"CONSULTING" THE FEDERAL SENTENCING GUIDELINES AFTER *BOOKER*

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In United States v. Booker, *the U.S. Supreme Court held that the mandatory nature of the Federal Sentencing Guidelines violated the Sixth Amendment because they required a judge to enhance a defendant's sentence based on facts that were neither found by a jury nor admitted by the defendant. The remedial portion of the opinion deemed the Guidelines "effectively advisory," thereby permitting judges to tailor defendants' sentences in light of certain statutory factors. The Court, however, limited the scope of the advisory Guidelines regime by requiring judges to "consult those Guidelines and take them into account when sentencing." The* Booker *opinion did not explain what it meant to "consult" the Guidelines, an omission that has led to a "discordant symphony" of sentencing approaches in the federal judiciary.*

*In a criminal justice system in which sentencing helps legitimize our constitutional order, few have attempted to articulate a comprehensive framework explaining how the newly advisory Guidelines should operate in a post-*Booker *world. In order to provide guidance to the federal judges who sentence over 65,000 defendants each year, this Comment aims to create such a framework by utilizing existing constitutional doctrine. More specifically, I argue that a rubric for understanding the advisory role of the Guidelines can be articulated using the language of rational basis, strict scrutiny, and intermediate scrutiny standards of review. After examining the deficiencies of the rational basis and strict scrutiny approaches, I conclude that an intermediate scrutiny model for understanding the advisory Guidelines system would provide the proper balance between Congress's intent in formulating a uniform sentencing system and* Booker*'s requirement that the Guidelines not act as a mandatory constraint on judges.*

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INTRODUCTION

On January 12, 2005, the U.S. Supreme Court issued its much anticipated decision in *United States v. Booker*.[1] The Court held that the mandatory nature of the Federal Sentencing Guidelines violated the Sixth Amendment because they required a judge to enhance a defendant's sentence based on facts that were neither found by a jury nor admitted by the defendant.[2] While this constitutional decision came as little surprise,[3] the Court's remedial holding that the Guidelines are now "effectively advisory"[4] sent shockwaves throughout

1. 543 U.S. 220 (2005).

2. *Id.* at 243–44. The Sixth Amendment commands that "[i]n 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." U.S. CONST. amend. VI (emphasis added).

3. *See, e.g.*, Linda Greenhouse, *Supreme Court Transforms Use of Sentence Guidelines*, N.Y. TIMES, Jan. 13, 2005, at A1.

4. *Booker*, 543 U.S. at 245.

the legal community.[5] Then–Attorney General John Ashcroft called the Court's decision "a retreat from justice that may put the public's safety in jeopardy."[6] Congressman Tom Feeney angrily wrote that "[t]he Supreme Court's decision to place this extraordinary power to sentence a person solely in the hands of a single federal judge—who is accountable to no one—flies in the face of the clear will of Congress."[7] Similarly, one sentencing expert argued that *Booker* granted "the most amount of judicial discretion ever afforded to sentencing judges."[8] In articles immediately following *Booker*, many scholars embraced the position that judicial discretion in federal sentencing had been resurrected.[9]

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5. What made the remedial portion of the opinion especially surprising was its preservation of a scheme in which judges found sentence-enhancing facts. *See infra* Part II.C.4. As explained in Part II, the *Booker* opinion contains two opinions written by different majorities. The first opinion, written by Justice Stevens and joined by Justices Ginsburg, Scalia, Souter, and Thomas, addresses the constitutional question of whether the Federal Sentencing Guidelines violate the Sixth Amendment. *Booker*, 543 U.S. at 225. After deciding that the mandatory nature of the Guidelines violated the Sixth Amendment, Justice Ginsburg left this majority to join Justices Breyer, Kennedy, O'Connor, and Rehnquist in a separate opinion remedying this constitutional infirmity. *Id.* at 244; *see also infra* Part II.C.

6. Dan Eggen, *Ashcroft Defends Tough Policies*, WASH. POST, Feb. 2, 2005, at A2.

7. Carl Hulse & Adam Liptak, *New Fight Over Controlling Punishments Is Widely Seen*, N.Y. TIMES, Jan. 13, 2005, at A29.

8. Luiza Ch. Savage, *Chaos Ahead After Sentencing Guidelines Decision*, N.Y. SUN, Jan. 13, 2005, at 1 (quoting Frank Bowman, M. Dale Palmer Professor of Law, Indiana University School of Law), *available at* LEXIS.

9. *See* Douglas A. Berman, *Foreword: Beyond* Blakely *and* Booker: *Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 676 (2005) ("*Booker* devised a new system of federal sentencing which granted judges more sentencing power than they had ever previously wielded and seemingly endorsed the entire panoply of relatively lax sentencing procedures that had been used in the federal system over the prior two decades [before the enactment of the Sentencing Reform Act of 1984]."); Douglas B. Bloom, United States v. Booker *and* United States v. Fanfan: *The Tireless March of* Apprendi *and the Intracourt Battle to Save Sentencing Reform*, 40 HARV. C.R.-C.L. L. REV. 539, 555 (2005) (arguing that *Booker* brings about a "purely discretionary sentencing system"); Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion Revived in* Booker *and* Fanfan, 33 PEPP. L. REV. 615, 616 (2006) ("Judicial sentencing discretion is alive and well."); Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 695–96 (2005) (arguing that, as a result of *Booker*, "[w]e will see a sharp, perhaps temporary surge of judicial discretion at the trial level in sentencing, used primarily to decrease the length of sentences"); Jonathan Chiu, Comment, United States v. Booker: *The Demise of Mandatory Federal Sentencing Guidelines and the Return of Indeterminate Sentencing*, 39 U. RICH. L. REV. 1311, 1311 (2005) ("Without a system of mandatory Guidelines, there is a genuine possibility that sentencing will return to the indeterminate process Congress sought to eliminate."); Michelle Reiss Drab, Case Comment, *Constitutional Law: Fact of Factor: The Supreme Court Eliminates Sentencing Factors and the Federal Sentencing Guidelines*, 57 FLA. L. REV. 987, 996 (2005) ("Judges are presently left with broad discretion at sentencing, so long as the sentence remains within the range authorized by the jury verdict."). For a discussion of the judicial discretion that existed before the adoption of the Federal Sentencing Guidelines, see *infra* Part I.A.

The reemergence of judicial discretion, however, is not a foregone conclusion. While rates of compliance with the Guidelines have slightly declined since the Court's ruling,[10] *Booker* did not on its face restore the indeterminate sentencing regime that existed before the Guidelines.[11] Though the Court opted to create an "advisory" system, *Booker* limited judges' discretion within this system by requiring them to "consult those Guidelines and take them into account when sentencing."[12] What it means to "consult" the Guidelines is not altogether clear from the *Booker* opinion. Indeed, the Court left unanswered what the precise role of the Guidelines should be in the sentencing of criminal defendants. If consulting the Guidelines means giving them substantial weight, then the Guidelines will remain in force much as they did before *Booker*. Conversely, if consulting the Guidelines means only that judges have to consider them equally with other statutory factors, then *Booker* will have breathed life back into indeterminate sentencing. The federal courts are split on which of these two positions to adopt,[13] which has, just as Justice Scalia predicted, led to a "discordant symphony" of sentencing standards that "vary[ ] from court to court and judge to judge."[14]

Few commentators have engaged the newly advisory Guidelines system and explained how it should operate in a post-*Booker* world.[15] With all the uncertainty created by *Booker*, a framework for understanding this advisory system should be contemplated to both promote uniformity and provide guidance to the federal judges who sentence over 65,000 defendants annually.[16] After

10. *See infra* note 211 and accompanying text.

11. *See* Alan Vinegrad & Marc Falkoff, 'Booker': *A Sea Change in Federal Sentencing?*, N.Y. L.J., Jan. 21, 2005, at 4.

12. United States v. Booker, 543 U.S. 220, 264 (2005).

13. *See infra* Part III.A–B.

14. *Booker*, 543 U.S. at 312 (Scalia, J., dissenting).

15. *See* Lynn Adelman & Jon Deitrich, *Fulfilling* Booker's *Promise*, 11 ROGER WILLIAMS U. L. REV. 521 (2006) (outlining a procedure for sentencing post-*Booker*); Jordan, *supra* note 9, at 620 (arguing that "*Booker* compels the lower courts to give full consideration to 18 U.S.C. § 3553(a)"); Adam Lamparello, *Implementing the "Heartland Departure" in a Post-*Booker *World*, 32 AM. J. CRIM. L. 133, 137 (2005) (arguing that "heartland departures" can provide courts increased sentencing discretion, which should be exercised only in situations where there are "substantial and compelling reasons to justify" a non-Guidelines sentence); Adam Lamparello, *The Unreasonableness of "Reasonableness" Review: Assessing Appellate Sentencing Jurisprudence After* Booker, 18 FED. SENT'G REP. 174 (2006) (proposing a multifactor test to assist the courts in assessing "reasonableness"); Eric Citron, Comment, United States v. Pho: *Reasons and Reasonableness in Post-*Booker *Appellate Review*, 115 YALE L.J. 2183, 2184 (2006) (adopting a "reasons-based" model for sentencing); Douglas F. Fries, Comment, *The Federal Sentencing Guidelines Weight-Loss Plan: Just How Mandatory Are the "Advisory" Guidelines After* United States v. Booker*?*, 55 CASE W. RES. L. REV. 1097, 1098 (2005) (arguing that the Guidelines should be seen "as a much less significant concern compared to other factors listed in the Federal Sentencing Act").

16. *See* Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665, 665 (2006).

Booker, district courts have struggled with the task of "consulting" the Guidelines, and no one yet has developed a coherent framework for explaining the proper role of the Guidelines that takes into account both *Booker*'s constitutional holding and Congress's intent in making the Guidelines as mandatory as possible.

This Comment argues that a rubric for understanding the advisory role of the Guidelines can be crafted from existing constitutional doctrine. More specifically, the scope of the advisory regime can be articulated using the language of rational basis, strict scrutiny, and intermediate scrutiny standards of review.[17] A rational basis model for understanding the Guidelines is problematic because it would create an indeterminate sentencing system similar to the one that existed before the Guidelines.[18] Conversely, a strict scrutiny model is far too deferential to the Guidelines and runs afoul of *Booker*'s constitutional underpinnings.[19] An intermediate scrutiny framework for understanding the role of the Guidelines, however, helps alleviate the deficiencies of both the rational basis and strict scrutiny models. Such a test would give judges the *Booker*-mandated discretion to consider other statutory factors in crafting a defendant's sentence, while also creating a weak presumption in favor of the Guidelines. Thus, this standard would give some deference to the Guidelines in light of Congress's intent but would not do so in a way that violates the Sixth Amendment prescriptions upon which *Booker* was premised.[20]

In Part I of this Comment, I briefly examine the history of federal sentencing, focusing on the Sentencing Reform Act of 1984. This history is critical because a standard for explaining the advisory nature of the Guidelines should conform to congressional intent as much as possible within the limits established by the Sixth Amendment. In Part II, I explore the *Booker* decision and the U.S. Supreme Court opinions that led to this dramatic revolution in federal sentencing. In Part III, I turn to an assessment of two contrasting views that have recently emerged in the federal courts on the role of the Guidelines in the newly advisory regime, and I explain how the debate between these two approaches reflects a broader conflict between *Booker*'s constitutional holding and congressional intent in creating a uniform sentencing system. In Part IV, I examine how existing constitutional doctrines can help judges better understand the Guidelines' role after *Booker*.

17. *See infra* Part IV.
18. *See infra* Part IV.A.
19. *See infra* Part IV.B.
20. *See infra* Part IV.C.

I. THE DECLINE OF REHABILITATION AND THE SENTENCING REFORM ACT

A. Indeterminate Sentencing

For most of the twentieth century, federal sentencing embraced the concept of rehabilitation.[21] The rehabilitation ideal was premised on the notions that inmates should be given motivation for self-betterment and that experts should determine whether an inmate has sufficiently improved to become a productive member of society. In accordance with these goals, federal judges were free to choose a punishment within a system of ranges authorized by Congress.[22] This system gave federal judges wide discretion by allowing them to determine "the goals of sentencing, the factors to be considered, and how much weight to accord [certain] factors, as well as the ultimate punishment."[23] So long as the sentence was below the statutory maximum allowed by Congress, it was treated with "virtually unconditional deference on appeal."[24] In 1910, the federal government established a parole system that embraced the rehabilitation ideal by granting individuals other than judges authority in determining release dates for individual prisoners.[25] Between the early 1900s and the 1980s, Congress largely stayed out of the picture, allowing judges to exercise their role as sentencing experts.[26]

Starting in the 1950s, reformers became very critical of the rehabilitation ideal.[27] Not only did they believe that rehabilitation was a failed model for criminal justice, but they questioned the fairness of parole boards and argued that judicial discretion in sentencing had created an arbitrary system in which sentences were based less on the law and more on the whims of individual judges.[28] Moreover, empirical research began to weaken the rationale behind

21. *See* Chiu, *supra* note 9, at 1312.

22. *See* Craig Green, Booker *and* Fanfan: *The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 GEO. L.J. 395, 396 (2005); Becky Gregory & Traci Kenner, *A New Era in Federal Sentencing*, 68 TEX. B.J. 796, 796–97 (2005).

23. Gregory & Kenner, *supra* note 22, at 796.

24. Rosemary T. Cakmis, *The Role of the Federal Sentencing Guidelines in the Wake of* United States v. Booker *and* United States v. Fanfan, 56 MERCER L. REV. 1131, 1133 (2005) (quoting Mistretta v. United States, 488 U.S. 361, 364 (1989)).

25. *See* Chiu, *supra* note 9, at 1313; Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1317–18 (2005).

26. *See* Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 571 (2005). For a good history of indeterminate sentencing, see *Mistretta*, 488 U.S. at 363.

27. *See* Gregory & Kenner, *supra* note 22, at 798.

28. *See* Bowman, *supra* note 25, at 1318.

indeterminate sentencing.[29] These studies contended, among other things, that indeterminate sentencing had produced vast sentencing disparities between similarly situated defendants.[30] The most well-known critic was Judge Marvin E. Frankel, who expressed deep skepticism of indeterminate sentencing in his 1972 book, *Criminal Sentences: Law Without Order*. Judge Frankel contended that indeterminate sentencing left "to the sentencing judge a range of choice that should be unthinkable in a 'government of laws, not of men.'"[31] Judges, he argued, had "almost wholly unchecked and sweeping powers" that were "terrifying and intolerable for a society that professes devotion to the rule of law."[32] As the reform movement progressed, many states dismantled or amended their indeterminate-sentencing regimes in favor of systems with mandatory minimum sentences, presumptive sentences, and sentencing guidelines—each of which was aimed at severely curtailing judicial discretion in sentencing.[33] Frequently, these sentencing reforms were made in conjunction with the dissolution of parole boards in an effort to create a "truth-in-sentencing" system in which defendants were required to serve most or all of their sentences.[34]

B. The Sentencing Reform Act

Angst over indeterminate sentencing eventually led to congressional action. In 1975, Senator Edward Kennedy introduced the first bill proposing the creation of a federal Sentencing Commission.[35] Senator Kennedy's bill was a reflection of the liberal concern that indeterminate sentencing—while not problematic for its rehabilitation principles[36]—was creating an environment in which minorities were given much higher sentences than their white

29. *See* Chiu, *supra* note 9, at 1314.

30. *See* Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 354–55 (2005). For an examination of how to define sentencing uniformity, see Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749 (2006).

31. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973).

32. *Id.*; *see also* M.K.B. Darmer, *The Federal Sentencing Guidelines After* Blakely *and* Booker*: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C. L. REV. 533, 539–40 (2005).

33. Bowman, *supra* note 25, at 1318. In 1978, Minnesota became the first state to establish a comprehensive guidelines system. Pennsylvania and Washington soon followed. *See* Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 10.

34. Bowman, *supra* note 25, at 1318.

35. *See* Chiu, *supra* note 9, at 1315.

36. Indeed, Senator Edward Kennedy embraced rehabilitation in nonjail cases. 129 CONG. REC. 3797, 3797 (1983). *Contra* 129 CONG. REC. 3812, 3813 (1983) (Senator Joseph Biden arguing that "incarceration for rehabilitation does not work").

counterparts.[37] Though Senator Kennedy's bill failed, it was a reflection of an emerging egalitarian approach toward sentencing by liberals in Congress.[38] As crime increased in the late 1970s and early 1980s,[39] indeterminate sentencing provided a unique platform for conservative and liberal interests to align. Law-and-order conservatives were less interested in egalitarianism and more concerned with indeterminate sentencing's perceived failure to provide adequate deterrence to potential criminals. Parole and judicial leniency, they argued, led to "sentences that were either too short, or even worse, prisoners serving less time than appropriate because of good fortune in the parole process."[40]

In 1984, liberal Senators Kennedy and Joseph Biden joined with the more conservative Senators Orrin Hatch and Strom Thurmond to sponsor the Sentencing Reform Act of 1984 (SRA).[41] Senator Kennedy and the bill's cosponsors had three goals in creating the SRA. The first goal was to create a more honest system in which defendants served more of their given sentences. Proponents of sentencing reform complained that in many cases "good time" credits and parole dramatically reduced defendants' sentences to, in some cases, one-third of the actual sentence handed down by the district court.[42] The second goal of the SRA was to establish a uniform sentencing scheme that limited disparity across federal jurisdictions.[43] The third goal was to enact a proportional system that "imposes appropriately different sentences for criminal conduct of different severity."[44] The Act attempted to accomplish its goals by eliminating parole[45] and forming a Sentencing Commission whose task it would be to create a set of guidelines designed to limit sentencing disparities throughout the country. The Sentencing Commission's specific job

37. *See* Darmer, *supra* note 32, at 540; Gertner, *supra* note 26, at 573; Gregory & Kenner, *supra* note 22, at 798.

38. *See* JAMES Q. WHITMAN, HARSH JUSTICE 53–54 (2003) (writing that there was "a widespread sense among liberals . . . that rich, white defendants did better under the system of indeterminate sentencing than poor, dark-skinned ones").

39. *See* John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 796 (2005); William W. Mercer, Principal Assoc. Deputy Att'y Gen., Statement Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary 1 (Mar. 16, 2006), *available at* http://judiciary.house.gov/media/pdfs/mercer031606.pdf.

40. Chiu, *supra* note 9, at 1315.

41. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 28 U.S.C.). *See* Darmer, *supra* note 32, at 540. In introducing the bill to the Senate, Senator Kennedy called indeterminate sentencing a "nonsystem" that "defeats the reasonable expectation of the public that . . . reasonable penalt[ies] will be imposed." 129 CONG. REC. 3797, 3797 (1983).

42. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2005).

43. *Id.*

44. *Id.*

45. *See* Klein, *supra* note 9, at 701–02.

was to "rationalize the sentencing rules, to bring to bear the latest scientific studies in effectuating all of the purposes of punishment, and to do the kind of legwork in determining the appropriate sentencing practices that Congress had been unable or unwilling to do."[46] Signaling the death of rehabilitation at the hands of retributivist policymaking, Congress asked the Commission to establish maximum and minimum sentences for certain offenses based on the characteristics of the crime.[47] Each crime was to have a particular value of severity that would be reflected in a defendant's sentence. The Act was signed into law by President Ronald Reagan in 1984,[48] and after consulting with Congress, the Sentencing Commission introduced the Federal Sentencing Guidelines three years later.[49]

The adoption of the Guidelines was no small step, as it amounted to a transfer of power from federal judges to the Sentencing Commission, and it has been considered by some to be the "most significant development in judging in the federal judicial system since the adoption in 1938 of the Federal Rules of Civil Procedure."[50] Decades of sentencing practices were eviscerated by the SRA in favor of a stricter regime that diminished the value of rehabilitation as a policy consideration in federal sentencing. For conservatives like Senator Thurmond, federal sentencing was now what it should have been all along—a retributivist system with rigid rules that reflected both the will of Congress (not judges) and the notion that a sentence should reflect a crime's seriousness. For liberals like Senator Kennedy, the Guidelines aimed to "provide predictability and fairness based on similarity of crime and criminal, not the serendipity of location, race, or socioeconomic status of the defendant or the personal perspective of the judge who imposed the sentence."[51]

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46. Gertner, *supra* note 26, at 573–74 (footnotes omitted).

47. 28 U.S.C. § 994(b)(1) (2000) ("The Commission . . . shall, for each category of offense involving each category of defendant, establish a sentencing range . . . .").

48. *See* U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 5 (2004), *available at* http://www.ussc.gov/15_year/15year.htm.

49. *See* Chiu, *supra* note 9, at 1317. Justice Breyer, who wrote the *Booker* remedial opinion, played an important role in the development of the Guidelines. He was the Senate Judiciary Committee's chief counsel in 1979 and 1980, and he served on the Sentencing Commission from 1985 to 1989. *See* Michael McGough, *Sentencing Guidelines Tossed Out: Supreme Court Keeps Federal Strictures as Only Advisory*, PITTSBURGH POST-GAZETTE, Jan. 13, 2005, *available at* LEXIS. For Justice Breyer's take on the Guidelines, see Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

50. Gardina, *supra* note 30, at 355 (quoting KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING 2 (1998)).

51. Gregory & Kenner, *supra* note 22, at 798. For a history of the Sentencing Reform Act, see Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

Regardless of the differing motivations of those pushing sentencing reform, the adoption of the Guidelines was certainly a watershed in legal history.

C. The Mechanics of the Guidelines

Before discussing how *Booker* revolutionized—at least conceptually—federal sentencing, it is necessary to explain briefly how the Guidelines work. Indeed, it was the very mechanics of the Guidelines that the *Booker* Court found problematic. Consider the following hypothetical case:

> John Doe is a recently hired attorney in the Federal Reserve Board's Division of Banking Supervision and Regulation. He has no criminal history. After a year on the job, Doe is short on cash, so he decides to steal some money from the Federal Reserve. Doe had studied computer science while in college and uses the skills he acquired to create a computer program that, when downloaded into the Fed's computer system, automatically takes money from the central bank and places it in his own bank account. After installing the program, Doe eventually runs out of luck and is arrested and charged with embezzlement under 18 U.S.C. § 656. By the time of his arrest, Doe has embezzled more than $250,000 from the Federal Reserve. Under § 656, an employee of the Federal Reserve Bank who "embezzles, abstracts, purloins or willfully misapplies any of the moneys . . . intrusted to the custody or care of such bank [including the Federal Reserve bank] shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both [if the amount embezzled exceeds $1000]."[52] Realizing that he cannot escape punishment, Doe pleads guilty to the offense. Doe only admits that he committed the elements of the offense. He makes no admission as to the amount of money embezzled.

In Chapter 2 of the *Federal Sentencing Guidelines Manual*, each offense is given a base level. In Doe's case, he committed a crime with a base offense level of 7 because, under § 2B1.1 of the *Guidelines Manual*, his embezzlement conviction "has a statutory maximum term of imprisonment of 20 years or more."[53] The district court judge is then obliged to consider "all relevant conduct" to adjust the offense level based on the specific characteristics of the offense.[54] For example, if a judge finds by a preponderance of the evidence that Doe actually embezzled $250,000, then his offense level would be increased by 12.[55] In addition, if the judge finds that Doe committed his embezzlement with

52. 18 U.S.C. § 656 (2000).
53. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a)(1) (2005).
54. Chiu, *supra* note 9, at 1318.
55. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1)(G).

"sophisticated means," then Doe's sentence can be increased by 2 levels.[56] The facts supporting these adjustments need to be found by a judge by a preponderance of the evidence.[57] After a judge takes into account all of these adjustments, the final offense level is then calculated. Assuming that the two findings above are made, Doe's total offense level is 21. This offense level is then evaluated in conjunction with the defendant's criminal history to derive the appropriate sentence. This is done by looking at the Sentencing Table in the *Guidelines Manual*.[58] Each row of the table corresponds to an offense level and each column corresponds to a criminal-history category. Doe has zero criminal-history points, so he falls in the Criminal History I category. Looking at the table, a defendant with an offense level of 21 and a category I criminal history should receive a sentence of between thirty-seven and forty-six months in prison. This range is dramatically narrower than the sentencing range that existed prior to the Guidelines; before the SRA, a district court judge could sentence Doe to anywhere between zero and thirty years in prison.

D. The Mandatory Nature of the Guidelines

The SRA permits judges to examine several factors in assessing whether a defendant's sentence is "sufficient, but not greater than necessary."[59] Under 18 U.S.C. § 3553(a), the factors include:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed . . . ; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established [by the Guidelines]; (5) any pertinent policy statement issued by the Sentencing Commission . . . ; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.[60]

In assessing § 3553(a)(2), district courts are to consider the need for the sentence imposed "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with

56. *Id.* § 2B1.1(b)(9)(C).
57. *See* Gregory & Kenner, *supra* note 22, at 798.
58. *See infra* Appendix.
59. 18 U.S.C. § 3553(a) (2000 & Supp. III 2003). This statute is often called the "parsimony provision."
60. *Id.*

needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[61]

Though these provisions appear on their face to give district court judges flexibility in departing downward from the Guidelines, the SRA made the calculated Guideline range, for all intents and purposes, the mandatory floor for a defendant's sentence.[62] Section 3553(b)(1) of the Act required district court judges to "impose a sentence of the kind, and within the range," of the sentencing Guidelines.[63] Judges were only allowed to depart from the Guidelines in two circumstances. In the first circumstance, a judge could depart upward or downward from the Guidelines if he found "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a [different sentence]."[64] This exception was enacted because Congress believed that the Sentencing Commission would be unable to anticipate every factual situation in its formulation of the Guidelines.[65] This narrow departure exception gave judges little flexibility because the Sentencing Commission adopted the position that it had taken into account virtually every consideration in creating the Guidelines.[66] In the second circumstance, a judge could depart downward from the Guidelines if the defendant provided substantial assistance to law-enforcement authorities. Judges, however, could not depart on their own, but had to wait until the prosecutor filed a motion with the court requesting the adjustment in sentence.[67] Thus, the decision to lower a defendant's sentence was mostly in the hands of the prosecutor. The rigidity of the Guidelines was only compounded by the fact that defendants had little recourse in appealing a sentence within the Guidelines range. As Judge Lynn Adelman noted, "The courts of appeals have uniformly held that they lack jurisdiction to review a district court's discretionary decision *not* to depart."[68]

61. *Id.* § 3553(a)(2).

62. This was the case at least until the U.S. Supreme Court's decision in *Koon v. United States*, 518 U.S. 81 (1996). *See infra* notes 78–82 and accompanying text.

63. 18 U.S.C. § 3553(b)(1) (Supp. III 2003).

64. *Id.*

65. *See* Gardina, *supra* note 30, at 357–58.

66. *See Implications of the* Booker/Fanfan *Decisions for the Federal Sentencing Guidelines: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 14, 15 (2005) [hereinafter *Hearing*] (statement of Ricardo H. Hinojosa, Chairman, U.S. Sentencing Comm'n). Hinojosa claimed that "[t]he factors the Commission has considered are a virtual mirror image of the factors sentencing courts are required to consider pursuant to section 3553(a)." *Id.*

67. *See* Gardina, *supra* note 30, at 357 (citing U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2005)).

68. Lynn Adelman & Jon Deitrich, *Observations on the New Standard of Review of Departures from the Sentencing Guidelines*, 16 FED. SENT'G REP. 269, 269 (2004).

Thus, a judge generally could consider the § 3553(a) factors only in deciding how to sentence a defendant within the Guidelines, not as a basis for downward departure from the Guidelines. For example, though judges were allowed to consider "the nature and circumstances of the offense and the history and characteristics of the defendant" under § 3553(a)(1), the Guidelines did not permit the district courts to consider this factor as a ground for departure. With the exception of cases where the "defendant is elderly and infirm," the Guidelines did not consider age as "relevant in determining whether a departure [from the Guidelines] is warranted."[69] The Guidelines also restricted district courts from considering, among other things, a defendant's education,[70] mental and emotional condition,[71] socioeconomic status,[72] or race.[73] As one judge observed, "The only aspect of a defendant's history that the guidelines permit courts to consider is criminal history."[74] However, the Sentencing Commission permitted judges to depart upward in a number of situations—illustrating the "one-way" nature of the Guidelines. Allowable upward departures included instances when the crime was motivated by hate,[75] when the victim was a government employee,[76] and when the victim was physically restrained while the defendant committed the offense.[77]

After the U.S. Supreme Court's 1996 decision in *Koon v. United States*,[78] sentencing judges were given some discretion to depart based on factors that were prohibited by the Sentencing Commission. The *Koon* Court held that a district court judge could depart from the Guidelines based on a proscribed departure factor, so long as the departure factor, "as occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline."[79] The Court refused to hold that certain factors could never be the basis for departures from the Guidelines, concluding that "Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance."[80] The Court also held that appellate courts should review departure decisions only for an abuse of discretion, not

69. U.S. SENTENCING GUIDELINES MANUAL § 5H1.1.
70. *Id.* § 5H1.2.
71. *Id.* § 5H1.3.
72. *Id.* § 5H1.10.
73. *Id.*
74. United States v. Ranum, 353 F. Supp. 2d 984, 986 (E.D. Wis. 2005); *See also* U.S. SENTENCING GUIDELINES MANUAL § 5H1.8.
75. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1.
76. *Id.* § 3A1.2.
77. *Id.* § 3A1.3.
78. 518 U.S. 81 (1996).
79. *Id.* at 109.
80. *Id.* at 106.

de novo.[81] The Court's holding in *Koon* created an appellate review standard that was considerably deferential to the sentencing judge's legal findings. Thus, though the appellate courts still vacated and remanded non-Guidelines sentences after *Koon*, departures that were considered "close" were frequently affirmed on the basis of the district court's newfound sentencing discretion.[82]

In 2003, Congress passed the controversial Feeney Amendment, which limited this rebirth of judicial discretion. The Feeney Amendment attempted to make the Guidelines more mandatory by codifying a de novo appellate review standard for all departures. According to the Amendment, though an appellate court must "give due deference" to the district court's fact-findings in calculating the Guidelines range, the appellate courts were required to "review de novo the district court's application of the guidelines to the facts" if the district court departed from that range.[83] In following a de novo standard of review, appellate courts were now able to make their own determination of whether a district court's departure from the Guidelines was justified without giving deference to the district judge's conclusions. Therefore, the Amendment limited district court judges' options and, in the event of departure, gave the sentencing power to the courts of appeals.[84]

Not surprisingly, judges were frustrated with the constraints imposed on them by the mandatory Guidelines system. Most judges opposed the Feeney Amendment, and the Judicial Conference of the United States unanimously voted to ask Congress to repeal the measure.[85] While most judges adhered to the Guidelines, many ruled them unconstitutional.[86] In a 2003 piece in the *New York Times*, then-Judge John Martin criticized the Guidelines—especially Congress's desire to make them more rigid. Judge Martin was particularly angry with how the Guidelines deprived him "of the ability to consider all of the factors that go into formulating a just sentence."[87] Judge Paul Cassell also expressed frustration with the Guidelines, calling one sentence he was compelled to give "unjust, cruel, and even irrational."[88] In 2003, Justice Kennedy

81. *Id.* at 91.

82. Katherine M. Menendez, De Novo *Review of Sentencing Departures: The End of* Koon v. United States, 27 HAMLINE L. REV. 457, 463 (2004).

83. 18 U.S.C. § 3742(e) (Supp. III 2003).

84. *See* Adelman & Deitrich, *supra* note 68, at 270.

85. *See* Linda Greenhouse, *Judges Seek Repeal of Law on Sentencing*, N.Y. TIMES, Sept. 24, 2003, at A23.

86. *See* Chiu, *supra* note 9, at 1319.

87. John S. Martin, Jr., Op-Ed., *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31.

88. United States v. Angelos, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006); *see also* Jim Newton, *Judge Denounces Mandatory Sentencing Law*, L.A. TIMES, Dec. 19, 1992, at B1 (U.S. District Judge J. Spencer Letts denounced the mandatory Guidelines system as "worse than uncivilized [and] barbaric.").

criticized the Guidelines' tendency to increase sentences, arguing that the "Federal Sentencing Guidelines should be revised downward."[89]

II. BOOKER AND ITS PREDECESSORS

A. *Apprendi v. New Jersey*

A dramatic shift in the U.S. Supreme Court's Sixth Amendment jurisprudence started brewing in the late 1990s. In *Apprendi v. New Jersey*[90] (a 5–4 decision), the Court held that the Sixth Amendment requires that any fact, other than the fact of a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[91] *Apprendi* marked a monumental shift from the Court's prior view that sentencing facts were distinct from elements of the offense. Indeed, the end of this distinction was indicative of what one commentator described as "an effort [by the Court] to protect the democratic voice in the courtroom from what it perceived to be the encroachment of legislative control over sentencing decisions."[92] Prior to *Apprendi*, cases like *McMillan v. Pennsylvania*[93] and *Almendarez-Torres v. United*

89. Anthony M. Kennedy, U.S. Supreme Court Justice, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *in* 16 FED. SENT'G REP. 126, 127 (2003).

90. 530 U.S. 466 (2000). Prior to *Apprendi*, in *Jones v. United States*, 526 U.S. 227 (1999), the Court held that a statutory enhancement that increased a defendant's sentence based on the degree of injury to the victim had to be treated as an element of the offense, not as a statutory factor. Thus, the facts required for this enhancement had to be placed in the indictment and proven to a jury beyond a reasonable doubt. *Id.* at 252.

91. *Apprendi*, 530 U.S. at 490. In *Apprendi*, Charles C. Apprendi pled guilty in state court to, among other things, second-degree possession of a firearm for an unlawful purpose. *Id.* at 469–70. The offense authorized a penalty of between five and ten years in prison. *Id.* at 470. After the plea hearing, the state filed a motion to extend Apprendi's sentence based on the state's "hate crime" law. *Id.* The law allowed a judge to extend a defendant's term beyond the maximum penalty for the offense if the trial judge found by a preponderance of the evidence that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id.* 468–69. In Apprendi's case, the hate-crime law permitted the judge, after making these findings of fact, to enhance his sentence from anywhere between ten and twenty years in prison. *Id.* at 469. At an evidentiary hearing, the judge found "by a preponderance of the evidence" that Apprendi conducted the crime "with a purpose to intimidate" as provided by the hate-crime law. *Id.* at 471. The judge then sentenced Apprendi to a twelve-year prison term for that offense—two years longer than the ten-year "statutory maximum" penalty. *Id.*

92. Bloom, *supra* note 9, at 539.

93. 477 U.S. 79 (1986). In *McMillan*, Pennsylvania's Mandatory Minimum Sentencing Act provided that a defendant convicted of an enumerated felony was subject to a mandatory minimum sentence of five years if the trial judge found by a preponderance of the evidence that the defendant "visibly possessed a firearm" during the commission of the offense. *Id.* at 80–81. The Court, in holding that the Act did not violate the Due Process Clause, concluded that "[s]tates may

States[94] stressed that the determination of a sentencing factor or element of a crime would be based on, among other things, legislative intent or the factor's traditional application. *Apprendi* abandoned this approach, instead focusing on the impact of punishment.[95] More importantly, *Apprendi* left undefined what exactly constituted a "statutory maximum" sentence authorized by the jury's verdict: Was the statutory maximum the upper limit on a sentence enumerated by Congress for a defendant convicted of a particular offense, or was it the maximum sentence authorized without any additional findings of fact? This open question did not seem all that problematic to lawyers and commentators;[96] however, as it turned out, these observers were wrong, and this question would soon prove instrumental in the landmark case of *Blakely v. Washington*.[97]

B. *Blakely v. Washington*

In *Blakely*, defendant Ralph Blakely argued that his Sixth Amendment rights were violated because his sentence was increased beyond the range authorized by the State of Washington's sentencing guidelines system after a judge found sentence-enhancing facts. Washington argued that there was no *Apprendi* violation because the relevant statutory maximum was the maximum

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treat 'visible possession of a firearm' as a sentencing consideration rather than an element of a particular offense" that must be proved beyond a reasonable doubt, so long as the state does so within constitutional limits. *Id.* at 86, 91; *see also* Margareth Etienne, *Into the Briar Patch?: Power Shifts Between Prosecution and Defense After* United States v. Booker, 39 VAL. U. L. REV. 741, 745–46 (2005).

94. 523 U.S. 224 (1998). In *Almendarez-Torres*, the Court, after examining congressional intent, held that a defendant's prior criminal history was a "sentencing factor"—not a separate criminal offense—and therefore did not need to be included in the indictment. *Id.* at 235. *Almendarez-Torres* created what many call the "prior conviction exception." That is, this case established that prior convictions are excluded from the *Apprendi* rule that facts enhancing a defendant's sentence beyond the statutory maximum need to be established by a jury beyond a reasonable doubt. A defendant's criminal history, instead, can be determined by a judge by a preponderance of the evidence for enhancement purposes. The scope of the "prior conviction exception" established in *Almendarez-Torres* appears to have been significantly limited by *Shepard v. United States*, 544 U.S. 13, 16 (2005) (holding that, in applying the Armed Career Criminal Act, a sentencing court is prohibited from looking to police reports or complaint applications to determine whether an earlier guilty plea admits, and supports a conviction for, generic burglary).

95. *See* Drab, *supra* note 9, at 996.

96. *See* Berman, *supra* note 9, at 674. As Professor Douglas Berman explained, "When certiorari was granted in *Blakely v. Washington* . . . it was thought that the Supreme Court would use [the case] to rule, as had nearly all lower courts, that *Apprendi* had no applicability to judicial fact-finding which only impacted guideline sentencing outcomes *within* otherwise applicable statutory ranges." *Id.* After *Apprendi*, every appeals court affirmed the Guidelines' constitutionality. *See* Green, *supra* note 22, at 398.

97. 542 U.S. 296 (2004).

set forth by the Washington legislature, not the maximum state guideline penalty for the offense.[98] In an opinion issued on June 24, 2004, Justice Scalia, writing for the same *Apprendi* majority, rejected Washington's argument, holding that

> the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* additional findings.[99]

Justice Scalia believed that this holding reflected "the need to give intelligible content to the right of a jury trial."[100] This right, he wrote, was a "fundamental reservation of power in our constitutional structure."[101]

Blakely had a profound impact on the federal judiciary. Though the Court explicitly noted that its decision had no impact on the Guidelines,[102] the logic of the *Blakely* decision suggested that the end of the Federal Sentencing Guidelines was near. In boldly concluding that "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment,"[103] *Blakely* put the federal courts on notice that the Guidelines were now constitutionally suspect, especially because they had the same procedural flaws as the Washington system.

Despite the logical applicability of *Blakely* to the Guidelines, Justice Scalia left the district courts in the dark as to the proper course of action to be taken in examining sentence-enhancing facts. The media presented *Blakely*'s aftermath as chaotic, and it published stories about defendants receiving favorable sentences outside the Guidelines.[104] In one brief, a government lawyer compared the post-*Blakely* situation to "Godzilla rampaging through Tokyo during a level 10 earthquake."[105] Unsurprisingly, a circuit split quickly emerged on how to interpret the Guidelines in light of *Blakely*.[106] When the Court granted

98. *Id.* at 303.
99. *Id.* at 303–04 (citations omitted).
100. *Id.* at 305.
101. *Id.* at 306; *see also* Berman, *supra* note 9, at 674.
102. *Blakely*, 542 U.S. at 305 n.9.
103. *Id.* at 313; *see also* Berman, *supra* note 9, at 675.
104. *See, e.g.*, Steven G. Kalar et al., A Booker *Advisory: Into the Breyer Patch*, CHAMPION, Mar. 2005, at 10. For more on *Blakely*, see Jennifer M. Murray, Casenote, Blakely v. Washington: *The End of Sentencing Guidelines and the Re-Emergence of Judicial Discretion*, 6 LOY. J. PUB. INT. L. 217 (2005).
105. Douglas A. Berman, *The Roots and Realities of* Blakely, CRIM. JUST., Winter 2005, at 5 (quoting a government brief).
106. Kalar et al., *supra* note 104, at 10. The Seventh and Ninth Circuit Courts of Appeals held that *Blakely* applied to the Guidelines while the Fourth, Fifth, and Eleventh Circuits found

certiorari in *United States v. Booker*[107] and *Fanfan v. United States*,[108] most believed that the rule in *Blakely* signaled the death knell for the Federal Sentencing Guidelines.[109]

C. *United States v. Booker*

In an opinion consolidating the *Booker* and *Fanfan* cases, the U.S. Supreme Court sought to address whether the Federal Sentencing Guidelines violated the Sixth Amendment by permitting a judge to enhance a defendant's sentence beyond the statutory maximum based on judge-found facts that were neither found by a jury nor admitted by the defendant.[110] The Court answered this question in the affirmative, holding that the Guidelines' mandatory use of enhancing factors not found by a jury was unconstitutional. To a large extent, this holding is not all that remarkable. This part of the opinion—which I call the constitutional holding—consisted of the same justices that were part of the *Apprendi* and *Blakely* majorities. What makes *Booker* a remarkable decision is that, for the remedial portion of the opinion, Justice Ginsburg left the majority that formed the Court's constitutional holding and, instead, joined Justices Breyer, Kennedy, O'Connor, and Rehnquist—all of whom had dissented from *Booker*'s constitutional opinion and the *Apprendi* line of cases. With Justice Ginsberg's switch, the dissenters from the constitutional holding, who believed that the Guidelines were constitutional, were able to fashion the remedy for this constitutional violation.

1. The Constitutional Holding

Writing for the majority, Justice Stevens argued that the Sixth Amendment places strict requirements on how facts are to be used at sentencing.[111] A defendant's Sixth Amendment rights, Justice Stevens wrote, are "implicated whenever a judge seeks to impose a sentence that is not solely based on 'facts reflected in the jury verdict or admitted by the defendant.'"[112]

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that the Guidelines were different than Washington's sentencing system. *Id.* *Compare* United States v. Ameline, 376 F.3d 967 (9th Cir. 2004), *with* United States v. Pineiro, 377 F.3d 464 (5th Cir. 2004). For more information on the circuit split that emerged after *Blakely*, see Kathleen A. Hirce, *A Swift and Temporary Instruction: The Effectiveness of the Circuit Courts Between* Blakely *and* Booker, 2 SETON HALL CIR. REV. 271 (2005).

107. 375 F.3d 508 (7th Cir. 2004).

108. No. 03-47, 2004 WL 1723114 (D. Me. June 28, 2004).

109. *See* Greenhouse, *supra* note 3.

110. *See* United States v. Booker, 543 U.S. 220, 229 n.1 (2005).

111. *Id.* at 231–32.

112. *Id.* at 228 (quoting Blakely v. Washington, 542 U.S. 296, 303 (2004)).

After examining *Blakely*'s definition of a statutory maximum penalty, the Court then analogized the Guidelines to the Washington system that was found unconstitutional in *Blakely*, concluding that there was no distinction between the two.[113] In rejecting the argument that "[t]he availability of a departure in specified circumstances" avoids the constitutional issue,[114] Justice Stevens expressed the belief that both the Washington and federal systems were problematic because "the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges."[115] After all, the Guidelines did mandate that courts "*shall* impose a sentence of the kind, and within the range" of the Guidelines.[116]

Justice Stevens rejected Justice Breyer's dissenting view that the Guidelines posed no constitutional problem because judges had the traditional authority to increase sentences based on the particular circumstances of the defendant's crime.[117] Justice Breyer's focus on American history was misplaced, Justice Stevens argued, because today's society placed an "increas[ed] emphasis on facts that enhanced sentencing ranges" where "the judge [rather than the jury] determined the upper limits of sentencing."[118] Therefore, because the legislative branch was playing a more active role in minimizing jury fact-finding, Justice Stevens believed that "sentencing was no longer taking place in the tradition" promoted by Justice Breyer.[119] Justice Stevens then went on to summarily reject the Government's three arguments for why the Guidelines were different than Washington's sentencing scheme in *Blakely*.[120]

2. The Remedial Holding

The second question certified by the Court in *Booker* was, if the Guidelines were unconstitutional, whether this constitutional violation should be remedied

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113. *Id.* at 233.
114. *Id.* at 234.
115. *Id.* at 233.
116. 18 U.S.C. § 3553(b)(1) (Supp. III 2003) (emphasis added); *see also Booker*, 543 U.S. at 234. The Vera Institute of Justice has noted that *Booker* strengthened *Blakely* in essentially holding "that the Sixth Amendment requirement of jury fact-finding hinges on whether a system places limits on the sentence a judge can impose without finding additional facts." Jon Wool, Vera Inst. of Justice, State Sentencing & Corr., *Beyond* Blakely: *Implications of the* Booker *Decision for State Sentencing Systems*, POL'Y & PRAC. REV., Feb. 2005, at 3, *available at* http://www.vera.org/publication_pdf/268_515.pdf.
117. *Booker*, 543 U.S. at 235.
118. *Id.* at 236.
119. *Id.* at 237.
120. *Id.* at 237–43. The government's three arguments were based on the following: (1) the fact that the Federal Sentencing Guidelines were promulgated by the Sentencing Commission and not Congress; (2) stare decisis; and (3) separation of powers principles. *Id.*

by rendering the Guidelines inapplicable "as a matter of severability analysis," thereby obligating the sentencing court to "exercise its discretion to sentence the defendant within the maximum and minimum set by the statute for the offense of conviction."[121] In accordance with the Court's holding that the mandatory nature of the Guidelines was unconstitutional, the Court answered this question by excising §§ 3553(b)(1)[122] and 3742(e).[123] In adopting a remedy that none of the parties had suggested,[124] Justice Breyer, writing for the majority, argued that these two provisions needed to be removed because they "depend[ed] upon the Guidelines' mandatory nature."[125] With this modification, Justice Breyer concluded, the Guidelines are now "effectively advisory."[126]

Through this severability analysis, Justice Breyer rejected Justice Stevens's view that the proper remedy should be an "engraft[ing] onto the existing system today's Sixth Amendment 'jury trial' requirement."[127] That remedy, Justice Breyer noted, "would change the Guidelines by preventing the sentencing court from increasing a sentence on the basis of a fact that the jury did not find (or that the offender did not admit)."[128] Doing so would be inconsistent with Congress's intent in passing the SRA.[129] Instead, Justice Breyer opted for a rule that would "make the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve."[130]

After concluding that severability was the proper course of action, the Court then explained its reasoning in excising §§ 3553(b)(1) and 3742(e). The existence of § 3553(b)(1), which required judges to impose a sentence within the Guidelines range, was clearly unconstitutional.[131] Justice Breyer also found problematic § 3742(e)—the Feeney Amendment provision, which

121. *Id.* at 229 n.1.
122. 18 U.S.C. § 3553(b)(1) (Supp. III 2003).
123. 18 U.S.C. § 3742(e) (2000 & Supp. III 2003).
124. For the Court's explanation of its rejection of the remedies presented by the parties, see *Booker*, 543 U.S. at 265–67.
125. *Id.* at 245.
126. *Id.*
127. *Id.* at 246. In his dissent from the remedial opinion, Justice Stevens argued that the Government—in order to comply with the Sixth Amendment—should "prove any fact that is *required* to increase a defendant's sentence under the Guidelines to a jury beyond a reasonable doubt." *Id.* at 284–85 (Stevens, J., dissenting in part). Justice Stevens also claimed that the creation of an advisory regime was in direct opposition to congressional intent, as Congress had rejected prior attempts to make the Guidelines advisory. *Id.* at 293.
128. *Id.* at 246 (majority opinion).
129. *Id.* at 249.
130. *Id.*
131. *Id.* at 259.

established a de novo appellate standard of review for federal sentencing and had several cross-references to § 3553(b)(1). Because of § 3742(e)'s similar reliance on the mandatory nature of the Guidelines, Justice Breyer concluded that the provision's de novo standard of appellate review had to be replaced with a "reasonableness" standard.[132] Justice Breyer justified this new standard by contending that it was a hallmark of appellate review, which courts are capable of performing.[133] The reasonableness of a sentence was to be determined in light of the factors in § 3553(a), which "will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable."[134]

The fate of the Guidelines after *Booker* is unclear because the Court never explicitly explained how the Guidelines should be treated in an advisory system. On one hand, the Court stressed the value of the § 3553(a) factors in assessing a defendant's sentence: "[The Court's holding] requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well."[135] On the other hand, the Court concluded that "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing."[136] According to Justice Breyer, this would be at least partly consistent with congressional intent, minimizing sentencing disparities while at the same time providing discretion to district courts.[137] The Court, however, understood that its ruling, to a large extent, was a contravention of Congress's will: "We do not doubt that Congress, when it wrote the Sentencing Act, intended to create a form of mandatory Guidelines system. But, we repeat, given today's constitutional holding, that is not a choice that remains open."[138]

3. Justice Scalia's Dissent

A notable dissent to Justice Breyer's remedial holding was written by Justice Scalia. Justice Scalia, who joined Justice Stevens's majority opinion on the constitutional question, believed that Justice Breyer's decision to make the Guidelines "effectively advisory" was particularly strange because the Court had declined to sever other provisions that were equally dependent on the

132. *Id.* at 261.
133. *Id.*
134. *Id.*
135. *Id.* at 245–46 (citations omitted).
136. *Id.* at 264.
137. *Id.* at 264–65.
138. *Id.* at 265 (citations omitted).

mandatory nature of the Guidelines.[139] Justice Scalia further argued that the majority had taken sentencing law into a "wonderland" where judicial discretion would exist as it did before the enactment of the Guidelines.[140] His concern lay in the fact that, because the Guidelines were now to be examined in conjunction with the § 3553(a) factors, a judge would be authorized "to apply his own perceptions of just punishment, deterrence, and protection of the public even when these differ from the perceptions of the Commission members" because § 3553(a) does not establish an "order of priority" among the factors mentioned.[141] Under an advisory regime, Justice Scalia argued, all judges had to do to comply with the Court's requirement that the Guidelines be consulted was state: "[T]his court does not believe that the punishment set forth in the Guidelines is appropriate for this sort of offense."[142] Justice Scalia chastised Justice Breyer for not fully defining what "advisory" meant. Such lack of definition, Justice Scalia argued, implied that the Guidelines were of minimal importance in federal sentencing: "[I]f the [remedial] majority . . . thought the Guidelines not only had to be 'considered' . . . but had generally to be followed—its opinion would surely say so."[143]

Justice Scalia also assailed the remedial majority's creation of "reasonableness" as the new standard of appellate review for federal sentences. He first attacked the majority's assertion that reasonableness was consistent with sentencing practice prior to the Feeney Amendment. While reasonableness was used as a standard of review for *departures* prior to the Feeney Amendment, Justice Scalia noted that it was not the standard utilized for sentences that fell *within* the Guidelines range.[144] Justice Scalia was even more bewildered by the

139. *Id.* at 305 (Scalia, J., dissenting in part). One provision that was left intact by the remedial majority was § 3553(c)(2), which requires the district court to articulate "the specific reason[s] for the imposition of a sentence different from that described" in the Guidelines. The Court also neglected to excise § 3553(b)(2), which provides that district courts "shall" apply the Guidelines for certain enumerated "child crimes and sexual offenses." 18 U.S.C. § 3553(b)(2) (Supp. III 2003); *see also* Peter B. Krupp, *The Return of Judicial Discretion: Federal Sentencing Under "Advisory" Guidelines After* United States v. Booker, BOSTON B.J., Mar./Apr. 2005, at 18, 20; Barry Coburn & Thomas Gilson, ABA Section of Litig., Criminal Litig. Comm., *The Road to* Booker *and* Fanfan, at 2, *available at* http://www.abanet.org/litigation/committee/criminal/booker.pdf.

140. *Booker*, 543 U.S. at 309 (Scalia, J., dissenting in part). Justice Stevens made the same argument in his dissent to the Court's remedial holding, writing that "[t]he result [of the majority's remedial holding] is certain to be the return to the same type of sentencing disparities Congress sought to eliminate in 1984." *Id.* at 300 (Stevens, J., dissenting in part). Justice Stevens was especially critical of the fact that the Court "neglected to provide a critical procedural protection that existed prior to the enactment of a binding Guidelines system." *Id.*

141. *Id.* at 304–05 (Scalia, J., dissenting in part).

142. *Id.* at 305. This view has been rejected by several circuits. *See infra* note 192.

143. *Id.* at 305–06.

144. *Id.* at 310; *see also id.* at 309 (arguing that "[t]here is no one-size-fits-all 'unreasonableness' review").

fact that the remedial opinion created a regime in which "no one knows—and perhaps no one is meant to know—how advisory Guidelines and 'unreasonableness' review will function in practice."[145] In contemplating how reasonableness would define the advisory nature of the Guidelines, Justice Scalia worried that a rigorous standard of review that equated reasonableness with the Guidelines would create the same constitutional problem that existed in *Booker*: "[A]ny system which held it *per se* unreasonable . . . for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court . . . holds unconstitutional."[146] At the other extreme could be a system under which appellate courts "approv[e] virtually any sentence within the statutory range that the sentencing court imposes, so long as the district judge goes through the appropriate formalities, such as expressing his consideration of and disagreement with the Guidelines sentence."[147] With all of this uncertainty as to how reasonableness should be defined, Justice Scalia was convinced that the majority's lack of clarity would create a "discordant symphony" of standards that vary from court to court.[148]

4. Ramifications

Though *Booker*'s constitutional decision reaffirmed the U.S. Supreme Court's holdings in *Apprendi* and *Blakely* that juries need to play a central role in sentencing fact-finding, the remedial majority permitted judges to find sentence-enhancing facts within an advisory system. This logic surprised many and, to a large extent, seems contrary to the Court's sentencing jurisprudence of the last decade, which aimed to empower juries with greater fact-finding abilities.[149] *Booker* narrowed *Blakely* and *Apprendi* significantly by refusing to

145. *Id.* at 311.

146. *Id.* Since *Booker*, many circuits have agreed with Justice Scalia and rejected per se rules for reasonableness. *See, e.g.*, United States v. Talley, 431 F.3d 784, 786–87 (11th Cir. 2005) (per curiam); United States v. Mykytiuk, 415 F.3d 606, 607 (7th Cir. 2005); United States v. Crosby, 397 F.3d 103, 115 (2d Cir. 2005), *abrogated on other grounds*, United States v. Lake, 419 F.3d 111, 113 n.2 (2d Cir. 2005).

147. *Booker*, 543 U.S. at 312 (Scalia, J., dissenting in part).

148. *Id.* For more on Justice Scalia's sentencing jurisprudence, see Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?* 94 GEO. L.J. 183 (2005).

149. *See* Douglas A. Berman, *Conceptualizing* Booker, 38 ARIZ. ST. L.J. (forthcoming 2006) (manuscript at 1), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/final_conceptualizing_booker.doc ("Read independently, each majority opinion in *Booker* seems conceptually muddled; read together, the two *Booker* rulings seem almost conceptually nonsensical."); McConnell, *supra* note 16, at 684 (arguing that *Booker* put "forward an extravagant claim of constitutional principles coupled with an anemic and self-contradictory remedy"); Paul Rosenzweig, Senior Legal Research Fellow, Ctr. for Legal and Judicial Studies, Testimony Before

accept that defendants have a constitutional right under the Sixth Amendment to have sentence-enhancing facts found by a jury. Instead, the rights defendants have under the Sixth Amendment are much narrower.[150] Even more puzzling is the fact that the remedial majority decided that an advisory system was more in line with congressional intent, especially when it is clear from the congressional record that Congress's goal in passing the SRA was to limit the power of federal judges.[151] Despite these contradictions, it is apparent that the remedial majority was trying to create a middle ground between indeterminate sentencing and the rigid regime that existed during the pre-*Booker* era.[152] Perhaps fearing that a system with jury-found enhancements would be impractical,[153] Justice Breyer wanted to save the Guidelines but was forced to limit their scope in light of the Court's constitutional holding.

On its face, the winners of the Court's middle-ground position appear to be criminal defendants. The advisory nature of the Guidelines seems to revive judicial discretion and permit judges to deviate from the Guidelines when they see fit. In a federal system in which over 97 percent of criminal defendants plead guilty,[154] one can now imagine a world in which defendants are less willing to negotiate with prosecutors, instead opting to take their chances with a judge. Whether or not this becomes the case, the winner may be the Department of Justice. The *Booker* Court, in actuality, minimized as much as possible the effects of *Blakely* on the federal system. The worry after *Blakely* was that prosecutors would now have to place all potential sentence-enhancing facts in their indictments and prove such facts to a jury. *Booker* alleviated this concern by preserving judicial fact-finding in federal sentencing. To this extent,

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the American Bar Association Regarding Sentencing in a Post-*Booker* World—It's Deja Vu All Over Again (Feb. 15, 2005), *available at* http://www.heritage.org/Research/LegalIssues/tst021505a.cfm (arguing that *Booker*'s remedial holding is incoherent and that it was derived from "theoretical, analytical, and political flaws that cannot be concealed"); *see also* Berman, *supra* note 33, at 43 ("Put simply, the state of sentencing law after *Blakely* and *Booker* is, both conceptually and doctrinally, an utter mess."); Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082 (2005) (arguing that the Supreme Court is not truly committed to its new Sixth Amendment doctrine and, instead, that the Court should extend *Blakely*'s jury fact-finding principle to all American sentencing systems).

150. *See* Edward Lazarus, *The Supreme Court's Sentencing Guidelines Decision: Its Logic, and Its Surprisingly Limited Practical Effect*, FINDLAW'S WRIT, Jan. 21, 2005, http://writ.news.findlaw.com/lazarus/20050121.html.

151. *See* Brief for the Honorable Orrin G. Hatch, et al. as Amici Curiae in Support of Petitioner at 15–16, United States v. Booker, 543 U.S. 220 (2005) (No. 04-104).

152. *See* Ian Weinstein, *The Revenge of* Mullaney v. Wilbur*:* United States v. Booker *and the Reassertion of Judicial Limits on Legislative Power to Define Crimes*, 84 OR. L. REV. 393, 395 (2005) (arguing that *Booker* reflects "the Supreme Court's best effort to maintain balance among judges, prosecutors, and legislators in the face of changing political and social conditions").

153 *See infra* note 217.

154. *See* Fries, *supra* note 15, at 1112.

the Court salvaged the Guidelines as much as it could, perhaps hoping that the federal criminal system would run just as it did before *Booker*.[155]

Whether the system is actually transformed by *Booker* remains to be seen. Arguably, the most compelling question left open by *Booker* is to what extent sentencing judges can deviate from the Guidelines in this newly advisory regime. The Court did not explain what it meant to "consult" the Guidelines, instead punting on the question of whether giving the Guidelines considerable weight violates *Booker*'s constitutional holding that the Guidelines not be mandatory. It is to this question that I now turn.

III. THE EMERGING DISCORDANT SYMPHONY: *BOOKER*'S CONSTITUTIONAL HOLDING VERSUS CONGRESSIONAL INTENT

In *United States v. Webb*,[156] the Sixth Circuit Court of Appeals explored the relationship between adherence to the Guidelines and *Booker*'s new "reasonableness" standard of review. In a footnote, the court noted its refusal to hold that a "sentence within a proper Guidelines range is per-se reasonable."[157] In her dissent, Judge Cornelia Kennedy took issue with the majority's conclusion that "holding all sentences within the Guidelines' range per-se reasonable would effectively make the Guidelines mandatory."[158] Moreover, Judge Kennedy argued that, based on the Sentencing Commission's congressional mandate to create sentencing factors, "it is hard to conclude that the . . . factors the Commission selected were not reasonable."[159] The debate between the majority and Judge Kennedy in *Webb* is indicative of a broader debate that is taking place throughout the federal judiciary on the question of what role the Guidelines should play in the new sentencing landscape. More specifically, the courts are struggling with how to articulate a rubric for understanding the advisory Guidelines that respects both Congress's intent in creating a uniform system and the Court's prohibition of a mandatory sentencing regime.

The decisions since *Booker* demonstrate that there is no clear consensus within the federal judiciary on how to apply the Guidelines. In fact, two

155. Professor Craig Green has argued that Justice Breyer, by both allowing the Sentencing Commission to operate and forcing judges to "consider" the Guidelines, was hoping that "bureaucratic pressures would lead courts to follow the Guidelines." Green, *supra* note 22, at 412.

156. 403 F.3d 373 (6th Cir. 2005).

157. *Id.* at 385 n.9.

158. *Id.* at 386 (Kennedy, J., concurring in part, and dissenting in part).

159. *Id.*

divergent views have emerged regarding how "advisory" the Guidelines should be. In one camp are those who believe that the Guidelines should be the dominant factor in any sentencing analysis, with judges only deviating in exceptional circumstances. This view, which I call the "substantial-weight" approach,[160] defers to Congress's intent in creating a mandatory sentencing scheme by relying heavily on Guidelines calculations, but may be constitutionally suspect under *Booker* because it appears to treat the Guidelines as controlling. The opposing camp believes that the Guidelines are not determinative and should merely be consulted along with the relevant sentencing factors enumerated by Congress. This view, which I have termed the "consultative" approach, reads literally *Booker*'s declaration that the Guidelines are "advisory," but in doing so, largely circumvents Congress's intent in creating a uniform sentencing scheme.[161]

A. The Substantial-Weight Approach

In the wake of *Booker*, the Department of Justice (DOJ) has argued that "guidelines sentences are presumptively reasonable [for the purposes of appellate review], and that sentences outside the guidelines become less reasonable the more they vary from the guidelines range."[162] The DOJ has also instructed

160. Several courts have adopted "substantial weight" language in formulating tests that balance the Guidelines with the statutory factors. *See, e.g.*, United States v. Jimenez-Beltre, 440 F.3d 514, 516–17 (1st Cir. 2006) ("I do intend to give [the Guidelines] substantial weight . . . ."); United States v. Peach, 356 F. Supp. 2d 1018, 1021 (D.N.D. 2005) ("This Court is of the opinion that the proper methodology for sentencing in the post-*Booker* environment is that federal district courts should give the Sentencing Guidelines 'substantial weight' and the Guideline range for sentencing as established by the Sentencing Commission provides a presumptively 'reasonable' sentence for district courts to follow."); United States v. Wanning, 354 F. Supp. 2d 1056, 1062 (D. Neb. 2005) (concluding that "the Guidelines must be given substantial weight even though they are now advisory").

161. A discussion on which of these views is more normatively appealing has recently emerged in legal scholarship. *See* Fries, *supra* note 15, at 1098 (2005). Rather than choosing between these two camps, the Second Circuit has left this issue to its district courts. *See* United States v. Crosby, 397 F.3d 103, 113, 115 (2d Cir. 2005), *abrogated on other grounds*, United States v. Lake, 419 F.3d 111, 113 n.2 (2d Cir. 2005).

162. *Hearing*, *supra* note 66, at 13–14 (prepared statement of Christopher A. Wray, Assistant U.S. Att'y Gen.); *see also* Letter from David N. Kelley, U.S. Atty, to Roseann B. MacKenchnie, Clerk of the Court, U.S. Court of Appeals for the Second Circuit 3 (Jan. 18, 2005), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/2d_circuit_govt_letter_briefs.pdf ("In other words, sentences within the Guidelines range should be upheld as reasonable, whereas sentences that deviate from the Guidelines should be presumptively unreasonable."); Memorandum from James B. Comey, Deputy Att'y Gen., to All Fed. Prosecutors 2 (Jan. 28, 2005), *in* 17 FED. SENT'G REP. 282, 283 (2005) ("[I]n any case in which the sentence imposed is below what the United States believes is the appropriate Sentencing Guidelines range . . . , federal prosecutors must oppose the sentence and ensure that the record is sufficiently developed to place the United States in the best position on appeal.").

Assistant U.S. Attorneys "to recommend guideline sentences in all but the rarest cases, and to recommend guideline departures only when justified by the facts and the law."[163] In recent opinions, the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuit Courts of Appeals have embraced the DOJ's presumptive approach, thereby directing their respective districts to rely heavily on the Guidelines calculation.[164] Similarly, the First Circuit has embraced the notion that the Guidelines should be given "substantial weight."[165] In *United States v. Mares*,[166] the Fifth Circuit refused to adopt per se rules for reasonableness, but made clear to its subordinate districts that departure sentences would be treated less favorably than sentences within the Guidelines:

> If the sentencing judge exercises her discretion to impose a sentence within a properly calculated Guideline range, in our reasonableness

163. *Hearing*, *supra* note 66, at 11 (prepared statement of Christopher A. Wray, Assistant U.S. Att'y Gen.). One of the Department of Justice's main concerns is that disparity may result from an advisory Guidelines system that permits judges to use sentencing factors, like age and economic status, that were prohibited by the Sentencing Commission. During the congressional hearings, Assistant Attorney General Christopher A. Wray urged that Congress "prohibit certain factors so that judges may not consider in sentencing grounds which would be improper to consider or which would create sentencing disparity based upon inappropriate characteristics of a defendant." *Id.* at 13. Similarly, the United States Sentencing Commission has argued that the Guidelines are still an important factor in determining a defendant's sentence. Conceding that "[t]he *Booker* decision does not expressly address the question of how much weight the guidelines should be accorded by the sentencing court," the Chairman of the Sentencing Commission believes that the courts should give "substantial weight" to the Guidelines. *Id.* at 15 (statement of Ricardo H. Hinojosa, Chairman, U.S. Sentencing Comm'n). In a memorandum to all district court and some circuit court judges, Hinojosa asked that they "continue to comply with the requirements of . . . § 3553(c) by providing a complete statement of reasons for imposing the sentence." Memorandum from Ricardo H. Hinojosa, Chair, U.S. Sentencing Comm'n, to Various Federal Judges, Law Clerks, and Probation Officers 2 (Jan. 21, 2005), *available at* http://www.ussc.gov/Blakely/DIR5-014.pdf.

164. United States v. Johnson, 445 F.3d 339, 344 (4th Cir. 2006); United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006) ("But we agree with the Seventh Circuit, which has concluded that a sentence imposed 'within the properly calculated Guidelines range . . . is presumptively reasonable.'") (quoting United States v. Newsom, 428 F.3d 685, 687 (7th Cir. 2005)); United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 43 (2005); United States v. Williams, 436 F.3d 706, 708 (6th Cir. 2006) ("We now join several sister circuits in crediting sentences properly calculated under the Guidelines with a rebuttable presumption of reasonableness."); United States v. Mykytiuk, 415 F.3d 606 (7th Cir. 2005); United States v. Lincoln, 413 F.3d 716, 717 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 840 (2005) (holding that a Guidelines sentence is "presumptively reasonable"); United States v. Terrell, 445 F.3d 1261, 1265 (10th Cir. 2006) ("[W]e cannot say that a district court errs when it gives a high degree of weight to the Guidelines in its sentencing decisions."); United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006) ("[W]e join our sister circuits and hold that a sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness.").

165. *Jimenez-Beltre*, 440 F.3d at 516–17. The court, however, rejected a presumptively reasonable standard for Guidelines sentences: "We do not find it helpful to talk about the guidelines as 'presumptively' controlling or a guidelines sentence as 'per se reasonable' . . . . Although making the guidelines 'presumptive' or 'per se reasonable' does not make them mandatory, it tends in that direction." *Id.* at 518.

166. 402 F.3d 511.

> review we will infer that the judge has considered all the factors for a fair sentence set forth in the Guidelines. Given the deference due the sentencing judge's discretion under the *Booker/Fanfan* regime, it will be rare for a reviewing court to say such a sentence is "unreasonable."[167]

The *Mares* Court held that a judge departing from the Guidelines would have to "carefully articulate the reasons she concludes that the sentence she has selected is appropriate for that defendant."[168] In other words, Guidelines sentences would be met with virtually unconditional approval on appeal, while departures would be heavily scrutinized. The Seventh Circuit's position, as articulated in *United States v. Mykytiuk*,[169] is similar in that "any sentence that is properly calculated under the Guidelines is entitled to a *rebuttable presumption of reasonableness*."[170] Acknowledging that this is a "deferential standard," the Court stated that "it will be a rare guidelines sentence that is unreasonable."[171]

Since Booker, federal appellate courts have, with one exception,[172] uniformly refused to hold that a properly calculated Guidelines sentence is *substantively* unreasonable in light of the § 3553(a) statutory factors.[173] The

167. *Id.* at 519.

168. *Id.*

169. 415 F.3d 606.

170. *Id.* at 608 (emphasis added). However, in *United States v. Cunningham*, 429 F.3d 673 (7th Cir. 2005), the Seventh Circuit held that a district court judge could not blindly follow the Guidelines. In an opinion written by Judge Richard A. Posner, the court vacated the defendant's sentence, holding that a sentence is unreasonable when a district court judge sentences a defendant within the Guidelines range without considering the relevant statutory factors. *Id.* at 679; *see also* United States v. Vonner, No. 05-5295, 2006 WL 1770095 (6th Cir. June 29, 2006).

One judge on the Sixth Circuit has argued that, even if a court held that a sentence within the Guidelines was per se reasonable, "it does not follow that a sentence outside the Guidelines' range is per-se unreasonable, a necessary prerequisite to making the Guidelines effectively mandatory." United States v. Webb, 403 F.3d 373, 386 (6th Cir. 2005) (Kennedy, J., dissenting in part). While this contention is logically correct, at a practical level the presumptive regime advocated by Judge Kennedy assumes both that a Guidelines sentence is reasonable and that a downward departure is unreasonable. *See Jimenez-Beltre*, 440 F.3d at 518; United States v. Myers, 353 F. Supp. 2d 1026, 1028 (S.D. Iowa 2005), *vacated*, 439 F.3d 415 (8th Cir. 2006). A system that treats both Guidelines sentences and departures as reasonable (so long as they bare some relationship to the statutory factors) would limit the scope of appellate review because *all* sentences would then be presumed reasonable. In light of *Booker*'s desire to stay in line with congressional intent, a regime under which all federal sentences are presumed to be reasonable would dilute the power of the Guidelines as a congressional tool in promoting sentencing uniformity.

171. *Mykytiuk*, 415 F.3d at 608. In a later case, the Seventh Circuit held that "there is no presumption of *unreasonableness*" for sentences that depart from the Guidelines. United States v. Jordan, 435 F.3d 693, 698 (7th Cir. 2006).

172. United States v. Lazenby, 439 F.3d 928, 933, 934 (8th Cir. 2006) (holding that a sentence on the low end of the Guidelines range was unreasonable because this was a "highly unusual" case where, among other things, "the district court gave too little weight to the extreme disparity between the sentences imposed on two similarly situated conspirators").

173. *See* Posting of Douglas A. Berman to Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2006/02/the_ugly_look_o.html (Feb. 3, 2006, 16:37 EST) ("To my knowledge, a full year+ after *Booker*, not one single within-guideline sentence has been declared unreasonable on appeal.").

circuits have consistently upheld sentences that depart upward from the Guidelines range,[174] while deeming unreasonable sentences that depart downward from the Guidelines.[175] This presumptively reasonable approach for Guidelines sentences may create serious constitutional problems. If Guidelines sentences are unconditionally deferred to—as appears to be the case after *Booker*—then judges are not fully exercising their mandated discretion.[176]

This deferential approach toward the Guidelines has also been embraced by many district court judges.[177] In *United States v. Wilson*,[178] Judge

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Since *Booker*, most circuit courts have separated "reasonableness" into substantive and procedural components. Procedural reasonableness requires that district courts make appropriate findings of fact and correctly calculate the applicable Guidelines range. Substantive reasonableness compels district court judges to assess whether the sentence serves the relevant § 3553(a) factors. *See* United States v. Jones, 445 F.3d 865, 869 (6th Cir. 2006); United States v. Moreland, 437 F.3d 424, 434 (4th Cir. 2006); United States v. Haack, 403 F.3d 997, 1002–03 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 276 (2005); United States v. Crosby, 397 F.3d 103, 114–15 (2d Cir. 2005), *abrogated on other grounds*, United States v. Lake, 419 F.3d 111, 113 n.2 (2d Cir. 2005). In one case, the Seventh Circuit vacated a defendant's Guidelines sentence, holding that a sentence is procedurally unreasonable when the district court judge sentences a defendant within the Guidelines range without considering the relevant statutory factors. *Cunningham*, 429 F.3d at 679. As one commentator correctly observed, how a "reasonable" sentence is defined by the appellate courts will dictate the terms by which this newly advisory regime will operate. David J. D'Addio, *Sentencing After* Booker: *The Impact of Appellate Review on Defendants' Rights*, 24 YALE L. & POL'Y REV. 173, 174 (2006).

174. *See, e.g.*, United States v. Scherrer, 444 F.3d 91 (1st Cir. 2006) (en banc); United States v. Fairclough, 439 F.3d 76 (2d Cir. 2006) (per curiam); United States v. Reinhart, 442 F.3d 857 (5th Cir. 2006); United States v. Jordan, 435 F.3d 693 (7th Cir. 2006); United States v. Porter, 439 F.3d 845 (8th Cir. 2006); United States v. Eldick, 443 F.3d 783 (11th Cir. 2006). *Contra* United States v. Zapete-Garcia, 447 F.3d 57 (1st Cir. 2006) (vacating a sentence that was above the Guidelines range); United States v. Davenport, 445 F.3d 366 (4th Cir. 2006); United States v. Castro-Juarez, 425 F.3d 430 (7th Cir. 2005); United States v. Kendall, 446 F.3d 782 (8th Cir. 2006).

175. *See, e.g.*, United States v. Rattoballi, No. 05-1562-CR, 2006 WL 1699460 (2d Cir. June 21, 2006); United States v. Hampton, 441 F.3d 284 (4th Cir. 2006); United States v. Duhon, 440 F.3d 711 (5th Cir. 2006); United States v. Gall, 446 F.3d 884 (8th Cir. 2006); United States v. Bradford, 447 F.3d 1026 (8th Cir. 2006); United States v. Bryant, 446 F.3d 1317 (8th Cir. 2006); United States v. Goody, 442 F.3d 1132 (8th Cir. 2006); United States v. Cage, No. 05-2079, 2006 WL 1554674 (10th Cir. June 8, 2006). *Contra* United States v. Gray, No. 05-15209, 2006 WL 1752372 (11th Cir. June 28, 2006); United States v. Williams, 435 F.3d 1350 (11th Cir. 2006) (holding that a downward departure is reasonable).

176. For more on the constitutional problems of a presumptively reasonable appellate review standard for Guidelines sentences, see Posting of Douglas A. Berman to Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2006/02/why_a_presumpti.html (Feb. 7, 2006 08:13 EST). For a review on sentencing law during the year after *Booker*, see Douglas A. Berman, *Tweaking* Booker: *Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 347–56 (forthcoming 2006), *available at* http://ssrn.com/abstract=900119.

177. *See, e.g.*, United States v. Corral-Alvarez, 381 F. Supp. 2d 1286, 1293 (D.N.M. 2005); United States v. Gray, 362 F. Supp. 2d 714, 720 (S.D. W. Va. 2005) ("In general, I will continue to place great weight in the recommendation offered by the Guidelines, as such advice is the product of almost two decades of expert analysis and consideration."); United States v. Duran, 383 F. Supp. 2d 1345, 1347 (D. Utah 2005); United States v. Peach, 356 F. Supp. 2d 1018, 1021 (D.N.D. 2005); United States v. Wanning, 354 F. Supp. 2d 1056, 1062 (D. Neb. 2005); United States v. Wilson (*Wilson II*), 355 F. Supp. 2d 1269 (D. Utah 2005) (explaining how the view in *Ranum* rejects congressional intent).

178. *Wilson I*, 350 F. Supp. 2d 910 (D. Utah 2005).

Cassell determined that, in light of congressional intent and the purposes behind the SRA, "considerable weight should be given to the Guidelines in determining what sentence to impose."[179] Judge Cassell stressed how the Guidelines had been an integral component of sentencing for nearly two decades. Moreover, he concluded that the Guidelines are the "only way" to serve Congress's interest in limiting sentencing disparities. Accordingly, Judge Cassell wrote that he will "only depart from those Guidelines in unusual cases for clearly identified and persuasive reasons."[180] The underlying rationale of this approach, as one defense attorney put it, is that "the guidelines' advisory ranges best effectuate the Sentencing Reform Act's statutory factors."[181] After his decision sparked an intense debate among judges throughout the country, Judge Cassell reaffirmed his decision, arguing that a consultative regime "alters without clear justification the Guidelines approach of giving limited effect to offender characteristics."[182] Rather, he wrote, an approach allocating substantial weight to the Guidelines calculation was more appropriate given that "[t]he Guidelines are a carefully-calibrated system put in place by Congress" that embraced restrictions on considering the individual characteristics of the defendant.[183]

As evidenced by Judge Cassell's opinions, proponents of the substantial-weight regime look to congressional intent in arguing that the Guidelines should play a determinative role in any sentencing analysis. One judge in Nebraska put it succinctly: "It seems obvious that the Guidelines must be given substantial weight even though they are now advisory. To do otherwise is to thumb our judicial noses at Congress."[184] Supporters of this position cite the fact that the Commission is an expert agency whose work in promulgating rules for district court judges has constantly been affirmed by Congress.[185] Moreover, *Booker*'s hope that the Commission "will continue to collect and study"[186] sentencing data is used to advance the proposition that the Guidelines are more determinative than any of the factors listed in § 3553(a). The SRA, according to Judge Cassell, was "the most comprehensive effort ever

179. *Id.* at 912.

180. *Id.* For more on Judge Paul Cassell's views on the Sentencing Guidelines, see Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004).

181. Kalar et al., *supra* note 104, at 15.

182. *Wilson II*, 355 F. Supp. 2d at 1275.

183. *Id.* at 1276.

184. United States v. Wanning, 354 F. Supp. 2d 1056, 1062 (D. Neb. 2005).

185. *See, e.g.*, *Wilson I*, 350 F. Supp. 2d at 914.

186. United States v. Booker, 543 U.S. 220, 263 (2005).

undertaken by Congress to reform the federal sentencing system."[187] The SRA promoted specific congressional goals, and Congress reaffirmed its mission of uniformity with the adoption of the Feeney Amendment.[188] Thus, the argument goes, a consultative regime belittles congressional intent and undermines the goals that have motivated Congress for decades. Proponents of the substantial-weight approach are skeptical of consultative sentencing because it takes into account a judge's own personal views vis-à-vis his evaluation of the § 3553(a) factors. Supporters argue that judges should instead adopt the views of society as represented by members of Congress through the SRA and the Feeney Amendment.[189]

B. The Consultative Approach

In the wake of *Booker*, defense attorneys have argued that the courts should adopt an approach that gives less deference to the Guidelines and the policy considerations of the Sentencing Commission. Embracing the U.S. Supreme Court's holding that courts are now allowed to tailor a defendant's sentence in light of the statutory factors in § 3553(a),[190] these attorneys have claimed that the courts only need to consult the Guidelines as one of many factors in the sentencing analysis.[191] Though most judges have conceded that a Guidelines range must be calculated,[192] many have agreed with these attorneys,

187. *Wilson I*, 350 F. Supp. 2d at 915.
188. *Id.* at 915–16.
189. *Id.*
190. *Booker*, 543 U.S. at 245–46.
191. *See* Kalar et al., *supra* note 104, at 15 ("*Booker* (inadvertently) invites us to dust off these attacks [against the Guidelines] and present them as § 3553 factors that merit a lower sentence . . . . If this Pandora's box is now open until likely congressional action, the defense should throw its doors wide."); David L. McColgin & Brett G. Sweitzer, *Grid & Bear It*, CHAMPION, Dec. 2005, at 42, 42 (2005) ("Defense counsel should make any and all arguments that will humanize the defendant, mitigate guilt, and encourage the judge to impose the lowest possible sentence."); Letter from Jon M. Sands, Chair, Fed. Defender Sentencing Guidelines Comm., to Judge Ricardo H. Hinojosa, Chairman, U.S. Sentencing Comm'n 2 (Jan. 10, 2006), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/letter_to_ussc_110061.pdf ("[Some judges] assume that the Guidelines are a perfect reflection of the purposes of sentencing in all but an extraordinary case, and that adherence to the Guidelines is necessary to maintain uniformity. [This] approach is indistinguishable from the mandatory system just struck down.").
192. No appellate courts have held that Guideline ranges need not be calculated and that sentences can instead roam freely within the statutory ranges issued by Congress. Indeed, a review of federal appellate case law since *Booker* reveals that the proper calculation of the Guideline range is the first step in assessing whether a sentence is *procedurally* "reasonable." *See supra* note 173; *see also, e.g.*, United States v. Clark, 434 F.3d 684, 685 (4th Cir. 2006) ("[A] district court shall first calculate (after making the appropriate findings of fact) the range prescribed by the guidelines. Then, the court *shall consider* that range as well as other relevant factors set forth in the guidelines *and those factors set forth in [18 U.S.C.] § 3553(a)* before imposing the sentence.").

contending that *Booker* "is not . . . an invitation to do business as usual."[193] These judges have argued that the view espoused by both Judge Cassell and the DOJ violates *Booker*'s constitutional holding because the substantial-weight approach neglects to fully consider the § 3553(a) factors—many of which are rejected by the Guidelines as grounds for departure—thereby making the Guidelines just as mandatory as they were before *Booker*. Consider one judge's harsh critique of the DOJ's position:

> The government's policy, however, is at odds with *Booker*. In essence, the Department of Justice continues to treat the guidelines as mandatory, by asserting that the [c]ourt has no discretion to deviate therefrom. Thus, while paying lip service to *Booker* and the statute, the government flouts the efficacy of the Supreme Court's opinion.
>
> One of the factors that the [c]ourt is instructed to consider in fashioning a reasonable sentence is to "promote respect for the law." Yet, the government itself shows no respect for the rule of law when it consistently advocates a policy which ignores a specific pronouncement of our nation's highest court.[194]

A system in which the Guidelines are given substantial weight, according to this judge, is constitutionally problematic because, by only going through a Guidelines analysis, a judge neglects to take into account the other statutory factors that must be examined according to *Booker*.[195] By failing to consider these factors, a judge is effectively applying the Guidelines in a mandatory

193. United States v. Ranum, 353 F. Supp. 2d 984, 987 (E.D. Wis. 2005); *see also, e.g.*, United States v. Pacheco-Soto, 386 F. Supp. 2d 1198, 1203 (D.N.M. 2005) ("The Court finds the reasoning of the district court in *Ranum* compelling, as it more faithfully adheres to the spirit of the Supreme Court's decision in *Booker* than do the *Wilson* opinions."); United States v. Milne, 384 F. Supp. 2d 1309 (E.D. Wis. 2005) (finding departure warranted based on, among other things, the characteristics of the defendant); Simon v. United States, 361 F. Supp. 2d 35, 40 (E.D.N.Y. 2005) ("I adopt the view that the Guidelines are advisory and entitled to the same weight accorded to each other factor that the Court is instructed to consider by § 3553(a) . . . . [T]he greater the weight given to the Guidelines, the closer the Court draws to committing the act that *Booker* forbids . . . ."); United States v. Jaber, 362 F. Supp. 2d 365, 367 (D. Mass. 2005) ("[T]he *Wilson* method comes perilously close to the mandatory regime found to be constitutionally infirm in *Booker*."); United States v. Galvez-Barrios, 355 F. Supp. 2d 958 (E.D. Wis. 2005); United States v. Kelley, 355 F. Supp. 2d 1031, 1035 (D. Neb. 2005) ("[T]he contention that *Booker* signals a return to pre-Guidelines discretion is an overstatement."); United States v. Myers, 353 F. Supp. 2d 1026, 1028 (S.D. Iowa 2005), *vacated*, 439 F.3d 415 (8th Cir. 2006) ("To treat the Guidelines as presumptive is to concede the converse, i.e., that any sentence imposed outside the Guideline range would be presumptively unreasonable in the absence of clearly identified reasons. If presumptive, the Guidelines would continue to overshadow the other factors listed in section 3553(a), causing an imbalance in the application of the statute to a particular defendant by making the Guidelines, in effect, still mandatory."); United States v. Jones, 352 F. Supp. 2d 22 (D. Me. 2005) (holding that departure from the Guidelines is justified based on § 3553(a) factors).

194. United States v. Williams, 372 F. Supp. 2d 1335, 1337 (M.D. Fla. 2005) (citations omitted).

195. *Ranum*, 353 F. Supp. 2d at 986–87.

fashion. Therefore, the argument goes, the Guidelines must be considered as one of many factors, not as a determinative factor.

To illustrate this point, recall the hypothetical in Part I.C in which John Doe embezzled $250,000 from the Federal Reserve Bank. Let's modify the hypothetical to include the following facts: Doe has a child who is suffering from a rare disease. The child's only hope is an experimental surgery that costs $250,000. Doe does not have the money because he is fresh out of law school, and no bank will lend him the money because his credit is poor. Doe feels like his only option is to steal the money, which he then proceeds to do. Moreover, with Doe in prison, the child will not be able to receive treatment due to a lack of financial resources.

As we discovered in Part I.D, the Guidelines prohibit the district court judge from taking into account the defendant's individual characteristics, with the exception of his criminal history. The Guidelines expressly prohibit a judge from considering the defendant's family ties and responsibilities.[196] As a result, in this case a judge generally could not consider the fact that Doe had a sick child who was dependent on his income.[197] However, *Booker* made clear that judges are permitted to tailor the defendant's sentence after examining the factors enumerated in § 3553(a), including § 3553(a)(1), which takes into account the "history and characteristics of the defendant."[198] Thus, the argument continues, giving the Guidelines substantial weight would essentially preclude judges from examining many of the § 3553(a) factors because the Guidelines actually conflict with these statutory factors. In considering Doe's situation in conjunction with § 3553(a)(1), a judge might determine that his case calls for a departure from the Guidelines range of thirty-seven to forty-six months based on Doe's dependent child. Under a regime in which the Guidelines calculation of thirty-seven to forty-six months carries substantial weight, Doe's circumstances under § 3553(a)(1) are rendered immaterial because the Sentencing Commission has expressly prohibited such facts from being considered as grounds for departure.[199]

196. U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (2005).

197. A judge could only take a defendant's family ties and responsibilities into account if this factor "is present to an exceptional degree." *Id.* § 5K2.0(a)(4). According to the Sentencing Commission, such departures based on "not ordinarily relevant" factors "should occur extremely rarely." *Id.* cmt. n.3(C).

198. United States v. Booker, 543 U.S. 220, 223 (2005).

199. Since *Booker*, defense attorneys have been arguing that "previously prohibited sentencing factors—such as age, and the atypical nature of the offense—now must be considered at sentencing." Kalar et al., *supra* note 104, at 16; *see also* United States v. Nellum, No. 2:04-CR-30-PS, 2005 WL 300073, at *3 (N.D. Ind. Feb. 3, 2005) (using age, among other factors, as a ground for departure from the Guidelines range).

A system in which the Guidelines are controlling would give judges little power to consider § 3553(a)(1) and other factors that have been significantly undermined by the Sentencing Commission's policy determinations. Thus, the Guidelines would essentially become a mandatory force on judges by precluding additional factors from consideration. As Judge Lynn Adelman put it, "In some cases the guidelines will clash with § 3553(a)'s primary directive: to 'impose a sentence sufficient, but not greater than necessary to comply with the purposes' of sentencing."[200] Because of this conflict between the Guidelines and *Booker*'s constitutional requirement that the Guidelines not be applied in a mandatory manner, many courts have decided that judges cannot "just add up figures and pick a number within a narrow range" but instead "must consider *all* of the applicable factors."[201] Because Congress did not allocate varying strengths to the factors enumerated in § 3553(a), and the *Booker* Court did not decide whether the Guidelines should be weighed more heavily than these factors, these courts have determined that the Guidelines need to be examined equally with these factors.[202]

Two circuits have come close to embracing the consultative approach. The Second Circuit has adopted a position that is very deferential to the district court's sentencing decision—regardless of whether the sentence is inside or outside the Guidelines range. Reiterating the *Booker* principle that the Guidelines need to be consulted along with the § 3553(a) factors, the court suggested that it would uphold any district court sentence where it was clear that the judge was "aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance."[203] The Second Circuit has also expressly rejected the rule that sentences within the Guidelines should be treated as presumptively reasonable.[204]

200. *Ranum*, 353 F. Supp. 2d at 986; *see also* Klein, *supra* note 9, at 721 ("[M]any of the [Sentencing] Commissioners' wishes, as reflected in the Guidelines, directly contradicted statutory factors that judges were supposed to be considering.").

201. *Ranum*, 353 F. Supp. 2d at 987 (emphasis added).

202. *See, e.g.*, *id.* at 985 ("[U]nder *Booker*, courts must treat the guidelines as just one of a number of sentencing factors.").

203. United States v. Fleming, 397 F.3d 95, 100 (2d Cir. 2005); *see also* Fries, *supra* note 15, at 1120.

204. United States v. Fernandez, 443 F.3d 19 (2d Cir. 2006) ("[W]e have expressed a commitment to avoid the formulation of *per se* rules to govern our review of sentences for reasonableness. We therefore decline to establish any presumption, rebuttable or otherwise, that a Guidelines sentence is reasonable.") (citations omitted). A different panel on the Second Circuit, however, has adopted a deferential view toward the Guidelines. *See* United States v. Rattoballi, No. 05-1562-CR, 2006 WL 1699460, at *6 (2d Cir. June 21, 2006) ("A non-Guidelines sentence that a district court imposes in reliance on factors incompatible with the Commission's policy statements may be deemed substantively unreasonable in the absence of persuasive explanation as to why the sentence actually comports with the § 3553(a) factors.").

In a per curiam opinion, the Ninth Circuit went even further, holding that "a Guideline calculation is simply *one factor* to be considered when selecting the most appropriate sentence for a particular defendant."[205] Like the Second Circuit, the Ninth Circuit has rejected a presumption of reasonableness standard for Guidelines sentences, arguing that a "presumption" goes far beyond *Booker*'s requirement that the Guidelines be consulted.[206]

The Second and Ninth Circuits notwithstanding, the general reluctance to embrace the consultative approach has much to do with the fact that this regime permits judges to consider factors that were explicitly rejected by the Sentencing Commission and implicitly rejected by Congress. The circuits likely feel that rulings minimizing the Guidelines' role would symbolize judicial activism that circumvents the will of Congress. However, such a fear has not stopped some from embracing the notion that judges are now "free at last" from the Guidelines altogether.[207] Indeed, some judges have taken *Booker* as a call to reject the Guidelines' hard-line distinction between crack cocaine and powder cocaine, arguing that, in certain cases, the § 3553(a) factors justify a sentence outside the Guidelines range.[208]

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205. United States v. Zavala, 443 F.3d 1165, 1171 (9th Cir. 2006) (per curiam).

206. *Id.* at 1169 ("If a district court presumed that the sentence should be a Guideline range sentence, it would thereby make it much more than something to be consulted and would give it much heavier weight than § 3553(a) now does. That leaves it as a factor in the sentencing alchemy.") (footnotes omitted); *see also* United States v. Diaz-Argueta, 447 F.3d 1167 (9th Cir. 2006) (placing heavy emphasis on the statutory factors).

207. United States v. Jaber, 362 F. Supp. 2d 365, 370 (D. Mass. 2005) (arguing that the "'free at last' mentality is characterized by comments like, 'I won't sentence according to the Guidelines because I simply don't agree that sale of marijuana deserves such severe penalties'").

208. *See, e.g.*, United States v. Smith, 359 F. Supp. 2d 771 (E.D. Wis. 2005); Simon v. United States, 361 F. Supp. 2d 35 (E.D.N.Y. 2005). *Contra* United States v. Cawthorn, 429 F.3d 793, 803 (8th Cir. 2005); United States v. Tabor, 365 F. Supp. 2d 1052, 1054 (D. Neb. 2005), *aff'd*, 439 F.3d 826 (8th Cir. 2006); *see also* Pamela A. MacLean, *Cracking the Code: After 'Booker,' Judges Reduce Crack Cocaine Sentences*, NAT'L L.J., Oct. 3, 2005, at 1. The Guidelines currently create a 1 to 100 ratio between crack cocaine and powder cocaine. Thus, if a defendant is caught with five grams of crack cocaine, the Guidelines treat the amount as five hundred grams of powder cocaine. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(4) (2005); *see also* 21 U.S.C. § 841(b)(1) (2000). The First Circuit has held that it is legally erroneous for a sentencing judge to reject the 1 to 100 ratio between crack and power cocaine, and instead adopt his own preferred ratio. In so holding, the court took a narrow view of how much discretion a judge has after *Booker*. United States v. Pho, 433 F.3d 53, 62–65 (1st Cir. 2006); *see also* Citron, *supra* note 15 (arguing that *Pho* was correctly decided); Edward Fitzpatrick, *Court Rejects Crack Sentence*, PROVIDENCE J., Jan. 6, 2006, at B-01, *available at* LEXIS. The Eleventh Circuit has held that departures from the Guidelines in crack cases can be reasonable. United States v. Williams, 435 F.3d 1350 (11th Cir. 2006); *see also* Charles Delafuente, *Cracked Sentencing: Two Appellate Rulings May Bring Very Different Terms in Cocaine Base Convictions*, ABA J. E-REP., Jan. 27, 2006, http://www.abanet.org/journal/ereport/j27crack.html.

The Sentencing Commission has expressed reservations over the crack to powder cocaine ratio: "After carefully considering all of the information currently available . . . the Commission firmly and

While in the months following *Booker* it appeared that judges were being highly compliant with the Guidelines,[209] new data released by the Sentencing Commission shows that the compliance rate with the Guidelines since *Booker* declined relative to the compliance rate during 2003—perhaps suggesting that the pendulum is swinging toward the consultative view that the Guidelines should be treated as one of many factors.[210] Between the *Booker* decision and May 1, 2006, 62.6 percent of federal sentences were within the Guidelines, versus 69.4 percent in 2003, and 72.2 percent of 2004 sentences issued before *Blakely* was decided.[211] Barring immediate congressional action, this trend may continue as new judges are appointed to the bench who were

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unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act." U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 91 (2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf; *see also* RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, SENTENCING WITH DISCRETION: CRACK COCAINE SENTENCING AFTER BOOKER (2006), *available at* http://www.sentencingproject.org/pdfs/crackcocaine-afterbooker.pdf. For more on the Guidelines' 1 to 100 cocaine ratio, see Briton K. Nelson, Comment, *Adding Fuel to the Fire:* United States v. Booker *and the Crack Versus Powder Cocaine Sentencing Disparity*, 40 U. RICH. L. REV. 1161 (2006).

209. *See* John Council, *Survey Reveals Little Change in Sentencing Habits After* 'Booker,' TEX. LAW., Aug. 8, 2005, at 1, *available at* http://www.law.com/jsp/article.jsp?id=1123684510748; *What Now After* Booker, Fanfan *Decisions?*, FAMMGRAM, Spring 2005, at 1, 11, *available at* http://www.famm.org/pdfs/Booker%20pdf%20FINAL%203%203%2005.pdf.

210. *See* Charles Toutant, *Sentencing Guidelines Departures Inch Up In Wake of* Booker-Fanfan*: Third Circuit Rate Tops National Figure*, N.J. L.J., Oct. 3, 2005, at 7. Despite this decline in compliance, judges have also increasingly used their newfound discretion to issue sentences that depart upward from the Guidelines. Since *Booker*, the number of upward-departure sentences issued has doubled. *See* Alan Vinegrad & Douglas Bloom, *Sentencing Guidelines: Above-the-Range Sentences After* 'Booker,' N.Y. L.J., June 16, 2006, at 3. Moreover, the average length of sentences has increased since *Booker*. U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 69 (2006), *available at* http://www.ussc.gov/booker_report/Booker_Report.pdf; *see also* Jack King, *Federal Sentences Longer Than Ever*, CHAMPION, May 2006, at 6.

211. U.S. SENTENCING COMM'N, SPECIAL POST-BOOKER CODING PROJECT 7 (2006) [hereinafter *USSC*], *available at* http://www.ussc.gov/Blakely/postBooker_052306.pdf. Since *Booker*, every circuit's compliance rate is less than their respective compliance rates in 2003. The First Circuit has gone from 77.3 to 66.4 percent and the Second Circuit has gone from 63.2 to 51.7 percent. Similarly, the Ninth Circuit has gone from 59.6 to 48.4 percent. The only circuit that has remained relatively unchanged is the Fifth Circuit, which had a compliance rate of 73.7 percent in 2003 and now has a 73.4 percent compliance rate since *Booker*. *Id.* at 7–11; *see also Sentencing Commission Feels the Effect of* Booker *and* Blakely, THIRD BRANCH, Dec. 2005, at 10.

This decline in compliance is statistically significant. This statistical significance seems to suggest that the lower rate of compliance is correlated to *Booker*'s creation of the advisory system. Statistical significance is evaluated based on the total number of sentences that were issued in 2003 (N=60,786) and in 2004 before *Blakely* (N=44,895) respectively, and the total number of sentences that were issued between *Booker* and May 1, 2006 (N=78,952). *USSC*, *supra*, at 14–15. The difference between the post-*Booker* compliance rate and the compliance rate of 65.0 percent for 2002 cases (N=55,856) is also statistically significant. *See id.* at 7, 14.

never compelled to sentence defendants under the mandatory Guidelines system.[212] While one can only guess as to whether this decline in compliance since *Booker* is the result of a deliberate and calculated rejection of the Guidelines on the part of some judges, such a conclusion is certainly within the realm of possibility given that many judges disliked the rigidity of the Guidelines system.[213]

This debate does not appear to be subsiding,[214] and the continued existence of these two contrasting approaches to the Guidelines makes it likely that sentencing disparities will continue to persist. The view that a particular defendant's sentencing judge adopts will have a profound impact on that defendant's sentence—especially if that defendant has sympathetic characteristics or circumstances that bolster his arguments for departure. Thus, *Booker* has made defendants particularly vulnerable to the whims of the judicial lottery.[215]

IV. THE ADVISORY GUIDELINES AND EXISTING DOCTRINES IN CONSTITUTIONAL LAW

While *Booker* prevented the practical nightmare of judges having to empanel juries for sentencing hearings,[216] the Court's constitutional and

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212. *See* Amanda Farnsworth, Comment, United States v. Booker: *How Should Congress Play the Ball?*, 83 DENV. U. L. REV. 579, 594 (2005) (arguing that "there is no guarantee that judicial discretion will remain constant in the future").

213. *See* Klein, *supra* note 9, at 694 ("[M]ost federal trial court judges were not overly fond of [the Guidelines system].").

214. *See* For a good examination of the debate between the *Wilson* and *Ranum* schools of thought, see Jordan, *supra* note 9, at 635; Kalar et al., *supra* note 104, at 13–16; Fries, *supra* note 15; O. Dean Sanderford, Comment, *The Feeney Amendment*, United States v. Booker, *and New Opportunities for the Courts and Congress*, 83 N.C. L. REV. 736, 765–68 (2005).

215. *See, e.g.*, United States v. Pho, 433 F.3d 53, 63 (1st Cir. 2006) ("[I]f sentencing courts are free to replace the 100:1 ratio with whatever ratio they deem appropriate, the sentences of defendants for identical 'real conduct' will depend largely on which judge happens to draw a particular case."); Artur Davis, *Beyond* Booker: *A Better Way to Sentence Criminals*, CRIM. JUST., Fall 2005, at 50. While sentencing uniformity may be undermined by the ruling, *Booker* can be seen as a positive move. Sentencing disparities certainly existed while the Guidelines were mandatory because prosecutors had the discretion to seek departures. Thus, similarly situated defendants frequently received different sentences because the exercise of this discretion was neither consistent nor uniform. Thus, *Booker* may have added some transparency to the system by shifting this disparity-causing discretion from prosecutors to judges. *See* Mark Osler, *This Changes Everything: A Call for a Directive, Goal-Oriented Principle to Guide the Exercise of Discretion by Federal Prosecutors*, 39 VAL. U. L. REV. 625 (2005).

216. Justice Stevens has argued that the remedial majority's opinion represented a much sounder policy than his solution of requiring that juries find sentence-enhancing facts. Justice John Paul Stevens, Judicial Predilections, Address Before the Clark County Bar Association (Aug. 18, 2005), *in* 6 NEV. L.J. 1, 2 (2005) ("[The] wholesale remedy [adopted by the *Booker* remedial majority] represents much wiser policy than the retail remedy that I thought the law required.").

remedial holdings are difficult to reconcile. Indeed, it is difficult to craft a role for the Guidelines that embraces congressional intent while following *Booker*'s Sixth Amendment holding. Although it seems that the remedial majority aimed to carve out a niche between indeterminate sentencing and a mandatory Guidelines system, this middle ground, as one scholar has noted, may not actually exist.[217] In order for there to be uniformity in federal sentencing, the Guidelines need to be rigorously enforced to comply with the goals of the SRA.[218] A rigorously enforced regime, however, is constitutionally suspect under *Booker*.

While I embrace this critique of the *Booker* decision, it is nonetheless true that, at a practical level, the advisory system that exists today is not likely to be abandoned by the courts unless Congress acts on the issue. Furthermore, the Supreme Court is unlikely to address the scope of the federal Guidelines' advisory nature, as it has already denied certiorari in several *Booker*-related cases.[219] More importantly, *Booker* made clear that the Guidelines are alive and well and that they must play a role (whatever that role may be) in

217. *See* Rosenzweig, *supra* note 149.

218. *See* Ben Trachtenberg, Note, *State Sentencing Policy and New Prison Admissions*, 38 U. MICH. J.L. REFORM 479, 508 (2005) (arguing that North Carolina's advisory program did not restrict judicial discretion). *Contra* Kim S. Hunt & Michael Connelly, *Advisory Guidelines in the Post-*Blakely *Era*, 17 FED. SENT'G REP. 233 (2005) (contending that advisory sentencing schemes in the states have produced results that are similar to presumptive sentencing systems); John F. Pfaff, *The Continued Vitality of Structured Sentencing Following* Blakely*: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. (forthcoming Dec. 2006), *available at* http://ssrn.com/abstract=869977 (arguing that voluntary Guidelines are able to accomplish much that presumptive Guidelines are able to, especially with respect to minimizing sentence variation).

219. *See* United States v. Lincoln, 413 F.3d 716 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 840 (2005); United States v. Haack, 403 F.3d 997 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 276 (2005); United States v. Mares, 402 F.3d 511 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 43 (2005); United States v. Duncan, 400 F.3d 1297 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 432 (2005); United States v. Barnett, 398 F.3d 516 (6th Cir. 2005), *cert. dismissed*, 126 S. Ct. 33 (2005); United States v. Rodriguez, 398 F.3d 1291 (11th Cir. 2005), *cert. denied*, 125 S. Ct. 2935 (2005).

The Supreme Court, however, has decided to hear several cases addressing the scope of *Blakely*. In *Washington v. Recuenco*, the Court held that the failure to submit a sentencing factor to a jury is not "structural error," and thus can be overcome as "harmless error." Washington v. Recuenco, No. 05-83, 2006 WL 1725561 (U.S. June 26, 2006). During the October 2006 Term, the Supreme Court will decide two important *Blakely* cases. In *Cunningham v. California*, the question is whether California's sentencing scheme violates the constitutional principle articulated in *Blakely*. Cunningham v. California, 126 S. Ct. 1329 (2006); *see also* Brief in Opposition to Petition for Writ of Certiorari at i, Cunningham v. California, No. 05-6551 (U.S. Dec. 12, 2005). Professor Michael O'Hear has argued that this case could be the Court's next "sentencing blockbuster." Michael M. O'Hear, Cunningham: The Supreme Court's Next Sentencing Blockbuster? (2006) (unpublished manuscript), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/ohear_cunningham.pdf. In *Burton v. Waddington*, the issue is whether the principle articulated in *Blakely* is a new rule and, if so, whether it applies retroactively. Burton v. Waddington, No. 05-9222, 2006 WL 393368 (U.S. June 5, 2006).

federal sentencing. While I find a move to displace the Guidelines normatively appealing,[220] it is more helpful at this stage to begin developing a rubric that explains how the Guidelines should operate within an advisory system.

What has not yet been recognized is that existing constitutional doctrine can be reformulated to explain the Guidelines' advisory role in a post-*Booker* world. The constitutional doctrines examined below—rational basis, strict scrutiny, and intermediate scrutiny—can each provide a helpful model for judges, especially given the divergent views that have emerged since *Booker*.[221] These legal tests have been emblematic of American constitutional jurisprudence for over fifty years, and judges are familiar with their application.

A. Rational Basis

Under the rational basis standard of review, a law is constitutional if it is rationally related to a legitimate governmental interest.[222] In the sentencing

220. As has been pointed out by several scholars, the Guidelines did little to eliminate sentencing disparity because, while judges were stripped of their discretion in issuing sentences, prosecutors had tremendous flexibility in deciding when to seek departures and enhancements for particular defendants. This prosecutorial discretion, coupled with the diminished capacity of judges to individualize defendants' sentences, has done much to undermine the transparency of the criminal justice system. *See supra* note 215; *see also* Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2005); Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 265 (2005); Bowman, *supra* note 25; Kennedy, *supra* note 89; Michael M. O'Hear, *The Myth of Uniformity*, 17 FED. SENT'G REP. 249, 253 (2005). For a general discussion of prosecutorial discretion, see KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 188–215 (1969).

221. As is clear from the analysis below, I am neither importing these constitutional standards in full force, nor am I claiming that these standards are completely transferable to the sentencing context. Rather, my goal is to have these standards operate as a heuristic. While these constitutional doctrines traditionally scrutinize legislative decisionmaking, the models I present are designed to give judges the tools necessary to scrutinize the applicability of the Guidelines range to a particular defendant's factual situation. As described, these models are not appellate tools for scrutinizing ex post sentencing judges' decisions whether or not to depart from the Guidelines. Rather, these models aim to provide tests for sentencing judges to use in weighing the Guidelines in individual cases. However, these models could also be easily transferred, on appellate review, to assess the "reasonableness" of a particular sentencing judge's decision to depart.

222. *See, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 n.6 (1993). Rational basis review is premised on the belief that "[t]he practice of deferring to rationally based legislative judgments 'is a paradigm of judicial restraint.'" United States v. Lopez, 514 U.S. 549, 604 (Souter, J., dissenting) (quoting *Beach Commc'ns*, 508 U.S. at 314). Until the *Lopez* decision, rational basis review dominated the Supreme Court's Commerce Clause jurisprudence, and it continues to play a central role in the Court's due process and equal protection analysis. In the due process context, rational basis review is applied to laws that do not infringe on a fundamental right. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Bowers v. Hardwick, 478 U.S. 186 (1986). In the equal protection context, rational basis review is applied to laws that do not distinguish on the basis of a suspect classification (such as race) or do not involve a quasi-suspect category that the Court has

context, we can adopt a form of rational basis review that can explain the advisory nature of the Guidelines. Under this model, the district court judge should sentence a defendant within the Guidelines if a Guidelines sentence reflects a rational relationship between the applicable § 3553(a) factors and the defendant's factual situation. Similarly, a sentencing judge should depart from the Guidelines if the relevant statutory factors are rationally related to the defendant's factual situation so as to justify the imposition of a non-Guidelines sentence.

This test suffers from a number of substantial flaws. First, this model would take federal sentencing back to the era of indeterminate sentencing under which judges could sentence defendants anywhere within the statutory range authorized by Congress. Under this system, both departure and Guidelines sentences would be easily justifiable because, in almost every case, the sentence would be rationally related to the statutory factors spelled out in § 3553(a). In the constitutional law setting, rational basis review defers to the legislature's purpose in passing a particular piece of legislation, presuming that this purpose represents a legitimate governmental interest.[223] Similarly, a rational basis sentencing system would defer too heavily to a judge's sentencing conclusions. Sentences within the Guidelines would almost always be justifiable because the government could easily argue—especially based on the reliance of § 3553(a)(5) on the Sentencing Commission's policy statements and the aim of § 3553(a)(6) in limiting sentencing disparities[224]—that a Guidelines sentence best reflects the relevant statutory factors. Due to the ease of establishing the rational relationship between a Guidelines sentence and the statutory factors, sentencing judges who are sympathetic to the Guidelines could apply them in every case and still meet their burden under *Booker* to consider § 3553(a). This deference to the Guidelines may also be constitutionally suspect based on *Booker*'s holding that the Guidelines should not be applied in a mandatory fashion.

Second, a rational basis model runs contrary to congressional intent by too easily permitting judges to sentence defendants outside the Guidelines. It would allow judges to consistently depart from the Guidelines because the § 3553(a) factors will almost always justify such departures. For example, a judge could, with little difficulty, find sympathetic "characteristics of the defendant" that warrant a departure under § 3553(a)(1). Thus, the rational basis

implicitly recognized (such as sex). *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Ry. Express Agency v. New York, 336 U.S. 106 (1949).

223. *Contra Lawrence*, 539 U.S. 558.

224. *See supra* note 60 and accompanying text.

sentencing model is similar to the consultative sentencing approach to the extent that district court judges would be given the power to sentence a defendant anywhere within the statutory range enumerated by Congress based on the § 3553(a) factors. Under traditional rational basis review, courts give legislatures the benefit of the doubt and usually presume rationality in upholding the law at issue. The legislative purpose presented by the state or federal government to the courts need not be the actual legislative purpose, but can be based on mere rational speculation. As Justice Thomas noted in *FCC v. Beach Communications, Inc.*,[225] "Where there are 'plausible reasons' for Congress's action, 'our inquiry is at an end.'"[226] Similarly, under the rational basis sentencing model, the district courts—so long as the stated reasons for the sentence are "plausible" based on the statutory factors—would have far-reaching discretion in departing from the Guidelines.

Given its similarities with the consultative regime, a rational basis approach to understanding the Guidelines runs contrary to Congress's intent in enacting the SRA.[227] The Guidelines were never intended to be merely a factor on par with those listed in § 3553(a). Rather, the statutory factors enumerated in the SRA were designed to give guidance to judges in sentencing within the Guidelines. Congress spent a decade formulating a solution to the perceived problem of sentencing disparity. Congress has both continuously approved of the Sentencing Commission's role in crafting the Guidelines and rejected moves to make the Guidelines advisory.[228] A rational basis model would entirely undermine these goals by dramatically limiting the scope of the Guidelines and permitting sentencing decisions to be made by the whims of judicial opinion.

B. Strict Scrutiny

Under the strict scrutiny standard of review, a law is permissible only if it is necessary to achieve a compelling governmental objective.[229] In the sentencing

225. 508 U.S. 307.

226. *Id.* at 313–14. The Court also stated that "[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Id.* at 314 (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).

227. For more on congressional intent, see Farnsworth, *supra* note 212, at 596.

228. *See* United States v. Booker, 543 U.S. 220, 293 (2005) (Stevens, J. dissenting) ("Congress explicitly rejected as a model for reform the various proposals for advisory guidelines that had been introduced in past Congresses.").

229. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224–25 (1995). Strict scrutiny review has the infamous distinction of originating out of the Japanese internment cases during World War II, in which the Supreme Court determined that "all legal restrictions which curtail

context, a sentencing judge applying the strict scrutiny model should conform to the Guidelines when the relevant statutory factors are not compelling enough based on the facts of the case to justify a departure. Similarly, a judge should depart from the Guidelines only if the statutory factors applicable to the case are compelling based on the defendant's factual situation.[230]

This strict scrutiny model is very similar to the substantial-weight approach advocated by Judge Cassell in *Wilson I* and *II*.[231] Just as the government has to prove that its interest in passing a particular statute is compelling under strict scrutiny, a defendant seeking a non-Guidelines sentence would be faced with the similar burden of proving that the reasons for a downward departure are compelling.[232] As demonstrated by cases like *Loving v. Virginia*[233] and *City of Richmond v. J.A. Croson Co.*,[234] this burden is difficult to meet in other contexts. Given this high threshold, this form of scrutiny would prefer Guidelines sentences and be very critical of departures. Strict scrutiny as a constitutional doctrine generally presumes that the regulation in question is unconstitutional, and the burden is on the state to prove that the regulation is necessary to achieve the state's objective.[235] Similarly, this strict scrutiny approach would essentially create a system in which Guidelines sentences are

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the civil rights of a single racial group are immediately suspect . . . . [C]ourts must subject them to the most rigid scrutiny." Korematsu v. United States, 323 U.S. 214, 216 (1944); *see also* Hirabayashi v. United States, 320 U.S. 81, 100 (1943). Though the Court failed to use strict scrutiny to end Japanese internment, the doctrine has been used to evaluate laws that discriminate against suspect classes, limit fundamental rights, and regulate content-based speech. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244 (2003); United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Loving v. Virginia, 388 U.S. 1 (1967).

230. The Fourth Circuit has adopted a similar test for when a departure from the Guidelines is permissible. The court determined that, "[i]n order to withstand reasonableness scrutiny, . . . a dramatic variance from the advisory guideline range must be supported by *compelling justifications* related to § 3553(a) factors and 'excessive weight' may not be given to any single factor." United States v. Hampton, 441 F.3d 284 (4th Cir. 2006) (citations omitted) (emphasis added).

231. *See supra* notes 177–180, 182–183 and accompanying text.

232. An upward departure would also be permissible upon a showing by the government that the statutory factors represent a compelling reason for a sentence above the Guidelines range.

233. 388 U.S. 1, 12 (1967) (holding that Virginia's antimiscegenation law violates the Fourteenth Amendment's Due Process Clause because such laws infringe on "one of the vital personal rights essential to the orderly pursuit of happiness by free men").

234. 488 U.S. 469, 509 (1989) (plurality opinion) (holding that the City of Richmond's plan requiring contractors that were awarded construction contracts to subcontract at least 30 percent of the dollar amount of each contract to one or more minority business was not narrowly tailored to a compelling governmental interest).

235. A new study by Professor Adam Winkler shows that strict scrutiny is not as fatal as once thought. In fact, strict scrutiny is a device that depends on the legal context within which it is being applied. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. (forthcoming 2006), *available at* http://ssrn.com/abstract=897360.

the preferred norm, and departures would occur—just as the *Wilson* court hoped—only in exceptional circumstances when the factors present a compelling justification.

This strict scrutiny model runs contrary to *Booker*'s constitutional holding that the Guidelines cannot act as a mandatory force on judges. While this approach embraces congressional intent by requiring sentencing judges to comply with the Guidelines in almost every case, a strict scrutiny model would minimize the importance of the § 3553(a) factors, thereby making this standard just as problematic as the substantial-weight regime embraced by *Wilson I* & *II*. Strict scrutiny permits judges to defer to the enumerated statutory factors only when such factors, in their totality, form a compelling interest in departing from the Guidelines. Thus, like a system in which the Guidelines are given substantial weight, this form of scrutiny essentially skirts the Supreme Court's holding in *Booker* that the Guidelines not be mandatory. While it is true that a judge acting within a strict scrutiny sentencing regime would in fact consider the factors per *Booker*'s mandate, they would be given such little weight as to render them nearly irrelevant (except insofar as they affect sentences within the Guidelines range).

Under a strict scrutiny sentencing approach, the burden placed on a defendant who is seeking a Guidelines departure would be so great that it would almost never be satisfied. In the areas of First Amendment law and equal protection, states have difficulty meeting this burden in seeking to preserve a statute that calls for strict scrutiny review.[236] Under the strict scrutiny sentencing model, defendants who may normatively deserve a Guidelines departure will have an uphill battle in convincing a sentencing judge that the factors are compelling enough to justify a departure. A defendant would probably only be able to show a compelling reason to depart if his personal history is sympathetic under § 3553(a)(1). However, even if reasons are compelling under this factor alone, other statutory factors included in the totality-of-the-circumstances analysis may make a defendant's history insufficiently compelling to justify a departure.[237] As discussed in Part I, there are strong conflicts

236. *See id.* According to Professor Winkler's study, 22 percent of free speech restrictions, 33 percent of freedom of association burdens, and 27 percent of laws that discriminate on the basis of suspect classifications withstand strict scrutiny. *Id.* (manuscript at 17).

237. This may especially be the case in light of § 3553(a)(4)–(5), which are heavily reliant on the Guidelines calculation. Section 3553(a)(4) permits a court, in imposing a sentence that is "sufficient, but not greater than necessary," to consider "the kinds of sentence and the sentencing range established [by the Guidelines]." 18 U.S.C. § 3553(a)(4) (Supp. III 2003). Under § 3553(a)(5), a judge can also consider "any pertinent policy statement" issued by the Sentencing Commission. *Id.* § 3553(a)(5). Taking John Doe's case in Part I.C as an example, given that Guidelines considerations are embedded in the statutory

between the § 3553(a) factors and the Guidelines. Thus, a strong presumption in favor of Guidelines sentences would essentially violate *Booker*'s requirement that all of the statutory factors be considered because such a presumption would be so difficult for a defendant to rebut that the factors would be rendered close to inconsequential.

C. Intermediate Scrutiny

The conflicts between the rational basis and strict scrutiny models largely center on the question of to what extent a regime favoring Guidelines sentences is constitutionally permissible. As Professor Frank Bowman wrote: "If the guidelines calculation and adherence to a guideline sentence become primary considerations in reasonableness review, then Justice Breyer has succeeded in reinstituting the guidelines much as they were. The only theoretical difference is that the guidelines will now best be characterized as presumptive rather than mandatory."[238] A presumptive regime, however, *is* different than a mandatory regime. This "theoretical difference" could play an important practical role in articulating a post-*Booker* place for the Guidelines. Merely establishing a presumptive system does not end the inquiry into how deferential the courts should be toward the Guidelines. Indeed, as the constitutional doctrines above demonstrate, the law not only creates presumptions, but it also allocates varying weights to these presumptions. Just because a presumptive regime exists does not necessarily mean that the pre-*Booker* Guidelines system has been preserved. A presumptive regime that gives weight to the Guidelines can—depending on the strength of the presumption—be different enough from a mandatory regime to escape a constitutional violation under *Booker*. The question is what this presumptive system would look like. I would argue that it would look much like the intermediate form of scrutiny that currently exists in constitutional law.

Under intermediate scrutiny, a law is deemed constitutional if it is substantially related to an important state objective.[239] Applying intermediate

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factors themselves, it may be reasonable for a judge to conclude that the totality of the factors *does not* represent a compelling justification for a departure from the Guidelines.

238. Bowman, *supra* note 25, at 1350.

239. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976). Intermediate scrutiny was developed by the Supreme Court to create a middle standard of review between rational basis review and strict scrutiny. It was created out of convenience for situations in which the Court wanted to be deferential to the will of the legislature, but not to the extent that such laws were always deemed constitutionally acceptable. Intermediate scrutiny has been frequently used in the First Amendment commercial speech context and has been adopted by the Court as a way to examine laws that discriminate on the basis of quasi-suspect classifications (such as sex). *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994); Miss. Univ. for

scrutiny to the sentencing context, a judge should sentence a defendant within the Guidelines if the relevant statutory factors are not of sufficient importance, based on the facts of the case, to justify a departure. Similarly, a judge should depart from the Guidelines if the relevant statutory factors are of sufficient importance, given the defendant's factual situation, to justify a sentence outside the Guidelines range.

An intermediate scrutiny sentencing system provides the ideal balance between the substantial-weight and consultative regimes, and solves many of the problems that exist in both the rational basis and strict scrutiny models. Under this system, there would be a weaker presumption in favor of the Guidelines than there would be under strict scrutiny. Strict scrutiny is problematic because it places such a heavy presumption in favor of the Guidelines that it fails to stay in accordance with *Booker*'s holding that the Guidelines not act as a mandatory constraint on judges. In lessening the burden for departure, intermediate scrutiny creates an equilibrium in which a presumption exists in favor of the Guidelines, but in which the presumption can be rebutted with greater ease upon a showing by the defendant that the statutory factors represent a substantial reason for departure. That is, in situations where the government is seeking a Guidelines sentence, the defendant would have to show that the statutory factors are of sufficient importance to justify a departure.[240]

The rational basis approach fails primarily because it runs against the will of Congress. It is difficult to dispute the fact that Congress wanted judges to work within a rigid Guidelines system to create greater uniformity throughout the country. A rational basis regime contravenes this desire for rigidity by stripping away the weight of the Guidelines and permitting judges to sentence at their own discretion. The purpose of intermediate scrutiny is to stay as true as possible to Congress's intent without violating *Booker*'s constitutional holding. By establishing a weak presumption in favor of the Guidelines, an intermediate scrutiny system would do just that. Such a presumption would create a sufficiently high bar for defendants seeking departures from the Guidelines.

Women v. Hogan, 458 U.S. 718 (1982); Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

240. Under the intermediate scrutiny model, an upward departure would also be permissible upon a showing by the government that the statutory factors represent a substantial reason for a sentence above the Guidelines range. In addition, like the strict scrutiny model, § 3553(a)(4)–(5) complicates the analysis. *See supra* note 237. Given these two factors' reliance on the Guidelines calculation, a sentencing judge could reasonably come to the conclusion that the totality of the factors is not sufficiently important to justify a departure. However, given the lower threshold for departure under the intermediate scrutiny model (as compared to the strict scrutiny approach), it is more likely that other statutory factors enumerated in § 3553(a) will be sufficiently important to create a ground for departure, thus trumping § 3553(a)(4)–(5).

This moderately high burden would reaffirm Congress's commitment to the Guidelines by making the Guidelines calculation the fundamental point of departure in the sentencing analysis.

At the same time, intermediate scrutiny would give judges the constitutionally required flexibility they need to consider the § 3553(a) factors and to depart when the factors substantially justify a non-Guidelines sentence. Such flexibility is of central importance in today's intermediate scrutiny analysis and has been a staple in constitutional law for nearly thirty years.[241] Intermediate scrutiny is not as "fatal in fact" as strict scrutiny,[242] and would allow judges to depart when there are sufficiently important reasons.

However, while intermediate scrutiny is not always fatal, it does require a more probing investigation than rational basis review in determining whether the state has an "exceedingly persuasive justification" for passing the law.[243] Not only does intermediate scrutiny satisfy Congress's desire for a heightened standard of review for departures as expressed through the Feeney Amendment, but the probing investigation required in an intermediate scrutiny analysis is easily transferable to the sentencing context. In such a regime, the Guidelines range is not uniformly embraced but is weighed against the strength of the relevant statutory factors. In applying intermediate scrutiny, the Court held in *United States v. Virginia*[244] that a state's objective in passing a particular law "must be genuine, not hypothesized."[245] Similarly, the § 3553(a) factors must be genuinely applicable to the defendant's factual situation and cannot be applied hypothetically. For example, § 3553(a)(6) requires a judge to issue a sentence that addresses the "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[246] Following the principle articulated by the Court in *Virginia*, for this factor to be considered substantial enough to justify a departure, it would have to

241. *See supra* note 239.

242. *See, e.g.*, Nguyen v. INS, 533 U.S. 53 (2001); Rostker v. Goldberg, 453 U.S. 57 (1981); Michael M. v. Superior Court, 450 U.S. 464 (1981); Califano v. Webster, 430 U.S. 313 (1977). In *Adarand*, the Court attempted to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment); *see also supra* notes 235–236.

243. *Miss. Univ. for Women*, 458 U.S. at 724.

244. 518 U.S. 515 (1996).

245. *Id.* at 533.

246. 18 U.S.C. § 3553(a)(6) (2000). In a recent article, Professor Michael O'Hear surveyed the cases since *Booker* in which the sentencing judge has invoked § 3553(a)(6) to justify a non-Guidelines sentence. Michael M. O'Hear, *The Duty to Avoid Disparity: Implementing 18 U.S.C. § 3553(a)(6) After* Booker, 36 MCGEORGE L. REV. (forthcoming 2006), *available at* http://ssrn.com/abstract=871246.

actually be shown that similarly situated defendants were given lower sentences. Anecdotal evidence would be insufficient to meet the importance requirement.

Not only are the federal courts familiar with intermediate scrutiny as applied in other contexts, but a form of this test—though not described as intermediate scrutiny—was used by the Fourth Circuit in its pre–Feeney Amendment appellate review standard for assessing whether a district court judge abused his discretion in departing from the Guidelines.[247] Once the Fourth Circuit ascertained whether there was an "adequate factual basis" for satisfying the factors, the court determined whether "the cited departure factors are of sufficient importance in the case such that a sentence outside the Guidelines range 'should result.'"[248] If the court determined that the factors were of sufficient importance, then it would "determine if the extent of departure was reasonable."[249] Though this standard was an appellate mechanism for reviewing sentences that departed from the Guidelines, my approach adopts the Fourth Circuit's "sufficient importance" test as a model for how district court judges should "consult" the Guidelines after *Booker*. Unlike the Fourth Circuit standard, my approach does not treat sentences within the Guidelines as per se reasonable, but rather establishes a set of principles for determining when a Guidelines sentence best fits a defendant's conduct.

CONCLUSION

Booker widely expanded the power of federal district and appellate courts in making sentencing decisions. As one commentator observed, "[T]he existence and amount of appellate review largely determines whether the entire guidelines scheme is more 'voluntary' or more 'mandatory.'"[250] Appellate courts have created some standards for district court judges. District courts must calculate the Guidelines range and use it as the point of departure in any

247. *See* Laurie P. Kelleher, A Reasonable "Reasonableness" Standard: Reconciling the Constitutional and Remedial Holdings of United States v. Booker 6 (2005) (unpublished manuscript), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/a_reasonable_reasonableness_standard.pdf; *see also, e.g.*, United States v. Palinkas, 938 F.2d 456, 461 (4th Cir. 1991), *vacated*, 503 U.S. 931 (1992), *reinstated*, 977 F.2d 905 (4th Cir. 1992); United States v. Hummer, 916 F.2d 186 (4th Cir. 1990), *cert. denied*, 499 U.S. 970 (1991).

248. *Hummer*, 916 F.2d at 192; *see also* Kelleher, *supra* note 247.

249. *Hummer*, 916 F.2d at 192. Prior to these two steps in the analysis, the court first determined de novo "whether the specific reasons cited by the district court are adequately taken into consideration by the Guidelines." *Palinkas*, 938 F.2d at 461. The court then reviewed "the factual support in the record for the identified circumstances under a clearly erroneous standard." *Id.* The Supreme Court in *Koon v. United States*, 518 U.S. 81 (1996), abrogated the Fourth Circuit's de novo standard of review. *See supra* notes 78–82 and accompanying text.

250. Steven L. Chanenson, *Guidance From Above and Beyond*, 58 STAN. L. REV. 175, 178 (2005).

sentencing analysis.[251] Moreover, the circuits appear to be rigorously enforcing the statutory requirement that judges state their reasons for departure under § 3553(c)(2).[252] It also appears that the circuits will rarely vacate a Guidelines sentence that was properly formulated.[253] Despite the appearance that the new advisory system is being "tightly controlled," how closely judges must rely on a properly calculated Guidelines range still remains uncertain.[254]

Though the Guidelines, as Professor David Yellen noted, are "neither as binding as [*Wilson I*] suggests or as avoidable as [*Ranum*] suggests,"[255] finding a middle ground that resolves the conflict between congressional intent and *Booker*'s constitutional holding is not an easy task. However, examining this issue in light of existing constitutional doctrines can help both judges and practitioners better understand this conflict. As I have argued, the debate as it has been presented in federal-court decisions can be analogized to the conflict between rational basis and strict scrutiny. Both of these forms of scrutiny fail to capture a proper compromise that respects congressional intent while staying true to *Booker*'s constitutional directive that the Guidelines not be mandatory. An intermediate scrutiny regime would alleviate many of these problems by giving judges the added flexibility that is required in light of *Booker*. Intermediate scrutiny's weak presumption in favor of the Guidelines also falls in line with Congress's intent to create a more uniform system, and it would limit the "discordant symphony" of sentencing standards that has emerged since *Booker*. This intermediate scrutiny system is certainly not perfect. It fails to fully realize Congress's goal in creating a mandatory system. Moreover, judicial discretion is so tightly confined within the narrow limits of intermediate scrutiny's "importance" prong that judges are still restrained when deciding to depart from the Guidelines, and they may not be able to properly individualize a defendant's sentence to their satisfaction in every case. Despite these flaws, intermediate scrutiny provides a workable middle-ground approach for judges as they sentence defendants in a post-*Booker* world. The permanent solution to this problem, however, will come from Congress. *Booker*, as one scholar observed, created a moment for "serious

251. *See supra* note 192.

252. *See* Chanenson, *supra* note 250, at 181–82 (citing United States v. Jackson, 408 F.3d 301, 304 (6th Cir. 2005)); *see also* United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 43 (2005).

253. *See* Chanenson, *supra* note 250, at 181–82. *But see* United States v. Cunningham, 429 F.3d 673 (7th Cir. 2005).

254. Chanenson, *supra* note 250, at 179.

255. Pamela A. MacLean, *Circuits Wrestle With Fallout From 'Booker,'* NAT'L L.J., Feb. 14, 2005, at 1.

rethinking of the federal sentencing system."[256] As *Booker* itself noted, "Ours, of course, is not the last word: The ball now lies in Congress's court."[257]

256. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 86 (2005).

257. United States v. Booker, 543 U.S. 220, 265 (2005). Since *Booker*, a number of proposals have been presented to fix the Guidelines so that they would survive Sixth Amendment scrutiny. Attorney General Alberto Gonzales prefers a "minimum guideline system," under which the sentencing court would be bound by the Guidelines minimum while the Guidelines maximum would be advisory. Alberto Gonzales, U.S. Att'y Gen., Federal Sentencing Guidelines Speech, Address Before the National Center for Victims of Crime (June 21, 2005), *in* 17 FED. SENT'G REP. 324, 326 (2005); *see also* Mercer, *supra* note 39, at 30–33. Representative Artur Davis has suggested that "Congress should adopt three or four aggravating elements that would extend sentences beyond the minimum range, and require those elements to be submitted to the jury for determination in a separate sentencing phase to commence immediately after the verdict." Davis, *supra* note 215, at 51. After *Blakely*, Professor Frank Bowman suggested that Congress adopt a system in which the upper limits of all sentencing ranges in the Guidelines table were set to the statutory maximum for the charged offense. Though this may help eliminate any Sixth Amendment violation, this change would allow judges to assign the statutory maximum in any case, thereby stripping away an important constraint on harsh sentences. *See* Bloom, *supra* note 9, at 556. After *Booker*, Professor Bowman abandoned this position, instead advising Congress to "not act precipitously because doing so may make an uncertain situation worse." *Hearing*, *supra* note 66, at 37 (prepared statement of Frank O. Bowman, III, M. Dale Palmer Professor of Law, Indiana University School of Law); *see also* Kristina Walter, Note, Booker *and Our Brave New World: The Tension Among the Federal Sentencing Guidelines, Judicial Discretion, and a Defendant's Constitutional Right to Trial by Jury*, 53 CLEV. ST. L. REV. 657, 659 (2005–2006).

APPENDIX

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0–6	0–6	0–6	0–6	0–6	0–6
2	0–6	0–6	0–6	0–6	0–6	1–7
3	0–6	0–6	0–6	0–6	2–8	3–9
4	0–6	0–6	0–6	2–8	4–10	6–12
5	0–6	0–6	1–7	4–10	6–12	9–15
6	0–6	1–7	2–8	6–12	9–15	12–18
7	0–6	2–8	4–10	8–14	12–18	15–21
8	0–6	4–10	6–12	10–16	15–21	18–24
9	4–10	6–12	8–14	12–18	18–24	21–27
10	6–12	8–14	10–16	15–21	21–27	24–30
11	8–14	10–16	12–18	18–24	24–30	27–33
12	10–16	12–18	15–21	21–27	27–33	30–37
13	12–18	15–21	18–24	24–30	30–37	33–41
14	15–21	18–24	21–27	27–33	33–41	37–46
15	18–24	21–27	24–30	30–37	37–46	41–51
16	21–27	24–30	27–33	33–41	41–51	46–57
17	24–30	27–33	30–37	37–46	46–57	51–63
18	27–33	30–37	33–41	41–51	51–63	57–71
19	30–37	33–41	37–46	46–57	57–71	63–78
20	33–41	37–46	41–51	51–63	63–78	70–87
21	37–46	41–51	46–57	57–71	70–87	77–96
22	41–51	46–57	51–63	63–78	77–96	84–105
23	46–57	51–63	57–71	70–87	84–105	92–115
24	51–63	57–71	63–78	77–96	92–115	100–125
25	57–71	63–78	70–87	84–105	100–125	110–137
26	63–78	70–87	78–97	92–115	110–137	120–150
27	70–87	78–97	87–108	100–125	120–150	130–162
28	78–97	87–108	97–121	110–137	130–162	140–175
29	87–108	97–121	108–135	121–151	140–175	151–188
30	97–121	108–135	121–151	135–168	151–188	168–210
31	108–135	121–151	135–168	151–188	168–210	188–235
32	121–151	135–168	151–188	168–210	188–235	210–262
33	135–168	151–188	168–210	188–235	210–262	235–293
34	151–188	168–210	188–235	210–262	235–293	262–327
35	168–210	188–235	210–262	235–293	262–327	292–365
36	188–235	210–262	235–293	262–327	292–365	324–405

Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
37	210–262	235–293	262–327	292–365	324–405	360–life
38	235–293	262–327	292–365	324–405	360–life	360–life
39	262–327	292–365	324–405	360–life	360–life	360–life
40	292–365	324–405	360–life	360–life	360–life	360–life
41	324–405	360–life	360–life	360–life	360–life	360–life
42	360–life	360–life	360–life	360–life	360–life	360–life
43	life	life	life	life	life	life

November 1, 2005
U.S. SENTENCING GUIDELINES MANUAL (2005)

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