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Reuschlein Lecture

SAVING FEDERAL SENTENCING REFORM AFTER *APPENDI, BLAKELY AND BOOKER*

DAVID YELLEN*

I. INTRODUCTION

AS a result of a dramatic, and largely unexpected, series of recent decisions by the United States Supreme Court, both the federal sentencing system and the sentencing systems in a number of states are in turmoil. The era of mandatory federal Sentencing Guidelines, with narrow ranges based on facts determined by judges on a preponderance of the evidence standard, is over. For now, the guidelines remain in place, but in an "advisory," not binding capacity. Congress is already considering what legislative changes to make to this new reality, and this debate may be as far-reaching in importance as the one that led to the passage of the Sentencing Reform Act¹ and the creation of the Sentencing Guidelines.

In *Appendi v. New Jersey*,² *Blakely v. Washington*³ and *United States v. Booker*,⁴ the Supreme Court announced and extended a rule that under the Sixth Amendment,⁵ facts that increase the maximum punishment to

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1. 28 U.S.C. §§ 991-98 (1984).

2. 530 U.S. 466 (2000).

3. 124 S. Ct. 2531 (2004).

4. 125 S. Ct. 738 (2005).

5. U.S. CONST. amend. VI. The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

which the defendant is exposed must be determined beyond a reasonable doubt by a jury, unless admitted by the defendant. Despite this ruling, a federal defendant will not necessarily have a sentencing fact determined by a jury. Further, it is far from clear that once the dust clears and Congress has spoken, the new federal sentencing system will be fairer or more just than the system that the Court invalidated in *Booker*.

On the other hand, the federal sentencing system under the binding guidelines and mandatory minimum statutes in effect produced such profound failures that we should welcome the opportunity provided by the Supreme Court to reconsider the system. This is perhaps the one real chance to revive the spirit of reform that initially led to the guidelines movement.

Part II of this Article reviews the past several decades of the sentencing reform movement. During that movement, the federal system and many states rejected the traditional discretionary sentencing system and replaced it with structured sentencing mechanisms such as sentencing guidelines and mandatory minimum statutes. One of the principal goals and effects of sentencing reform is to bring law to sentencing. Prior to the Supreme Court's recent decisions, though, a great deal of procedural informality, some would say unfairness, was still permitted.

Part III summarizes the line of cases beginning with *Apprendi* and extending through *Booker* that has now revolutionized sentencing. Part IV examines the options available to Congress and makes policy recommendations. In sum, I believe that the best policy after *Booker* is for Congress to direct the Sentencing Commission to revise and simplify the Sentencing Guidelines, and to submit disputed facts to juries for decision. Simplified guidelines that provide judges with more flexibility will be both workable under *Booker* and more in keeping with the original goals of sentencing reform.

II. A QUICK HISTORY OF THE SENTENCING REFORM MOVEMENT

One of the most dramatic developments in the criminal justice system over the past twenty-five years was the transformation of the sentencing process. For most of the twentieth century, criminal offenders were sentenced based on a medical or rehabilitative model, and judicial discretion and parole release marked the sentencing system.⁶ Typically, a judge sentencing a convicted defendant was constrained only by the maximum sentence authorized by statute.⁷ The judge could impose probation, some

6. See, e.g., Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993) ("From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion The great majority of federal criminal statutes have stated only a maximum term of years permitting the sentencing judge to impose any term of imprisonment and any fine up to the statutory maximums.").

7. See *id.* (noting traditional rule that sentencing judges could impose any sentence up to statutory maximum).

other nonincarcerative sanction or a prison term of any length up to the statutory maximum. The judge could consider virtually any available information about the offender and the offense when deciding whether, and for what length of time, prison was appropriate.

The sentences imposed were indeterminate—a sentenced offender was initially informed only as to the maximum possible duration of the term to be served. A parole board usually determined the actual time served.⁸ Typically, an inmate became eligible for parole after serving one-third of the maximum sentence and could be released any time from then until completion of the entire sentence.⁹ The parole board, in theory, made an individualized assessment of the offender's needs and progress and ordered the offender's release only when rehabilitation was accomplished.¹⁰

The reality of this system, of course, always diverged greatly from its aspirations. The prison environment hardly fosters rehabilitation, even for inmates committed to reforming themselves. The "science" of parole release proved incapable of predicting, with any great accuracy, which inmates were ready to become law-abiding citizens. Nonetheless, the system sketched above remained largely unchanged for many years.

The traditional sentencing system came under increasing attack in the late 1960s and early 1970s.¹¹ Both conservatives and liberals criticized then existing sentencing practices. Conservatives viewed rehabilitation as a failed ideal.¹² After a century of reform-based penology, crime rates were high and recidivism widespread. To these critics, judicial discretion and parole produced much mischief.¹³ Too many liberal judges were free

8. *See id.* at 226 (explaining that "parole authorities were assigned the task of determining the actual release date for most federal prisoners").

9. *See id.* (discussing federal prisoner parole availability).

10. *See id.* at 227 (explaining that when rehabilitation was viewed as one goal of imprisonment, "parole officers' power to determine a sentence's duration was seen both as a valuable incentive to prison inmates to rehabilitate themselves and as a vehicle to permit 'experts' to determine when sufficient rehabilitation had occurred to warrant release from prison").

11. The publication of a thoughtful book by a sitting judge was a critical moment in the development of the sentencing reform movement. *See generally* MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973) (criticizing pre-Guidelines discretionary system for often producing unfair sentences and arguing for structured sentencing system).

12. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 1984 U.S.C.C.A.N. (98 Stat. 1837) 3182, 3221 ("In the Federal system today, criminal sentencing is based largely on an outmoded rehabilitation model . . . [A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting."); *see also* *Mistretta v. United States*, 488 U.S. 361, 365 (1989) (discussing reports of "'outmoded rehabilitation model' for federal criminal sentencing"); Stith & Koh, *supra* note 6, at 227 (describing conservative critiques of rehabilitation).

13. *See generally* Joseph C. Howard, *Racial Discrimination in Sentencing*, 69 JUDICATURE 121 (1975) (discussing specifically how judicial sentencing discretion led to different sentences for prisoners of different races).

to impose lenient sentences, and social work-oriented parole boards released offenders too early. Liberals also doubted the effectiveness of rehabilitation and were troubled that offenders were incarcerated "for their own good."¹⁴ Liberals also found judicial discretion problematic because it led to sentencing disparities, especially by race and class, in which similar criminal offenders in similar cases received quite different sentences.¹⁵ In addition, some liberals viewed the system as basically "lawless," with no guiding principles for judges to follow, rampant procedural unfairness and an absence of meaningful appellate review.

Conservatives and liberals agreed that the sentencing system was deeply flawed.¹⁶ Although important differences existed in how each diagnosed the problems, leading liberals and conservatives formed an alliance aimed at reforming the sentencing system. They agreed on several fundamental points.

First, both sides agreed that unwarranted sentencing disparity was an unnecessary evil. Policymakers shared the perception that similarly situated offenders often received significantly different sentences, an obvious consequence of judicial and parole discretion. Second, both sides targeted uncertainty in sentencing, another consequence of indeterminate sentencing and parole release. They agreed that it should be replaced with "truth in sentencing," under which the term imposed would actually be served, minus a modest amount of time off for good behavior. Third, both conservatives and liberals agreed on the broad outlines of a philosophical shift in the aims of sentencing. Both sides agreed that rehabilitation should be de-emphasized, although for different reasons.¹⁷

Although some commentators urged that general deterrence should be the guiding rationale of sentencing, more attention was focused on a modernized version of retribution, or just deserts.¹⁸ Although there are many different approaches to just deserts, at its most basic level it means that sentencing decisions are based more on the circumstances of the offense, and perhaps the offender's criminal record, than on the offender's individual characteristics. Conservatives favored this approach because it was more manifestly punitive. Liberals, or at least some of them, believed that offense-based sentencing would be fairer and less subject to bias.

So much for philosophy. The sentencing reform movement had to develop mechanisms to replace or supplement the prevailing methods of

14. See Stith & Koh, *supra* note 6, at 227 (describing liberal critiques of indeterminate sentencing and parole).

15. See *id.* (noting that sentencing discrepancies were "fundamentally at odds with ideals of equality and the rule of the law").

16. See *id.* at 227-28 (considering growing academic literature criticizing indeterminate sentencing and parole).

17. See *id.* at 240 (providing that rehabilitation as sentencing goal was criticized by both conservatives and liberals).

18. See *id.* at 240 (offering proposed goals of punishment by various sentencing reformers). See generally NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (1974) (discussing failure of rehabilitation as imprisonment goal).

sentencing offenders. Reforms proceeded in two distinct directions. Some legislatures, in light of their unhappiness with the traditional sentencing system, enacted mandatory penalty schemes. Under those regimes, specific or minimum penalties are prescribed by statute for violations of various laws.¹⁹ There may be mandatory penalties covering a wide range of offenses, as in California, or a more specific group of offenses, as in the federal system, where mandatory minimums basically apply to narcotics and weapons offenses.²⁰ New York's "Rockefeller Drug Laws"²¹ are an example of targeted mandatory sentencing statutes.

Another approach to implementing sentencing reform involved sentencing guidelines. Many reformers coalesced around the idea of having an expert, independent administrative agency of judges, lawyers, criminal justice officials and scholars, known as a sentencing commission, study sentencing and develop a set of guiding principles. These principles would be reduced to a set of rules, or guidelines, which judges would be required to follow in ordinary cases. Judges could, however, "depart" from the guidelines in atypical cases. Parole would be abolished to ensure honesty in sentencing.²² With a body of rules to govern sentences, meaningful appellate review would be available for the first time, leading to the development of a "common law of sentencing."²³ In the end, proponents of the sentencing guideline approach hoped that the Sentencing Commission's expertise and insulation from political considerations would lead to crucial improvements in sentencing.

In 1980, Minnesota became the first state to implement sentencing guidelines, followed by Pennsylvania in 1982 and Washington in 1984.²⁴ In 1984, Congress passed the landmark Sentencing Reform Act.²⁵ The United States Sentencing Commission, established by the Sentencing Reform Act, promulgated its original guidelines in 1987. Today, sentencing

19. See Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 62 (1993) (discussing legislatures' enactment of mandatory sentencing laws that require significantly enhanced punishment in large number of felony prosecutions).

20. See *id.* (noting cases where mandatory minimums would apply, such as felony prosecutions involving violent crimes and drug trafficking).

21. N.Y. PENAL LAW §§ 220.00-65, 221.00-5 (McKinney 2005).

22. See Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 36 (2000) (referring to bill calling for abolition of parole in addition to creation of federal sentencing commission and guidelines).

23. See Adam Lamparello, *Introducing the "Heartland Departure,"* 27 HARV. J.L. & PUB. POL'Y 643, 646-67 (2004) (describing role of appellate courts under federal Sentencing Guidelines).

24. See MINN. STAT. ANN. § 244 app. (West 1992) (discussing first implementation of sentencing guidelines in Minnesota in 1978); see also 42 PA. CONST. STAT. ANN. § 9721 (West 1990) (discussing initial sentencing guidelines effective in Pennsylvania in 1982); WASH. REV. CODE ANN. § 9.94A.030 (West 1999) (discussing Washington's first sentencing guideline system in 1984).

25. For an excellent review of the development of the Sentencing Reform Act, see Stith & Koh, *supra* note 6, at 223.

guidelines are in effect in over twenty states and the federal system, and a number of additional states have sentencing commissions at work.

Sentencing guidelines vary in important ways. The federal Sentencing Guidelines are extremely complex. They severely restrict the ability of judges to consider individual offender characteristics, often require sentences to be based on alleged offenses of which the defendant was not convicted and barely consider nonimprisonment sentences.²⁶ The various state guidelines are generally simpler and more flexible than the federal model. Although they differ on such issues as whether the guidelines are binding or advisory, the ease with which judges may depart from the guidelines, the extent to which they regulate nonprison sentences and whether parole was abolished, state guidelines have been much more readily accepted.²⁷

Although the *Apprendi* line of cases came as a great surprise, there has long been a vigorous debate about the procedures and standards of proof that should apply at sentencing. As noted above, one significant goal of sentencing reformers was making sentencing fairer. Until 2000, the Supreme Court took a very hands-off approach to procedural and substantive fairness issues in sentencing. That jurisprudence was both highly deferential to legislative choices and very tolerant of procedural informality.²⁸ In traditional sentencing regimes, before the introduction of the Sentencing Guidelines, legislatures could decide, with few limits, which facts were elements of offenses and which were sentencing factors. Within typically broad statutory ranges, judges could rely on almost any facts of their choosing in selecting the sentence to be imposed. Such facts, which did not need to be determined by more than a preponderance of the evidence, could be about the offense or the offender.

As discretionary sentencing systems began to give way to more structured approaches, there was renewed attention to the process of determining sentencing facts. Sentencing guidelines systems have introduced more due process and applied more refined legal principles to sentencing. For example, judges in sentencing guidelines systems (other than the loosest advisory guidelines) must apply previously established rules rather than simply relying on their own instincts or philosophies. Contested factual issues are often the subject of hearings, and decisions of the sentencing judge are subject to appellate review. Still, the Supreme Court continued to approve of a preponderance of the evidence standard.²⁹ Critics argued

26. See Ronald F. Wright, *Making Sense of the Federal Sentencing Guidelines, Complexity and Distrust in Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 617, 617 (1992) (observing complaints about complexity of federal Sentencing Guidelines).

27. See *id.* at 620 (acknowledging difference between federal and state sentencing systems, which often results in more complexities).

28. The leading Supreme Court case of this era was *Williams v. New York*, 337 U.S. 241 (1949) (holding that defendants did not have right to confront or cross-examine witnesses against them at sentencing).

29. In *McMillan v. Pennsylvania*, 477 U.S. 79, 92 (1986), for example, the Court upheld a provision mandating a five-year minimum sentence if the judge

that with the heightened importance and formality of fact finding in guidelines systems, this approach was inadequate to protect defendants' due process rights.³⁰ Prior to *Apprendi*, though, the Supreme Court showed little inclination to overturn its past, deferential approach to sentencing fairness.³¹

III. APPRENDI, RING, HARRIS, BLAKELY

To understand *Blakely*, it is appropriate to begin with *Apprendi*, a 2000 Supreme Court decision.³² In *Apprendi*, the defendant pleaded guilty to a weapons offense with a statutory maximum punishment of ten years imprisonment. A separate statute authorized increasing the maximum to twenty years if the court found by a preponderance of the evidence that the defendant was motivated by racial animus.³³ After finding this animus, the judge sentenced Apprendi to prison for twelve years.³⁴ The Supreme Court, in a five-four decision, ruled that "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."³⁵ The dissent argued that established precedent allowed sentence enhancements of

found by a preponderance of the evidence that the defendant had visibly possessed a firearm during the commission of enumerated offenses.

30. See Benjamin J. Priester, *Structuring Sentencing: Apprendi, The Offense of Conviction, and the Limited Role of Constitutional Law*, 79 IND. L.J. 863, 870-71 (2004) (considering findings of fact in sentencing determined by preponderance of evidence rather than beyond reasonable doubt standard as "sentencing factor" in *McMillan*).

31. See, e.g., *United States v. Watts*, 519 U.S. 148, 149-53 (1997) (arguing that because of different standard of proof at sentencing, guidelines permissibly require judges to consider acquitted conduct); *Witte v. United States*, 515 U.S. 389, 399-400 (1995) (concluding that double jeopardy was not violated by prosecution for conduct that had been used to enhance defendant's sentence in prior case).

32. *Apprendi* did not arrive out of thin air. Justice Scalia planted the seeds for this decision with his dissents in *Monge v. California*, 524 U.S. 721 (1998), and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (enhancement of defendant's sentence for prior convictions does not require jury finding beyond reasonable doubt as to those prior convictions). In *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999), the Court interpreted the federal carjacking statute in a manner to avoid having to reach the constitutional issue, but suggested that, other than prior convictions, a fact that "increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." For a further discussion of these cases, see Jon Wool, *Aggravated Sentencing: Blakely v. Washington; Legal Considerations for State Sentencing Systems*, POL'Y & PRAC. REV. (Vera Inst. of Justice, New York, N.Y.), Sept. 2004, at 3-6, available at http://www.vera.org/publication_pdf/250_477.pdf.

33. See *Apprendi v. New Jersey*, 530 U.S. 466, 470 (2000) (reviewing enhancement findings by judge regarding sentence maximums).

34. See *id.* at 466 (finding Apprendi guilty by preponderance of evidence that shooting was racially motivated, thereby sentencing Apprendi to twelve year term on firearms count).

35. *Id.* at 490.

this sort and worried that the majority's rationale could be extended far beyond the narrow situation presented in *Apprendi*.³⁶

Two years later, the Court applied the *Apprendi* rule in a way that foreshadowed *Blakely* in *Ring v. Arizona*.³⁷ The defendant in *Ring* was convicted of felony murder, an offense for which the death penalty was available. Under Arizona's statutory scheme, though, the judge could only sentence a defendant to death after finding certain enumerated aggravating factors at a sentencing hearing.³⁸ After finding an aggravating circumstance at the sentencing hearing, the judge sentenced Ring to death. The Supreme Court applied *Apprendi* broadly, ruling that if a "State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."³⁹

In hindsight, *Blakely* was probably the inevitable result of *Ring*, although at the time, most experts did not expect the Court to follow through in this manner.⁴⁰ The defendant in *Blakely* was charged with first-degree kidnapping after abducting his wife. He pleaded guilty to second-degree kidnapping, an offense punishable by up to ten years imprisonment. Washington's Sentencing Reform Act ("Act") set the normal range for this offense at forty-nine to fifty-three months imprisonment.⁴¹ Under the Act, the judge could only exceed fifty-three months upon finding a "substantial and compelling reason."⁴² After finding by a preponderance of the evidence that Blakely had acted with "deliberate cruelty," the judge sentenced him to ninety months.⁴³

The Supreme Court, by the same five to four majority that decided *Apprendi*, ruled that this procedure was unconstitutional. According to the Court, under *Apprendi*, the "prescribed statutory maximum" that triggers Sixth Amendment rights is "the maximum sentence that a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the

36. See *id.* at 525 (O'Connor, J., dissenting).

37. 536 U.S. 584 (2002).

38. See *id.* (discussing Arizona sentencing scheme).

39. See *id.* at 602 (relying on *Apprendi* in striking down death sentence).

40. See, e.g., Stephanos Bibas, *Back from the Brink: The Supreme Court Balks at Extending Apprendi to Upset Most Sentencing*, 15 FED. SENTENCING REP. 79, 81 (2002) (discussing contemporaneous belief that *Apprendi* will pose no future threat to validity of discretionary sentencing guidelines); Nancy J. King & Susan R. Klein, *Après Apprendi*, 12 FED. SENTENCING REP. 331, 338 (2000) (arguing that only lasting impact of *Apprendi* will be its effect on "legislative efforts to draft crimes and punishments in its wake, and . . . constitutional limits on the shape of substantive criminal law"). Blakely's attorney, a young law firm associate, saw the case as an easy one after *Apprendi* and *Ring*, using only twenty-five of the fifty page limit in his brief. See David Feige, *The Supreme Beginner*, L.A. TIMES, Dec. 5, 2004, at 18.

41. See *Blakely v. Washington*, 124 S. Ct. 2531, 2534–35 (2004) (discussing Washington's sentencing scheme).

42. *Id.* (quoting WASH. REV. CODE ANN. § 9.94A.310(3)(b) (West 2003)).

43. See *id.* (recounting facts).

defendant."⁴⁴ Because the defendant's "deliberate cruelty" was not part of the statutory definition of the offense, and the defendant made no such admission, his sentence could be raised above the normal range only upon a jury finding beyond a reasonable doubt. The Court did not view the distinction between the formal statutory maximum in *Apprendi* and the functional equivalent of the normal range in *Blakely* to be constitutionally significant.⁴⁵

Blakely sent shockwaves through the federal criminal justice system. As the case made clear, both the federal Sentencing Guidelines and other state guidelines sharing many of the attributes of Washington's system might be invalid.⁴⁶ The lower federal courts quickly split on the question,⁴⁷ and the Supreme Court agreed to hear the issue promptly. On the first day of the new term, less than three months after deciding *Blakely*, the Court heard arguments in *United States v. Booker*⁴⁸ and *United States v. Fanfan*.⁴⁹

On January 12, 2005, the Supreme Court announced its decision. The same five member majority from *Apprendi* and *Blakely* dismissed the government's efforts to distinguish the federal Sentencing Guidelines, ruling that the Sixth Amendment was violated by the guidelines' mandatory enhancement of sentencing ranges based on facts not proven beyond a reasonable doubt to a jury or admitted by the defendant.⁵⁰ The Court rejected the government's argument that the federal guidelines, written by an administrative agency to constrain judicial discretion, were distinguishable from Washington's statutory guidelines.⁵¹

44. *Id.* at 2537 (emphasis added).

45. *See id.* at 2538 (rebutting state's argument).

46. The *Blakely* majority expressly noted that the status of the federal Sentencing Guidelines was not then before the Court. *See id.* at 2538 n.9 (passing up opportunity to rule on federal guidelines). The dissent, though, predicted that there were no constitutionally significant differences between Washington's system and the federal guidelines. *See id.* at 2549 (O'Connor, J., dissenting) ("The structure of the Federal Guidelines likewise does not, as the Government half-heartedly suggests, provide any grounds for distinction If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack.").

47. *See United States v. Booker*, 375 F.3d 508, 513 (7th Cir. 2004), *aff'd*, 125 S. Ct. 738 (2005) (refusing to grant upward departure mandated by federal Sentencing Guidelines after *Blakely*); *Fanfan v. United States*, No. 03-47, 2004 WL 1723114, at *3 (D. Me. June 28, 2004), *vacated by*, *United States v. Booker*, 125 S. Ct. 738 (2005) (adhering to federal guidelines after *Blakely*).

48. *United States v. Booker*, 375 F.3d 508, 513 (7th Cir. 2004), *aff'd*, 125 S. Ct. 738 (2005).

49. No. 03-47, 2004 WL 1723114 (D. Me. June 28, 2004), *vacated by*, *United States v. Booker*, 125 S. Ct. 738 (2005).

50. *Booker*, 125 S. Ct. at 754-55 (refusing to distinguish *Blakely* system from federal guidelines).

51. *See id.* at 753 ("Regardless of whether the legal basis of the accusation is in a statute or in guidelines promulgated by an independent commission, the principles behind the jury trial are equally applicable.").

The Court then turned to the appropriate remedy for its finding that the federal Sentencing Guidelines were unconstitutional. Here, a different five-four majority⁵² ruled that the remedy most in keeping with congressional intent was to strike those statutory provisions that made the guidelines mandatory.⁵³ The remaining provisions of the Sentencing Reform Act now direct judges to “consider” the applicable sentencing guideline range, along with a number of other factors, such as “the nature and circumstances of the offense and the history and characteristics of the defendant,” and the “need to avoid unwarranted sentencing disparities.”⁵⁴ The guidelines are therefore advisory, rather than mandatory. Appellate courts can continue to hear appeals of sentences, with the applicable standard of review being “reasonableness.”⁵⁵

The dissent to this part of the decision complained vigorously that the Court was improperly engaging in judicial legislation.⁵⁶ They complained that the Court was invalidating statutory provisions that neither party had challenged.⁵⁷ Instead, they argued, the Court should “simply allow the Government to continue doing what it has done since this Court handed down *Blakely*—prove any fact that is *required* to increase a defendant’s sentence under the Guidelines to a jury beyond a reasonable doubt.”⁵⁸

It is far too soon to comment meaningfully on the precise nature of the post-*Booker* federal sentencing system. Several important issues are already apparent. The most significant is the role the guidelines will play in their new “advisory” capacity. The guidelines no longer carry the formal force of law. Under the Sentencing Reform Act, with the excisions made by the Court in *Booker*, the judge is under no compulsion to sentence within the guidelines range. The judge must “consider” the guidelines, as well as the various purposes of sentencing set forth in the statute. This structure has already led some sentencing judges to conclude that sentences below the guidelines range are appropriate because, for example, the guidelines’ restrictions on the consideration of personal characteristics conflict with a federal statute.⁵⁹ This sort of decision treats the guidelines as in fact advisory.

52. Justice Ginsburg joined the four dissenters from the first part of the ruling. See *id.* at 756 (Breyer, J., dissenting in part).

53. See *id.* at 756–57 (striking down relevant portions of statute).

54. *Id.* at 759 (quoting 18 U.S.C. § 3553(a) (2005)).

55. See *id.* at 757 (articulating new standard of review for sentencing).

56. See *id.* at 771–72 (Stevens, J., dissenting) (“While it is clear that Congress has ample power to repeal these two statutory provisions . . . this Court should not make that choice on Congress’ behalf.”); see also *id.* at 789–90 (Scalia, J., dissenting) (criticizing “remedial majority’s” analysis).

57. See *id.* at 777 (Stevens, J., dissenting) (arguing that majority’s severability analysis constitutes “entirely new law”).

58. *Id.* at 779.

59. See *United States v. Myers*, No. 3:03-CR-147, 2005 WL 165314, at *6 (S.D. Iowa Jan. 26, 2005) (sentencing defendant to probation when guideline range was twenty to thirty months imprisonment); *United States v. Ranum*, No. 04-CR-31, 2005 WL 161223, at *6 (E.D. Wis. Jan. 19, 2005) (sentencing defendant to impris-

On the other hand, some courts are still giving enormous deference to the guidelines. In a decision announced the day after *Booker* was decided, Judge Paul Cassell concluded that he was still bound to impose a sentence within the applicable guidelines range in all but the most unusual cases.⁶⁰ Thus, we are likely to see very different approaches to the weight given to the guidelines in an advisory system. As a result, it is impossible to predict how often judges will sentence within the recommended guidelines range. It seems fair to say that sentences deviating from the guidelines will increase, perhaps substantially, from the time when the guidelines had the force of law. Also, it is likely that there will be large inter-judge and inter-region differences in approaches to the guidelines.

IV. THE COMING DEBATE ABOUT FEDERAL SENTENCING

A. Legislative Options

Now that the Supreme Court has invalidated the mandatory nature of the existing federal Sentencing Guidelines (and, presumably, the guidelines and some nonguideline systems in a number of states),⁶¹ it is up to Congress to decide what to do next.⁶² There exists a wide range of plausible legislative responses, some of which could be used in combination. These options fall into three categories, which can be characterized broadly as *abandonment*, *evasion* and *compliance*.

1. Abandonment

First, Congress could *abandon* sentencing guidelines that have the force of law. One way to do this would be by *repealing sentencing guidelines and returning to a system of unguided judicial discretion*. Although it might

onment of one year and one day when guideline range was thirty-seven to forty-six months); *see also* 18 U.S.C. § 3661 (2004) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

60. *See* United States v. Wilson, No. 2:03-CR-00882 PGC, 2005 WL 273168, at *15 (D. Utah Feb. 2, 2005) (concluding that "court . . . will give heavy weight to the Guidelines when determining a sentence").

61. *Compare* Jon Wool & Don Stemen, *Aggravated Sentencing: Blakely v. Washington—Practical Implications for State Sentencing Systems*, POL'Y & PRAC. REV. (Vera Inst. of Justice, New York, N.Y.), Aug. 2004, at 3, *available at* http://www.vera.org/publication_pdf/250_477.pdf (noting states "fundamentally" affected by *Blakely*, and now *Booker*, are Alaska, Arizona, California, Colorado, Indiana, Minnesota, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Tennessee and Washington), *with* NAT'L CTR. FOR STATE COURTS, *Blakely v. Washington: Implications for State Courts*, (July 16, 2004), *available at* http://www.ncsconline.org/WC/Publications/KJS_SentenBlakely.pdf (listing potentially affected states as Alaska, Arizona, California, Colorado, Idaho, Indiana, Kansas, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Tennessee and Washington).

62. *See Booker*, 125 S. Ct. at 768 (Breyer, J., dissenting in part) ("Ours, of course, is not the last word: The ball now lies in Congress's court.").

seem ironic given the Supreme Court's concern with the role of the jury in the *Apprendi* line of cases, there is apparently nothing constitutionally suspect about the traditional sentencing system.⁶³ The Court has clearly noted its concern with the process of finding facts that increase the effective maximum punishment to which the defendant is exposed. In the traditional system, the judge has discretion to sentence up to the statutory maximum; thus, there is no *Apprendi* problem. As the likelihood of this being Congress's preferred option seems to be between slim and none, I will not dwell on it.

Another form of abandonment would be *replacing the guidelines with mandatory minimum statutory penalties*. Mandatory minimum provisions are unaffected by the *Apprendi* line of cases because the penalty is established by the fact of conviction of a particular offense. Broadly criticized as overly rigid and severe, mandatory minimums retain appeal for many in Congress.⁶⁴ As discussed below, mandatory minimums are the crudest, least principled form of sentencing available.⁶⁵ Although Congress may well enact additional mandatory minimums, it would be impossible for such a structure to serve as the meaningful foundation of a sentencing system given the broad reach of many federal criminal statutes.

The status quo created by the Supreme Court in *Booker* can be considered another form of abandonment: *keeping the guidelines, but as voluntary or advisory, rather than binding*. Even before *Booker*, this option had been proposed.⁶⁶ A number of jurisdictions have voluntary or advisory sentencing guidelines.⁶⁷ In these systems, there is no obligation for the judge to sentence within the range recommended by the guidelines, and usually no right of appeal.⁶⁸ Of course, after *Booker*, the federal system involves advisory guidelines with appellate review of sentences for "unreasonable-

63. See *id.* at 750 (Stevens, J., dissenting in part). "For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts the judge deems relevant." *Id.* (Stevens, J., dissenting in part).

64. See Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 200-02 (1993) (discussing pervasiveness of mandatory minimums in sentencing legislation). "[T]he federal code contains 100 separate mandatory minimum sentence provisions, located in sixty different statutes." *Id.* at 201.

65. For a discussion of mandatory minimums, see *infra* notes 117-18 and accompanying text.

66. See, e.g., AM. COLL. OF TRIAL LAWYERS, *United States Sentencing Guidelines 2004: An Experiment That Has Failed* 35 (Sept. 2004), available at http://www.actl.com/pdfs/SentencingGuidelines_3.pdf (advocating replacement of binding guidelines with advisory system).

67. See Wool & Stemen, *supra* note 61, at 3 (listing Arkansas, Delaware, Maryland, Rhode Island, Utah and Virginia as jurisdictions with voluntary sentencing systems that are possibly affected by *Blakely*). The District of Columbia, Louisiana, Missouri and Wisconsin are listed as jurisdictions not affected by *Blakely*. See *id.*

68. See *id.* at 5 (describing voluntary systems). "[Voluntary] systems are similar in structure to the Washington Guidelines in that they prescribe a range of sentences for each offense or offense class, but they differ in that the ranges are *not expressly binding*." *Id.* (emphasis added).

ness.”⁶⁹ The value in advisory guidelines is giving judges meaningful guidance, requiring them to consider the collective judgment embodied in the guidelines and explain their decisions to deviate and, at least in the model created in *Booker*, incorporating appellate review as a tool for correcting outlier sentences. The weaknesses of advisory guidelines are inherent in their flexibility. With no requirement that judges comply with any sentencing rules, individual sentences may vary widely. It seems unlikely that appellate review for “unreasonableness” will provide a meaningful control mechanism. In an important respect, advisory guidelines represent even greater judicial power in determining sentences. In the traditional system, the Parole Commission had a leveling effect on judicial discretion. In the current post-*Booker* system, we have broad judicial discretion combined with determinate sentences.

2. *Evasion*

Another category of responses would be to *evade* the requirement of jury determination of aggravating factors. *Apprendi*, *Blakely* and *Booker* do not require a jury finding of a sentencing fact unless the fact increases the effective maximum sentence to which the defendant is exposed.⁷⁰ Congress could evade this requirement, while keeping the current guideline system in place, by *increasing the top of each guideline range to the statutory maximum*.⁷¹ The guidelines calculation would effectively determine a point that would serve as the minimum of the applicable sentencing range. These so-called “topless guidelines” would comply with *Booker* because the offense or offenses of conviction—not any additional factual findings—would determine the upper limit of the sentencing range.⁷²

69. For a discussion of the holding in *Booker*, see *supra* notes 50–58 and accompanying text.

70. See *United States v. Booker*, 125 S. Ct. 738, 756 (2005) (holding that jury must find facts that cause sentences to exceed maximum authorized); *Blakely v. Washington*, 124 S. Ct. 2531, 2537 (2004) (stating that Sixth Amendment is only implicated when “a judge inflicts punishment that the jury’s verdict alone does not allow”); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“[A]ny 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.”).

71. See Frank O. Bowman, III, *Memorandum Presenting a Proposal for Bringing the Federal Sentencing Guidelines into Conformity with Blakely v. Washington*, 16 FED. SENTENCING REP. 364, 367 (2004) (proposing “topless guidelines”). “I believe that the Guidelines structure can be preserved essentially unchanged with a simple modification—*amend the sentencing ranges on the Chapter 5 Sentencing Table to increase the top of each guidelines range to the statutory maximum of the offense(s) of conviction.*” *Id.*

72. See *Booker*, 125 S. Ct. at 756 (concluding that only facts found by jury may increase sentence beyond maximum allowed). It is important to note, however, that the constitutionality of “topless guidelines” depends on the continued vitality of *United States v. Harris*, 536 U.S. 545, 568 (2002) (holding that two-year increase in defendant’s minimum sentence on judicial finding does not evade Fifth and Sixth Amendment requirements). In *Harris*, the Supreme Court ruled—in another five-four decision—that the rule from *Apprendi* does not apply to the setting of the minimum, as opposed to the maximum, of a sentencing range. See *Harris*, 536 U.S. at 567–68 (addressing impact of *Apprendi* on minimum sentences). As a

This is apparently the option favored by the Department of Justice.⁷³

To proponents, the principal advantage of "topless guidelines" is that they would require few changes in the federal Sentencing Guidelines as they existed before *Booker*. Judges would be required to make the same determinations as they always have under the guidelines, and there would be no need to resort to juries. The resulting sentencing ranges would, of course, be greatly increased on the upper ends. There probably would not be a dramatic increase in harsher sentences, however, because most judges have previously imposed sentences at or below the bottom of the applicable ranges. Opponents respond that a system that only regulates the lower end of sentences, and where there is no parole mechanism to regulate sentence length, is irrational, unfair and invites disparity.⁷⁴ If even ten percent of sentences are imposed above the current guidelines, with no effective method of regulation, sentencing consistency would suffer greatly.⁷⁵ It is also important to note that the constitutionality of "topless guidelines" depends on the continued vitality of *United States v. Harris*.⁷⁶ In *Harris*, the Supreme Court ruled, in another five-four decision, that the rule from *Apprendi* does not apply to the setting of the minimum, as opposed to the maximum, of a sentencing range. However, Justice Breyer, one of the *Harris* majority, recognized that this rule was not really consistent with the logic of *Apprendi* and suggested that the issue might be recon-

member of the *Harris* majority, Justice Breyer recognized that this rule was not really consistent with the logic of *Apprendi* and suggested that the issue might be reconsidered if *Apprendi* (from which he vigorously dissented) remained law. See *id.* at 569-72 (Breyer, J., concurring) (stating Sixth Amendment permits judges to apply sentencing factors when those factors lead to application of mandatory minimum).

73. See *The Future of Federal Sentencing Before the U.S. Sentencing Comm'n* 10-12 (Nov. 17, 2004) (statement of Christopher A. Wray, Assistant Attorney General, Criminal Div., U.S. Dep't of Justice), available at http://www.ussc.gov/hearings/11_16_04/Wray-testimony.pdf (stating "there appear to be many advantages to the [topless guidelines] proposal").

74. See Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. (forthcoming 2005) (manuscript on file with author) (topless guidelines "would likely re-inject into the federal sentencing system excessive unregulated discretion that would, at a minimum, result in dangerous outliers"); see also ASS'N OF FED. DEF. ATTORNEYS, *Online Presentation: Blakely Updates* (Nov. 22, 2004), at http://www.afda.org/afda/news/outline_BlakelyChat.pdf (discussing issues of unfairness that topless guidelines pose to defense bar). "[J]udges will have flexibility to give much longer sentences than the guidelines would otherwise have allowed, up to the statutory maximum, WITHOUT HAVING TO JUSTIFY AN UPWARD DEPARTURE." *Id.*

75. See Chanenson, *supra* note 74, at 47 (discussing how topless guidelines increase individualization of sentences and cause decrease in proportionality). It would be possible to combine topless guidelines and parole release to guard against unduly severe sentences. See *id.* at 62-65 (proposing system of indeterminate structured sentencing). Pennsylvania's sentencing guidelines follow this model. See *id.* at 66-68 (explaining Pennsylvania's basic sentencing structure).

76. 536 U.S. 545 (2002). For a discussion of the holding in *Harris*, see *supra* note 72.

sidered if *Apprendi* (from which he vigorously dissented) remained law. If the Court reverses *Harris*, a system of “topless guidelines” would have to be replaced, again disrupting the federal sentencing system.

Another method of evading *Booker* while maintaining sentencing guidelines would be to *turn all aggravating factors into mitigating factors*.⁷⁷ In this system, the only fact-finding necessary would result in lowering, rather than increasing, the defendant’s possible punishment. Therefore, this fact-finding could presumably be done by the judge on a preponderance of the evidence standard. In that sense, it shares the same “virtue” as “topless guidelines.” A presumptive sentence, however, at the statutory maximum—with the burden of proof on the defense for any reduction—is a rather perverse form of sentencing reform. Currently, there do not appear to be any strong advocates of this approach.

3. *Compliance*

Finally, Congress could establish a system that *complies* with *Booker*’s model of jury consideration of aggravating facts in a binding guideline system. The existing Sentencing Guidelines, or a modified version, could be as fully mandatory as in the past if Congress authorized the use of juries to find any disputed facts necessary to increase the guidelines’ base offense levels. Kansas made such a change to its sentencing guidelines system after *Apprendi*,⁷⁸ and other states are considering similar efforts.⁷⁹

B. *What Should Congress Do?*

There is no need for immediate action. The system in place after *Booker* is stable. Sentences will be imposed and can be appealed. Even if it is a viable or desirable system in the long run, the risks of rash congressional action are great. Congress might make unwise, or even unconstitutional choices, necessitating further disruptive changes in the near future. Congress should set a time period for evaluating the current system—nine months to a year makes sense—and work closely with the Sentencing Commission, the Department of Justice, the federal judiciary, the defense

77. See *Blakely v. Washington*, 124 S. Ct. 2531, 2558 (2004) (Breyer, J., dissenting).

78. See *State v. Gould*, 23 P.3d 801, 814 (Kan. 2001) (holding state’s sentencing scheme unconstitutional under Sixth Amendment). This Kansas Supreme Court decision preceded the rulings in *Blakely* and *Booker*. The Kansas legislature promptly enacted legislation requiring disputed aggravating facts to be “presented to a jury and proved beyond a reasonable doubt during the trial of the matter or following the determination of the defendant’s innocence or guilt.” KAN. STAT. ANN. § 21-4718(b)(2) (2005).

79. See, e.g., MINN. SENTENCING GUIDELINES COMM’N, *The Impact of Blakely v. Washington on Sentencing in Minnesota: Long Term Recommendations* 16–17 (Sept. 30, 2004), available at http://www.msgc.state.mn.us/Data%20Reports/blakely_longterm.pdf, reprinted in 17 FED. SENTENCING REP. 146, 153 (2004) (proposing that juries be required “to reach a unanimous decision on the presence of aggravating factors for an aggravated departure sentence to be imposed”).

bar and scholars to plan the contours of such an evaluation. At the same time, Congress can be examining alternative systems if it elects to replace the current one.

As Congress contemplates what, if anything, to do in the wake of *Booker*, the most important thing is to engage in an open, searching evaluation of the current system and future options. In this sense, *Booker* provides an unparalleled opportunity. The first serious reconsideration of federal sentencing policy in Congress since passage of the Sentencing Reform Act is likely in the wake of *Booker*. Although Congress has enacted numerous pieces of individual sentencing legislation over the years, it has not seriously examined the sentencing system and its many flaws.⁸⁰ Such an examination is long overdue, and can help provide a roadmap for the most sensible response to *Booker*.

The federal Sentencing Guidelines have been in effect since 1987.⁸¹ Supporters of the system contend that the guidelines have led to more certain, consistent sentences.⁸² The many critics of the guidelines, and I

80. See Schulhofer, *supra* note 64, at 200–02 (discussing federal sentencing legislation since 1984). Most importantly, Congress has enacted a number of mandatory minimum sentencing provisions. See, e.g., Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 21 U.S.C. §§ 801–971 (2000)) (establishing numerous mandatory minimum sentences); see Schulhofer, *supra* note 64, at 201 (noting enactment of numerous mandatory minimums for drug offenses). Congress has also been increasingly willing to micromanage the Sentencing Guidelines by requiring the Sentencing Commission to increase some ranges, directly increasing the guidelines by statute, overturning Sentencing Commission amendments to the guidelines that reduced the disparity in treatment of crack and powder cocaine and reducing some money laundering sentences. See generally David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211 (2004) (discussing Congress's influence on federal Sentencing Guidelines). Finally, the "Feeney Amendment," among its other aims, sought to significantly reduce the frequency of downward departures from the guidelines. See *United States v. Kahn*, 325 F. Supp. 2d 218, 233 (E.D.N.Y. 2004) (citing 18 U.S.C. § 3742(g) (2004)) ("The Feeney Amendment, among other unsound innovations, prohibits a downward departure unless the ground for departure was relied upon in the previous sentencing and approved by the court of appeals.").

81. See U.S. Sentencing Comm'n Guidelines Manual § 1A.1 (2005) [hereinafter U.S.S.G.] (noting that guidelines took effect on November 1, 1987). A number of lower courts soon declared them to be unconstitutional, generally on separation of powers grounds. See, e.g., *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245, 1268 (9th Cir. 1988) (affirming district court conclusion that Sentencing Guidelines are unconstitutional), *vacated by* *United States v. Chavez-Sanchez*, 488 U.S. 1036 (1989). In early 1989, the Supreme Court rejected these challenges, and upheld the guidelines. See *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (concluding that guidelines are constitutional).

82. See U.S. SENTENCING COMM'N, *Fifteen Years of Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 138–39 (Nov. 2004) [hereinafter *Fifteen Year Report*], available at http://www.ussc.gov/15_year/15year.htm (noting goal of certainty of punishment "has been most fully achieved"). There are, in fact, few favorable scholarly reviews of the guidelines. One of the more prominent supporters of the guidelines has, more recently, declared them to be a failure. Compare Frank O. Bowman, III, *The Quality of Mercy*

count myself as one,⁸³ focus on the issues of complexity, rigidity, procedural and substantive unfairness and severity. These criticisms are interrelated and shed light on the available options after *Booker*.

C. Rigidity

At the outset, it is important to note that a number of the worst aspects of the federal sentencing system are the result of mandatory minimum statutes.⁸⁴ Mandatory minimums are fundamentally at odds with the goal of striking a reasonable balance between judicial discretion and consistency.⁸⁵ Mandatory minimums are overly severe, result from whatever crime has captured Congress's attention at that moment and shift enormous sentencing discretion to prosecutors. They contribute enormously to the federal sentencing system's rigidity and severity. This does not excuse the flaws of the Sentencing Guidelines, which in some ways make the mandatory minimums worse. Instead, any sensible review of current sentencing policy should reject the continued use of mandatory minimums.

A major additional source of the guidelines' rigidity is the so-called "25% Rule." In the Sentencing Reform Act, Congress directed the Sentencing Commission that, except at the lowest sentence levels, the top of a guideline range could be no more than twenty-five percent greater than the bottom.⁸⁶ Once the guidelines calculations are complete, the sentencing judge has quite limited input into the exact sentence, at least until a

Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines, 1996 WIS. L. REV. 679, 680 (1996) ("[The Guidelines] are, at worst, a marked improvement over the system they replaced . . ."), with Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. (forthcoming May 2005).

83. See, e.g., David Yellen, *Illusion, Illogic and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403 (1993) (criticizing guidelines on numerous grounds); David Yellen, *Just Deserts and Lenient Prosecutors: The Flawed Case for Real-Offense Sentencing*, 91 NW. U. L. REV. 1434 (1997) [hereinafter Yellen, *Just Deserts*] (same); David Yellen, *Little Progress in Federal Sentencing After Ten Years of Guidelines*, 8 OVERCROWDED TIMES 1 (1997) (same); David Yellen, *What Juvenile Court Abolitionists Can Learn from the Failures of Sentencing Reform*, 1996 WIS. L. REV. 577 (1996) (same).

84. See U.S. SENTENCING COMM'N, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Aug. 1991) [hereinafter *Mandatory Minimum Report*], available at http://www.ussc.gov/r_congress/MANMIN.PDF (providing thorough and devastating evaluation of mandatory minimum penalties).

85. See MICHAEL TONRY, SENTENCING MATTERS 134 (1996) ("The greatest gap between knowledge and policy in American sentencing concerns mandatory penalties.").

86. See 28 U.S.C. § 994(b)(2) (2004) ("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 . . .").

sentence is in one of the highest sentencing ranges.⁸⁷ The goal was to fairly and narrowly constrain judicial discretion, but Congress erred in several respects. First, it overshot the mark. A range of twenty-five percent, particularly for offenders at lower severity levels, simply does not provide enough room for reasonable differentiation of sentences. Second, in order to have such narrow sentencing ranges covering everything from zero months imprisonment to life imprisonment, the Sentencing Commission had to develop an inordinately detailed sentencing table.⁸⁸ The forty-three levels of the sentencing table are a major factor in the overly complex nature of the guidelines, as discussed below.

Rigidity or flexibility is a function of two factors: the amount of discretion judges have within the guidelines and the extent of their ability to deviate or depart from the guidelines. Faced with the severe limitations on in-guideline discretion imposed by the sentencing table's twenty-five percent rule, federal judges have increasingly sought to depart from the guidelines. The "departure rate" from the guidelines increased steadily in the first fifteen years of the guidelines.⁸⁹ Congress responded to this increased exercise of judicial discretion by significantly restricting departures in the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 ("PROTECT Act").⁹⁰

D. Complexity

The federal Sentencing Guidelines are far more detailed and complex than any state guideline system. Two fundamental decisions of the Sentencing Commission explain this and both are related to the Sentencing Commission's embrace of "real offense sentencing."⁹¹ First, for all of

87. See *Mandatory Minimum Report*, *supra* note 84, at 24 ("As sentence exposure increases at the higher offense levels, the twenty-five percent within-range differential can result in considerable latitude for judges.").

88. See U.S.S.G., *supra* note 81, app. G (2003) (providing sentencing table).

89. See U.S. SENTENCING COMM'N, *Report to the Congress: Downward Departures from the Federal Sentencing Guidelines* 32 (Oct. 2003) [hereinafter *Downward Departure Report*], available at www.ussc.gov/departprt03/departprt03.pdf (graphing steady increase in downward departures). The rate of downward departures—for reasons other than the government filing a motion addressing the defendant's "substantial assistance" in the investigation or prosecution of another—increased from 5.8 percent in 1991 to 18.1 percent in 2001. See *id.* at 31 (discussing trends in downward departures).

90. See Pub. L. 108-21, §§ 401(a), (c), (j)(5), 117 Stat. 667, 669, 673 (codified as amended at 18 U.S.C. § 3553 (2004)) (restricting availability of downward departures in Sentencing Guidelines).

91. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8–9 (1988) (noting Sentencing Commission's compromise between "real offense" sentencing system and "charge offense" system). Justice Breyer, an original member of the Sentencing Commission, explained and defended the guidelines' incorporation of "modified real offense sentencing." *Id.* at 8–12. There are a few scholarly analyses favorable to real offense sentencing. But see Yellen, *Just Deserts*, *supra* note 83, at 1439–40 (responding to Professor Sullivan by arguing "alleged-related offense sentencing

fenses, the Commission chose not to rely on the statutory offense of conviction to determine the sentencing range. To some extent, this was understandable. The statutory offense of conviction often tells less about the nature and severity of the defendant's conduct in the federal system than in the states. State criminal codes tend to be more developed and coherent than the federal criminal statutes, and differences in offense severity are more often defined by state statutes.⁹² Further, many federal criminal prosecutions involve statutes covering a wide range of conduct. A conviction for mail fraud or racketeering—which can itself be based on mail fraud—does not tell nearly as much about the nature of the offense as a conviction for manslaughter or burglary.

Still, the Sentencing Commission attempted to do much more than simply introduce some rational distinction among offenses and develop special rules for umbrella-like federal statutes. The guidelines attempt to identify and assign a value to most of the harms that occur from an offense. Through the many “specific offense characteristics” in the Chapter 2 offense guidelines and the Chapter 3 adjustments, the federal Sentencing Guidelines strive for a sentencing system based on a detailed version of the offense.

Second, and most controversially, the guidelines calculate the sentencing range for important categories of federal offenses based in part on offenses for which the defendant has not been convicted. In drug, fraud and other types of cases, the court must include in the guidelines other *alleged* offenses that were “of the same course of conduct or common scheme or plan as the offense of conviction.”⁹³ In addition to being demonstrably unfair, this provision contributes greatly to the guidelines' complexity.⁹⁴ It is also unwise. Assuming that the relevant conduct rules are aimed at assessing the defendant's “just deserts,” they focus too narrowly. A measure of just deserts should consist of both harm and culpability. The guidelines largely ignore culpability by rejecting factors such as youth that judges have traditionally relied on to mitigate punishment. Also, the offender's role in the offense, which should be of paramount importance, is given a relatively modest and constrained role.

reflects an unduly narrow focus on eliminating disparity”). See generally Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 Nw. U. L. Rev. 1342 (1997) (advocating real offense system and criticizing charge offense system).

92. One cannot really speak meaningfully of a federal criminal code. Instead, we have a hodgepodge of four thousand or so criminal statutes scattered throughout the United States Code, often using different terminology.

93. U.S.S.G., *supra* note 81, § 1B1.3(a)(2).

94. For a discussion of how the relevant conduct provisions are unfair, see *infra* notes 133–34 and accompanying text.

E. *Unfairness*

Criticisms of the federal Sentencing Guidelines on fairness grounds have both procedural and substantive components. Some have complained that because the Sentencing Reform Act and the guidelines provide very few procedures, there is disparity in the approaches judges take.⁹⁵ Some judges fairly routinely hold sentencing evidentiary hearings; others rarely do. Approaches to hearsay evidence also vary widely. Consistency aside, it was also argued before *Apprendi* that a preponderance of the evidence standard was constitutionally inadequate, at least in cases where the sentencing fact-finding has a dramatic effect on the sentence.⁹⁶

The greatest complaints about the substantive unfairness of the federal guidelines involve the guidelines' real offense sentencing or "relevant conduct."⁹⁷ No other sentencing system in the world mandates that sentences be increased based on alleged additional offenses for which the defendant has not been convicted. This additional alleged criminal conduct, for which the defendant even may have been acquitted, counts just as much in the guidelines as the conduct for which the defendant was convicted. As I have argued elsewhere, the system is almost grotesquely unfair, and does not accomplish much of what the Sentencing Commission believed it would.⁹⁸

F. *Severity*

Whether a sentencing system achieves sanctions of appropriate severity is, of course, not a matter that can be empirically determined. It is clear, however, that the current federal system is far more severe than the pre-reformed federal system, and many, if not most, federal judges find the sentences they are compelled to impose to be too harsh in too many cases.⁹⁹ Overly severe sentences can also lead to manipulation and evasion, which undercut the goals of reform.

95. See Susan N. Herman, *Procedural Due Process in Guidelines Sentencing*, 4 FED. SENTENCING REP. 295, 295 (1992) (arguing that absence of clear procedural guidance has caused disparity).

96. See Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 291 (1992) (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986)) (noting burden of proof for sentencing facts as preponderance of evidence).

97. See Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 208-20 (1991) (discussing ability of sentencing judges to sentence offenders for relevant conduct on preponderance of evidence); see also Herman, *supra* note 96, at 299 (arguing that adoption of modified real-offense system with bifurcated fact-finding was "irrational").

98. For a discussion of the real offense aspects of the guidelines, see *supra* notes 91-92 and accompanying text.

99. See Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) [hereinafter Kennedy Speech], at www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html ("Our resources are misspent, our punishments too severe, our sentences too long."). In the area of drug sentencing, even many federal prosecutors are apparently uneasy with sentence severity. See

In 2002, the federal prison system became the nation's largest, surpassing California, with over 175,000 inmates.¹⁰⁰ This dramatic change is the result of a much greater percentage of federal offenders being sentenced to imprisonment than before the guidelines and a doubling of the average time served.¹⁰¹ Diverse segments of the federal judiciary have expressed dissatisfaction with the severity of the current federal sentencing system.¹⁰² Justice Anthony Kennedy made headlines and spawned the creation of an American Bar Association commission that bears his name with an August 2003 speech in which he declared that federal sentences were often too severe and called for a downward revision in the Sentencing Guidelines and reconsideration of mandatory minimum penalties.¹⁰³ Several federal judges have resigned from the bench, or declined to hear criminal cases, to protest the rigidity and severity of federal sentencing policy.¹⁰⁴ On an individual case level, judges have increasingly opted to sentence defendants at the bottom of the applicable sentencing range or have chosen to depart below the guidelines.¹⁰⁵ On the other hand, they rarely depart above the guidelines range.¹⁰⁶

Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 559 (2002) ("prosecutors, and the judges they appear before, use their discretion liberally, but irregularly, to reduce drug sentences").

100. *Fifteen Year Report*, *supra* note 82, at 40. This represents a six-fold increase in federal inmates from when there were 24,363 in 1980. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *Bulletin: Prisoners in 1994* 1 (Aug. 1995), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pi94.pdf> (highlighting number of federal inmates from 1980–1994).

101. See *Fifteen Year Report*, *supra* note 82, at 46 ("Average prison time for federal offenders more than doubled after implementation of the guidelines."); *id.* at 43 (detailing drop in federal sentences to probation from one-half of all sentences in 1984 to below ten percent in 2002).

102. See generally David M. Zlotnick, *Shouting into the Wind: District Court Judges and Federal Sentencing Policy*, 9 ROGER WILLIAMS U. L. REV. 645 (2004) (providing excellent survey and analysis of judicial attitudes toward federal sentencing levels).

103. See Kennedy Speech, *supra* note 99 ("The Federal Sentencing Guidelines should be revised downward. By contrast to the Guidelines, I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences.").

104. See Zlotnick, *supra* note 102, at 649 (noting that some federal judges have resigned "or took senior status and declined to hear criminal cases"); see also Robert W. Pratt, *Senseless Sentencing: A Federal Judge Speaks Out*, DES MOINES REG. (Jan. 10, 1999), at <http://www.mapinc.org/drugnews/v99/n070/a01.html> (highlighting "mind-boggling" cost incarceration puts on taxpayers under federal Sentencing Guidelines); Ian Urbina, *New York's Federal Judges Protest Sentencing Procedures*, N.Y. TIMES, Dec. 8, 2003, at B1 (discussing New York federal judges' criticism of new sentencing law).

105. See *Downward Departure Report*, *supra* note 89, at 31 (noting decrease in cases sentenced within applicable guideline ranges from 1991 to 2001). "The decline in the rate of within range sentences has been gradual and primarily is reflected in the corresponding increase in the nonsubstantial assistance downward departure rate." *Id.*

106. See *id.* at 32 (graphing upward departure rate at .06 percent of sentences in 2001).

This severity comes from multiple factors. An important one is the lack of real budgetary constraints on punishment at the federal level. State correctional budgets tend to comprise a major percentage of available resources. As a result, a number of state sentencing guidelines are directly tied to correctional resources. To increase sentence lengths for one category of offenders, other offenders must receive shorter sentences or the legislature must find additional money for prisons.¹⁰⁷ At the federal level, in contrast, correctional expenditures are a tiny fraction of the federal budget. There is no meaningful financial check on the punitive impulses of Congress.

V. ANALYSIS

Where does this analysis of the flaws of the pre-*Booker* world lead? To begin, my arguments suggest that sentencing guidelines with more modest goals are likely to further the major goals of the Sentencing Reform Act, be more widely acceptable to participants in the federal criminal justice system and be easier to implement after *Booker*. Therefore, legislative fixes designed to evade *Booker* should be rejected. The main benefit of “topless” or “upside down” guidelines is that they would allow use of the current form of the guidelines, or an inverted but equally detailed and complex version. Given the many weaknesses of “topless” and “upside down” guidelines, the costs of those approaches far outweigh any benefits.

Advisory guidelines in the federal system are more promising, but ultimately seem unlikely to provide enough certainty and consistency in punishment. Advisory guidelines may work well in jurisdictions that are either small enough that the judges can establish a “culture of compliance” or where political accountability provides an incentive to follow the guidelines. These factors are absent in the federal system with many life-tenured sentencing judges spread across the country. Appellate review for unreasonableness may provide a meaningful constraint. Appellate review that effectively establishes fact-finding requirements, however, may run afoul of the *Apprendi* line of cases.

107. See, e.g., Daniel F. Wilhelm & Nicholas R. Turner, *Is the Budget Crisis Changing the Way We Look at Sentencing and Incarcerations?*, STATE SENTENCING & CORRECTIONS PROGRAM (Vera Inst. of Justice, New York, N.Y.), June 2002, at 7, available at http://vera.org/publication_pdf/167_263.pdf (discussing state legislation that “directs sentencing commissions to devise sentencing guidelines that keep prison populations within certain limits”); Jon Wool & Don Stemen, *Changing Fortunes or Changing Attitudes? Sentencing and Corrections Reforms in 2003*, STATE SENTENCING & CORRECTIONS PROGRAM (Vera Inst. of Justice, New York, N.Y.), Mar. 2004, at 14, available at www.vera.org/publication_pdf/226_431.pdf (commenting that budget crises are providing opportunity for sentencing reform); see also Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980–2000*, in 29 CRIME & JUSTICE 39, 85–105 (Michael Tonry ed., 2002) (reviewing major effects of sentencing laws on prison sentences and community corrections in North Carolina).

Another problem with simply continuing with the current system is that, no matter how much weight is given to the Sentencing Guidelines and how often judges follow them, they are still the same deeply flawed guidelines. There is no reason why the Sentencing Commission could not simplify and improve the guidelines in an advisory system. The main political incentive for the necessary simplification that is needed is that it provides a way to return to guidelines with the force of law. I find it hard to believe that, based on its recent history, Congress will accept simplified, more flexible sentencing guidelines that remain advisory, subject to fairly loose appellate review.

The best response to *Booker* is likely to bring the guidelines into compliance by authorizing the use of juries to resolve factual disputes. “*Booker*-izing” the current guidelines, with elaborate fact-finding, could be quite burdensome, at least compared to the task faced by states impacted by *Booker*.¹⁰⁸ Addressing the major deficiencies of the guidelines, however, would have the added virtue of making compliance with *Booker* far easier. The guidelines should be simplified and made more flexible. Far fewer offense levels with broader ranges within each level are necessary. The range of facts that go into determining the guideline range and the impact of quantity-based factors should be dramatically reduced. Mandatory consideration of alleged criminal conduct beyond what the defendant has been convicted of should be abolished.

These are only general principles; many details need to be worked out.¹⁰⁹ Nevertheless, such a system would be a great improvement on the pre-*Booker* guidelines and would be quite workable for jury determination of disputed facts. With fewer facts impacting the guideline range and broader sentencing ranges diluting the impact of any particular fact, jury fact-finding would not be unduly burdensome. Combined with more reasonable levels of severity, under this system, plea bargaining would probably remove all but the most serious factual disputes from jury consideration. For the few remaining disputes, requiring proof beyond a reasonable doubt seems appropriate.

108. Complying with *Blakely* and *Booker* by submitting contested aggravating facts to a jury is a much simpler matter for the states affected by those decisions than for the federal system. All state guidelines systems are principally based on the offense of conviction, rather than the “real offense” elements embraced by the federal guidelines. As a result, in most cases in those states, there are no aggravating facts found beyond those implicit in the fact of conviction. For example, a study by the Minnesota Sentencing Guidelines Commission found that only about two percent of sentenced cases in 2002 involved a contested aggravated departure. See MINN. SENTENCING GUIDELINES COMM’N, *supra* note 79, at 9 (“[D]ata indicates that the impact [of *Blakely*] should not create a severe crisis within the state’s criminal justice system.”). For a discussion of Kansas’s implementation of a system where juries consider aggravating facts, see *supra* note 78.

109. See generally, Frank O. Bowman, III, *Beyond BandAids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. (forthcoming 2005) (presenting thoughtful recommendations for more flexible guidelines).

An important question is the impact such simplified, “Booker-ized” guidelines will have on unwarranted sentencing disparity. The federal Sentencing Guidelines have probably reduced inter-judge sentencing disparity.¹¹⁰ Compared with the unfettered discretion of the traditional system, any sentencing guidelines, even if they do not have the force of law, are likely to accomplish this. Guidelines that do have some force of law are even more likely to reduce disparity in the sense of similarly situated defendants receiving different sentences. This, however, is not the only important question. We must also ask whether unwarranted sentencing *uniformity* has increased.¹¹¹ In other words, does a sentencing system make appropriate distinctions so that offenders who really ought to receive different sentences do so? In the case of the federal guidelines, it seems clear that any marginal reduction in disparity that has come from the complexity and rigidity of the system has been more than offset by unwarranted uniformity.

The federal system’s fixation on reducing disparity borders on the pathological.¹¹² It is particularly unwise to focus too narrowly on disparity when that term is so poorly understood. As a number of scholars have pointed out, unwarranted sentencing disparity is a very imprecise concept.¹¹³ This is particularly true when—as is the case in the federal Sentencing Guidelines—no meaningful principles of punishment have been adopted to give content to the concept of “similar” yet “different” cases.¹¹⁴

110. See generally James M. Anderson et al., *Measuring Inter-Judge Sentencing Disparity Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271 (1999) (providing findings that indicate guidelines have been successful in reducing inter-judge sentencing disparity).

111. See Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 902 (1991) (arguing that disparity is not only concern). “Some things are worse than sentencing disparity, and we have found them.” *Id.*; see also Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1705 (1992) (“Too often, the Commission’s remedy for disparity is uniformity . . .”).

112. See Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L.J. (forthcoming 2005). The controversy surrounding medical malpractice awards is instructive. Whether one agrees or disagrees with the notion that there is a “crisis” requiring limits on such awards, it is significant that the limitation proposals take the form of “caps” or increased authority for judges to reduce awards. To my knowledge, there has been no major effort to develop specific binding guidelines covering broad ranges of cases. Instead, the reform effort focuses on that minority of cases that deviates from a broadly acceptable range of awards. I suggest that this is much more consistent with the states’ approaches to sentencing reform than it is to the federal Sentencing Guidelines. Again, the federal Sentencing Guidelines stand alone.

113. See, e.g., Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 NW. U. L. REV. 1336, 1336 (1997) (“disparity is not a self-defining concept”); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 835–37 (1992) (analyzing concept of disparity); see also Alschuler, *supra* note 111, at 941 (arguing that “there is a better way for a sentencing commission to address the problem of disparity”).

114. There has been much early and important criticism of the Sentencing Commission’s failure to adopt guiding purposes of punishment. See, e.g., Paul J.

Relaxing this narrow focus on disparity, and pursuing more modest, attainable goals, would enable “Booker-ized” guidelines to lead to the first real improvement in the federal Sentencing Guidelines.

VI. CONCLUSION

Federal sentencing reform needed saving long before *Booker*, *Blakely* and *Apprendi*. Regardless of the jurisprudential merits of these decisions, they provide an opportunity to focus Congress’s attention on the deep flaws of the guidelines and mandatory minimums. Someday, Congress will again look at sentencing with clear eyes, as it did leading up to the Sentencing Reform Act. There is no reason why it should not do so now.

Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 36 (2003) (noting goal of Sentencing Reform Act is “equal treatment for similar offenders,” but guidelines fail to accomplish it); Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 418 (1992) (commenting that “a reasoned sentencing approach may best be met when both rule makers and judges assess sentencing purposes for groups of offenders rather than the sentencing system as a whole”); Aaron Rapaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 642 (2003) (applying “rational reconstruction” to conclude that only utilitarianism explains criminal history, offense seriousness, family ties and substantial assistance guidelines).

