it had two undoubted virtues—it sent shock waves through a federal system badly in need of rethinking, and the rule it announced, even if asymmetrical and formalistic, was clear. After *Blakely*, but before *Booker*, it seemed obvious that some legislative response to the Court was going to be required. Moreover, the possible legislative responses were reasonably clear-cut. By contrast, the manifold uncertainties of *Booker* have, at least temporarily, paralyzed the movement for broad federal sentencing reform. For the moment, most of the major players are mesmerized by *Booker's* uncertain flight, not quite sure whether to swing away, bunt, or step out of the box.

This is a regrettable development. I have always thought *Blakely* a bad decision: unsound as either an interpretation or extrapolation of American Constitutional history; weakly reasoned and narrowly formalistic; heedless of its consequences to both state and federal criminal justice practice; and stunningly insensitive to considerations of institutional balance among the branches and agencies of the federal government involved in the sentencing process.²⁰⁸ On the other hand, I also believe that the federal sentencing system has failed and requires a major overhaul. Thus, I viewed *Blakely* as an unfortunate incident from which some good might come. If the opportunity for reform created by *Blakely* is lost in the confusion surrounding *Booker*, if all we gain is fractionally more judicial wiggle room under presumptive guidelines or the asymmetry of semi-topless guidelines, then the whole *Blakely/Booker* incident will amount to nothing more than aggravation and wasted opportunity. And if congressional hardliners succeed in their effort to make *Booker* the catalyst for a movement to pervasive mandatory minimum sentences, *Booker* will have been an unparalleled disaster.

We can do better, or at least we ought to try. In place of the proposals made to date, I suggest another alternative. The principal features of the proposal are these:

²⁰⁸ These views of *Blakely* are set out in detail in Bowman, 41 Am Crim L Rev 217 (cited in note 162); Frank O. Bowman, III, *Function Over Formalism: A Provisional Theory of the Constitutional Law of Crime and Punishment*, 17 Fed Sent Rptr 1 (2004).

A. A Simplified Sentencing Table

As noted above, the current federal sentencing guidelines system is essentially a set of instructions for the Sentencing Table.²⁰⁹ The complexity of the Table contributed heavily to the proliferation of sentencing factors and the complexity that has had such unfortunate effects at both the policy-making and operational levels. In addition, the complexity of the federal guidelines is the feature that makes transformation of federal law to the *Blakely/Booker* template most difficult. Moreover, whatever one thinks of the rule Justice Scalia announced in *Blakely*, his basic idea that juries should play a larger role in finding the facts that delimit a defendant's punishment seems plainly right. As a practical matter, a system that gives juries a larger sentencing role requires that the number of facts juries are asked to decide be fairly small. Consequently, the constitutional reasoning of *Blakely* and *Booker* and the preconditions for meaningful substantive reform converge in an imperative of greater systemic simplicity.

A simpler federal sentencing system begins with a simpler sentencing table. I propose a table incorporating the same two indicia of punishment severity used in the current Sentencing Table and common to virtually all modern guideline systems—offense seriousness and criminal history. The table would have nine basic levels of offense seriousness arrayed along the vertical axis, and the same number of criminal history categories (six) as the current guidelines arrayed along the horizontal axis.²¹⁰ Each intersection on the table would correspond to a “base sentencing range” consisting of a maximum and minimum penalty. The contraction of the Sentencing Table to nine offense levels from the current forty-three is accomplished by abandoning two features of the current table: overlapping ranges and the logarithmic increase in maximum sentence—and thus in the width of ranges—required by the “25 percent rule.” The original Sentencing Commission created overlapping ranges largely to provide a disincentive for appeals; their theory was that litigants would be less apt to appeal a sentence within the overlapping portion of two contiguous ranges because reversal of a judicial decision producing a one-level difference would be deemed harmless error. In a post-*Blakely/Booker* world, the factual determinations necessary to

²⁰⁹ See note 38 and accompanying text.

²¹⁰ The Criminal History axis of the current guideline system might profitably be modified and improved, but that effort is beyond the scope of this Article.

place a defendant in a particular offense level will be made by juries or as an incident of a plea, and thus will be effectively unappealable.²¹¹

As for the “25 percent rule,” its undesirable effects on the current Guidelines have not been limited to requiring the creation of an overly complex sentencing table. Widening each successive sentencing range by an additional 25 percent has a compounding effect such that the lowest ranges (those corresponding to Offense Levels 1-13 and Criminal History Category I) are only six months wide,²¹² but widen progressively until, at the highest levels, the top of a range is more than seven years higher than its bottom.²¹³ These progressively widening sentencing ranges have no justification in sentencing theory. They exist not because anyone believes that judicial discretion should be given greater play as sentence lengths increase, but solely because the mathematical straitjacket imposed by the “25 percent rule” required logarithmically increasing ranges in order to cover the entire sweep of possible sentence lengths from probation to thirty years in prison. Worse still, ever-widening ranges mean that guidelines sentencing factors that produce increases or decreases in offense levels have no set value in terms of quantum of punishment.

For example, if a defendant commits a fraud against Smith, a vulnerable victim, his sentence will be enhanced by two offense levels.²¹⁴ If he takes \$12,000 from Smith, the two-level vulnerable victim enhancement increases his minimum guideline sentence by four months. On the other hand, if Smith’s loss is \$121,000, the same two-level enhancement for exactly the same vulnerable victim would increase the defendant’s minimum sentence by six months, and if the loss were \$1.2 million, the same enhancement would raise the minimum sentence by eleven months.²¹⁵ This effect is magnified for offenses such a white collar crime where the Commission and Congress have added ever more targeted en-

²¹¹ Of course, a jury determination of a fact determinative of a defendant’s offense level could be appealed for insufficiency of the evidence in the same way that a defendant can presently appeal a jury’s finding of an element of the crime. But such appeals are rarely successful. See, for example, *Nguyen v United States*, 539 US 69, 85 (2003) (noting that appellant’s challenges to the sufficiency of the evidence supporting his conviction were considered and rejected by the United States Court of Appeals for the Ninth Circuit).

²¹² USSG Ch 5, Pt A (1996).

²¹³ *Id.* (creating a sentencing range of 324–405 months for Offense Level 38, Criminal History Category IV).

²¹⁴ USSG § 3A1.1(b)(1) (2004).

²¹⁵ USSG § 2B1.1 (2004).

hancements.²¹⁶ In such cases, a single defendant may be subject to multiple and seemingly inconsequential two-level enhancements, but each enhancement will boost his sentence by an additional 25 percent. Like the compound interest charged weekly by a loan shark, the total can mount rapidly to breathtaking levels.

In place of the current Sentencing Table's gradually widening ranges, the "base sentencing ranges" proposed here would be of five types. First, the range expressed as "0-1" would correspond to Zone A on the current Sentencing Table²¹⁷ and would permit the imposition of a sentence of straight probation or any combination of penalties up to one year in prison. Second, the range expressed as "1-2" would correspond to Zones B and C on the current Sentencing Table²¹⁸ and would require the imposition of some period of confinement up to two years, but would permit split sentences and other alternative punishments.²¹⁹ Third, the range expressed as "2-5" would require imposition of at least two, but no more than five, years in prison. All ranges of 2-5 years or greater would correspond to Zone D on the current Sentencing Table in that at least the minimum guideline sentence would have to be served in a prison. Fourth, the remaining numerical ranges are five years wide. This figure was chosen for two reasons. First, it is a figure which permits the creation of ranges that correspond nicely with many statutory minimum and maximum sentences and thus simplifies the task of mapping the statutory sentencing structure onto the new grid.²²⁰ Equally important, because *Blakely* appears to bar upward departures based on post-conviction judicial fact finding, the top of a jury-determined range must be far enough above the bottom to permit a sentencing judge to make meaningful distinctions between the most and least serious offenders in each "base sentencing range"

²¹⁶ See Bowman, 1 Ohio St J Crim L at 387-91 (cited in note 125) (discussing the rise in white collar crime sentences during the past decade).

²¹⁷ USSG §§ 5A, 5C1.1(b) (2004).

²¹⁸ USSG §§ 5A, 5C1.1(c) (2004).

²¹⁹ A "split sentence" is one in which the court imposes a term of incarceration, some portion of which must be served in prison and some portion of which may be satisfied by lesser conditions of confinement such as home detention or community confinement. USSG § 5C1.1(d) (2004).

²²⁰ I share the concern expressed by many observers about the deleterious effects of mandatory minimums on federal sentencing practice. See, for example, Letter of Criminal Law Committee of United States Judicial Conference to Congressman James Sensenbrenner (cited in note 207). Ideally, a new federal sentencing system would eliminate or at least reduce the number and severity of such sentences. However, I think it exceedingly unlikely that this objective can be achieved in the near term. Accordingly, to be politically viable, a new sentencing model probably has to accommodate existing mandatory minimums.

without resorting to a constitutionally prohibited upward departure. Fifth, one “range” is reserved for the rare cases in which life imprisonment is appropriate.

Figure 1 shows the basic table. I have not filled in values for Criminal History Categories II-VI because calibrating the precise effect of criminal history in this model is beyond the scope of the present Article. In general, of course, sentences would increase with increasing criminal history.

FIGURE 1: BASIC SENTENCING TABLE
(SENTENCES EXPRESSED IN YEARS)

	I	II	III	IV	V	VI
1	0-1					
2	1-2					
3	2-5					
4	5-10					
5	10-15					
6	15-20					
7	20-25					
8	25-30					
9	LIFE	LIFE	LIFE	LIFE	LIFE	LIFE

On this sentencing table, the maximum sentence in each “base sentencing range” would be the “statutory maximum sentence” as that term is defined in *Blakely*. Accordingly, as a constitutional matter, all facts necessary to assign one of the nine offense levels and thus to a “base sentencing range,” would have to be pled and proven at a jury trial, at a bench trial if the defendant waives a jury, or admitted as part of a guilty plea.

Some pre-*Blakely* statutory crimes might be easily assignable to one of the nine offense levels based on proof of nothing more than the traditional pre-*Blakely* elements of the crime.²²¹

²²¹ For example, federal homicide crimes could easily be placed into this system. Under current law, first degree murder has a base offense level of 43, USSG § 2A1.1(a) (2004), or life imprisonment. USSG § 5A (2004). The new offense level would be 9, also life imprisonment. Under current law, second degree murder carries a base offense level of 33, USSG § 2A1.2(a) (2004), or 135–168 months (11 years, 3 months to 14 years), USSG § 5A (2004). The new offense level could be 5, or 10–15 years. Voluntary manslaughter is now an offense level 25, USSG § 2A1.3(a) (2004), or 57–71 months (4 years, 9 months to 5 years, 11 months), USSG § 5A (2004). The new range could either be 3 or 4, and thus either 2–5 years or 5–10 years. Reckless manslaughter is now an offense level 18, USSG § 2A1.4(a)(2) (2004), or 27–33 months, USSG § 5A (2004). The new range would be 3, or 2–5 years. Negligent manslaughter is now an offense level 12, USSG § 2A1.2(a) (2004), or 10–16 months, USSG § 5A (2004). The new offense level would be 2, or 1–2 years. Note that

For many classes of federal crime, however, offenses could not be categorized without reference to at least some facts which have hitherto been considered sentencing factors. This is particularly true for several of the most commonly prosecuted categories of federal crime, such as narcotics and fraud offenses, where the statutes criminalize a broad swathe of behavior—running from the trivial to the truly heinous—but create no rules for grading crimes within the broad category.

Creating a simplified sentencing table would pose two immediate challenges: first, deciding which facts now classified by the Guidelines as sentencing factors should be added to traditional statutory elements to create what amounts to a new system of offense classification; and second, deciding how to place the hybrid element plus sentencing factor offenses on the simplified grid. Both phases would be moderately difficult, but hardly impossible. For example, in narcotics cases, drug quantity is written into the criminal code as a factor bearing on offense seriousness.²²² Likewise, the law has for centuries treated the amount of pecuniary loss imposed on victims as relevant to the seriousness of property crimes.²²³ The current drug and fraud guidelines place drug quantity and loss amount at the core of their calculations. A simplified system could transform drug amount and loss into jury factors by simply reducing the number of applicable subdivisions. The addition of one or two other factors, perhaps including role in the offense or particularly egregious victim impacts, should permit creation of a simple but rational classification system. The trickier part would be deciding how to group element and non-element factors and determining how much weight to give these factors in the grading scheme, but the job would be a far simpler one than drafting the original Guidelines.

in each case except first degree murder, the new range would be somewhat wider than the old range, but would overlap most of the old range. The low end of the new range would be slightly higher than the low end of the old in some cases (second degree murder and negligent manslaughter), but would be slightly lower in others (reckless manslaughter and possibly voluntary manslaughter).

²²² See, for example, 21 USC § 841(b) (2004) (mandating five, ten, and twenty-year minimum sentences for possession with intent to distribute various quantities of various controlled substances).

²²³ See Frank O. Bowman, III, *Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 Vand L Rev 461, 476–77 (1998) (describing the role of economic harm in the grading of economic offenses).

B. Refining the Sentencing Calculus

So far, this proposal mirrors suggestions made by James Felman, Chair of the ABA Sentencing and Corrections Committee, Professor Stephanos Bibas,²²⁴ and others, who have urged that the Guidelines be reformed by shrinking the table, dramatically reducing the number of factors determinative of placement on the table, and putting those factors to the jury. A reform that went this far, but no further, would make the federal sentencing system far simpler and constitutional under *Blakely* and *Booker*. However, as helpful as these proposals have been, they require significant refinement if their central insight is to become the basis of a successful legislative program.

The theoretical problem with a barebones simplification approach is that it is too crude, being simultaneously too rigid and too flexible. On the one hand, if a defendant's placement in a relatively constrained sentencing range of 1-2, 2-5, or 5-10 years is to be determined solely by conviction of the statutory offense and jury determination of one or two additional sentencing factors, some critics will complain that the court ought to be able to consider a wide variety of factors in selecting a range. Defendants (often) and judges (sometimes) will feel that the defendant's circumstances merit a sentence below the floor of the range generated by the jury's findings. Prosecutors will want mechanisms for inducing both pleas and cooperation through sentence reductions.²²⁵

On the other hand, if the table were reduced to ten or fewer offense level categories, the resulting ranges would be broad enough that other critics would complain that judges would have too much unrestrained discretion to choose a sentence within the range. Without more, such a system sacrifices too many of the goals and accomplishments of the SRA and the Guidelines. What

²²⁴ Stephanos Bibas, *Reforming the U.S. Sentencing Guidelines after Blakely*, U Iowa Legal Stud Research Paper No 04-01, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=634202> (last visited Apr 7, 2005) (arguing that the best long-term solution to *Blakely* is to simply and streamline the Guidelines while broadening sentencing ranges, so as to allow more flexibility while retaining the Guidelines' binding force); Felman, *How Should Congress Respond?*, 17 Fed Sent Rptr at 97 (cited in note 201); Felman, *Legislative Solutions to Blakely* (cited in note 201) (arguing in favor of a 'codification' system in which certain culpability factors are added as elements of the offense to be charged in the indictment and presented to the jury, whose verdict would then yield a sentencing range that would be binding on the district court).

²²⁵ Jim Felman has recognized this point and suggests that downward departures from simplified guideline ranges could be available in much the same way as they were under the pre-*Booker* federal sentencing guidelines. Felman, *Legislative Solutions to Blakely* (cited in note 201).

is missing is some mechanism for moving below the sentencing range set by the jury when necessary, as well as some method of guiding judicial sentencing discretion within the range set by the jury.

In addition, a barebones simplification approach suffers from several political infirmities. The most important of these flaws flows from the lack of constraint on judicial sentencing discretion within the jury-determined ranges. It seems unlikely that either Congress or the Justice Department would acquiesce to a plan that gave federal judges unfettered discretion to sentence anywhere within five-year ranges. The SRA was intended to constrain judicial sentencing discretion and, as the Feeney Amendment to the PROTECT Act graphically demonstrate,²²⁶ the legislative determination to achieve that end has, if anything, strengthened in recent years. In addition, a radically simplified system that gives legal consequence to only a short list of factors would require the Sentencing Commission to abandon all the work it has done over the past two decades in identifying and assigning values to increasingly intricate webs of sentencing factors. As an institution, the Commission may be amenable to pruning back the foliage it has cultivated; it is unlikely to favor plowing the garden under and sowing the ground with salt.

1. Constraining judicial sentencing discretion within the ranges of a simplified system.

Two suggestions have been made for constraining judicial discretion within the ranges of a simplified grid. First, Jim Felman suggests that the sentencing factors, that are listed in the current Guidelines but not transformed into jury facts by the new simplified system, should be treated by the sentencing judge as non-binding considerations in setting the sentence within range.²²⁷ While this suggestion is a reasonable one, it seems unlikely to meet the objections of the Justice Department or Congress. For those institutions, “guidelines” without the force of law are no guidelines at all, and an unstructured list of relevant factors is unlikely to garner approval.

Second, in 2001, R. Barry Ruback and Jonathan Wroblewski proposed a simplified sentencing table with eight-to-twelve offense levels.²²⁸ They further suggested that each resulting sen-

²²⁶ See note 134 and accompanying text.

²²⁷ See Felman, *Legislative Solutions to Blakely* (cited in note 201).

²²⁸ See Ruback and Wroblewski, 7 *Psych Pub Pol & L* at 772–74 (cited in note 119).

tencing range be subdivided into standard, aggravated, and mitigated sub-ranges.²²⁹ The sentencing judge would place the defendant in one of those three sub-ranges by determining which aggravating and mitigating factors enumerated in the Guidelines were present in the case, and then find on the record whether the existing aggravators, mitigators, or neither predominated. Assuming that the judge's findings of fact and balancing of factors were subject to appellate review, a system of this sort would be more structured and would constrain judges somewhat more than the standardless consideration of guideline factors proposed by Felman. Unfortunately, even if the additional degree of constraint would satisfy the interested political actors,²³⁰ *Blakely* and *Booker* would seem to render the plan unconstitutional insofar as it conditioned a sentence in the upper or aggravated sub-range upon a judicial finding of aggravating facts.

I propose a third alternative, which relies on the capability to set minimum sentences based on post-conviction judicial findings of fact that endures under *Harris*. More colloquially, the plan combines "topless guidelines" with a simplified sentencing table. Under this plan, each "base sentencing range" in the simplified Sentencing Table starting with Level 3²³¹ would be divided into three sub-ranges. The bottom sub-range would span the full "base sentencing range," from its minimum to its maximum. The middle range would run from a minimum sentence somewhat higher than the bottom of the full "base sentencing range" to the top of the full range. The high sub-range would run from a minimum sentence higher than the bottom of the middle sub-range to the top of the full range.

Figure 2 shows the Basic Table with sub-ranges (but without figures filled in for Criminal History Categories II-VI).

²²⁹ *Id.* at 771.

²³⁰ There is reason to doubt that Congress or the Justice Department would be satisfied with a system that assigned no values to aggravating or mitigating factors and created no rules for weighing those factors against each other. Both prosecutors and legislators would suspect (probably with justice) that the ostensible structure and rigor of the three-tiered system would turn to mush in the press of everyday practice and would simply become a vehicle for erecting pro forma verbal justifications for each judge's subjective outcome preferences.

²³¹ The ranges in Levels 1 and 2 are probably too narrow to warrant subdividing them into sub-ranges measured in months. One might, however, subdivide Level 2 in terms of the types of alternative sentences that might be available.

FIGURE 2: SENTENCING TABLE WITH SUB-RANGES

	I	II	III	IV	V	VI
1	0-1					
2	1-2					
3	2-5					
	3-5					
	4-5					
4	5-10					
	6 1/2-10					
	8-10					
5	10-15					
	11 1/2-15					
	13-15					
6	15-20					
	16 1/2-20					
	18-20					
7	20-25					
	21 1/2-25					
	23-25					
8	25-30					
	26 1/2-30					
	28-30					
9	LIFE	LIFE	LIFE	LIFE	LIFE	LIFE

Alternatively, one could take advantage of the nuances of the *Booker* opinion by subdividing each base sentencing range into thirds, and then making the low end of each sub-range mandatory in the same sense that the low ends of guideline ranges were mandatory before *Booker*, while declaring the top end of the bottom two sub-ranges “advisory.” The effect would be much the same.

This expanded table would be used as follows:

- (1) The Sentencing Commission would review those sentencing factors which are now included in the Sentencing Guidelines and which it determines should not become sentencing elements submitted to the jury. The Commission would (a) eliminate altogether some sentencing factors that are infrequently used or, for other reasons, have not demonstrated their usefulness to the sentencing process; and (b) assign point values to the sentencing factors it elects to keep. Aggravating factors would be assigned positive point values, while mitigating factors would be assigned negative point values.
- (2) The Sentencing Commission would determine how many points would be needed to trigger a move from one sub-range to another sub-range. The process would be similar to that now used to place defendants in Criminal History Categories along the horizontal axis of the current Sentencing Table.
- (3) Conviction by plea or trial verdict would place a defendant in the lowest (and broadest) of the three sub-ranges of the basic sentencing range corresponding to the intersection of the offense level resulting from the conviction and the defendant’s criminal history score.
- (4) After trial, the court would receive a presentence investigation report and conduct a sentencing hearing much as it now does.
- (5) At the hearing, the court would determine which aggravating and mitigating factors existed in the case. It would then add and subtract the point values assigned to each factor found. It would then determine the sub-range to which the defendant should be assigned. Finally, the court

would select the defendant's sentence from within that sub-range in the same way it selected a sentence within the guideline range pre-*Booker*, which is to say through the exercise of largely unfettered discretion.

Such a system would operate quite differently than the existing guidelines in several important respects. First, the requirement that a number of offense level points must be accumulated to trigger a movement to the next higher sub-range would de-emphasize the importance of non-element sentencing factors. Under the current guidelines, every offense-related sentencing factor is associated with an increase or decrease in a defendant's offense level and thus with an increase or decrease in a defendant's maximum and minimum guideline sentence. Consequently, every judicial finding related to offense level necessarily matters. In the proposed system, a judicial finding of an offense-related sentencing factor would only have a necessary effect on the defendant's sentencing range if the total points from all offense-related sentencing factors triggered a move from one sub-category to the next.

Second, the *Blakely* ruling means that the high end of the "base sentencing range" to which the defendant is assigned by virtue of trial or plea is the "statutory maximum sentence" and thus is a hard cap on the defendant's possible sentence. Hence, no matter how many offense level points a defendant was assigned during the post-conviction process of judicial fact-finding, the court could *not* sentence the defendant to a term greater than the top of the "base sentencing range." Non-element sentencing factors would remain important because they could, in the aggregate, push the defendant up one or two sub-ranges and so increase a defendant's minimum sentence by as much as three years. But they could not increase the defendant's maximum sentence above the figure set by the jury's verdict or the defendant's plea.

The de-emphasis of non-element sentencing factors intrinsic to the proposed system is critical because it addresses two principal critiques of the present guideline regime. First, at the case level, Guidelines critics (including Justice Scalia and the other members of the *Blakely* majority) have long been concerned that judicial findings of relevant conduct can have a greater effect on the defendant's ultimate sentence than the jury's verdict of guilt of the crime itself—the concern manifested in the metaphor of the tail which wags the dog. In his opinion for the *Blakely* majority, Justice Scalia is scornful of the dissent's failure to place any

meaningful constraint on the degree to which judicially-found facts can impact a sentence.²³² The system proposed here would continue to allow Congress and the Commission to enumerate facts that, if found post-trial, would constrain the judge's discretion and affect the defendant's sentence. However, it would place significant limits on the *degree* to which such facts could influence the sentence. The "dog" would be the "base sentencing range" produced by the jury's verdict or the defendant's plea and it would, under the table proposed here, be no more than five years wide. No amount of relevant conduct tail-wagging could increase the defendant's sentence above the top of that range. In short, this proposal does "give intelligible content to the right of jury trial,"²³³ while providing some structure to the exercise of judicial sentencing discretion.

Second, placing a cap on the sentence-enhancing effect of specific offense characteristics would have three salutary effects at the rulemaking level. On one hand, it would reduce the political incentive for the Department of Justice and Congress to seek ever more upward adjustments in response to outbreaks of public concern about the crime du jour. There is less point in seeking such adjustments if they will change the sentences of only some of the defendants to whom they apply. On the other hand, to the extent that Congress does mandate such adjustments, the proposed system would cabin their effect within the limits of the "base sentencing range." Of course, the Justice Department could seek and Congress could enact changes to the configurations of statutory elements and sentencing factors associated with the "base sentencing ranges," but this would be a sufficiently complex and systemically unsettling exercise that one suspects it would not often be attempted.

The preceding two observations about the rule-making effects of the proposed system derive from the premise that constant intervention in the sentencing rulemaking process by Congress and the Department of Justice is a bad thing. I believe that to be true as a general matter. Nonetheless, Congress certainly has the right and the constitutional authority to make sentencing policy, and it will often feel political pressure to respond to real or perceived crises by enacting new (usually tougher) sentencing measures. The Executive will sometimes feel similar pressure. The system proposed here leaves room for the political

²³² See *Blakely*, 124 S Ct at 2539.

²³³ *Id* at 2538.

branches to do what they feel they must, while moderating the real-world effects of such conduct. The proposed system makes it fairly difficult for Congress to enact changes that have necessary effects on lots of defendants and that disarrange the overall balance of the structure created by the Sentencing Commission. At the same time, the system makes it fairly easy for the Justice Department to seek and Congress to enact enhancements that yield political benefit, but affect individual defendants only in combination with other enhancements and only up to the ceiling set by the base sentencing range.

2. Creating room for plea bargaining, cooperation incentives, and the exercise of judicial discretion.

The discussion in the preceding section focused on the effects of aggravating adjustments and thus did not address three important issues: the necessity of sentencing incentives for guilty pleas, the government's need for sentencing incentives to offer potential cooperators, and the need for some degree of judicial discretion to adjust the sentences of defendants whose crimes or personal circumstances seem to require sentences less severe than called for by the generally applicable rules. Satisfying these needs requires a mechanism for reducing a defendant's sentence below the floor of the "base sentencing range." Fortunately, *Blakely* does not apply to sentencing facts that reduce sentences, and thus the tools employed by the current Guidelines can be readily adapted to the proposed system.

a) *Plea bargaining, case management, and acceptance of responsibility.* In 2002, 97.1 percent of all federal convictions were obtained by plea.²³⁴ While that figure may be undesirably high, few would argue with the proposition that the federal criminal justice system will continue to depend heavily on plea bargaining, and thus that some incentive must be available to induce defendants to plead guilty rather than exercising their trial rights. At present, the principal incentive is the "acceptance of responsibility" adjustment pursuant to § 3E1.1, which offers a two- or three-offense-level reduction for defendants who plead guilty.²³⁵

The proposed system could offer an analogous acceptance of responsibility adjustment. It could be structured in one of several

²³⁴ United States Sentencing Commission, *2002 Sourcebook* at 24, Table 11 (cited in note 37).

²³⁵ USSG § 3E1.1 (2004).

ways. One possibility would be to award a certain number of offense level points for acceptance. These points would be subtracted from the points assessed for findings of aggravating sentencing factors, lowering the final point total used to place a defendant within the appropriate sub-range of the base sentencing range. Acceptance of responsibility would have to be weighted fairly heavily in offense level points to make it a sufficient plea incentive. And even this might be insufficient if the only effect of receiving the acceptance credit was to keep the defendant in the lowest sub-range—where he would have a low minimum sentence but still be exposed to the maximum sentence in the range.

Accordingly, it might be necessary to create an acceptance of responsibility credit that, if awarded, could move the defendant down into the next lowest base sentencing range. This would not only lower the defendant's minimum sentence, but would cap his exposure at the top of the reduced base offense range, which would correspond to the bottom of the original base sentencing range.

b) *Cooperation and substantial assistance.* From the point of view of prosecutors, one of the primary advantages of the existing sentencing guidelines over the previous regime of discretionary sentencing is the leverage created by the “substantial assistance” provisions of the SRA and the Guidelines.²³⁶ These provisions permit judges to depart downward from the otherwise applicable guideline range in consideration of a defendant's cooperation in the investigation or prosecution of others if, but only if, the government moves for such a departure.²³⁷ This is not the proper forum for discussion of the controversial government monopoly on substantial assistance motions,²³⁸ but regardless of who has the power to seek cooperation reductions, it is fairly plain that some inducement for cooperation would be required in any revised federal guideline system. Not only is such an inducement desirable from a policy perspective, but it would cer-

²³⁶ See 18 USC § 3553(b) (2004); USSG § 5K1.1 (2004). See also Bowman, 29 Stetson L Rev 7 (cited in note 76) (discussing various aspects of the debate over substantial assistance departures).

²³⁷ See 18 USC § 3553(e) (2004) (authorizing departure below the statutory minimum sentence upon motion of the government for “substantial assistance in the investigation or prosecution of another person”); USSG § 5K1.1 (2004) (authorizing departure below the otherwise applicable guideline range upon motion of the government for “substantial assistance in the investigation or prosecution of another person”).

²³⁸ See American College of Trial Lawyers, *Report and Proposal on Section 5K1.1 of the U.S. Sentencing Guidelines* (1999), available at <<http://www.actl.com/PDFs/ReportProposalSentencingGuidelines.pdf>> (last visited Sept 18, 2005); Bowman, 27 Stetson L Rev at 53–58 (cited in note 76).

tainly be a precondition for Justice Department support of any new system.

The system proposed here should include a downward departure provision closely patterned on the existing substantial assistance rules. Downward departures for cooperation should be permitted on motion of the government. Consideration should be given to whether such departures would be limited to one base sentencing range below the otherwise applicable range, or whether, as is now the case, a substantial assistance motion would empower a judge to reduce the sentence all the way to probation, and in appropriate cases to go below a minimum mandatory sentence.²³⁹

c) *Judicial departure authority.* The *Blakely* decision would preclude what we would now call an “upward departure,” that is, a sentence above the top of the applicable sentencing range created by the facts found by the jury or admitted by plea. However, *Blakely* does not preclude a downward departure below the bottom of a range determined by trial or plea. Accordingly, the proposed system can—and should—retain a provision for downward departures initiated by judges, either with or without the approval of prosecutors. As with substantial assistance departures, consideration should be given to whether any limit ought properly to be placed on the extent of the judicial departure power.

3. Appeal.

In the proposed system, findings of fact by the jury would be subject to appellate review only for sufficiency of the evidence and would thus be overturned only in the rarest instances. However, post-conviction judicial findings of fact that affect placement in the sub-ranges would be subject to appeal in the same way as sentencing factor determinations were under the pre-*Booker* Guidelines. Likewise, legal errors in applying sentencing law to facts found by either juries or judges would be appealable to the same extent as was the case pre-*Booker*.

C. One Last Post-*Booker* Wrinkle

The proposal outlined here depends at least in small part on the rule of *Harris* that post-conviction judicial findings of fact

²³⁹ At present, a judge may sentence a defendant below an otherwise applicable mandatory minimum sentence if requested by the government to do so in a substantial assistance motion.

may generate legally binding minimum sentences. *Booker* may cast at least some doubt on the continued viability of *Harris*. After *Blakely*, the conventional wisdom was that no judicially determined guideline range with even a presumptive maximum could survive. But *Booker*, by salvaging the Guidelines, authorizes Guideline ranges with tops determined by post-conviction judicial fact-finding. If the Court ultimately accords those ranges at least some measure of legally presumptive effect, then the distinction between constitutional and unconstitutional guideline systems becomes the degree of presumptiveness of the tops of the guideline ranges. Put another way, the constitutional distinction between a "statutory maximum" which must be determined by a jury under *Blakely* and the top of a presumptive guideline range that can be determined by a judge under *Booker* can only be the degree of discretion afforded the judge to sentence above the top of the range. If the Court decides that presumptive limits on maximum sentences are constitutionally acceptable, it is hard to see why the same reasoning should not apply to minimum sentences.

After *Blakely*, those who opposed the adoption of "topless guidelines" raised doubts about the continued viability of *Harris*. They noted that Justice Breyer was the fifth vote for preserving statutes that set minimum sentences through post-conviction judicial fact-finding, and that he expressed doubt about how *Harris* could be squared with *Apprendi*. Before *Booker*, it seemed plausible that Justice Breyer and other members of the Court who favor keeping the Constitution hospitable to structured sentencing systems would hold on to *Harris* because it provided at least one tool of structured sentencing. A system that constrains judicial discretion only by setting minimums is awkward and asymmetrical, but not wholly useless. After *Booker*, it is no longer clear that the weird asymmetry of *Blakely* and *Harris* is necessary. It would make far greater sense for the Court to hold that real, hard, impermeable statutory maximum and minimum sentences can only result from facts found by juries or admitted by plea, while at the same time permitting structured sentencing systems that use judicial fact-finding to generate sentencing ranges, presumptive at both top and bottom, inside the statutory limits. Such an approach would appeal to many members of the Court because it treats minimum and maximum sentences consistently, gives a meaningful role to juries in setting the actual minimum sentences that matter more to defendants than theoretical maximums, preserves the accomplishments of the structured sentencing movement, and confers constitutional status on

judicial sentencing discretion.²⁴⁰ If this is the direction the Court is heading, then *Harris* is in danger.

Would the fall of *Harris* fatally wound the proposal in this Article? I think not. The two central pillars of the proposal are (1) using juries to determine the facts necessary to placement of defendants within the base sentencing ranges of a drastically simplified sentencing table, and (2) using judicial fact-finding to further constrain the exercise of judicial sentencing discretion within the boundaries of the base sentencing ranges. If my analysis of where Justice Breyer is leading the Court should prove correct, it would not affect the jury component of the proposal. A jury would still have to find (or a defendant would have to admit) the facts that place a defendant in a base sentencing range box. The only difference would be that the minimum sentence for subranges determined by post-conviction judicial fact-finding would have only presumptive effect. This alteration would not vitiate any of the major advantages of the proposal.

CONCLUSION

The system proposed here would offer a number of advantages. First, it remains a guidelines system that cabins judicial sentencing discretion within ranges created by findings of fact, some of which would be made by juries or result from the defendant's admissions during his plea, and some of which would be made by judges after adjudication of guilt. Second, it retains a significant role for post-conviction judicial findings of fact, while at the same time giving juries a much larger role in setting limits on a defendant's possible punishment. Third, it limits the effect of "relevant conduct" on sentencing outcomes and thus addresses the problem of the judicial sentencing tail wagging the jury trial dog. Fourth, it is far simpler than the current federal sentencing guidelines inasmuch as it markedly limits the number of decision points required in each case to arrive at a final sentence. Fifth, in consequence, the design markedly alters those structural features of the current guidelines that have made the rulemaking process a one-way upward ratchet. The system proposed here is not perfect. It is not even the best system that could be devised if one were freed from considerations of practical politics and from the architectural limits imposed by the Supreme Court's new Sixth Amendment jurisprudence. It is, however, the best system

²⁴⁰ For a more complete outline of how this constitutional model of sentencing might work, see Bowman, 17 Fed Sent Rptr 1 (cited in note 232).

I have been able to come up with that meshes considerations of sound national sentencing policy, the Court's new constitutional rules, and pragmatic projections of what the major institutional sentencing actors will and will not accept. I offer it not as a panacea, but as a basis of discussion in the hope that the window of opportunity created by *Blakely* and *Booker* will not be wasted.